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May 20, 2011

**MEMORANDUM**

**TO:** Chair Saris  
Commissioners  
Judith Sheon

**FROM:** Office of Research and Data  
Office of General Counsel

**SUBJECT:** Analysis of the Impact of Guideline Implementation of the Fair Sentencing Act of 2010 if the Amendment Were Applied Retroactively

On October 15, 2010, the United States Sentencing Commission promulgated a temporary, emergency amendment<sup>1</sup> that implemented the emergency directive in section 8 of the Fair Sentencing Act of 2010.<sup>2</sup> On April 6, 2011, the Commission re-promulgated the temporary amendment as a permanent amendment, which will become effective, absent congressional action, on November 1, 2011. The Commission also voted to publish an issue for comment regarding whether, pursuant to 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2), it should give the amendment retroactive effect, and announced a hearing for June 1, 2011 regarding that issue. This memorandum estimates the impact on offenders currently incarcerated in the federal prison system of portions of the amendment, if the Commission were to make all of the amendment, or those portions, retroactively applicable.

Section I of this memorandum describes the statutory and guideline penalty structure for federal cocaine offenses prior to enactment of the FSA and the statutory authority and policy statement governing retroactive application of amendments to the federal sentencing guidelines. Section II explains the changes made by the FSA to that

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<sup>1</sup> United States Sentencing Commission, *Guidelines Manual*, 2010 Supp. to App. C, Amendment 748 (effective Nov. 1, 2010) [hereinafter USSG].

<sup>2</sup> Pub. L. No. 111–220, 124 Stat. 2372 (2010) [hereinafter FSA].

penalty structure and the guideline amendment implementing those statutory changes. Section III contains a data analysis of the likely impact on crack cocaine offenders of that portion of the guideline amendment modifying the base offense level for various quantities of crack cocaine assigned by the Drug Quantity Table if that portion of the amendment were made retroactively applicable. Finally, Section IV contains a data analysis of the likely impact of two other portions of the amendment that modify the drug guideline if those changes, which are not limited to crack cocaine offenses and which apply to all drug offenses, were made retroactively applicable.

I. PENALTY STRUCTURE FOR FEDERAL COCAINE OFFENSES PRIOR TO ENACTMENT OF THE FSA

A. Statutory Penalties for Powder Cocaine and Crack Cocaine Offenses

The Anti-Drug Abuse Act of 1986<sup>3</sup> establishes the basic framework of statutory penalties currently applicable to federal drug trafficking offenses. With respect to cocaine offenses, the Act specifies separate statutory ranges for trafficking offenses involving various quantities of crack cocaine and powder cocaine. Prior to August 3, 2010, for a first-time trafficking offense involving less than five grams of crack cocaine or less than 500 grams of powder cocaine, the statutory penalty range was zero to 20 years of imprisonment. For a first-time trafficking offense involving five grams or more of crack cocaine, or 500 grams or more of powder cocaine, the statutory penalty range was five to 40 years of imprisonment. For a first-time trafficking offense involving 50 or more grams of crack cocaine or 5,000 or more grams of powder cocaine, the statutory penalty range was 10 years to life imprisonment. Because it took 100 times more powder cocaine than crack cocaine to trigger the same statutory mandatory minimum penalties, this penalty structure was commonly referred to as the “100-to-1 drug quantity ratio.” These statutory penalty ranges for first-time offenders<sup>4</sup> are reflected in the two tables below:

<b>Crack Cocaine Quantity</b>	<b>Statutory Range</b>	<b>Provision</b>
Less than 5 grams	0-20 years	21 U.S.C. § 841(b)(1)(C)
5 or more but less than 50 grams	5-40 years	21 U.S.C. § 841(b)(1)(B)(iii)
50 or more grams	10 years-life	21 U.S.C. § 841(b)(1)(A)(iii)

<b>Powder Cocaine Quantity</b>	<b>Statutory Range</b>	<b>Provision</b>
Less than 500 grams	0-20 years	21 U.S.C. § 841(b)(1)(C)

<sup>3</sup> Pub. L. No. 99-570, 100 Stat. 3207 (1986) [hereinafter 1986 Act].

<sup>4</sup> Repeat offenders are subject to increased penalties. See 21 U.S.C. §§ 841(b), 851.

500 or more but less than 5,000 grams	5-40 years	21 U.S.C. § 841(b)(1)(B)(ii)
5,000 or more grams	10 years-life	21 U.S.C. § 841(b)(1)(A)(ii)

The Anti-Drug Abuse Act of 1988<sup>5</sup> also established a mandatory minimum penalty for simple possession of crack cocaine. Prior to August 3, 2010, the statutory penalty range for first-time simple possession of five grams or less of crack cocaine was not more than one year of imprisonment. The statutory penalty range for first-time simple possession of more than five grams of crack cocaine was five to 20 years of imprisonment. The statutory penalty range for first-time simple possession of powder cocaine, regardless of the quantity, was not more than one year of imprisonment. These ranges for first-time offenders<sup>6</sup> are reflected in the two tables below:

<b>Crack Cocaine Quantity</b>	<b>Statutory Range</b>	<b>Provision</b>
5 grams or less	0-1 year	21 U.S.C. § 844(a)
More than 5 grams	5-20 years	21 U.S.C. § 844(a)

<b>Powder Cocaine Quantity</b>	<b>Statutory Range</b>	<b>Provision</b>
Any	0-1 year	21 U.S.C. § 844(a)

#### B. Guideline Penalties for Powder Cocaine and Crack Cocaine

The Commission responded to the 1986 Act by incorporating the statutory mandatory minimum sentences into the guidelines and generally extrapolating upward and downward to set guideline sentencing ranges for all drug quantities. Offenses sentenced under the primary drug trafficking guideline involving five grams or more of crack cocaine or 500 grams or more of powder cocaine were assigned a base offense level 26, which corresponds to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I.<sup>7</sup> Similarly, offenses involving 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine were assigned a base offense level 32, which corresponds to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. Crack cocaine and powder cocaine

<sup>5</sup> Pub. L. No. 100-690, 102 Stat. 4181 (1988).

<sup>6</sup> Repeat offenders are subject to increased penalties. 21 U.S.C. § 844(a).

<sup>7</sup> See USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) (Nov. 2009). Defendants with no prior convictions or a minimal prior criminal record are assigned to Criminal History Category I. See USSG, Chapter 4.

offenses for quantities above and below the mandatory minimum penalty threshold quantities were set proportionately using the same 100-to-1 drug quantity ratio.<sup>8</sup>

In order to account for the statutory mandatory minimum for simple possession offenses involving more than five grams of crack cocaine, the Commission included in the guideline for simple possession offenses a cross-reference to the drug trafficking guideline for offenders who possess more than five grams of crack cocaine.<sup>9</sup>

In 2007, the Commission amended the Drug Quantity Table in USSG §2D1.1 for offenses involving crack cocaine. The amendment, which became effective November 1, 2007, reduced by two levels the base offense level assigned by the Drug Quantity Table for each quantity of crack cocaine.<sup>10</sup> Pursuant to the amendment, offenses involving five grams of crack cocaine were assigned a base offense level of 24, which corresponds to a sentencing guideline range of 51 to 63 months for a defendant in Criminal History Category I and includes the applicable five-year (60 month) statutory mandatory minimum.<sup>11</sup> Similarly, offenses involving 50 grams of crack cocaine were assigned a base offense level of 30, which corresponds to a sentencing guideline range of 97 to 121 months for a defendant in Criminal History Category I and includes the applicable ten-year (120 month) statutory mandatory minimum. In addition, USSG §2D1.1 was amended to include a mechanism to determine a combined base offense level in a case involving crack cocaine and other substances.<sup>12</sup> (In this memorandum, these amendments are referred to collectively as the “2007 Crack Cocaine Amendment.”)

In 2007, the Commission voted to give retroactive effect to the 2007 Crack Cocaine Amendment pursuant to the statutory authority discussed below. The retroactive application of the 2007 Crack Cocaine Amendment took effect on March 3, 2008, and was governed by the statutory provisions and guideline policy statements discussed in Part I.C. of this memorandum.

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<sup>8</sup> See generally UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, CHAPTER 7 (FEBRUARY 1995) [hereinafter 1995 Commission Report] (providing a more thorough explanation of how sentences are determined under the federal sentencing guidelines).

<sup>9</sup> See USSG §2D2.1(b)(1) (Nov. 2009).

<sup>10</sup> Offenses involving quantities of less than 500 mg of crack cocaine were unaffected by the amendment and remained assigned to base offense level (“BOL”) 12.

<sup>11</sup> See USSG, App. C, Amendment 706 and 711 (effective Nov. 1, 2007). If a defendant in Criminal History Category I possesses more than 5 grams of crack cocaine and no other guideline provision applies to impact the defendant’s base offense level of 24, USSG §5G1.1(c)(2) provides that the guideline range would be 60-63 months’ imprisonment, *i.e.*, the portion of the otherwise-applicable guideline range (51 to 63 months) that is at or above the statutory mandatory minimum.

<sup>12</sup> See USSG, App. C, Amendment 715 (effective May 1, 2008).

