

**United States Sentencing Commission Public Meeting Minutes
July 18, 2014**

Chair Patti B. Saris called the meeting to order at 1:00 p.m. in the Mecham Conference Center of the Thurgood Marshall Federal Judicial Building, Washington, D.C.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- Ricardo H. Hinojosa, Vice Chair
- Ketanji B. Jackson, Vice Chair
- Charles R. Breyer, Vice Chair
- Dabney L. Friedrich, Commissioner
- Rachel E. Barkow, Commissioner
- William H. Pryor, Jr., Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Kenneth Cohen, Staff Director
- Kathleen Grilli, General Counsel
- Tobias Dorsey, Special Counsel

Chair Saris thanked the public for coming to the Commission's public meeting, noting that its attendance was a testament to the extraordinary interest in federal sentencing issues and specifically in the issue that the Commission was considering – whether the amendment the Commission approved unanimously in April to reduce the guideline levels applicable to the drug quantity table by two levels should be made retroactive for eligible offenders currently in prison.

Chair Saris reported that the Commission published a list of proposed policy priorities for the amendment cycle ending May 1, 2015, in the Federal Register on June 2, 2014. She noted that the period for public comment would close on July 29, 2014, and she encouraged the public to comment on the proposed priorities as the Commission found such comment to be valuable to its deliberations.

Chair Saris announced the Commission's "USSC Live!" broadcast, which will be held August 19, 2014. She added that the topics to be covered in the broadcast will include the drug guidelines, the Commission's interactive sourcebook, and a discussion of alternatives to incarceration.

Chair Saris announced that registration for the Commission's Annual National Training Seminar, to be held in Philadelphia, PA, on September 17-19, 2014, was closed. She noted that over 1,000 individuals have registered to attend, a number that exceeded the Commission's expectations. Information about the seminar is available on the Commission's website.

Chair Saris called for a motion to adopt the April 10, 2014, public meeting minutes. Commissioner Pryor made a motion to adopt the minutes, with Commissioner Barkow seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris called on Ms. Grilli to inform the Commission on a possible vote to make recently adopted Amendment 3 retroactive.

Ms. Grilli stated that the proposed amendment, attached hereto as Exhibit A, provides for the retroactive application of Amendment 782, which was Amendment 3 in the amendments that went to Congress on May 1, 2014, subject to a special instruction. Amendment 782 generally revised the Drug Quantity Table and Chemical Quantity Tables across drug and chemical types.

The proposed amendment would list Amendment 782 at subsection (d) of §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)) as an amendment that may be available for retroactive application, subject to a special instruction stating as follows:

“The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.”

The proposed amendment also provides a new Application Note clarifying that the special instruction does not preclude the court from conducting sentencing reduction proceedings and entering orders before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later. As a result, offenders cannot be released from custody pursuant to retroactive application of Amendment 782 before November 1, 2015.

Ms. Grilli advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2014, effective date, and with staff authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Ms. Grilli. Commissioner Breyer made a motion to promulgate the proposed amendment, with Commissioner Barkow seconding.

Chair Saris explained that the Commission would vote on whether to grant retroactive application of the April drug guideline amendment to all offenders subject to a special instruction that reduced sentences shall not take effect until November 1, 2015, or later. She observed that before any offender would be released, a federal judge would have to decide that the offender

would not pose a public safety risk and whether release was appropriate. As the Commission always does for retroactivity questions, she continued, it considered the purposes of the amendment, the magnitude of the change, and the difficulty of applying the change retroactively.

Chair Saris noted that the response to the Commission's request for public comment spoke to the interest in this issue. The Commission received well over 60,000 letters during the public comment period. Chair Saris thanked the members of Congress who submitted letters: Senators Leahy, Durbin, Whitehouse, and Paul, and Congressmen Conyers, Scott, Cardenas, Cohen, Johnson, O'Rourke, and Richmond. She also thanked the Criminal Law Committee of the Judicial Conference, the Department of Justice, the Federal Public and Community Defenders, the Commission's advisory groups, and the many advocacy groups, law enforcement organizations, and the individuals who submitted views. All of the input was once again of paramount importance in this process, she added.

