Statement of Judge Patti B. Saris
Chair, United States Sentencing Commission
For the Hearing on
"H.R. 3713, Sentencing Reform Act of 2015"
Before the U.S. House of Representatives Judiciary Committee

November 18, 2015

Chairman Goodlatte, Ranking Member Conyers, and distinguished members of the Committee on the Judiciary, thank you for giving the United States Sentencing Commission ("Commission") an opportunity to enter into the record this statement relating to the Sentencing Reform Act of 2015 (H.R. 3713).

The Commission applauds the Committee for considering legislation relating to federal criminal sentencing policy, particularly reforms targeting mandatory minimum penalties. The Commission acknowledges the Committee's expertise in this complicated policy area, born in part from the culmination of past hearings held by this Committee that evaluated the effectiveness and fairness of the criminal justice system as a whole. Of note, the Commission recognizes the great undertaking by the Committee in the establishment of the bipartisan Task Force on Over-Criminalization and the corresponding series of ten hearings held between June 2013 and July 2014.

Evaluating the impact of mandatory minimum sentences is an important priority for the Commission. In 2011, the bipartisan Commission[1] issued a report to Congress entitled *Mandatory Minimum Penalties in the Federal Criminal Justice System*,[2] where the Commission unanimously concluded that mandatory minimum sentences, in their current form, are often too high and applied too broadly and inconsistently. The problems underscored in the Commission's 2011 report continue to persist, making the need for legislative solutions from this Committee all the more necessary and urgent.

The impact of mandatory minimum sentences on the federal prison population has been consequential. The number of inmates housed by the Federal Bureau of Prisons ("BOP") on December 31, 1991 was 71,608.[3] Today that number is approximately 198,842.[4] The number of offenders in the custody of the BOP who were convicted of a statute carrying a mandatory minimum penalty similarly increased from 40,104 offenders in 1995 to 125,077 in 2014, an

[1] By statute, no more than four members of the Commission may be of the same political party. 28 U.S.C. § 991(a).

[2] U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (October 2011) (Mandatory Minimum Report), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

[3] Allen J. Beck & Gillard, *Prisoners in 1994*, Bureau of Justice Statistics Bulletin 1 (1995).

[4] Fed. Bureau of Prisons, *Population Statistics* (accessed October 15, 2015), http://www.bop.gov/about/statistics/population_statistics.jsp.

increase of 211.9% percent.[5] Despite the recent decline of the federal prison population, the Federal Bureau of Prisons ("BOP") population continues to exceed capacity and, as has been well documented by Department of Justice (DOJ) officials, the costs associated with these expenditures are dangerously crowding out funding for other potential crime prevention initiatives.

The costs of federal prison and detention are significant: such costs currently account for approximately one-third of the overall DOJ budget,[6] which presents a more than six-fold increase from $1.36 billion for fiscal year 1991[7] to currently more than $8 billion a year.

In our 2011 report, the Commission articulated three central principles relating to mandatory minimum penalties. The Commission unanimously agreed that mandatory minimum penalties should (1) not be excessively severe, (2) be narrowly tailored to apply only to specific offenders who warrant such punishment, and (3) be applied consistently. The Commission's research also revealed the inconsistent application of excessively severe mandatory minimum penalties drives unwarranted sentencing disparities.

In view of these three principles, the Commission put forward specific recommendations for modifying mandatory minimum penalties to make federal sentencing laws operate more fairly and uniformly, as we believe Congress intended. Among the Commission's specific recommendations are that:

- Congress should reduce the current statutory mandatory minimum penalties for drug trafficking.

- Congress should consider expanding the so-called "safety valve" at 18 U.S.C. § 3553(f) to allow a greater number of non-violent, low-level drug offenders drug offenders to be sentenced below the mandatory minimum penalties.

- Congress should give retroactive effect to the Fair Sentencing Act of 2010, which reduced the disparity in the mandatory minimum penalties for crack cocaine and powder cocaine offenders.