## C. Retroactivity of Guideline Amendment

### 1. Statutory authority

The Commission is statutorily authorized to determine whether a guideline amendment that reduces the sentencing range applicable to a particular offense or category of offenses may be retroactively applied. Section 994(u) of title 28, United States Code, specifically provides that:

[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.<sup>13</sup>

Sentencing courts are statutorily precluded from applying a guideline amendment retroactively unless the Commission has designated such amendment for retroactive application. Section 3582(c)(2) of title 18, United States Code, provides that the court may not modify a term of imprisonment once it has been imposed except 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), . . . 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.<sup>14</sup>

### 2. Guidelines Manual policy statement

To implement 28 U.S.C. § 994(u) and to provide guidance to a court when considering a motion under 18 U.S.C. § 3582(c)(2), the Commission promulgated USSG §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement). Subsection (a) of USSG §1B1.10 specifies when a reduction pursuant to 18 U.S.C. § 3582(c)(2) is available:

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<sup>13</sup> 28 U.S.C. § 994(u). The Commission’s Rules of Practice and Procedure provide that “in those cases in which the Commission considers an amendment for retroactive application to previously sentenced, imprisoned defendants, it shall decide whether to make the amendment retroactive at the same meeting at which it decides to promulgate the amendment. Prior to final Commission action on the retroactive application of an amendment, the Commission shall review the retroactivity impact analysis . . .” United States Sentencing Commission, *Rules of Practice and Procedure*, Rule 4.1 (2007). Pursuant to Rule 2.2, the Commission instructed staff to prepare this retroactivity impact analysis at its April 6, 2011, public meeting.

<sup>14</sup> 18 U.S.C. § 3582(c)(2).

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 (c) 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.

Section 1B1.10 further explains that a reduction would not be consistent with the policy statement if none of the amendments listed in subsection (c) of USSG §1B1.10 is applicable to the defendant or if a listed amendment “does not have the effect of lowering the defendant's applicable guideline range.”<sup>15</sup> Additionally, that section provides that proceedings under 18 U.S.C. § 3582(c)(2) “do not constitute a full resentencing of the defendant.”<sup>16</sup>

In addition to specifying which guideline amendments may be retroactively applied, consistent with 28 U.S.C. § 994(u), USSG §1B1.10 guides courts as to the amount by which a sentence may be reduced under 18 U.S.C. § 3582(c)(2). Subsection (b)(1) of USSG §1B1.10 states:

In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), 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 (c) 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 (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.<sup>17</sup>

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<sup>15</sup> USSG §1B1.10(a)(2).

<sup>16</sup> USSG §1B1.10(a)(3). Listing an amendment in §1B1.10(c) “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.” *See* USSG §1B1.10, comment. (backg'd.) The background commentary further provides that “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.” *Id.* Among the factors considered by the Commission in selecting the amendments included in subsection (c) are “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).” *Id.*

<sup>17</sup> USSG §1B1.10(b)(1).

Section 1B1.10 further provides that, as a general matter, the extent of the reduction granted should not go below the amended guideline range determined in accordance with subsection (b)(1).<sup>18</sup> However, an exception is noted where the sentence originally imposed “was less than the term of imprisonment provided by the guideline range,” in which case “a reduction comparably less than the amended guideline range . . . may be appropriate.”<sup>19</sup>

The analysis presented below is based on the constraints imposed by 18 U.S.C. § 3582(c)(2) and USSG §1B1.10 and its commentary on the extent of any reduction to the amended guideline range under section 3582(c)(2). Consequently, the analysis presented below accounts only for the application of the guideline amendment discussed below in Part II. Modifications of sentence under 18 U.S.C. § 3582(c)(2) are unaffected by the decision in *United States v. Booker*.<sup>20</sup>

## II. STATUTORY CHANGES IN THE FSA AND CONFORMING GUIDELINE AMENDMENT

### A. Statutory Changes in the FSA

This section analyzes the impact of the FSA on federal cocaine sentencing. Specifically, the FSA changed the quantities of crack cocaine that trigger the five- and ten-year statutory mandatory minimum penalties. As a consequence, first-time trafficking offenses involving less than 28 grams of crack cocaine are subject to a statutory penalty range of zero to 20 years of imprisonment. First-time trafficking offenses involving between 28 and 280 grams of crack cocaine are subject to a statutory penalty range of five to 40 years of imprisonment.<sup>21</sup> A first-time trafficking offense

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<sup>18</sup> USSG §1B1.10(b)(2).

<sup>19</sup> USSG §1B1.10(b)(2)(B).

<sup>20</sup> *Dillon v. United States*, 560 U.S. \_\_\_, 130 S. Ct. 2683 (2010) (holding that proceedings under 18 U.S.C. § 3582(c)(2) do not implicate the Sixth Amendment jury trial right and that the decision in *United States v. Booker*, 543 U.S. 220 (2005) (rendering the guidelines advisory) does not prevent courts from giving effect to USSG §1B1.10 in such proceedings).

<sup>21</sup> The new five year mandatory minimum threshold quantity of 28 grams corresponds to approximately one ounce, which has been considered to be a threshold quantity for purposes of classifying the function of certain federal crack cocaine offenders. Offenders who distribute less than one ounce of crack cocaine directly to users are considered to be street level dealers selling retail quantities. Offenders who sell more than one ounce of crack cocaine in a single transaction are considered to be wholesalers selling more than retail or user-level quantities. See UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 18 (MAY 2007) [hereinafter 2007 Commission Report]. See also, *id.* at 84, n.124 (citing Letter from Paul Daly, Assistant Administrator, Intelligence Division, Drug Enforcement Administration to Richard P. Conaboy, Chairman, U.S. Sentencing Commission (October, 1996) stating that wholesalers sell crack cocaine in ounce quantities, which are then resold in smaller quantities at the next level).

involving 280 or more grams of crack cocaine is subject to a statutory penalty range of 10 years to life imprisonment.<sup>22</sup> These changes are reflected in the table below:

<b>Crack Cocaine Quantity</b>	<b>Statutory Range</b>
Less than 28 grams	0-20 years
28 or more but less than 280 grams	5-40 years
280 or more grams	10 years-life

In addition, the FSA repealed the separate statutory penalty range of five to 20 years of imprisonment for first-time simple possession of more than five grams of crack cocaine. As a result, a first conviction for simple possession of any amount of crack cocaine, like simple possession of powder cocaine, is subject to a statutory penalty range of zero to one year of imprisonment regardless of quantity.

B. Temporary and Permanent Amendments to the *Guidelines Manual*

On October 15, 2010, the Commission promulgated a temporary, emergency amendment to the guidelines that implemented the emergency directive in section 8 of the FSA.<sup>23</sup> On April 6, 2011, the Commission re-promulgated the temporary amendment as a permanent multipart amendment, which will become effective, absent congressional action, on November 1, 2011.<sup>24</sup> (In this memorandum, the new guidelines modifications related to drug penalties are referred to collectively as the “FSA Guideline Amendment.”) The Commission also voted to publish an issue for comment regarding whether, pursuant to 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2), it should give the FSA Guideline Amendment retroactive effect, and announced a hearing for June 1, 2011 regarding that issue.

Responding to the statutory changes in the FSA, Part A of the FSA Guideline Amendment modified the base offense level for various quantities of crack cocaine assigned by the Drug Quantity Table.<sup>25</sup> Offenses involving 28 grams of crack cocaine

<sup>22</sup> Because it now takes approximately 18 times more powder cocaine than crack cocaine to trigger the same statutory mandatory minimum penalties, some may refer to this penalty structure as an “18-to-1” drug quantity ratio.

<sup>23</sup> USSG, 2010 Supp. to App. C, Amendment 748 (effective Nov. 1, 2010).

<sup>24</sup> All of the amendments promulgated by the Commission in the 2010-2011 amendment cycle were submitted to Congress on April 28, 2011, and will become effective on November 1, 2011, unless Congress acts affirmatively within 180 days to modify or disapprove them.

<sup>25</sup> The base offense level for some quantities of crack cocaine in the Drug Quantity Table did not change. Also, offenses involving quantities of less than 500 mg of crack cocaine were unaffected by the amendment and remained assigned to BOL 12.



were assigned a base offense level of 26, which corresponds to a sentencing guideline range of 63 to 78 months for a defendant in Criminal History Category I. Similarly, offenses involving 280 grams of crack cocaine were assigned a base offense level of 32, which corresponds to a sentencing guideline range of 121 to 151 months for a defendant in Criminal History Category I. This approach is consistent with how the guidelines incorporate the statutory mandatory minimum penalties for all other drug offenses as well as how the guidelines incorporated the statutory mandatory minimum penalties for crack cocaine offenses prior to the 2007 Crack Cocaine Amendment. Part C of the FSA Guideline Amendment also eliminated the cross-reference at USSG §2D2.1(b)(1) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under the drug trafficking guideline, USSG §2D1.1. Section III below contains a data analysis of the likely impact of making this portion of the FSA Guideline Amendment retroactively applicable.

Responding to additional specific directives in sections 5, 6, and 7 of the FSA, Part B of the FSA Guideline Amendment added both mitigating and aggravating provisions to USSG §2D1.1 for offenses involving drugs, regardless of drug type. Two of these provisions have the effect of lowering guideline ranges for certain defendants: namely, those who receive the 4-level ("minimal participant") reduction in subsection (a) of USSG §3B1.2 (Mitigating Role). One provision modifies subsection (a)(5) (often referred to as the "mitigating role cap") to ensure that the base offense level for those who receive a minimal participant reduction will be capped at level 32. The other provision creates a new specific offense characteristic in USSG §2D1.1 providing for a 2-level downward adjustment if the defendant receives the minimal participant reduction and the offense involved each of three additional specified factors.<sup>26</sup> Section IV below contains a data analysis of the likely impact of making these two changes retroactively applicable.