Chair Saris recalled how, after much discussion and consideration, the Commission voted unanimously in April to reduce the guidelines applicable to the Drug Quantity Table by two levels across all drug types. She noted that the amendment was now before Congress and, unless Congress acts to disapprove the amendment, it will become effective on November 1, 2014.

Chair Saris reviewed why the Commission adopted the drug amendment in April. She explained that the Commission had the statutory duty to ensure that the guidelines minimize the likelihood that the federal prison population will exceed capacity. The Chair stated that reducing the federal prison population has become urgent, with that population almost three times where it was in 1991. Federal prisons are 32 percent overcapacity and 52 percent overcapacity for the highest security facilities. Federal prison spending exceeds \$6 billion a year, making up more than a quarter of the budget of the entire Department of Justice and reduced the resources available for federal prosecutors and law enforcement, aid to state and local law enforcement, crime victim services, and crime prevention programs – all of which promote public safety.

Chair Saris observed that several changes in the guidelines and the law supported lowering the Drug Quantity Table by two levels. She recalled that when the Drug Quantity Tables levels were set at their current level, above the statutory mandatory minimum penalties, drug quantity was the primary driver of drug sentences. Chair Saris recounted that where there had been only one other specific offense characteristic in the drug guideline, now there were fourteen enhancements for factors like violence, firearms, and aggravating role. Quantity, she observed, while still an important proxy for seriousness, no longer needed to be quite as central to the calculation.

Chair Saris added that, originally, drug guideline levels were set above the mandatory minimum penalties so that, even for the lowest level drug offenders with minimal criminal history, there would still be some room for their sentences to move down before hitting the statutory mandatory minimum. That way, she continued, these offenders would receive some benefit if they accepted responsibility. Since then, Congress has added the "safety valve," which provides for sentences below statutory mandatory minimum levels for low-level offenders and gives those offenders a substantial benefit if they accept responsibility. It is no longer necessary to set the guidelines above the statutory mandatory minimum penalties to ensure that low-level offenders

benefit from accepting responsibility, Chair Saris explained.

Chair Saris noted that when the Commission reduced guideline levels for crack offenses by two levels in 2007, the overall rates at which crack cocaine defendants pled guilty and cooperated with the government remained relatively stable. She believed that this recent experience indicated that the April drug guideline amendment, which is similar in nature to the 2007 crack cocaine amendment, should not affect the willingness of defendants to plead guilty and cooperate with authorities.

Chair Saris stated that many of the same factors which led the Commission to vote in April to reduce drug guidelines supported making those reductions retroactive. She noted that the same changes in the guidelines and laws she mentioned earlier that made the lower guideline levels more appropriate prospectively would also make lower guideline levels appropriate for those offenders already in prison, most of whom were convicted after many of these statutory and guideline changes were already in place.

Chair Saris added that retroactive application of the April drug guideline amendment would have a significant impact on reducing prison costs and overcapacity, which was an important purpose of the April amendment, and the impact would come much more quickly than from a prospective change alone.

Chair Saris stated that with respect to the magnitude of the change, if the Commission voted to make the amendment retroactive for all offenders subject to a special instruction that reduced sentences shall not take effect until November 1, 2015, it would make an estimated 46,290 offenders potentially eligible for reduced sentences. These offenders would be eligible to have their sentences reduced by an average of 25 months or 18.8 percent. She noted that they would still serve 108 months, on average. Chair Saris observed that the potential reduction would result over time in a savings of 79,740 prison bed years. The magnitude of the change, both collectively and for individual offenders, was significant, she added. Chair Saris emphasized that retroactive application of the April drug guideline amendment would make a real short-term and long-term difference as the Commission seeks to help get the federal prison budget and population under control.

Chair Saris noted that the Commission had heard from many in Congress, as well as federal judges, advocacy organizations, faith organizations, academics, and many thousands of citizens urging it to make the amendment reducing drug guideline levels fully retroactive. She continued that they argued that retroactivity leads to a fair and just result, that it would promote rather than hinder public safety, and that judges were well positioned to determine in which cases sentences should and should not be reduced.