- Congress should reassess the scope and severity of the recidivism provisions in 21 U.S.C. §§ 841 and 960, which generally double the mandatory minimum penalties if a drug

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[5] U.S. Sentencing Comm'n, *Quick Facts on Federal Offenders in Prison* (January 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_BOP.pdf.

[6] U.S. Dep't of Justice, *FY 2014 Budget Request at a Glance* 3 (2013) (U.S. Dep't of Justice FY 2014 Budget Request), *available at* http://www.justice.gov/sites/default/files/jmd/legacy/2013/11/11/fy14-bud-sum.pdf#bs; *see also* Letter from Jonathan Wroblewski, U.S. Dep't of Justice, to Hon. Patti Saris, U.S. Sentencing Comm'n, 8 (July 11, 2013), *available at* http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf.

[7] Pub. L. No. 101-515, 104 Stat. 2101, 2114 (1990).

offender has a prior conviction for a "felony drug offense" and provides for mandatory life imprisonment if an offender has two or more prior drug felonies.

- Congress should eliminate the mandatory "stacking" requirement for multiple violations of 18 U.S.C. § 924(c) so that the enhanced mandatory minimum penalties for a "second or subsequent" offense apply only to prior convictions.

- Congress should consider clarifying the statutory definitions in the Armed Career Criminal Act (ACCA) at 18 U.S.C. § 924(e) and reduce their severity.

The Commission also believes that these recommendations flow from the twin objectives of alleviating the excess capacity burden on the federal prison population while safeguarding public safety. As the Committee has undertaken its own examination of these penalties, the Commission is encouraged to see that several of the provisions of H.R. 3713 correlate, at least in part, with the Commission's recommendations.

The remainder of my statement will highlight key findings of the Commission's extensive research and data analyses as they relate to specific provisions of H.R. 3713, as introduced.

A. Mandatory Minimums for Drug Offenses Impact Many Low-Level Offenders

Based on the legislative history, Congress intended mandatory minimum penalties for "major" or "serious" drug traffickers.[8] Of note, in a House Judiciary Subcommittee on Crime report released in 1986, the Subcommittee determined that the five and ten-year mandatory minimum sentencing structure would encourage the Department of Justice to direct its most intense focus on major traffickers and serious traffickers.[9]

The Commission, however, has found that in practice these penalties sweep more broadly than Congress may have intended. In the Commission's 2011 report to Congress, we found that the majority of offenders in nearly every function of a drug trafficking enterprise, including low-level secondary and miscellaneous functions, were convicted of an offense carrying a mandatory minimum penalty, although higher-level functions tended to be convicted of such statutes at more frequent rates.[10]

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[8] *See* U.S.Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 6 (2002); *see also* 132 Cong. Rec. 27, 193-94 (Sept. 30, 1986) (statement of Sen. Byrd) ("For the kingpins . . . the minimum term is 10 years . . . [F]or the middle-level dealers . . . a minimum term of 5 years."); 132 Cong. Rec. 22,993 (Sept. 11, 1986) (statement of Rep. LaFalce) ("[S]eparate penalties are established for the biggest traffickers, with another set of penalties for other serious drug pushers.").

[9] H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986).

[10] To provide a more complete profile of federal drug offenders for the Mandatory Minimum Report, the Commission undertook a special project in 2010. Using a 15% sample of drug cases reported to the Commission in fiscal year 2009, the Commission assessed the functions performed by drug offenders as part of the offense. Offender function was determined by a review of the offense conduct section of the Presentence Report. The Commission assigned each offender to one of 21 separate function categories based on his or her most serious conduct as described in the

Commission data revealed that in fiscal year 2009, for instance, nearly half of all low-level couriers, who constitute 23 percent of all drug traffickers, were convicted of an offense carrying a mandatory minimum penalty. Likewise, nearly half of all street-level dealers, who constitute 17.2 percent of all drug traffickers, were subject to mandatory minimum penalties at sentencing because they did not obtain relief either for providing substantial assistance to the government or for meeting the statutory safety valve criteria.[11]