### C. Assumptions Made For This Analysis

This analysis assumes that no additional changes will be made to the statutory punishments for crack cocaine offenses. Specifically, this analysis assumes that the changes made in the FSA to the statutory mandatory minimum penalties for crack cocaine offenses will not be made retroactive so as to apply to offenders incarcerated on the date the FSA became effective and, therefore, the statutory mandatory minimum penalties in effect when these offenders were sentenced would continue to govern any modifications to the sentences imposed on these incarcerated offenders.

In addition, staff have not estimated the impact, if any, of the provisions in Part B of the FSA Guideline Amendment that increase the applicable guideline range in certain cases. These provisions may affect the eligibility of some offenders to receive a reduced sentence, or the extent of any such reduction, if the amendment were made retroactive.

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<sup>26</sup> The three factors are that the defendant: (a) was motivated by an intimate or familial relationship or by threats or fear to commit the offense when the defendant was otherwise unlikely to commit such an offense; (b) was to receive no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and (c) had minimal knowledge of the scope and structure of the enterprise.

Finally, this analysis assumes that Congress does not vote to modify or disapprove of the FSA Guideline Amendment before the November 1, 2011 effective date.

### III. IMPACT OF THE RETROACTIVE APPLICATION OF PARTS A AND C OF THE FSA GUIDELINE AMENDMENT ON CRACK COCAINE OFFENDERS

#### A. Introduction to the Data Analysis

This section of the memorandum provides an analysis of the estimated impact of parts A and C of the FSA Guideline Amendment, should it be made retroactive, on offenders incarcerated as of November 1, 2011, in the federal prison system.<sup>27</sup> This analysis was prepared by the Commission's Office of Research and Data (ORD). ORD estimates that 12,040 offenders sentenced between October 1, 1991, and September 30, 2010 (fiscal years 1992 through 2010),<sup>28</sup> would be eligible to receive a reduced sentence if the FSA Guideline Amendment was made retroactive.<sup>29</sup> If these offenders were to receive reduced sentences pursuant to the FSA Guideline Amendment, the dates on which they would be released would span more than thirty years.

#### B. Estimate of Total Number of Incarcerated Offenders Eligible for Sentence Modification

ORD estimates that 12,040 offenders would be eligible to receive a reduced sentence pursuant to the FSA Guideline Amendment. These offenders were sentenced between October 1, 1991, and September 30, 2010 (fiscal years 1992 through 2010), and remained incarcerated as of November 1, 2011.<sup>30</sup> This estimate was derived through the process described below.

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<sup>27</sup> This analysis does not include any estimate of the number of offenders who were sentenced during fiscal year 2011 (*i.e.*, sentenced on or after October 1, 2010), or the impact of the FSA Guideline Amendment on such offenders.

<sup>28</sup> The analysis is limited to data from fiscal year 1992 through September 30, 2010 (fiscal years 1992 through 2010) because the Commission did not collect information on the type of drug involved in drug offenses prior to fiscal year 1992. However, it is anticipated that relatively few offenders were sentenced for crack cocaine offenses prior to fiscal year 1992 because of the relatively low percentage of crack cocaine cases, *vis-a-vis* powder cocaine cases, occurring in fiscal year 1992 compared to later fiscal years. In fiscal year 1992, of the 7,873 cocaine offenses for which the Commission received information, 5,802 (73.7%) were powder cocaine offenses and 2,071 (26.3%) were crack cocaine offenses.

<sup>29</sup> As a result of the retroactive application of the 2007 Crack Amendment, some incarcerated offenders previously were eligible to receive a reduction in their sentence pursuant to 18 U.S.C. § 3582(c)(2). Of the 12,040 offenders whose guideline range is estimated to be affected by FSA Guideline Amendment (*see* Part III.B.), 4,390 submitted a request for modification of their sentence pursuant to the 2007 Crack Amendment as of April 14, 2011. The courts granted a reduction to 2,788 (63.5%) of these offenders. The average sentence reduction received by these offenders was 16.9 percent (from 200 months to 165 months). These offenders are also eligible to receive an additional reduction pursuant to the FSA Guideline Amendment.

1. Examination of the Commission’s Files for Fiscal Years 1992 Through 2010 to Determine the Number of Crack Cocaine Offenders in Those Years and, of Those, the Number Still Incarcerated Who Appear to Be Eligible For Sentence Modification

ORD examined the Commission datasets from October 1, 1991, through September 30, 2010 (fiscal years 1992 through 2010), to determine the number of cases in those datasets in which an offender appears to be eligible to receive a reduced sentence if the FSA Guideline Amendment was made retroactive. For purposes of this analysis, a case was considered to be eligible for retroactive application of the FSA Guideline Amendment if it met the following criteria:

- (a) crack cocaine was involved in the offense;
- (b) USSG §2D1.1 was the Chapter Two guideline that applied in the case;<sup>31</sup> and
- (c) the base offense level was not level 43.<sup>32</sup>

As described on Figure A, 1,140,787 cases sentenced under the guidelines have been reported to the Commission from fiscal years 1992 through 2010. Of these, 35.6 percent (n = 405,968) involved at least one guideline calculation pursuant to USSG §2D1.1. Of these 405,968 cases, 22.6 percent (n = 91,659) involved crack cocaine. Of

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<sup>30</sup> The Federal Bureau of Prisons (BOP) has informed the Commission that the BOP has records relating to 28,946 crack offenders sentenced under USSG §2D1.1 between fiscal years 1992 and 2010 who the BOP estimated (as of April, 2011) would still be incarcerated on November 1, 2011. An additional 532 offenders not included in BOP records, but who were sentenced between October 1, 2008, and September 30, 2010, according to Commission records, and who the ORD projected (as of April, 2011) would still be incarcerated on November 1, 2011, also have been included in this analysis for a total of 29,478 cases.

<sup>31</sup> This includes cases in which the applicable guideline range was determined under USSG §2D1.1 pursuant to a cross-reference from another Chapter Two guideline (*e.g.*, USSG §2D2.1 (Unlawful Possession; Attempt or Conspiracy), USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition)).

<sup>32</sup> Offenders sentenced under USSG §2D1.1(a)(1) with a BOL of 43: (1) were convicted under 21 U.S.C § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3); and (2) the offense of conviction established that death or serious bodily injury resulted from use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense. The BOL in these cases was not based on drug quantity. In contrast, offenders sentenced under USSG §2D1.1(a)(2) (*i.e.*, those with a BOL of 38 who were convicted under 21 U.S.C § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and whose offense of conviction establishes that death or serious bodily injury resulted from use of the substance) are included in this analysis because the Commission’s data do not currently distinguish those offenders from other offenders who received a BOL of 38 based on drug quantity alone. This fact could result in a slight overestimate of the number of offenders eligible for a modification of sentence pursuant to the FSA Guideline Amendment.

the offenders sentenced in these crack cocaine cases, 29,323 met the inclusion criteria and were projected to be incarcerated on November 1, 2011.

2. Total Number of Offenders Eligible for Retroactive Application of the FSA Guideline Amendment

ORD identified 29,323 offenders who met all of the above criteria and, therefore, appeared eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) if the FSA Guideline Amendment was made retroactive. ORD then recalculated the sentence for each offender using its Prison Impact Model (described below).

Using this model, of the 29,323 offenders who met the criteria for inclusion in the analysis, the retroactive application of the FSA Guideline Amendment would have no effect on the guideline range that was determined at the time of sentencing for 17,283 offenders. These offenders, therefore, were removed from further analysis. The reasons why these offenders would experience no change in the respective guideline ranges applicable in their cases are as follows:

(A) 6,084 offenders were originally sentenced pursuant to the Career Offender<sup>33</sup> or Armed Career Criminal<sup>34</sup> provisions and their guideline range would continue to be controlled by these provisions and would not change;

(B) 5,082 offenders were sentenced at the statutory minimum and that minimum did not change as a result of the amendment;<sup>35</sup>

(C) 1,398 offenders had a guideline range less than or equal to their statutory minimum and had received a departure for substantial assistance pursuant to USSG §5K1.1, so their original guideline range did not change;<sup>36</sup>

(D) 2,241 offenders were convicted of an offense for which the applicable Base Offense Level did not change either because more than one drug was involved and the combined weights of these drugs was such that the Base Offense Level did not change or because the drug quantity of the single drug involved in the offense was sufficient that the offender remained at Base Offense Level 38;

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<sup>33</sup> See USSG §4B1.1.

<sup>34</sup> See USSG §4B1.4.

<sup>35</sup> The changes made by the FSA to the statutory penalty structure for crack cocaine offenses were not made retroactive by the Act. Therefore, the statutory mandatory minimum sentences applicable to these offenders have not changed.

<sup>36</sup> *Id.*

- (E) 2,341 offenders had a guideline range that did not change;
- (F) 77 offenders had an original Base Offense Level of 12, which would not be affected by the amendment;
- (G) 32 offenders would receive a sentence reduction of less than one month;<sup>37</sup>
- (H) 22 offenders originally received the mitigating role cap<sup>38</sup> and the estimated reduction pursuant to the amendment would not reduce the Base Offense Level below the originally applicable Base Offense Level;
- (I) one offender with a statutory minimum sentence of 60 months received relief from a statutory minimum sentence pursuant to the statutory safety valve provision for their drug offense and was sentenced to the minimum sentence required by that provision<sup>39</sup> of 24 months; and
- (J) five offenders were projected to die before the end of their sentence, even if those sentences were reduced pursuant to the FSA Guideline Amendment.<sup>40</sup>

After accounting for those offenders for whom the sentencing range would not change after application of the FSA Guideline Amendment, the total number of crack cocaine offenders incarcerated on November 1, 2011, who are estimated to be eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) is 12,040.<sup>41</sup> Figure A summarizes the manner by which this number was derived.