Chair Saris stated that the Commission also listened very carefully to the law enforcement community and paid close attention to the concerns raised by many in law enforcement and by some judges about the public safety implications of applying the April drug guideline amendment retroactively. She noted that some, like the Major Cities Chiefs Police Association and the Department of Justice, have been supportive of retroactivity but had urged that it be done

in a way that safeguarded public safety. Others, she added, like the Fraternal Order of Police, the National Association of Assistant United States Attorneys, and the National Narcotics Officers' Associations' Coalition, opposed retroactivity based on public safety concerns. Chair Saris stated that the Commission takes very seriously its duty to promote public safety and that it appreciated the hard work law enforcement officers do every day to protect all of our safety.

Chair Saris observed that the proposed amendment seeks to address concerns about public safety. She noted that the Commission was informed by studies it conducted comparing the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 amendment reducing guideline levels for crack cocaine offenders with a control group of offenders who served their full terms of imprisonment. The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. Chair Saris stated that the study suggested that retroactive application of modest reductions in drug penalties such as those in the proposed amendment would not increase the risk of recidivism.

Nonetheless, Chair Saris stressed, the Commission recognized the reasonable concerns it has heard that releasing a large number of offenders within a short period of time can create risks. She believed that the proposed amendment takes steps that would effectively address those risks, as well as reduce the difficulty of applying the change retroactively. Specifically, she continued, under the proposed amendment, judges would be able to begin considering motions to reduce sentences based on retroactive application of the drug amendment starting November 2014. However, she stressed, any order reducing terms of imprisonment cannot be effective until November 1, 2015, meaning that no offenders will actually be released early until November 2015.

Chair Saris stated that this delayed implementation will address public safety concerns in three ways. First, it will allow judges more time to consider the initial influx of motions for reduced sentences. She noted that, as the Commission has consistently stressed, retroactive application of the proposed amendment does not automatically entitle anyone to a reduced sentence. Judges will review every case to determine whether it is appropriate for a given offender's sentence to be reduced. The delayed implementation will allow judges time to carefully weigh each case, including considering the public safety implications of releasing any given offender early, and will give courts enough time to obtain and review the information necessary to make an individualized determination. In addition, Chair Saris continued, the government will have adequate time to access information including regarding offenders' conduct in prison and object to sentence reductions when prosecutors believe public safety may be at risk. She noted that the Commission had heard testimony from the judiciary that additional time would be essential to facilitate the kind of consideration that would be required. With an estimated 7,953 offenders eligible for release in November 2015 under retroactive application of this amendment, she noted, added time to consider each case thoroughly would be crucial, particularly in those states, like border states, which have huge caseloads.

Second, Chair Saris observed, the delayed implementation will ensure that the Bureau of Prisons has enough time to give every offender the usual transitional services and opportunities that help

increase the chances of successful reentry into society. She noted that in the regular course, many offenders transitioned from prison to halfway houses or home confinement before their ultimate release. Officials from the Bureau of Prisons have emphasized that such transitions help ensure that offenders had the services, support, and skills they needed to live productive lives. Chair Saris recalled that the Commission heard testimony in June that, without a period of delay when a guideline reduction was applied retroactively in the past, some offenders were released without a reentry plan and services. She observed that the special instruction on timing in the proposed amendment would mean that, this time, no offenders would be released without having had the opportunity for this regular transition.

Third, Chair Saris continued, the delay would allow the Office of Probation and Pretrial Services adequate time to prepare so that released offenders could be effectively supervised. She noted that the delay will allow probation officers to be transferred or hired and trained and would allow them to prepare for supervising additional offenders. With time to prepare, Chair Saris believed, the Office of Probation and Pretrial Services would be able to ensure more effective supervision, which would increase the chance of successful offender reentry and help ensure public safety. Chair Saris recounted that the Commission heard from judges and probation officers that additional time for this step was essential to protecting public safety, and the proposed amendment directly addressed that concern.

Chair Saris stated that she understood that the special instruction on the effective date of reduced sentences under retroactive application of the drug amendment would reduce somewhat the number of offenders who may benefit. But, she believed, that limitation was necessary to ease the difficulty in applying the amendment retroactively by enabling appropriate consideration of individual petitions, ensuring sufficient staffing and preparation to effectively supervise offenders upon release, and allowing for effective reentry plans. All of these steps, Chair Saris concluded, will ultimately help to protect public safety and make the delay necessary.