Based on the Commission's review of past cases, the drug mandatory minimum penalties are driven, in essence, by the quantity and type of drug involved in the underlying offense. Yet, the Commission's research has found that drug quantity is often not a reliable proxy for the function played by the offender, as Congress may have envisioned. For example, a courier may be carrying a large quantity of drugs, but may be a low-level member of a drug organization at most. Similarly, an offender convicted as part of a drug conspiracy may play a minor role in the conspiracy, personally handle a small quantity of drugs, and yet be held responsible for all the drugs trafficked in the conspiracy.

The sweeping overbreadth of mandatory minimum penalties is compounded by their severity. The Commission's data analysis shows that over half of all drug offenders – 5,721 of 10,966 – who were convicted of an offense carrying a mandatory minimum penalty in fiscal year 2014 were convicted of an offense carrying a 10-year mandatory minimum, a penalty Congress intended to reserve for "major" traffickers.[12]

In a positive step forward, Section 4 of H.R. 3713 aims to lessen the unintended overreach of drug mandatory minimums by establishing a new statutory mechanism somewhat akin to the existing statutory safety valve codified in 18 U.S.C. § 3553(f). The relief provided in Section 4 would permit certain offenders who are currently subject to the 10-year mandatory minimum penalty to be subject to the 5-year mandatory minimum as an alternative. Specifically, a defendant would qualify for this new form of relief if:

(1) the defendant does not have a prior conviction for a "serious drug felony" or "serious violent felony";
(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense and the offense did not result in death or serious bodily injury to any person;
(3) the defendant did not play an enhanced role in the offense by acting as an organizer, leader, manager, or supervisor of other participants in the offense, or did not exercise substantial authority or control over the criminal activity;

Presentence Report and not rejected by the court on the Statement of Reasons form. For more information on the Commission's analysis, *see* Mandatory Minimum Report, *supra* note 2, at 165-166.

[11] *Id.* at 166-170.

[12] U.S. Sentencing Comm'n, *2014 Sourcebook of Federal Sentencing Statistics*, Table 43 (2014). Of those drug offenders convicted of an offense carrying a mandatory minimum penalty, approximately 31% received relief under the safety valve. *See id*., at Table 44.

(4) the defendant did not act as an importer, exporter, high-level distributor or supplier, wholesaler, or manufacturer of the controlled substance involved in the offense, or engage in a continuing criminal enterprise;
(5) the defendant did not distribute a controlled substance to a person under 18 years of age; and
(6) not later than the time of sentencing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense.

The Commission is encouraged that H.R. 3713, as introduced, would limit the applicability of the 10-year mandatory minimum penalty that has been too often applied to low-level drug offenders. Limiting the applicability of the 10-year mandatory minimum better reflects Congress's intent when it initially passed the existing mandatory minimum drug sentencing structure. We note, however, that Section 4, as currently drafted, is a complicated provision that is heavily reliant on definitions that are likely to invite litigation to determine their scope. The Commission stands ready to offer assistance in any way to help address potential application issues. Subject to that uncertainty, the Commission estimates that 550 offenders each year would benefit from the new provision provided in Section 4, and their average sentence would be reduced by 19.3 percent (21 months) from 109 months to 88 months. Furthermore, the provision is projected to save 127 prison beds within five years of enactment.