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<sup>37</sup> These offenders would be eligible to receive a sentence reduction for the fractional portion of the month; however, the model the Commission uses to conduct the analysis described in this memorandum categorizes cases with a change in sentence of less than a month as a case in which no change would occur.

<sup>38</sup> See USSG §2D1.1(a)(3).

<sup>39</sup> 18 U.S.C. § 3553(f).

<sup>40</sup> The Commission's Prison Impact Model incorporates actuarial tables based on race and gender to predict life expectancy.

<sup>41</sup> This estimate includes 2,224 offenders for whom the information necessary to perform the analysis in the Commission's Prison Impact Model was missing. They are included in the total number of offenders who appear to be eligible to receive a reduced sentence if the FSA Guideline Amendment was made retroactive because they meet all of the criteria for inclusion based on the information that is available.

**Figure A**

**Summary Analysis of Retroactive Eligible Crack Cocaine Cases  
Fiscal Years 1992 – 2010**

All cases sentenced under the guidelines between fiscal years 1992 and 2010  
N = **1,140,787**

Number of USSG §2D1.1 Guideline offenders in USSC dataset  
N = **405,968**

Number of USSG §2D1.1 Guideline crack cocaine offenders in USSC dataset  
N = **91,659**

Number of USSG §2D1.1 Guideline crack cocaine offenders still in prison  
on November 1, 2011  
N = **29,478**

Number of USSG §2D1.1 Guideline crack cocaine offenders still in prison  
on November 1, 2011, with a Base Offense Level below level 43  
N = **29,323**

Final number of offenders remaining after excluding those with no change  
in the guideline range when analyzed  
N = **12,040**

C. Distribution of Eligible Offenders by Year of Sentence

Table 1 presents the number of offenders eligible to seek a sentence reduction by the year in which they were sentenced. As would be expected, the more recent the sentencing year the greater the number of offenders who are still serving their sentence and so would be eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2). Over half of the eligible offenders identified in this analysis (n = 6,238) were sentenced between fiscal years 2007 and 2010.

**Table 1**  
**Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2010)**

<b>FISCAL YEAR</b>	<b>ELIGIBLE CRACK COCAINE OFFENDERS</b>	
	<b>N</b>	<b>%</b>
<b>TOTAL</b>	<b>12,040</b>	<b>100.0</b>
<b>Fiscal Year</b>		
2010	1,630	13.5
2009	1,866	15.5
2008	1,531	12.7
2007	1,211	10.1
2006	1,028	8.5
2005	894	7.4
2004	630	5.2
2003	532	4.4
2002	389	3.2
2001	308	2.6
2000	252	2.1
1999	285	2.4
1998	296	2.5
1997	285	2.4
1996	225	1.9
1995	204	1.7
1994	221	1.8
1993	156	1.3
1992	97	0.8
Total percentages may not add to exactly 100% due to rounding.		
SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.		

#### D. Geographic Distribution of Eligible Offenders and Year of Sentence

Eligible offenders were sentenced in all federal judicial districts except Idaho, Guam, and the Northern Mariana Islands. The number of eligible offenders in each district ranges from 884 offenders (in the Eastern District of Virginia, accounting for 7.3% of all eligible offenders) to two offenders (in the District of Hawaii). Twenty-two of the 94 federal judicial districts account for just over half of all offenders eligible for retroactive application of the FSA Guideline Amendment. Only one district accounts for five percent or more of the total number of eligible offenders (Eastern District of Virginia, 7.3%).

Table 2 presents information on the number of eligible offenders sentenced in each judicial district and, therefore, where the issue of retroactive application of the FSA Guideline Amendment in their cases most likely would be decided. This list presents the districts in descending order by the number of eligible offenders sentenced in each district.





Table 3 presents the number of eligible offenders displayed by the circuit in which the district court that imposed the sentence is located. Almost 26 percent of the eligible offenders were sentenced in district courts in the Fourth Circuit, more than in any other circuit. The fewest eligible offenders were sentenced in the District of Columbia Circuit (which has only one federal judicial district) and the First Circuit.

**Table 3**  
**Geographic Distribution of Eligible Crack Cocaine Amendment Offenders**  
**By Judicial Circuit**  
**(FY1992 through FY2010)**

<b>CIRCUIT</b>	<b>N</b>	<b>%</b>
Fourth Circuit	3,096	25.7
Eleventh Circuit	1,729	14.4
Fifth Circuit	1,487	12.4
Seventh Circuit	1,118	9.3
Sixth Circuit	1,093	9.1
Eighth Circuit	893	7.4
Third Circuit	668	5.5
Second Circuit	658	5.5
Ninth Circuit	483	4.0
Tenth Circuit	400	3.3
First Circuit	276	2.3
DC Circuit	139	1.2
<b>TOTAL</b>	<b>12,040</b>	<b>100.0</b>
Total percentages may not add to exactly 100% due to rounding.		
SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.		

E. Offender and Offense Characteristics

Table 4 presents information on the demographic characteristics of the offenders eligible for retroactive application of the FSA Guideline Amendment. The vast majority are U.S. citizens (94.9%), male (95.6%), and African-American (85.1%). The average age of these offenders on November 1, 2011, will be 36 years.

**Table 4**  
**Demographic Characteristics of Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2010)**

<b>DEMOGRAPHICS</b>			
<b>Race/Ethnicity</b>			
	White	665	5.5%
	Black	10,232	85.1%
	Hispanic	1,021	8.5%
	Other	99	0.8%
	<b>Total</b>	<b>12,017</b>	<b>100.0%</b>
<b>Citizenship</b>			
	U.S. Citizen	11,424	94.9%
	Non-Citizen	608	5.1%
	<b>Total</b>	<b>12,032</b>	<b>100.0%</b>
<b>Gender</b>			
	Male	11,510	95.6%
	Female	529	4.4%
	<b>Total</b>	<b>12,039</b>	<b>100.0%</b>
<b>Average Age</b>			
		<b>36</b>	<b>31</b>
		<b>(as of November 1, 2011)</b>	<b>(at sentencing)</b>
The analysis involves a total of 12,040 cases, however, cases missing information for any specific analysis are excluded from that analysis.			
Total percentages may not add to exactly 100% due to rounding.			
SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.			

In order to better understand the offense conduct of the offenders who would be eligible for retroactive application of the FSA Guideline Amendment, ORD analyzed offense-related factors that contributed to the sentence originally imposed on each offender. ORD also analyzed the criminal history category of each offender and the extent to which the original sentence imposed was within the applicable guideline range. Table 5 displays these factors for the 12,040 offenders as a group.

Table 5A displays the average base offense level and guideline-relevant offense characteristics for these offenders sorted by the year in which the offender was sentenced for the crack cocaine offense. Table 5B displays the criminal history category of these offenders by the year in which they were sentenced. Table 5C displays the position of the sentences relative to the guideline range each year for these offenders. The data in each of these tables does not represent the characteristics of all crack cocaine offenders sentenced in each of the years listed. The information presented is only for those offenders whose sentence was sufficiently long such that they would still be incarcerated on November 1, 2011, and who otherwise met the criteria for inclusion in the analysis.

**Table 5**  
**Guideline Sentencing Characteristics, Criminal History, and Position Relative to the**  
**Guideline Range of Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2010)**

<b>CHARACTERISTICS</b>		
<b>Average Base Offense Level</b>		<b>31</b>
<b>Weapon Specific Offense Characteristic</b>	3,537	29.4%
<b>Firearms Mandatory Minimum Applied</b>	1,778	14.9%
<b>Safety Valve §5C1.2</b>	775	6.4%
<b>Aggravating Role §3B1.1</b>	1,942	16.1%
<b>Mitigating Role §3B1.2</b>	240	2.0%
<b>Obstruction Adjustment §3C1.1</b>	1,038	8.6%
<b>Career Offender Status §4B1.1</b>	997	8.3%
<b><u>Criminal History Category</u></b>		
<b>I</b>	1,992	16.6%
<b>II</b>	1,253	10.5%
<b>III</b>	2,249	18.8%
<b>IV</b>	1,984	16.6%
<b>V</b>	1,454	12.1%
<b>VI</b>	3,051	25.5%
<b>Total</b>	<b>11,983</b>	<b>100%</b>
<b><u>Sentence Relative to the Guideline Range</u></b>		
<b>Within Range</b>	8,166	68.4%
<b>Above Range</b>	183	1.5%
<b>Substantial Assistance §5K1.1</b>	1,805	15.1%
<b>Otherwise Below Range</b>	1,787	15.0%
<b>Total</b>	<b>11,941</b>	<b>100%</b>
The analysis involves a total of 12,040 cases, however, cases missing information for any specific analysis are excluded from that analysis.		
Total percentages may not add to exactly 100% due to rounding.		
SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.		