Chair Saris stated that she was convinced that the proposed amendment was a well-reasoned approach to appropriately reduce prison costs and overcapacity, while also safeguarding public safety and that is why she would vote for retroactive application.

The Chair called for any additional discussion on the vote and recognized Vice Chair Hinojosa.

Vice Chair Hinojosa stated that he voted in April for the two-level reduction in the Drug Quantity Table because the new penalties would continue to be consistent with the statutory mandatory minimum enacted by Congress. He added that the resulting penalties would continue to recognize that weight was an important factor when sentencing drug trafficking offenders. At the same time, Vice Chair Hinojosa continued, the April drug guideline amendment also recognized that, since the original guidelines were promulgated, there have been aggravating and mitigating factors added and there was a need to adjust the guideline penalties to permit the operation of those added factors.

Vice Chair Hinojosa stated that he also voted for the April amendment because the Commission's recidivism studies showed that the two-level reduction for crack cocaine penalties

had not affected the recidivism rates of individuals who were released early compared to individuals who had served longer sentences.

Vice Chair Hinojosa noted that the Commission had heard from thousands of individuals and their comments were helpful. He stated that the Commission had heard from judges, especially from judges on the Southwest border who handle a significant part of the criminal docket when looked at on a national scale. Vice Chair Hinojosa observed that some judges have asked the commissioners to vote for retroactivity for policy and resource reasons and others have just as eloquently asked the Commission not to vote for retroactivity for policy and resource reasons.

Vice Chair Hinojosa stated that, after careful consideration of the comment the Commission has received, including thousands of letters and e-mails, and consideration of the three factors the Commission uses when deliberating possible retroactivity, he believed retroactivity as proposed was appropriate.

Vice Chair Hinojosa added that, having listened to those on the Southwest border that will bear the brunt of the work that has to be done, there were ample reasons to delay the release of any individual until November 1, 2015. He noted that this delay will assist judges, who must make individual decisions on any motions for a reduction, the United States Attorneys, who must carefully review any such cases, and the United States Probation Office.

Vice Chair Hinojosa observed that the assistance given by the probation officer to the judges cannot be underestimated. He noted that the delay will allow probation offices to add staff, if needed, and find the resources necessary to handle the additional number of requests for reduction the proposed amendment is likely to generate.

Vice Chair Hinojosa explained that the delay would also give the Bureau of Prisons time to make sure that the public safety factors of reintegration into society are taken care of with enough time for halfway house and/or home confinement as a reentry program that are normally part of the process for anybody who is released from prison.

Vice Chair Hinojosa observed that about 25 to 30 percent of the defendants that may benefit from the proposed amendment are non-citizens and they are likely to be deported. He suggested that the Administration consider giving notice to the governments of these non-citizens to make them aware that beginning November 1, 2015, there may be a larger number of individuals released and returned to their country of origin, so that those countries could prepare for their reentry.

Vice Chair Hinojosa cautioned that the proposed amendment was not a solution to the issue of drug trafficking statutory penalties. He noted that the Commission continued to believe that Congress should consider the issue of a reduction in statutory mandatory minimums and an extension of the safety valve beyond defendants with only one criminal history point.

For all the foregoing reasons, Vice Chair Hinojosa stated, he would support the proposed amendment.

Vice Chair Jackson observed that the proposed amendment would retroactively apply the two-level Drug Quantity Table reduction adopted in April without condition, except for a delayed implementation date. She recalled that at the Commission's June hearing on retroactivity, the Department of Justice expressed its concern that dangerous offenders should not have their sentences reduced as a result of the proposed amendment, a concern that many on the Commission shared. As a result, she continued, much of the work since the June hearing has been devoted to analyzing and evaluating various limitations that would attempt to target and exclude dangerous offenders. However, Vice Chair Jackson stated, she came to the conclusion that it is nearly impossible to make the dangerousness determination in a principled and fair way retrospectively and as a categorical matter.

Vice Chair Jackson observed that each drug offender will have to be evaluated individually in order to determine whether or not—as a result of dangerousness or otherwise—his or her sentence should be reduced. Despite the enormity of the task in light of the huge numbers, she continued, judges have testified that they are willing to take up this charge.