B. Mandatory Minimums Have Disparate Demographic Effects

The Commission's research has shown that noticeable differences exist in the application of drug mandatory minimum penalties among various demographic groups, particularly amongst racial minorities. The Commission's 2011 report showed that Hispanic offenders constituted 44.0 percent of drug offenders convicted of an offense carrying a mandatory minimum in fiscal year 2010; Black offenders constituted 30.3 percent, while White offenders were 23.1 percent, and Other Race offenders were 2.5 percent.[13]

The Commission found, however, despite Hispanics' higher conviction rate for drug-related offenses carrying mandatory minimum penalties, mandatory minimum penalties still apply most often to Black offenders at sentencing because Blacks are more frequently disqualified for safety valve relief. Three-quarters (75.6%) of Black drug offenders convicted of an offense carrying a mandatory minimum penalty in fiscal year 2010 were excluded from safety valve eligibility due to criminal history scores of more than one point.[14]

Black offenders qualified for relief under the safety valve at the lowest rate of any racial group (11.1%), compared to White (26.7%), Hispanic (42.8%), and Other Race offenders (36.6%).[15] As a result, Blacks constituted 40.4 percent of drug offenders subject to a mandatory minimum at sentencing, compared to 18.4 percent for White offenders, 39.6 percent for Hispanic offenders, and 1.5 percent for Other Race offenders.

[13] Mandatory Minimum Report, *supra* note 2, at 154.

[14] *Id.* at 354.

[15] *Id.* at xxviii.

The Commission identified criminal history as the decisive factor excluding most Black offenders from safety valve relief. The impact of criminal history on drug sentences is, in part, a function of the minimum term of imprisonment required by statute, and in part a function of the interaction between the mandatory minimum penalties, the safety valve, and the sentencing guidelines.[16]

To help lessen racial disparities – as well as to alleviate the general overbreadth of the drug mandatory minimum penalties – the Commission recommended that Congress consider expanding eligibility for the safety valve at 18 U.S.C. § 3553(f) to include offenders who have criminal histories above one criminal history point.

Section 3 of H.R. 3713 broadens the safety valve to provide greater relief to more low-level, non-violent offenders. Section 3 specifically permits offenders who have up to four criminal history points to remain eligible for safety valve relief, provided that the offender does not have a prior 3-point offense under the guidelines or a prior 2-point "drug trafficking offense" or "crime of violence" as defined in 18 U.S.C. § 16. Section 3 also would provide courts with new authority to waive the criminal history criteria entirely if the court specifies in writing the specific reasons why reliable information indicates that excluding the defendant based on the criminal history exclusionary criteria substantially over represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.

The Commission is pleased that H.R. 3713 would expand the safety valve to include additional low-level offenders. A modest expansion of the safety valve is consistent with the goal of relieving low-level, non-violent drug offenders from the severe mandatory minimum penalties, as well as reducing the federal prison population. The Commission estimates that 3,314 offenders each year would benefit from the safety valve expansion proposed in Section 3, and their average sentence would be reduced by 20 percent (11 months) from 55 months to 44 months. Furthermore, the provision is projected to save 1,593 prison beds within five years of enactment.

The Commission notes that the accuracy of these analyses is somewhat limited by the fact that, as currently drafted, the exclusion of certain 2-point criminal history events, in particular "crimes of violence," are based on definitions that have been the subject of significant litigation. Furthermore, the Commission cannot objectively predict how courts would exercise their new authority to waive the criminal history criteria under H.R. 3713, nor whether courts would exercise their authority in a uniform manner. The Commission offers its assistance in drafting alternative language to help minimize the risk of excessive litigation and to avoid any unintended differences in application.

[16] *Id*. at 352.

C. Retroactive Application of the Fair Sentencing Act

To redress disparities in sentencing between offenses involving crack cocaine and powder cocaine, the Fair Sentencing Act of 2010 (FSA)[17] eliminated the mandatory minimum sentence for simple possession of crack cocaine and increased the quantities of crack cocaine required to trigger the five- and ten-year mandatory minimum penalties for trafficking offenses from five to 28 grams and from 50 to 280 grams, respectively.[18] The FSA, however, did not make those statutory changes retroactive.

