



## **Most Frequently Asked Questions**

### **The 2011 Retroactive Crack Cocaine Guideline Amendment**

This document provides answers to the most frequently asked questions about the Commission's decision to give retroactive effect to the proposed permanent guideline amendment implementing the Fair Sentencing Act of 2010.

#### **Background Information**

Congress passed the Fair Sentencing Act of 2010, effective August 3, 2010, that, among other things, increased the quantities of crack cocaine that trigger the five and 10-year federal statutory mandatory minimums penalties.

The Act gave the Commission emergency amendment authority to temporarily change the guidelines to implement the statutory changes and to add certain enhancements and reductions to the sentencing guidelines. The temporary emergency amendment went into effect on November 1, 2010 and will expire on October 31, 2011.

On April 28, 2011 the Commission submitted to Congress the proposed permanent guideline amendment implementing the Fair Sentencing Act. The proposed permanent amendment will go into effect on November 1, 2011, unless Congress acts to modify or reject the amendment.

On June 30, 2011 the Commission voted to give retroactive effect to the proposed permanent guideline amendment. **The effective date of this retroactive effect and changes to §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range), the policy statement governing retroactivity, is November 1, 2011.** Until that date, the courts should apply §1B1.10 as set forth in the 2010 Guidelines Manual.

#### **Questions and Answers**

1. **What authority does the Commission have to make its amendments retroactive?**

Congress gave the Commission authority to make its amendments retroactive in 28 U.S. C. § 994(u). The statute provides, "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

2. **Does the amendment make the statutory changes in the Fair Sentencing Act retroactive?**

No. The amendment only affects the guideline changes implementing the Fair Sentencing Act of 2010. Only Congress can make a statute retroactive.

3. **Will all defendants who have been convicted of distributing or possessing crack cocaine automatically receive a reduction because of the Commission's decision on retroactivity?**

No one will automatically receive a sentencing reduction. Title 18 U.S.C. § 3582(c)(2) provides that upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment. In order to be eligible for a sentence reduction, a defendant must be serving a term of imprisonment, and the guideline range applicable to the defendant has been lowered as a result of the crack cocaine amendment. In addition, even if a defendant is eligible for a reduction, a district court judge has the final decision of whether to reduce the sentence.

4. **Did the Commission make the entire Fair Sentencing Act of 2010 proposed permanent guideline amendment retroactive?**

No. The Commission decided that only Parts A and C may be considered for retroactive application. Part A amended the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses) for crack cocaine and made related revisions to Application Note 10 to §2D1.1. Part C deleted the cross reference in §2D2.1 (Unlawful Possession) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1. No other provisions of the Fair Sentencing Act proposed guideline amendment has been designated for retroactive application.

5. **Do the federal sentencing guidelines provide instructions to courts on how to address motions under 18 U.S.C. § 3582(c)(2)?**

Yes. Policy Statement §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range), provides instructions to the court in addressing motions under 18 U.S.C. § 3582(c)(2).

6. **Are there any limits on the extent of the reduction if an offender is eligible for a reduction?**

Yes. The court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and §1B1.10 to a term that is less than the minimum of the amended guideline range, except for a sentence resulting from a downward departure pursuant to a government motion for substantial assistance.

7. **How does the exception to the limitation in §1B1.10 for a sentence pursuant to a government motion for substantial assistance differ from the limitation for other types of sentences?**

The amended §1B1.10, effective November 1, 2011, provides that the court cannot reduce the defendant's sentence to less than the minimum of the amended guideline range unless the term of imprisonment below the guideline range was pursuant to a government motion based on a defendant's substantial assistance. Therefore, in a case in which the term of imprisonment was below the guideline range pursuant to a government motion based on a defendant's substantial assistance (*i.e.*, under §5K1.1 (Substantial Assistance to Authorities), 18 U.S.C. § 3553(e) or Fed. R. Crim. P. 35(b)), then a reduction comparably less than the amended guideline range may be appropriate. This exception to the limitation is not available for a sentence that is departure or variance based on any other reason.

8. **Are there any other limitations on the extent of a possible reduction?**

Yes. Policy Statement §1B1.10(b)(2)(C) provides that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

9. **Is public safety a consideration in the determination as to whether a reduction in the defendant's term of imprisonment is warranted and the extent of such a reduction?**

Yes. Policy Statement §1B1.10, Application Note 1B(ii) *requires* the court to consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment.

10. **Are courts bound by Policy Statement §1B1.10?**

Yes. The Supreme Court has concluded that proceedings under 18 U.S.C. § 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. *Dillon v. United States*, 130 S. Ct. 2683 (2010).

11. **Is a defendant who was previously sentenced pursuant to a binding plea agreement under Rule 11(c)(1)(C) eligible for a reduction under 18 U.S.C. § 3582(c)(2)?**

Possibly. A sentence resulting from a binding plea agreement is not categorically disqualified from a retroactive reduction pursuant to 18 U.S.C. § 3582(c)(2). *See Freeman v. United States*, 131 S. Ct. 2685 (2011). If the district court determines that the defendant qualifies for a reduction after analyzing the agreement, the court will then analyze the motion to determine eligibility and potential amount of a reduction under §1B1.10.

12. **What is the projected average reduction in sentence for eligible defendants?**

The Commission projects an average sentence reduction of about 37 months for eligible defendants. The Commission projects that the average sentence will drop from 164 months (13 years 8 months) to 127 months (10 years 7 months).

13. **What are the projected release dates for these defendants?**

Defendants eligible for a sentence reduction would be eligible for release at various times over a 30-year period. The Commission projects that approximately 34 percent of the defendants would be eligible for release within the first year of retroactive enactment.

14. **Where are the defendants who are eligible to seek a reduced sentence located?**

Over 52 percent of the defendants who are eligible for release were convicted and sentenced in the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, West Virginia), Eleventh Circuit (Alabama, Florida, Georgia) and Fifth Circuit (Louisiana, Mississippi, Texas). The remaining defendants eligible to seek a reduced sentence are located throughout the rest of the country.

15. **Is there a form for district courts to submit to the Commission regarding their decisions to grant a reduction under 18 U.S.C. § 3582(c)(2).**

Yes. AO form 247, located at [http://jnet.ao.dcn/Forms/AO\\_National\\_Forms/AO0247.html](http://jnet.ao.dcn/Forms/AO_National_Forms/AO0247.html), should be submitted to the Commission in all 18 U.S.C. § 3582(c)(2) *motions*, including motions denied by the district court. Submission of this documentation is critical to the Commission's ability to collect, analyze, and report information of federal sentencing practices in this area.