Vice Chair Jackson stated that she would vote in favor of the proposed amendment because she was confident that, by extending the implementation date, the Commission would give the criminal justice community sufficient time to make the kinds of individualized determinations that would be necessary to ensure public safety.

Commissioner Wroblewski thanked Chair Saris for her leadership, attributing to it much of the Commission's successful work over the last two-and-a-half years. He also thanked everyone who participated in the amendment process.

Commissioner Wroblewski observed that the last eight years have seen major changes to sentencing and corrections policy at the state level across the country. Faced with huge budget challenges arising in part from the 2008 Recession, states have implemented new reforms to sentencing policy that have reduced incarceration modestly. He noted that those states have reinvested some of the savings from these reductions in other public safety investments, including drug courts, police, and community corrections. And over that time, he added, the violent crime rate nationwide has fallen significantly.

Commissioner Wroblewski noted that new research has shown that prisoner re-entry can indeed be effective; that certain strategies do work to reduce re-offending. He stated that the Department of Justice has discussed over the past several years the promise of swift, certain, and fair reentry accountability programs, most notably the Hawaii and Washington State Helping Offenders Pursue Excellence (“H.O.P.E.”) programs and the Department of Justice will continue to encourage the Commission to support research and development around those types of programs.

Commissioner Wroblewski observed that from the experience of the states, and from the Commission's own history, the Nation has learned that while prison can work to reduce crime, just as importantly less prison can also work to reduce crime—especially when justice is delivered with swiftness and certainty.

Commissioner Wroblewski stated that sanctions do not have to be severe, but they must be imposed swiftly and consistently. He observed that when punishments are excessive, their connection to the crime is obscured or forgotten and they no longer serve public safety goals, and, in fact, deplete the system of resources needed for police, prosecution, and other criminal functions.

Commissioner Wroblewski observed that what happens after a prison sentence is served is crucial to ensuring public safety. He noted that when judges, probation officers, prosecutors, and police work in a unified way with released offenders, punish all infractions consistently and swiftly, and provide needed services, the likelihood of the offender's post-prison success rises dramatically, and with it the level of safety in the community.

Commissioner Wroblewski stated that this less prison, swift sanctions, strong reentry approach improves public safety at lower fiscal, human, and community costs. He added that it is part of the Smart on Crime strategy that includes robust policing and a commitment to treatment, prevention, and reentry, and is better public policy.

Commissioner Wroblewski recalled that in the last three years, agencies at the Federal level have also experienced fiscal austerity with budgets reduced and being required to do more with less and that now they must be more thoughtful and deliberate with their criminal justice policy decisions.

Commissioner Wroblewski stated that for all of the foregoing reasons, the Department of Justice supported the April drug guideline amendment as an important step to moving Federal criminal justice to the lower cost approach to sentencing and corrections and the fight against drug trafficking and drug abuse. He added that it was why the Department of Justice continues to call for Congressional action on pending sentencing legislation.

Commissioner Wroblewski observed that at the Commission's June hearing, United States Attorney Sally Quillian Yates testified before the Commission in support of retroactive application of the April drug guideline Amendment. He noted that Ms. Yates spoke about her personal experience and about the importance of the issue to the cause of justice and improved public safety.

Commissioner Wroblewski expressed his gratitude to the Commission for considering the views of the Department of Justice. While the Commission may take a different approach than the one the Department of Justice advocated to address our public safety concerns, he continued, it appreciated very much that the Commission recognized these important concerns. Commissioner Wroblewski added that in the Department of Justice's view, the decision to delay implementation of retroactivity will help address its concerns, in particular by giving the Bureau of Prisons the opportunity to move prisoners through halfway houses and otherwise provide transitional services.

Commissioner Wroblewski observed that after the vote may come many months of implementation. He stated that it is imperative for the Commission to help facilitate the

implementation of retroactivity, if adopted, and thanked the Commission for the discussions the Department of Justice have had with it and its staff.

Commissioner Wroblewski pledged the Department of Justice's support in seeing that retroactivity is implemented efficiently, if adopted, and that courts get the information they would need to make informed decisions on the thousands of sentence modifications requests that may be filed.