In 2011, the Commission amended the sentencing guidelines in accordance with the statutory changes in the FSA and voted unanimously to make these guideline changes retroactive. In reaching this decision,[19] the Commission considered the underlying purposes of the FSA, including Congress's intent to "restore fairness to Federal cocaine sentencing," to provide "cocaine sentencing disparity reduction," and to act "consistent[ly] with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine 'significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere.'"[20]

The Commission concluded, based on testimony, comment, and the experience of implementing the 2007 crack cocaine guideline amendment retroactively,[21] that the administrative burden on the federal courts caused by applying the FSA would be manageable even though a large number of cases would be affected.[22] The Commission was further informed by its study of the recidivism rate of crack cocaine offenders who were released early pursuant to retroactive application of the 2007 amendment. The Commission found that, five years after their early release, crack cocaine offenders who had been released early had the same recidivism rate as similarly situated crack cocaine offenders who had served their entire sentence.[23]

Nearly 14,000 offenders petitioned for a sentence reduction based on retroactive application of guideline amendment implementing the FSA, and courts granted relief in 7,748 of

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[17] Fair Sentencing Act, Pub. L. No. 111–220, 124 Stat. 2373 (2010) (FSA).

[18] FSA § 2.

[19] The Commission, in deciding whether to make amendments retroactive, considers factors including "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." U.S. Sentencing Guidelines Manual §1B1.10, comment (backg'd). *See also* U.S. Sentencing Comm'n, *Notice of Final Action Regarding Amendment on Retroactivity* (eff. Nov. 1, 2011), 76 Fed. Reg. 41332, 41333 (Jul. 13, 2011) (Notice of Final Action Regarding Retroactivity).

[20] *See generally* FSA.

[21] U.S. Sentencing Guidelines Amendments 706 (eff. Nov. 1, 2011), 710 (eff. Mar 3, 2008).

[22] See *supra* note 17, at 10.

[23] U.S. Sentencing Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* (May 2014).

those cases.[24] The average sentence reduction in these cases has been 30 months, which corresponds to a 19.9 percent decrease from the original sentence.[25]

The Commission believes that the same policy justifications that prompted our decision to modify the sentencing guidelines to incorporate FSA retroactive implementation are convincing to make the FSA statutory changes retroactive.

The Commission believes that principles such as restoring fairness and reducing disparities are ideals that govern our consideration of prospective sentencing policy, and they should similarly govern our evaluation of sentencing decisions already made. The Commission has determined that 5,826 offenders currently in prison could receive an approximate 20 percent reduction in sentence, and we are pleased that Section 7 of H.R. 3713 would bring about a more fundamentally fair result.

D. Recidivist Provisions at 21 U.S.C. §§ 841 and 960 Are Inconsistently Applied

The Commission's research suggests that when mandatory minimum penalties are perceived as too severe, they are often applied inconsistently, leading to both demographic and geographic sentencing disparities. These differences were particularly acute with respect to prosecutorial practices regarding the filing of notice under section 851 of title 21, United States Code, for the recidivist penalties at 21 U.S.C. §§ 841 and 960. These provisions generally double the applicable mandatory minimum sentence (from 5 to 10 years of imprisonment, and from 10 to 20 years) for drug offenders with a prior conviction for a "felony drug offense." These provisions also subject certain offenders with two or more drug felonies to mandatory life imprisonment.

Commission interviews with prosecutors and defense attorneys in thirteen districts across the country revealed that many viewed these recidivist provisions as disproportionate and excessively severe in individual cases. As a result, the Commission observed widely divergent practices with respect to the filing of these recidivism penalties. In some districts, the filing was routine. In others, it was filed more selectively, and in one district, it was almost never filed at all.[26] Commission data bore out these differences. For example, in six districts, more than 75 percent of eligible defendants received the increased mandatory minimum penalty for a prior conviction, while in eight other districts, none of the eligible drug offenders received the enhanced penalty.[27]

In light of the Commission's research on this issue, we recommended that Congress mitigate these gross differences by limiting the scope and decreasing the severity of these

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[24] U.S. Sentencing Comm'n, *Final Crack Retroactivity Data Report Fair Sentencing Act*, Table 1 (December 2014), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf.