**Table 5A**  
**Guideline Sentencing Characteristics of Retroactive Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2010)**

	Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Average Base Offense Level	N	37	38	38	36	35	36	35	35	35	34	34	33	33	32	31	31	30	29	29
Weapon Special Offense Characteristic	N	39	57	82	76	95	94	102	122	82	111	140	204	188	265	269	368	407	457	379
	%	40.2	36.5	37.1	37.3	42.2	33.0	34.5	42.8	32.5	36.0	36.0	38.3	29.8	29.6	26.2	30.4	26.6	24.5	23.3
Firearms Mandatory Minimum	N	n/a	40	61	54	39	38	24	39	37	46	61	83	130	188	212	191	200	188	147
	%	n/a	25.6	27.6	26.5	17.3	13.5	8.1	13.7	14.7	14.9	15.7	15.6	20.6	21.0	20.6	15.8	13.1	10.1	9.0
Safety Valve	N	n/a	n/a	n/a	n/a	3	1	1	1	4	6	2	13	11	15	33	70	110	244	261
	%	n/a	n/a	n/a	n/a	1.3	0.4	0.3	0.4	1.6	1.9	0.5	2.4	1.7	1.7	3.2	5.8	7.2	13.1	16.0
Aggravating Role	N	50	80	114	99	90	124	100	92	85	82	106	115	90	114	108	145	108	121	119
	%	51.5	51.3	51.6	48.5	40.0	43.5	33.8	32.3	33.7	26.6	27.2	21.6	14.3	12.8	10.5	12.0	7.1	6.5	7.3
Mitigating Role	N	1	0	1	3	1	4	5	6	7	3	5	4	7	22	18	14	24	62	53
	%	1.0	0.0	0.5	1.5	0.4	1.4	1.7	2.1	2.8	1.0	1.3	0.8	1.1	2.5	1.8	1.2	1.6	3.3	3.3
Obstruction of Justice	N	22	37	52	46	44	63	53	43	40	54	49	66	58	62	68	74	72	75	60
	%	22.7	23.7	23.5	22.5	19.6	22.1	17.9	15.1	15.9	17.5	12.6	12.4	9.2	6.9	6.6	6.1	4.7	4.0	3.7
Career Offender	N	8	23	36	29	38	48	50	32	34	38	39	55	56	80	88	88	70	83	102
	%	8.2	14.7	16.3	14.2	16.9	16.8	16.9	11.2	13.5	12.3	10.1	10.3	8.9	8.9	8.6	7.3	4.6	4.4	6.3

The analysis involves a total of 12,040 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages for any specific year may not add to exactly 100% due to rounding.

The statutory safety valve, codified as 18 U.S.C. § 3553(f), was enacted in September 1994.

SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.

**Table 5B**  
**Criminal History Category of Retroactive Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2010)**

	Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Criminal History Category	N	19	49	52	43	37	55	48	40	31	42	36	80	82	84	113	151	231	412	387
I	%	20.4	32.5	24.4	21.6	17.4	19.7	17.0	14.1	12.3	13.6	9.3	15.0	13.0	9.4	11.0	12.5	15.1	22.1	23.7
Criminal History Category	N	12	18	24	25	27	25	32	33	24	21	34	40	73	111	91	112	163	203	185
II	%	12.9	11.9	11.3	12.6	12.7	9.0	11.3	11.7	9.5	6.8	8.7	7.5	11.6	12.4	8.9	9.2	10.6	10.9	11.3
Criminal History Category	N	25	25	37	35	43	56	62	55	52	60	82	106	106	170	205	229	313	311	277
III	%	26.9	16.6	17.4	17.6	20.2	20.1	22.0	19.4	20.6	19.5	21.1	19.9	16.9	19.0	19.9	18.9	20.4	16.7	17.0
Criminal History Category	N	13	17	25	29	28	31	51	45	42	46	59	91	121	156	187	212	262	313	256
IV	%	14.0	11.3	11.7	14.6	13.1	11.1	18.1	15.9	16.7	14.9	15.2	17.1	19.2	17.4	18.2	17.5	17.1	16.8	15.7
Criminal History Category	N	8	9	18	17	20	23	17	19	19	35	47	60	80	123	156	161	225	225	192
V	%	8.6	6.0	8.5	8.5	9.4	8.2	6.0	6.7	7.5	11.4	12.1	11.3	12.7	13.8	15.2	13.3	14.7	12.1	11.8
Criminal History Category	N	16	33	57	50	58	89	72	91	84	104	131	155	167	250	276	346	337	402	333
VI	%	17.2	21.9	26.8	25.1	27.2	31.9	25.5	32.2	33.3	33.8	33.7	29.1	26.6	28.0	26.8	28.6	22.0	21.5	20.4

The analysis involves a total of 12,040 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages for any specific year may not add to exactly 100% due to rounding.

SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.

**Table 5C**

**Position of Sentence Relative to the Guideline Range of Retroactive Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2010)**

	Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	
Within Range	N	95	147	208	190	216	256	254	247	210	240	277	401	484	609	707	805	1,033	1,075	712	
	%	97.9	94.2	95.0	94.5	97.3	90.1	87.9	88.2	85.0	81.1	76.1	76.5	77.8	69.0	68.9	66.6	67.6	57.6	43.7	
Above Range	N	0	3	1	0	3	1	5	1	1	0	1	5	3	14	17	13	32	43	40	
	%	0.0	1.9	0.5	0.0	1.4	0.4	1.7	0.4	0.4	0.0	0.3	1.0	0.5	1.6	1.7	1.1	2.1	2.3	2.5	
Substantial Assistance USSG §5K1.1	N	1	3	7	6	2	13	19	22	23	37	68	89	105	137	147	202	233	349	342	
	%	1.0	1.9	3.2	3.0	0.9	4.6	6.6	7.9	9.3	12.5	18.7	17.0	16.9	15.5	14.3	16.7	15.3	18.7	21.0	
Otherwise Below Range	N	1	3	3	5	1	14	11	10	13	19	18	29	30	122	155	189	229	399	536	
	%	1.0	1.9	1.4	2.5	0.5	4.9	3.8	3.6	5.3	6.4	4.9	5.5	4.8	13.8	15.1	15.6	15.0	21.4	32.9	

The analysis involves a total of 12,040 cases, however, cases missing information for any specific analysis are excluded from that analysis. Total percentages for any specific year may not add to exactly 100% due to rounding.

SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.



## F. Extent of Possible Sentence Reduction and Projected Release Dates

As part of its analysis, ORD estimated the release date for each offender who would be eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) should the FSA Guideline Amendment be made retroactive, provided the documentation received for that offender's case was sufficient to perform this analysis.<sup>42</sup> This calculation provides an estimate of the overall number of offenders whose sentence would expire in each fiscal year, if the offender received retroactive application of the FSA Guideline Amendment to the maximum extent consistent with the limitation of the reduction outlined in USSG §1B1.10. This information is also presented by the judicial district in which the offenders were sentenced.

### 1. Methodology and Assumptions for Determining Sentence Reduction and Release Dates

The methodology for this analysis is based on the Commission's Prison Impact Model, which has been in use in some form since the guidelines were first developed. This model is used to estimate the impact of proposed statutory and guideline amendments on newly sentenced offenders and to project the future impact those amendments will have on bed space in the BOP. For this analysis, those offenders who appear to be eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) were hypothetically "resentenced" with the computer program as if the amended guideline provisions had been in effect in the year in which they were sentenced. The new sentence for each offender was then compared with the original (*i.e.*, actual) sentence for that offender to determine the average reduction in sentence length.<sup>43</sup> A new release date for each offender also was calculated in order to determine the year in which the offender would be eligible for release if he or she were provided the full reduction in sentence provided by the amendment.

In performing this part of the analysis, ORD was required to make additional assumptions (set forth below) concerning the decisions courts would make in determining whether, and to what extent, to reduce the sentences of offenders eligible to receive a modification of sentence pursuant to the FSA Guideline Amendment. These assumptions may not hold in every case. As discussed above, the *Booker* decision is inapplicable to modifications of sentence under 18 U.S.C. § 3582(c)(2).<sup>44</sup> The analysis estimates the

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<sup>42</sup> Of the 12,040 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 9,158 offenders.

<sup>43</sup> As a result of the retroactive application of the 2007 Crack Cocaine Guideline Amendment to the Guidelines (Amendment 706, as amended by Amendment 711), which adjusted downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity Table in USSG §2D1.1, the current sentence of some offenders differs from that originally imposed. For those offenders who received a modification of sentence pursuant to the 2007 Crack Cocaine Guideline Amendment that was reported to the Commission by April 14, 2011, the modified sentence was used as the original (*i.e.*, current) sentence.

<sup>44</sup> See *supra* note 20 and accompanying text.

impact of the following: 1) changes to USSG §2D1.1 reflecting the new statutory penalty structure establishing mandatory minimum quantity thresholds in crack cocaine trafficking offenses at 28 grams = 5 years and 280 grams = 10 years; 2) the elimination of the mandatory minimum penalty for simple possession of more than five grams of crack cocaine; and 3) corresponding changes to USSG §2D2.1.<sup>45</sup> This analysis does not reflect any other change in the sentence, consistent with Application Note 2 of USSG §1B1.10.

The assumptions used in this analysis are as follows:

(1) offenders would be sentenced at the same point in the new guideline range as they were when originally sentenced;<sup>46</sup>

(2) offenders sentenced outside the applicable guideline range at the time they were sentenced would be sentenced to a new position outside the amended guideline range that is the same proportional distance above or below the amended guideline range as their original sentence was from the guideline range in effect at the original sentencing;<sup>47</sup>

(3) offenders for whom the new estimated sentence is below the applicable mandatory minimum (all cases in this analysis have five grams triggering a five-year

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<sup>45</sup> This analysis is limited to offenders sentenced pursuant to USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). This is the principal drug trafficking guideline and accounts for most drug offense involving crack cocaine. For example, in fiscal year 2010, 91.4 percent of all crack cocaine offenders were sentenced pursuant to this guideline. As such, the analysis includes offenders convicted of simple possession of more than five grams of crack cocaine and sentenced under USSG §2D1.1 by operation of the cross-reference in USSG §2D2.1(b)(1), as well as offenders sentenced under this guideline by operation of cross-references in other Chapter Two guidelines.