Commissioner Wroblewski stated that he wanted to acknowledge his colleagues in the United States Attorneys' offices from coast to coast who go to work every day with two things front and center in their minds: To keep our communities safe, and to do justice. He stated that the Nation owed them its gratitude along with the entire court family.

Commissioner Wroblewski noted that violent crime rates across the country are at generational lows. In the last five-and-a-half years, violent crime has been reduced across the country more than 20 percent and he believed that part of the reason for this was effective sentencing policy.

Commissioner Wroblewski stressed that the Nation still needs strong sentencing, and the Department of Justice looks forward to examining important systemic issues facing Federal sentencing and corrections policy with the Commission over the coming months. But he also stressed that strong sentencing policy should be fair and smart sentencing policy—swift, certain, fair, and not excessive.

Commissioner Wroblewski stated that the Department of Justice believed the Commission's actions on the proposed amendment were consistent with strong, fair, and smart sentencing. He concluded by again thanking Chair Saris for considering the Department of Justice's views and for her leadership of the Commission.

Hearing no further discussion, the Chair called on the Staff Director to perform a roll call vote on the motion to adopt the proposed amendment. The motion was adopted unanimously with Chair Saris, Vice Chairs Hinojosa, Jackson, and Breyer, and Commissioners Friedrich, Barkow, and Pryor voting in favor of the motion.

Chair Saris noted that members of the Commission come from across the country and across the political spectrum. She stated that she was proud that it worked hard, listened to each other, and gave to this important issue the very serious consideration it deserved, and that the commissioners had also so often been able to reach consensus. By working together, Chair Saris emphasized, the Commission reached results that were balanced and supported by empirical evidence. She recalled again how the Commission voted unanimously in April to reduce guideline levels for drug offenses.

Chair Saris observed that the Commission worked hard to achieve similar consensus on the just adopted amendment. She noted that the amendment received unanimous support because it was a measured approach to reduce prison costs and populations and responded to statutory and guidelines changes, while it reduced the difficulty of application and safeguarded public safety.

Chair Saris expressed her hope that Congress would work together to pass legislation to address the many problems the Commission has found with the current statutory mandatory minimum penalties. Acknowledging that the step the Commission just took was an important one, she stressed that only Congress can bring about the more comprehensive reforms needed to reduce disparities, fully address prison costs and populations, and make the federal criminal justice system work better.

Chair Saris again thanked the audience for attending and all of the Members of Congress, judges, organizations, and members of the public who submitted comments and contributed so much to the amendment process. She concluded her comments by thanking her fellow Commissioners who considered this important issue so carefully and worked to ensure a thoughtful and appropriate result.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Vice Chair Hinojosa made a motion to adjourn, with Vice Chair Jackson seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 1:36 p.m.

EXHIBIT A

PROPOSED AMENDMENT: RETROACTIVE APPLICATION OF AMENDMENT 782

Synopsis of Proposed Amendment: *This proposed amendment provides for the retroactive application of Amendment 782, subject to a special instruction. Amendment 782 generally revised the Drug Quantity Table and chemical quantity tables across drug and chemical types.*

Retroactive Application of Amendment 782, Subject to a Special Instruction that Reduced Sentences Shall Not Take Effect Until November 1, 2015, or Later

The proposed amendment includes Amendment 782 in the listing in §1B1.10(d) as an amendment that may be available for retroactive application, subject to a special instruction stating as follows:

The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

The proposed amendment also provides a new application note clarifying that this special instruction does not preclude the court from conducting sentence reduction proceedings and entering orders before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

The Commission determined that public safety, among other factors, requires a limitation on retroactive application of Amendment 782. In light of the large number of cases potentially involved, the Commission determined that the agencies of the federal criminal justice system responsible for the offenders' reentry into society need time to prepare, and to help the offenders prepare, for that reentry. For example, the Bureau of Prisons has the responsibility under 18 U.S.C. § 3624(c) to ensure, to the extent practicable, that the defendant will spend a portion of his or her term of imprisonment under conditions that will afford the defendant a reasonable opportunity to adjust to and prepare for his or her reentry into the community. In addition, for many of the defendants potentially involved, the sentence includes a term of supervised release after imprisonment. The judiciary and its probation officers will have the responsibility under 18 U.S.C. § 3624(e) to supervise such defendants after they are released by the Bureau of Prisons. The Commission concluded that a one-year delay in the effective date of any orders granting sentence reductions is needed (1) to give courts adequate time to obtain and review the information necessary to make an individualized determination in each case of whether a sentence reduction is appropriate, (2) to ensure that all offenders who are to be released have the opportunity to participate in reentry programs while still in the custody of the Bureau of Prisons, to the extent practicable, and (3) to permit those agencies that will be responsible for offenders after their release to prepare for the increased responsibility. As a result, offenders cannot be released from custody pursuant to retroactive application of Amendment 782 before November 1, 2015.

