



ISSUE FOR COMMENT: RETROACTIVITY

This document sets forth the unofficial text of an issue for comment promulgated by the Commission and is provided only for the convenience of the user. As with all amendments that the Commission has voted to promulgate but has not yet officially submitted to Congress and the Federal Register, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once the amendments have been submitted to Congress and the Federal Register, official text of the issue for comment will be posted on the Commission’s website at www.ussc.gov and will be available in a forthcoming edition of the Federal Register

Written public comment should be received by the Commission not later than June 23, 2023. Public comment received after the close of the comment period may not be considered. All written comment should be sent to the Commission via any of the following two methods: (1) comments may be submitted electronically via the Commission’s Public Comment Submission Portal at <https://comment.ussc.gov>; or (2) comments may be submitted by mail to the following address: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, Washington, D.C. 20002-8002, Attention: Public Affairs – Issue for Comment on Retroactivity. For further information, see the full contents of the official notice when it is published in the Federal Register (available at www.ussc.gov).

The issue for comment is as follows:

REQUEST FOR COMMENT ON PARTS A AND B OF THE CRIMINAL HISTORY AMENDMENT, RELATING TO “STATUS POINTS” AND CERTAIN “ZERO-POINT” OFFENDERS

On May 1, 2023, the Commission submitted to Congress amendments to the sentencing guidelines and official commentary, which become effective on November 1, 2023, unless Congress acts to the contrary. Such amendments and the reasons for amendment are included in this notice.

Section 3582(c)(2) of title 18, United States Code, provides that “in 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.” Pursuant to 28 U.S.C. § 994(u), “[i]f 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 criminal history amendment has the effect of lowering guideline ranges. The Commission intends to consider whether, pursuant to 18 U.S.C. 3582(c)(2) and 28 U.S.C. § 994(u), Parts A and B of this amendment, relating to the impact of “status points” at §4A1.1 (Criminal History Category) and offenders with zero criminal history points at new §4C1.1 (Adjustment for Certain Zero-Point Offenders), should be included in 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 applied retroactively to previously sentenced defendants. In considering whether to do so, the Commission will consider, among other things, a retroactivity impact analysis and public comment. Accordingly, the Commission seeks public comment on whether it should make Parts A and B of this amendment available for retroactive application. To help inform public comment, the retroactivity impact analysis will be made available to the public as soon as practicable.

The Background Commentary to §1B1.10 lists 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 §1B1.10(b) as among the factors the Commission considers in selecting the amendments included in §1B1.10(d). To the extent practicable, public comment should address each of these factors.

The Commission seeks comment on whether it should list Parts A and B of the amendment, addressing the impact of “status points” at §4A1.1 and offenders with zero criminal history points at new §4C1.1, in subsection (d) of §1B1.10 as changes that may be applied retroactively to previously sentenced defendants. For each of these parts, the Commission requests comment on whether that part should be listed in subsection (d) of §1B1.10 as an amendment that may be applied retroactively.

If the Commission does list one or both parts of the amendment in subsection (d) 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?