

This is a "reader-friendly" version of the issue for comment published by the United States Sentencing Commission on Amendment 2, pertaining to drug offenses. Amendment 2 and other amendments were submitted to the Congress on April 28, 2011. Official text of the issue for comment, and of the amendments, can be found in the Federal Register (see 76 FR 24960 (May 3, 2011)) and is posted on the Commission's website at [www.ussc.gov](http://www.ussc.gov).

Public comment regarding whether Amendment 2, pertaining to drug offenses, should be included as an amendment that may be applied retroactively to previously sentenced defendants should be received on or before June 2, 2011.

Comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE, Suite 2-500, South Lobby, Washington, DC 20002-8002, Attention: Public Affairs-Retroactivity Public Comment.

#### ISSUE FOR COMMENT: RETROACTIVITY

*On April 28, 2011, the Commission submitted to the Congress amendments to the sentencing guidelines and official commentary, which become effective on November 1, 2011, unless Congress acts to the contrary. Such amendments and the reasons for amendment subsequently were published in the Federal Register. See 76 FR 24960 (May 3, 2011).*

*Amendment 2, pertaining to drug offenses, has the effect of lowering guideline ranges. See 28 U.S.C. § 994(u) ("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."). The Commission seeks comment regarding whether, pursuant to 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 994(u), this amendment, or any part thereof, should be included in subsection (c) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be applied retroactively to previously sentenced defendants.*

*The Commission also requests comment regarding whether, if it amends §1B1.10(c) to include this amendment, it also should amend §1B1.10 to provide guidance to the courts on the procedure to be used when applying an amendment retroactively under 18 U.S.C. § 3582(c)(2).*

#### Part-by-Part Consideration of the Amendment Pertaining to Drug Offenses

*Amendment 2, pertaining to drug offenses, contains three parts. The Commission seeks comment on whether it should list the entire amendment, or one or more parts of the amendment, in subsection (c) of §1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants.*

*Part A changes the Drug Quantity Table in §2D1.1 for offenses involving crack cocaine. This has the effect of lowering guideline ranges for certain defendants for offenses involving crack cocaine.*

*Part B contains both mitigating and aggravating provisions for offenses involving drugs, regardless of drug type. The mitigating provisions have the effect of lowering guideline ranges for certain defendants in drug cases, and the aggravating provisions have the effect of raising guideline*

ranges for certain defendants in drug cases.

*Part C deletes the cross reference in §2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1. This has the effect of lowering guideline ranges for certain defendants for offenses involving simple possession of crack cocaine.*

*For each of these three parts, the Commission requests comment on whether that part should be listed in subsection (c) of §1B1.10 as an amendment that may be applied retroactively. Note that if Part B were applied retroactively (in isolation, or in combination with Parts A and/or C), the court would determine not only whether any mitigating provisions in Part B applied, but also whether any aggravating provisions in Part B applied. To the extent any aggravating provisions applied, the aggravating effect of those provisions would act to offset the mitigating effect of changes made by Parts A, B, and C, to the extent they apply, but in no event could the net effect result in the defendant receiving a sentence higher than the sentence previously imposed. See 18 U.S.C. § 3582(c)(2) (authorizing the court to "reduce", but not increase, the defendant's term of imprisonment).*

*For its consideration of Parts A and B, the Commission seeks comment on two options in particular. Option 1 would include Part A as an amendment that may be applied retroactively, but would not include Part B. Option 2 would include both Part A and Part B.*

#### *Other Guidance or Limitations for the Amendment Pertaining to Drug Offenses*

*If the Commission does list the entire amendment, or one or more parts of the amendment, in subsection (c) of §1B1.10 as an amendment that may be applied retroactively to previously sentenced defendants, should the Commission provide further guidance or limitations regarding the circumstances in which and the amount by which sentences may be reduced?*

*In particular, should the Commission limit retroactivity only to a particular category of defendants, such as (A) defendants in a particular criminal history category or categories (e.g., defendants in Criminal History Category I) or (B) defendants who received an adjustment under the guidelines' "safety valve" provision (currently §2D1.1(b)(16))?*

*Should the Commission exclude from retroactivity certain categories of defendants whose offense involved aggravating conduct such as, for example, (A) defendants who received an enhanced penalty under §2D1.2 (Drug Offenses Occurring Near Protected Locations or Involving Underage or Pregnant Individuals; Attempt or Conspiracy), (B) defendants who received an adjustment under §3B1.1 (Aggravating Role), (C) defendants who received an adjustment under §3B1.4 (Using a Minor to Commit a Crime), (D) defendants who received an enhancement under §2D1.1(b)(1) (i.e., if "a dangerous weapon (including a firearm) was possessed"), (E) defendants who were sentenced to a mandatory minimum term of imprisonment because of a conviction for a firearms offense (i.e., a conviction under 18 U.S.C. §§ 844(h), 924(c), or 929(a)), or (F) defendants who are career offenders under §4B1.1 (Career Offender)?*

*In considering whether to limit retroactivity to a particular category or categories of defendants, how, if at all, should the Commission account for the fact that the jurisprudence that applies to sentencing has changed to expand the discretionary authority of a sentencing court to impose a sentence outside the guidelines framework? Should the Commission limit retroactivity only to, for example, (A) defendants who were sentenced within the guideline range, (B) defendants who were sentenced within the*

*guideline range or who received a departure under Chapter Five, Part K, (C) defendants sentenced before United States v. Booker, 543 U.S. 220 (2005), (D) defendants sentenced before Kimbrough v. United States, 552 U.S. 85, 110 (2007) ("it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case"), or (E) defendants sentenced before Spears v. United States, 555 U.S. 261, 129 S.Ct. 840, 844 (2009) ("we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines")? Section 1B1.10 addresses this factor as follows:*

*If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.*

*Should the Commission amend §1B1.10 to provide further guidance on how the sentencing court, in considering retroactivity, should account for this factor?*