In making this determination, the Commission considered the following factors, among others: (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. See §1B1.10, comment. (backg'd.).

In addition, public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is

warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. *See* §1B1.10, comment. (n.1(B)(ii)).

Proposed Amendment:

**§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range
(Policy Statement)**

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant’s term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (d) is applicable to the defendant; or

(B) an amendment listed in subsection (d) does not have the effect of lowering the defendant’s applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (d) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitation and Prohibition on Extent of Reduction.—

(A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18

U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

- (B) Exception for Substantial Assistance.—If the 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 pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.
- (C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.
- (c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).
- (d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, and 750 (parts A and C only), and 782 (subject to subsection (e)(1)).

(e) Special Instruction.—

- (1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

- (A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (*i.e.*, the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C.

§ 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

- (i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (ii) Public Safety Consideration.—The court shall 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 in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).
- (iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

- 2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.
- 3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward

departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the 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 pursuant to a government motion to reflect the defendant's substantial assistance to authorities. In such a case, the court may reduce the defendant's term, but the reduction is not limited by subsection (b)(2)(A) to the minimum of the amended guideline range. Instead, as provided in subsection (b)(2)(B), the court may, if appropriate, provide a reduction comparably less than the amended guideline range. Thus, if the term of imprisonment imposed in the example provided above was 56 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing), a reduction to a term of imprisonment of 41 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range) would amount to a comparable reduction and may be appropriate.

The provisions authorizing such a government motion are §5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward departure based on the defendant's substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect the defendant's substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect the defendant's substantial assistance).

In no case, however, shall the term of imprisonment be reduced below time served. See subsection (b)(2)(C). Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Application of Subsection (c).—As stated in subsection (c), if the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction). For example:

- (A) Defendant A is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing was 135 to 168 months, which is entirely above the mandatory minimum, and the court imposed a sentence of 101 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 108 to 135 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's

original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

- (B) Defendant B is subject to a mandatory minimum term of imprisonment of 120 months. The original guideline range at the time of sentencing (as calculated on the Sentencing Table) was 108 to 135 months, which was restricted by operation of §5G1.1 to a range of 120 to 135 months. See §5G1.1(c)(2). The court imposed a sentence of 90 months pursuant to a government motion to reflect the defendant's substantial assistance to authorities. The court determines that the amended guideline range as calculated on the Sentencing Table is 87 to 108 months. Ordinarily, §5G1.1 would operate to restrict the amended guideline range to precisely 120 months, to reflect the mandatory minimum term of imprisonment. See §5G1.1(b). For purposes of this policy statement, however, the amended guideline range is considered to be 87 to 108 months (i.e., unrestricted by operation of §5G1.1 and the statutory minimum of 120 months).

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant B's original sentence of 90 months amounted to a reduction of approximately 25 percent below the original guideline range of 120 months. Therefore, an amended sentence of 65 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 87 months) would amount to a comparable reduction and may be appropriate.

5. Application to Amendment 750 (Parts A and C Only).—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to §2D1.1 (see §2D1.1, comment. (n.8)). Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

6. Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2). Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

67. Supervised Release.—

- (A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.
- (B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

78. Use of Policy Statement in Effect on Date of Reduction.—Consistent with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of this policy statement that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), 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, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which 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." The Supreme Court has concluded that proceedings under section 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. See Dillon v. United States, 130 S. Ct. 2683 (2010).

Among the factors considered by the Commission in selecting the amendments included in subsection (d) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously

sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

*So in original. Probably should be "to fall above the amended guidelines".