<sup>46</sup> As discussed in Part II of this memorandum, courts would not be required to reduce the sentence for any offender seeking such a reduction under the FSA Guideline Amendment, were it made retroactive. Courts also could sentence an offender to any point in the new guideline range, and would not be required to impose a sentence at the same point in the new range as it did when first sentencing the offender. For offenders sentenced to a higher point in the new sentencing range than in the original range, assumption (1) discussed in the text would overestimate the amount of the offender's sentence reduction. For offenders sentenced to a lower point in the new sentencing range than in the original range, that assumption would underestimate the amount of the offender's sentence reduction.

<sup>47</sup> This assumption could overstate the amount of the reduction in sentence that an eligible offender receives with respect to offenders who were originally sentenced after December 10, 2007. On that date, the Supreme Court decided *Kimbrough v. United States*, 552 U.S. 85 (2007) (affirming that courts have discretion to sentence outside the sentencing guidelines in drug trafficking cases involving crack cocaine). In cases in which courts imposed a sentence that was below the guideline range after that decision, those sentences were 32.7 percent below the guideline range on average. In cases in which offenders were sentenced before that date and after the decision in *Booker*, the sentences imposed were 27.9 percent below the range on average. Therefore, offenders who received a lower sentence under the guidelines after *Kimbrough* might not receive a modified sentence pursuant to the FSA Guideline Amendment that is the same proportional distance below the amended guideline range as was the original sentence.

mandatory minimum and 50 grams triggering a 10-year mandatory minimum), and where no safety valve or substantial assistance reduction was applied when the offender was originally sentenced, would be sentenced at the applicable mandatory minimum;<sup>48</sup>

(4) offenders classified as Career Offenders<sup>49</sup> would be sentenced pursuant to the Career Offender provision of the guidelines in accordance with the statutory maximums applicable when the offender was originally sentenced;

(5) offenders classified as Armed Career Criminals<sup>50</sup> for whom the new estimated sentence is below the guideline minimums provided for those offenders would be sentenced in accordance with the Armed Career Criminal provision of the guidelines;

(6) the “mitigating role cap” on the base offense level of the guidelines<sup>51</sup> would be applied, if appropriate, based upon the new BOL;

(7) offenders originally receiving relief from a mandatory minimum penalty by operation of the safety valve provision<sup>52</sup> would continue to receive relief but, if the applicable statutory minimum is at least five years, the offense level determined after applying Chapters Two (Offense Conduct) and Three (Adjustments) of the guidelines would not be less than level 17 (pursuant to USSG §5C1.2(b));

(8) for offenders with an original combined offense level (after application of Chapters Two and Three) of level 16 or greater but having a new combined offense level below level 16, the applicable reduction for Acceptance of Responsibility<sup>53</sup> would be reduced from three levels to two levels in accordance with that guideline provision;

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<sup>48</sup> This assumption is likely to underestimate the amount of the sentence reduction and projected release dates for some offenders. Because of limitations in Commission data, the final sentence imposed on any offender who received a reduced sentence pursuant to Federal Rule of Criminal Procedure 35(b) for cooperating with the government after they were incarcerated is unknown. Some offenders who received a reduced sentence under Rule 35(b) in this manner currently may have a sentence that is below the otherwise applicable statutory mandatory minimum penalty, because the court was authorized to impose a sentence below that mandatory minimum penalty. For these offenders, the Commission’s assumption that any modification of sentence pursuant to the FSA Guideline Amendment would be limited by the statutory mandatory minimum penalties would be inaccurate and, therefore, underestimate the magnitude of sentence reduction for some offenders. In such a case, the actual release date for these offenders would be earlier than the projected release date.

<sup>49</sup> See USSG §4B1.1.

<sup>50</sup> See USSG §4B1.4.

<sup>51</sup> See §2D1.1(a)(3). There were 38 offenders in the analysis who continued to meet the criteria for application of the mitigating role cap. The new minimal role cap created by the FSA Guideline Amendment is not included in this estimate. The impact of this part of the FSA Guideline Amendment is estimated in Section IV below.

<sup>52</sup> See USSG §5C1.2.

<sup>53</sup> See USSG §3E1.1.

(9) the sentence for each offender would be reduced based on the maximum good conduct credit allowed by the BOP; and

(10) offenders would serve the lesser of the newly calculated sentence or their life expectancies.<sup>54</sup>

ORD further assumed that the effective date of the FSA Guideline Amendment if it were applied retroactively to these offenders would be November 1, 2011, and that pursuant to 18 U.S.C. § 3582(c)(2) courts applying the amendment retroactively would adhere to the limitations on the extent of sentence reduction outlined in USSG §1B1.10.

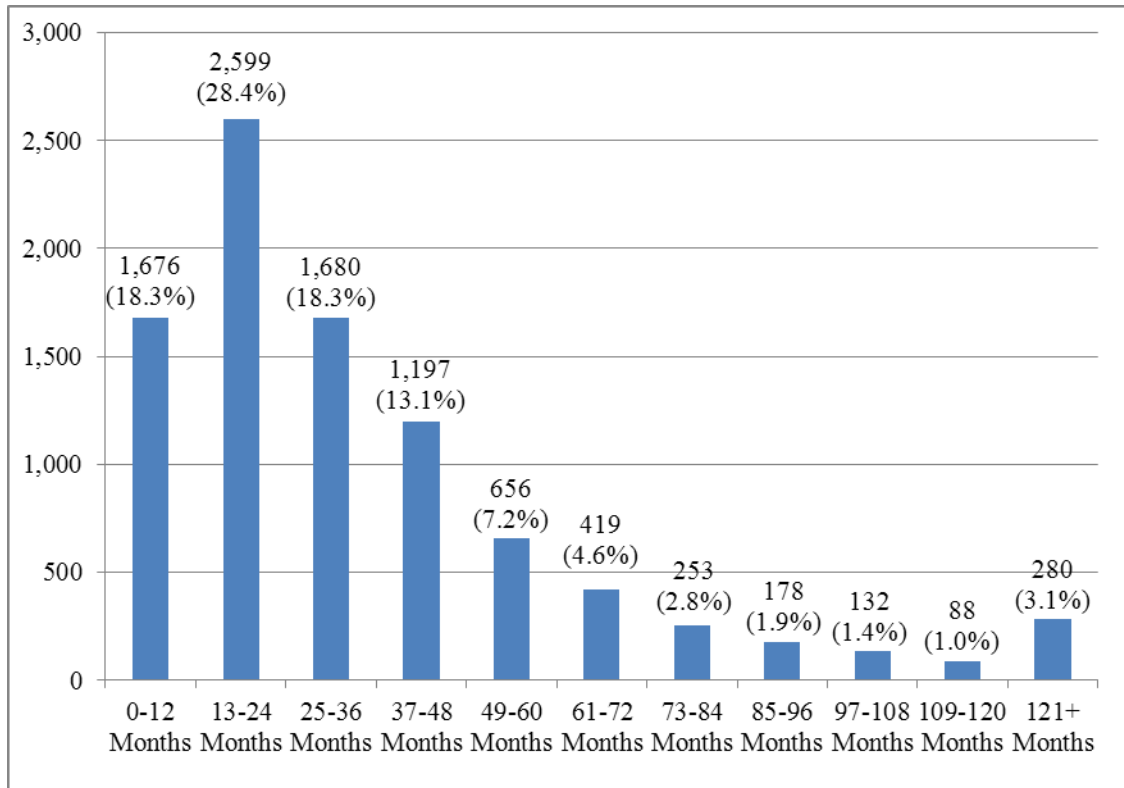
## 2. Estimated Sentence Reduction

Based on these assumptions, the average sentence reduction for all impacted offenders with sufficient information to perform this analysis would be 22.6 percent (or 37 months, from 164 months to 127 months). Table 6 shows that 7,152 offenders (78.1%) would receive a sentence reduction of 48 months or less. Conversely, 280 offenders (3.1%) would receive a sentence reduction of more than 10 years.

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<sup>54</sup> The Commission's Prison Impact Model incorporates actuarial tables based on race and gender to predict life expectancy.

**Table 6**  
**Average Sentence Reduction for Eligible Crack Cocaine Offenders<sup>55</sup>**  
**(FY1992 through FY2010)**



Total percentages may not add to 100% due to rounding.

SOURCE: U.S. Sentencing Commission, 1992-2010 Datafiles, USSCFY92-USSCFY10

### 3. Projected Release Dates

Offenders eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) if the FSA Guideline Amendment was made retroactive would be eligible for release at various times over a 30-year period. Commission records contained sufficient information to perform this analysis for 9,158 offenders. Approximately 34 percent of these offenders (n = 3,109) would be eligible for release within the first year after November 1, 2011, if the FSA Guideline Amendment was made retroactive as of that date. Conversely, about 27 percent of these offenders (n = 2,451) would not be eligible for release within the first five years.

Table 7 shows the current projected release dates for all eligible offenders by year and compares them to the estimated release dates for these same offenders if the FSA Guideline Amendment was not made retroactive. The most significant impact of the FSA

<sup>55</sup> Of the 12,040 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 9,158 offenders.