[25] *Id.* at Table 8.

[26] Mandatory Minimum Report, *supra* note 2, at 111-13.

[27] *Id.* at 255.

recidivist provisions. Section 2 of H.R. 3713, among other things, would reduce the 20-year mandatory minimum to 15 years, and reduce the life imprisonment mandatory minimum to 25 years.

Section 2 also narrows the type of prior drug offense that would trigger the recidivist mandatory minimum penalty to a "serious drug felony," which is defined to require more than a 12-month term of imprisonment. This added limitation better reflects the sentencing court's judgment concerning the seriousness of the prior offense. Section 2 would also broaden the type of prior offenses that would trigger the recidivist mandatory minimum penalties to a new category of offenses, "serious violent offenses."

The Commission cannot estimate the impact of the expansion of the trigger mechanism to include prior "serious violent offenses." Nevertheless, the Commission approximates that nearly 84 offenders each year would benefit from the lower mandatory minimum penalties in Section 2. Their average sentence would be reduced by 22.5 percent (54 months) from 240 months to 186 months. Furthermore, the provision is projected to save 331 prison beds within five years of enactment.

Section 2 provides for retroactive application of the mandatory minimum sentence reductions for recidivist drug offenders. The Commission is encouraged to see this thoughtful approach to retroactive application that closely follows the process set forth following its own action last year. As the Committee knows, the Commission submitted an amendment to Congress which amended the federal sentencing guidelines to reduce the guidelines applicable to drug trafficking offenses. Specifically, this amendment reduced by two the offense levels assigned in the Drug Quantity Table, resulting in lower guideline ranges for most drug trafficking offenses.

Through the Commission's action, there were no automatic sentence reductions. For any eligible offenders, a district court judge reviewed the case to determine whether any sentencing reduction was appropriate. In the review of each individual case, the judge considered all of the factors that a judge considers at an initial sentencing in determining whether a reduction in the defendant's term of imprisonment is warranted and the extent of any reduction. This means factors like the nature and circumstances of the offense, the characteristics of the offender, public safety, deterrence, and the sentencing guidelines were all considered. In the judge's review of a motion for a reduction, there was explicit attention to public safety. In addition, this analysis included a review of the offender's record while in prison as well as input from the probation service.

To that end, the Commission is pleased to see the same structure for any retroactive applicability in the proposed legislation. In addition, as introduced, the bill would bar offenders with a prior conviction for a "qualifying serious violent felony" from retroactive relief. The Commission cannot approximate the impact of the "serious violent felony" limitation on retroactive eligibility under Section 2. Consequently, we cannot estimate how many of the 2,265 offenders we believe could be eligible for possible retroactive sentence reduction, would no longer be eligible. The early release of these offenders, if granted, would occur over several years.

E. Firearms and Armed Career Criminal Act Provisions Are Applied Inconsistently and Are Too Severe

Commission research also revealed vastly different policies in different districts in the charging of 18 U.S.C. § 924(c), for the use or possession of a firearm during a crime of violence or drug trafficking crime. Under section 924(c), different factors trigger successively larger mandatory minimum sentences ranging from five years to life, including successive 25-year sentences for second or subsequent convictions. Significantly, section 924(c) mandates that the penalty imposed for violation of that statute must be served consecutively to any other sentences imposed on the offender, including sentences for other violations of section 924(c).

The Commission found that districts had different policies as to whether and when they would bring section 924(c) charges, and whether and when they would bring multiple section 924(c), which trigger far steeper mandatory minimum penalties.[28] Commission data bears out these geographic variations. In fiscal year 2012, just thirteen districts accounted for 45.8 percent of all cases involving a conviction under section 924(c), even though those districts reported only 27.5 percent of all federal criminal cases that year. In contrast, 35 districts reported ten or fewer cases with a conviction under section 924(c).

