

Substantial Sentence Likely for Convicted Theranos CEO Elizabeth Holmes

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The federal conviction of Elizabeth Holmes on Monday night, January 3, 2022, has been of great interest in legal and business circles. One question that has been consistently asked in various media reports is what type of sentence Ms. Holmes is likely to receive? This article will attempt to answer that question in a general sense. To do so, a few basic concepts need brief attention.

- **The “Statutory Maximum”**

Holmes was convicted of three counts of wire fraud and one count of conspiracy to commit wire fraud under 18 U.S. Code §§ 13.43 and 13.49. Each count of conviction carries a **maximum** punishment of 20 years in prison. So, the total “statutory max” is 80 years. It is rare for a defendant to receive the statutory maximum sentence, but it does happen. At this stage, what is important is to understand that the most punishment Holmes could receive is 80 years.

- **Federal Sentencing Guidelines**

Federal sentencing is a somewhat complicated process¹, involving a calculation of a defendant’s offense level under the “Federal Sentencing Guidelines,” a dense and highly esoteric bundle of regulations which attempt to establish “uniform” sentencing for like offenses. So, if Holmes had theoretically been convicted in a Maine, Alabama, Louisiana, or Nebraska federal court, her sentence should – theoretically – be the same as in a federal court in California. At least that is the goal of the “Guidelines” which have been in effect in federal criminal cases since 1987.

- **Criminal History Category**

A defendant is placed along an X-Y axis with the X, or horizontal axis, being the defendant’s criminal history. Most high profile white collar defendants are at the most favorable point, a criminal history category of “I” (on a scale of I to VI). This is almost certainly where Holmes will be placed.

- **Offense Level**

The next step in calculating a federal defendant’s sentence is under the “Y” axis or, vertical axis. This axis consists of offense levels ranging from “one” to “forty-three.” An offense level “one” results in a potential custodial sentence of between 0 to 6 months. An offense level of “forty-three” results in a sentence of “life.”²

- **Sentencing in Federal Fraud Cases**

Sentencing under the Guidelines for persons convicted of federal fraud offenses is largely, although not exclusively, driven by the “loss amount.” This is a term of art: In a general sense it means the amount of money involved in the defendant’s wrongful behavior in relation to the counts of conviction and other “relevant conduct.” It is not **necessarily** money that was “lost” or stolen—so the term is a bit of a misnomer.

Section 2(B)1.1 of the Guidelines is the starting point for calculating a fraud sentence. Under that section, a defendant convicted of one or more related counts of wire fraud is at a base offense level of “7.” Then things get more interesting because a table within Section 2(B)1.1 adds offense levels as dollar amounts go up. For example, let’s assume a loss amount of \$3,000,000.00 in a criminal fraud case. Such a defendant’s **initial** base offense level would be 23 because the offense level increase for a loss amount over \$1.5 million but less than \$3.5 million is 16. (Base offense level of 7 plus 16 = 23).

- **The Elizabeth Holmes Loss Amount and Likely Offense Level**

In the Holmes case, dollar figures reported [in the media](#) total over \$950,000,000.00. That is an extremely high potential loss amount for Federal Sentencing Guidelines calculations. Why? Because the loss amount table in Section 2(B)1.1 literally stops just over halfway there. Let’s consider the situation in more detail.

A loss amount of \$550,000,000.00 or greater adds a **30-level** increase. So even if the court is persuaded that the applicable loss amount is significantly below the reported \$950,000,000.00 level, it would have to get below \$550,000,000.00 for such a reduction to matter for purposes of the Guidelines’ offense level.³

- **The Likely Sentence Holmes is Facing Under the Federal Guidelines**

Therefore, using the X-Y axis contained in the sentencing table, Holmes is at an extremely high offense level: Level 37. (The sentencing table stops at level 43; more on that later). At that level her sentence calculates out to between 17.5 years to 21.8 years. *And this is just the starting point.* Other “offense characteristics” exist that will almost certainly be applied to raise her offense level. These include whether the offense resulted in “substantial financial hardship to 25 or more victims.” This seems fairly obvious to be so. If the court finds that it did, then Subsection 2(B)1.1(b)(C) directs that the offense level be **increased by six levels**. Such an increase, when the defendant is already at an astronomic level, becomes catastrophic because it puts the offense level at 43. Remember — at level 43 the guidelines sentence is life.