Guideline Amendment is seen in the first year after it becomes retroactive. In that year, 3,109 offenders would be eligible for release if the FSA Guideline Amendment was made retroactive and courts were to follow the assumptions outlined above regarding resentencing. If the FSA Guideline Amendment was not made retroactive, 1,046 of those offenders will be released, a difference of 2,063 offenders. After year two, fewer offenders would be released if the FSA Guideline Amendment was made retroactive than would be the case if the FSA Guideline Amendment was not made retroactive.

		<b>IF FSA GUIDELINE AMENDMENT RETROACTIVE</b>	<b>IF FSA GUIDELINE AMENDMENT NOT RETROACTIVE</b>
	<b>Release Date</b>	<b>N</b>	<b>N</b>
	<b>within 1 yr</b>	3,109	1,046
	<b>within 2 yr</b>	1,210	1,138
	<b>within 3 yr</b>	1,045	1,240
	<b>within 4 yr</b>	764	1,025
	<b>within 5 yr</b>	579	787
	<b>within 6 yr +</b>	2,451	3,922
Of the 12,040 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 9,158 offenders.			
SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.			

Table 8 shows the projected release dates by year for all eligible offenders displayed by the circuit and district in which each was sentenced.

**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2010)**

CIRCUIT District	Eligible for Immediate Release 11/01/11		Eligible for Release in Year One		Eligible for Release in Year Two		Eligible for Release in Year Three		Eligible for Release in Year Four		Eligible for Release in Year Five		Eligible for Release in Six or More Years		TOTAL
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N
<b>TOTAL</b>	<b>1,873</b>	<b>20.5</b>	<b>1,236</b>	<b>13.5</b>	<b>1,210</b>	<b>13.2</b>	<b>1,045</b>	<b>11.4</b>	<b>764</b>	<b>8.3</b>	<b>579</b>	<b>6.3</b>	<b>2,451</b>	<b>26.8</b>	<b>9,158</b>
D.C. CIRCUIT	24	24.0	10	10.0	16	16.0	14	14.0	9	9.0	3	3.0	24	24.0	100
District of Columbia	24	24.0	10	10.0	16	16.0	14	14.0	9	9.0	3	3.0	24	24.0	100
FIRST CIRCUIT	49	23.4	29	13.9	32	15.3	29	13.9	18	8.6	7	3.3	45	21.5	209
Maine	5	18.5	2	7.4	4	14.8	5	18.5	1	3.7	2	7.4	8	29.6	27
Massachusetts	17	28.3	9	15.0	11	18.3	3	5.0	8	13.3	2	3.3	10	16.7	60
New Hampshire	11	37.9	6	20.7	4	13.8	2	6.9	1	3.4	0	0.0	5	17.2	29
Puerto Rico	10	16.4	7	11.5	12	19.7	13	21.3	3	4.9	1	1.6	15	24.6	61
Rhode Island	6	18.8	5	15.6	1	3.1	6	18.8	5	15.6	2	6.3	7	21.9	32
SECOND CIRCUIT	95	19.1	81	16.3	62	12.4	56	11.2	51	10.2	39	7.8	114	22.9	498
Connecticut	22	23.7	14	15.1	6	6.5	10	10.8	6	6.5	9	9.7	26	28.0	93
New York															
Eastern	10	12.3	12	14.8	11	13.6	12	14.8	11	13.6	2	2.5	23	28.4	81
Northern	14	18.7	10	13.3	17	22.7	7	9.3	9	12.0	7	9.3	11	14.7	75
Southern	22	15.7	31	22.1	15	10.7	15	10.7	12	8.6	9	6.4	36	25.7	140
Western	25	27.5	13	14.3	10	11.0	9	9.9	10	11.0	10	11.0	14	15.4	91
Vermont	2	11.1	1	5.6	3	16.7	3	16.7	3	16.7	2	11.1	4	22.2	18
THIRD CIRCUIT	99	20.3	80	16.4	73	15.0	62	12.7	36	7.4	28	5.7	109	22.4	487
Delaware	0	0.0	0	0.0	3	30.0	6	60.0	1	10.0	0	0.0	0	0.0	10
New Jersey	16	21.6	10	13.5	15	20.3	12	16.2	2	2.7	5	6.8	14	18.9	74
Pennsylvania															
Eastern	18	19.1	15	16.0	8	8.5	10	10.6	10	10.6	5	5.3	28	29.8	94
Middle	48	21.3	44	19.6	34	15.1	27	12.0	16	7.1	10	4.4	46	20.4	225
Western	17	21.0	11	13.6	13	16.0	7	8.6	7	8.6	8	9.9	18	22.2	81
Virgin Islands	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3	100.0	3
FOURTH CIRCUIT	431	18.2	247	10.4	273	11.5	259	10.9	221	9.3	159	6.7	780	32.9	2,370
Maryland	20	19.8	14	13.9	15	14.9	8	7.9	4	4.0	2	2.0	38	37.6	101
North Carolina															
Eastern	46	16.3	36	12.7	24	8.5	36	12.7	20	7.1	20	7.1	101	35.7	283
Middle	43	20.6	12	5.7	16	7.7	32	15.3	21	10.0	16	7.7	69	33.0	209
Western	32	14.8	20	9.3	26	12.0	24	11.1	23	10.6	14	6.5	77	35.6	216
South Carolina	41	12.7	34	10.5	42	13.0	29	9.0	27	8.3	18	5.6	133	41.0	324
Virginia															
Eastern	98	14.4	49	7.2	75	11.0	80	11.7	85	12.5	48	7.0	247	36.2	682
Western	56	23.8	25	10.6	31	13.2	19	8.1	12	5.1	17	7.2	75	31.9	235
West Virginia															
Northern	54	27.1	38	19.1	28	14.1	22	11.1	20	10.1	16	8.0	21	10.6	199
Southern	41	33.9	19	15.7	16	13.2	9	7.4	9	7.4	8	6.6	19	15.7	121

**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2010)**

CIRCUIT District	Eligible for Immediate Release 11/01/11		Eligible for Release in Year One		Eligible for Release in Year Two		Eligible for Release in Year Three		Eligible for Release in Year Four		Eligible for Release in Year Five		Eligible for Release in Six or More Years		TOTAL
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N
FIFTH CIRCUIT	266	22.5	162	13.7	173	14.6	125	10.6	93	7.9	82	6.9	283	23.9	1,184
Louisiana															
Eastern	22	18.6	16	13.6	17	14.4	16	13.6	10	8.5	11	9.3	26	22.0	118
Middle	8	17.0	13	27.7	3	6.4	5	10.6	3	6.4	2	4.3	13	27.7	47
Western	17	13.7	21	16.9	15	12.1	9	7.3	8	6.5	9	7.3	45	36.3	124
Mississippi															
Northern	16	34.0	7	14.9	9	19.1	1	2.1	3	6.4	3	6.4	8	17.0	47
Southern	21	23.1	19	20.9	11	12.1	11	12.1	5	5.5	4	4.4	20	22.0	91
Texas															
Eastern	45	21.6	33	15.9	43	20.7	25	12.0	17	8.2	11	5.3	34	16.3	208
Northern	30	18.9	15	9.4	20	12.6	15	9.4	16	10.1	12	7.5	51	32.1	159
Southern	32	26.4	11	9.1	14	11.6	15	12.4	10	8.3	9	7.4	30	24.8	121
Western	75	27.9	27	10.0	41	15.2	28	10.4	21	7.8	21	7.8	56	20.8	269
SIXTH CIRCUIT	181	22.3	127	15.6	124	15.3	107	13.2	56	6.9	42	5.2	176	21.6	813
Kentucky															
Eastern	10	27.0	5	13.5	5	13.5	4	10.8	1	2.7	2	5.4	10	27.0	37
Western	12	17.4	16	23.2	17	24.6	4	5.8	4	5.8	8	11.6	8	11.6	69
Michigan															
Eastern	33	29.5	15	13.4	14	12.5	18	16.1	5	4.5	2	1.8	25	22.3	112
Western	27	21.3	16	12.6	20	15.7	15	11.8	6	4.7	4	3.1	39	30.7	127
Ohio															
Northern	27	27.3	12	12.1	13	13.1	18	18.2	5	5.1	5	5.1	19	19.2	99
Southern	16	16.0	22	22.0	14	14.0	11	11.0	11	11.0	9	9.0	17	17.0	100
Tennessee															
Eastern	29	19.1	24	15.8	15	9.9	26	17.1	12	7.9	6	3.9	40	26.3	152
Middle	6	24.0	1	4.0	5	20.0	3	12.0	1	4.0	3	12.0	6	24.0	25
Western	21	22.8	16	17.4	21	22.8	8	8.7	11	12.0	3	3.3	12	13.0	92
SEVENTH CIRCUIT	153	17.7	112	12.9	100	11.6	103	11.9	70	8.1	50	5.8	277	32.0	865
Illinois															
Central	15	10.9	17	12.4	12	8.8	17	12.4	13	9.5	12	8.8	51	37.2	137
Northern	35	15.8	32	14.5	25	11.3	25	11.3	21	9.5	12	5.4	71	32.1	221
Southern	27	22.3	14	11.6	12	9.9	7	5.8	10	8.3	6	5.0	45	37.2	121
Indiana															
Northern	29	21.8	18	13.5	16	12.0	26	19.5	7	5.3	7	5.3	30	22.6	133
Southern	6	10.5	8	14.0	10	17.5	3	5.3	5	8.8	2	3.5	23	40.4	57
Wisconsin															
Eastern	22	23.7	9	9.7	11	11.8	12	12.9	8	8.6	6	6.5	25	26.9	93
Western	19	18.4	14	13.6	14	13.6	13	12.6	6	5.8	5	4.9	32	31.1	103