As a result of its findings, the Commission set forth two recommendations regarding section 924(c). First, Congress should consider amending 18 U.S.C. § 924(c) so that the enhanced mandatory minimum penalties for a "second or subsequent" offense apply only to prior convictions, thereby making it a true recidivist provision, and should consider amending the penalties for such offenses to lesser terms. Second, Congress should eliminate the mandatory "stacking" requirement and amend 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other.[29]

Section 5 incorporates these recommendations, in part, by making section 924(c)(1)(C) a true recidivist provision by requiring an intervening conviction and by reducing the mandatory minimum for this particular provision from 25 to 15 years of imprisonment. The Commission estimates that approximately 62 offenders each year would benefit from these statutory changes, and their average sentence would be reduced by 30.4 percent (229 months) from 753 months to 524 months.

Section 5 provides for retroactive application of the changes to the penalty provisions in 18 U.S.C. § 924(c). Offenders with a prior serious violent felony, however, are ineligible for retroactive relief under this section. The Commission's analysis of the retroactive impact under this section is limited because we cannot assess with certainty the offenders ineligible for retroactive relief resulting from a prior a serious violent felony conviction. Even so, approximately 1,117 currently incarcerated offenders could possibly receive a retroactive reduction in sentence, but their early releases, if granted, would occur over several years, and it

[28] *Id.* at 113-14.

[29] *Id.* at xxxi.

remains unknown if these 1,117 perspective petitioners for retroactive relief would be ineligible due to a serious violent felony conviction.

The Commission made similar observations about the ACCA, which is codified at 18 U.S.C. § 924(e). That provision provides a 15-year mandatory minimum penalty for an offender who is convicted under 18 U.S.C. § 922(g) (felon in possession of a firearm) and who also "has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both." The Commission observed that the ACCA's mandatory minimum penalty can apply to offenders who served no or minimal terms of imprisonment for their predicate offenses, which increased the potential for inconsistent application insofar as the 15-year penalty may be viewed as excessively severe in those case.[30] To mitigate both the over-severity and disparate application of the ACCA, the Commission recommended that Congress consider clarifying the statutory definitions in the ACCA and reduce its severity.

The Commission is pleased that Section 6 of H.R. 3713 would reduce the mandatory minimum penalty under ACCA from fifteen to ten years of imprisonment. The Commission estimates that approximately 277 offenders would benefit each year from the reduction in the ACCA mandatory minimum, with their average sentence reduced by 21.6 percent (40 months) from 185 months to 145 months. Section 6 provides for retroactive application of the statutory penalty modifications made under this section. Again, the Commission's retroactive analysis is limited to some extent because we cannot account for those offenders who would be ineligible for retroactive relief due to a prior serious violent felony conviction. Even so, the Commission approximates that up to 2,317 offenders could receive a retroactive reduction in sentence, and their early release, if granted, would occur over several years.

F. Conclusion

As the House Judiciary Committee continues to move forward in a bipartisan manner, the Commission is pleased to see this continuing, serious examination of current mandatory minimum penalties while expanding options to make the federal criminal justice system fairer, more effective, and less costly. In many respects, H.R. 3713, as introduced, is consistent with longstanding recommendations of the Commission, and we are gratified to see they are under serious consideration.

To that end, we support this focus on the so-called "front-end" sentencing reforms and hope that the Committee will continue to exercise caution related to reforms of the federal prison system. While we all support efforts to prepare federal inmates for a successful transition home to their communities upon release, we have concerns about the application of any reforms that could have disparate impacts based on an offender's race, gender or socioeconomic status.

We applaud the Committee's effort to address unwarranted sentencing disparities and to strengthen the effectiveness of the federal criminal justice system in a manner that will improve public safety outcomes across country. The Commission commends you for this important progress and looks forward to working with you in the weeks ahead.

[30] *Id* at 363.