Alternatively, perhaps the judge will ultimately place the loss amount figure at a level below \$550,000,000.00. In the (unlikely) event that the judge found the loss amount to be less than \$250,000,000.00 but above \$150,000,000.00, Holmes would nonetheless receive an increase of 26, for preliminary total of 33. Add the six-level increase for 25 or more victims just discussed and her offense level would still be extremely high: **39**. A level 39 offense results in a Guidelines sentence of between 21.8 and 27 years.

- **Other “Adjustments”**

“Adjustments” are covered by Section 3 of the Guidelines. For the most part, these only work against a defendant.⁴ So, if upward adjustments apply, they have the result of increasing rather than decreasing the offense level.

Such adjustments include Holmes’ having an “aggravating” role in the offense or her abuse of the position of trust. It seems quite likely the court will conclude that Holmes was at least an “organizer/leader” of a “criminal activity that included five or more participants⁵ or was otherwise extensive.” Section 3(B)1.1(a).

If so, then an additional four levels are added to her already stratospheric high offense level.

Finally, it is virtually certain that Holmes, in her role as founder and CEO of Theranos, will be found to have “abused a position of trust” in a “manner that significantly facilitated the commission of the offense.” Therefore, she would receive a separate two-level increase in her offense level under Section 3(B)1.3. Case law strongly supports the finding that a CEO would unquestionably fall under this particular enhancement. This Section also expressly provides that such an adjustment is to be added even when the aggravating role adjustment discussed above also applies.

So, under these two adjustments, another six-level total increase in offense level is likely.

So, How Much Time Is She Going to Get?

Fortunately for Ms. Holmes, the U.S. Supreme Court, in the case of *United States v. Booker*, 543 U.S. 220 (2005) held that the Guidelines are merely advisory and not binding. A series of later decisions around 2008-2009 supplemented and supported the *Booker* decision. Now, the guidelines are but one factor among many a court should consider when sentencing a defendant. However, they remain extremely important and influential. Under current case and statutory law, a sentencing judge is to take into account a number of factors when sentencing a criminal defendant.

Those factors are:

1. The nature and circumstances of the offense and the history and characteristics of the defendant.
2. The need for the sentence imposed (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (b) deterrence (to others); (c) to protect the public from further crimes of the defendant; (d) to provide needed training or treatment.
3. The kinds of sentences available.
4. The kinds of sentences and the sentencing range established by the sentencing guidelines.
18 U.S. Code § 3553(a)

While advisory the guidelines are “a product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.” *Gall v. U.S.*, 552 U.S. 38, 49 (2007). “As matter of administration and to secure nationwide consistency, the guidelines should be the starting point and the initial benchmark.” *Ibid.*

A likely sentence in this case, in the opinion of the author, will be between 17 and 21 years. A sentence of anything less than at least 10 years is highly unlikely in this writer's opinion. Given that Ms. Holmes' offense level is likely to be at the 37 or higher point, resulting in a Guideline sentence of at least 17.5 years, even under the most optimistic scenario, it is extremely difficult to see how a sentencing court would impose a sentence lower than the 210-month sentence which is at the "low end" of offense level 37.

Ultimately, the district judge's decision is subject to appellate review under an abuse of discretion standard. So long as the judge stays within the boundaries of the Guidelines, the sentence is likely to withstand attack on appeal.

[1] The help of an experienced criminal attorney is typically needed to interpret the Byzantine sentencing guidelines. *continue reading*

[2] There is no parole or early release under current federal law. *continue reading*

[3] According to trial testimony, the government's first witness in the case, the controller of Theranos, testified that Theranos lost revenue of approximately **\$586,000,000.00**. As stated earlier, the term "loss amount" does not necessarily mean that the company or any one individual or individual or group of individuals actually "lost" that much money. It really is more accurately thought of as the total amount of money involved in the defendant's wrongful scheme or conspiracy. But even using a more restricted definition of "loss amount," given the testimony at trial of the Theranos controller, it appears that the loss amount in the Elizabeth Holmes case is going to be above the cutoff of \$550,000,000.00. *continue reading*

[4] Downward adjustments such as having a minor role in the offense or acceptance of responsibility under Guideline Section 3(E)1.1 will not apply in this case. *continue reading*

[5] The other participants need to have been criminally responsible but need have not been convicted. Section 3(B)1.1, application note 1. *continue reading*

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