**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2010)**

CIRCUIT District	Eligible for Immediate Release 11/01/11		Eligible for Release in Year One		Eligible for Release in Year Two		Eligible for Release in Year Three		Eligible for Release in Year Four		Eligible for Release in Year Five		Eligible for Release in Six or More Years		TOTAL
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	N
<b>EIGHTH CIRCUIT</b>	138	19.2	106	14.8	105	14.6	72	10.0	62	8.6	50	7.0	184	25.7	717
Arkansas															
Eastern	13	25.0	12	23.1	10	19.2	2	3.8	5	9.6	1	1.9	9	17.3	52
Western	8	32.0	4	16.0	6	24.0	0	0.0	5	20.0	1	4.0	1	4.0	25
Iowa															
Northern	13	23.6	4	7.3	4	7.3	4	7.3	8	14.5	4	7.3	18	32.7	55
Southern	7	9.3	8	10.7	2	2.7	7	9.3	10	13.3	4	5.3	37	49.3	75
Minnesota	19	22.6	20	23.8	10	11.9	6	7.1	5	6.0	11	13.1	13	15.5	84
Missouri															
Eastern	40	22.6	32	18.1	37	20.9	22	12.4	9	5.1	12	6.8	25	14.1	177
Western	23	23.2	11	11.1	13	13.1	13	13.1	13	13.1	9	9.1	17	17.2	99
Nebraska	14	10.0	14	10.0	23	16.4	18	12.9	5	3.6	8	5.7	58	41.4	140
North Dakota	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1	50.0	2
South Dakota	0	0.0	1	12.5	0	0.0	0	0.0	2	25.0	0	0.0	5	62.5	8
<b>NINTH CIRCUIT</b>	64	18.2	57	16.2	58	16.5	47	13.4	41	11.6	20	5.7	65	18.5	352
Alaska	5	11.1	12	26.7	13	28.9	1	2.2	4	8.9	2	4.4	8	17.8	45
Arizona	2	20.0	1	10.0	2	20.0	3	30.0	0	0.0	1	10.0	1	10.0	10
California															
Central	16	17.0	12	12.8	12	12.8	12	12.8	13	13.8	5	5.3	24	25.5	94
Eastern	10	23.3	10	23.3	5	11.6	3	7.0	8	18.6	2	4.7	5	11.6	43
Northern	8	15.4	10	19.2	10	19.2	14	26.9	1	1.9	3	5.8	6	11.5	52
Southern	2	16.7	2	16.7	1	8.3	1	8.3	1	8.3	2	16.7	3	25.0	12
Guam	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Hawaii	0	0.0	1	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	1
Idaho	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Montana	0	0.0	0	0.0	1	33.3	0	0.0	0	0.0	0	0.0	2	66.7	3
Nevada	6	31.6	1	5.3	3	15.8	1	5.3	1	5.3	0	0.0	7	36.8	19
Northern Mariana Islands	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Oregon	3	27.3	1	9.1	2	18.2	2	18.2	1	9.1	1	9.1	1	9.1	11
Washington															
Eastern	4	26.7	0	0.0	3	20.0	3	20.0	2	13.3	2	13.3	1	6.7	15
Western	8	17.0	7	14.9	6	12.8	7	14.9	10	21.3	2	4.3	7	14.9	47

**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2010)**

CIRCUIT District	Eligible for Immediate Release 11/01/11		Eligible for Release in Year One		Eligible for Release in Year Two		Eligible for Release in Year Three		Eligible for Release in Year Four		Eligible for Release in Year Five		Eligible for Release in Six or More Years		TOTAL N
	N	%	N	%	N	%	N	%	N	%	N	%	N	%	
TENTH CIRCUIT	66	21.4	44	14.3	36	11.7	45	14.6	19	6.2	29	9.4	69	22.4	308
Colorado	11	26.2	4	9.5	2	4.8	3	7.1	4	9.5	7	16.7	11	26.2	42
Kansas	24	21.6	15	13.5	14	12.6	14	12.6	8	7.2	12	10.8	24	21.6	111
New Mexico	7	18.9	10	27.0	4	10.8	8	21.6	3	8.1	1	2.7	4	10.8	37
Oklahoma															
Eastern	3	21.4	3	21.4	3	21.4	2	14.3	0	0.0	1	7.1	2	14.3	14
Northern	6	22.2	1	3.7	5	18.5	7	25.9	1	3.7	4	14.8	3	11.1	27
Western	12	18.5	9	13.8	7	10.8	8	12.3	2	3.1	4	6.2	23	35.4	65
Utah	2	33.3	2	33.3	1	16.7	1	16.7	0	0.0	0	0.0	0	0.0	6
Wyoming	1	16.7	0	0.0	0	0.0	2	33.3	1	16.7	0	0.0	2	33.3	6
ELEVENTH CIRCUIT	307	24.5	181	14.4	158	12.6	126	10.0	88	7.0	70	5.6	325	25.9	1,255
Alabama															
Middle	17	26.2	13	20.0	8	12.3	6	9.2	4	6.2	2	3.1	15	23.1	65
Northern	15	24.2	8	12.9	11	17.7	6	9.7	3	4.8	1	1.6	18	29.0	62
Southern	26	18.2	14	9.8	19	13.3	14	9.8	9	6.3	8	5.6	53	37.1	143
Florida															
Middle	78	27.1	42	14.6	38	13.2	23	8.0	25	8.7	18	6.3	64	22.2	288
Northern	24	16.1	10	6.7	7	4.7	7	4.7	6	4.0	11	7.4	84	56.4	149
Southern	41	24.4	25	14.9	21	12.5	18	10.7	13	7.7	10	6.0	40	23.8	168
Georgia															
Middle	32	25.0	32	25.0	21	16.4	16	12.5	10	7.8	5	3.9	12	9.4	128
Northern	17	32.1	5	9.4	7	13.2	6	11.3	2	3.8	4	7.5	12	22.6	53
Southern	57	28.6	32	16.1	26	13.1	30	15.1	16	8.0	11	5.5	27	13.6	199

Of the 12,040 offenders identified as eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 9,158 offenders.

Estimated release dates are determined using the Commission's prison and sentencing impact model which applies proposed guideline changes to affected offenders and re-sentences these offenders in a proportional manner. Under the model, affected offenders: 1) receive a new offense level; 2) have a new sentencing range determined (using the ranges from the Sentencing Tables); 3) are resentenced to the same relative position within (or outside) the original guideline range (e.g., an offender currently sentenced at the midpoint of the original guideline range then will be sentenced to the midpoint of the new guideline range); and 4) receive statutory and guideline trumps when applicable. Other assumptions incorporated into the model include: 1) offenders earn the maximum allowable good-time (currently 54 days per year served for imposed sentences greater than one year but not life imprisonment); and 2) offenders serve the lesser of A) the sentence imposed less the maximum allowable good conduct time, or B) their estimated remaining life expectancy, based upon an actuary table incorporating age, race, and sex.

SOURCE: U.S. Sentencing Commission, 1992 - 2010 Datafiles, USSCFY92 - USSCFY10.

#### IV. IMPACT OF THE RETROACTIVE APPLICATION OF PORTIONS OF PART B OF THE FSA GUIDELINE AMENDMENT ON ALL DRUG OFFENDERS

Responding to specific directives in section 7 of the FSA, the Commission promulgated Part B of the FSA Guideline Amendment to add mitigating provisions to USSG §2D1.1 for offenses involving drugs, regardless of drug type. These two provisions have the effect of lowering guideline ranges for certain defendants: namely, those who receive the 4-level ("minimal participant") adjustment in subsection (a) of USSG §3B1.2 (Mitigating Role). These reductions are not limited to crack cocaine offenders but apply to any drug trafficking offender who had received the 4-level reduction at the time of sentencing as a minimal participant.

The first provision creates a new specific offense characteristic, USSG §2D1.1(b)(15), which provides for a 2-level downward adjustment if the defendant receives the minimal participant reduction and the offense involved each of three additional specified factors. The three factors are that the defendant: (a) was motivated by an intimate or familial relationship or by threats or fear to commit the offense when the defendant was otherwise unlikely to commit such an offense; (b) was to receive no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and (c) had minimal knowledge of the scope and structure of the enterprise. Information on the presence of this conduct is not available in Commission datafiles and as a consequence, a precise estimate of the impact of the retroactive application of this part of the FSA Guideline Amendment cannot be made. It is possible, however, to identify the potential total number of eligible offenders by identifying offenders who received the 4-level reduction for minimal participant who are projected to be incarcerated in the BOP on November 1, 2011.

The BOP has identified 85,774 drug trafficking offenders who are projected to be incarcerated on November 1, 2011. Of these, 400 received the 4-level minimal participant adjustment. Of these 400 offenders, 127 will not be eligible for a further reduction under USSG §2D1.1(b)(15) for one of two reasons: 97 are sentenced at the mandatory minimum and therefore are not eligible for a reduction in the applicable guideline range; 30 were sentenced pursuant to the Career Offender provision at USSG §4B1.1 and are also not eligible for a reduction in the guideline range. After excluding offenders for the reasons cited above, ORD estimates that 273 offenders may be eligible for the reduction at USSG §2D1.1(b)(15) if the additional requirements are met.

The other provision of section 7 of the FSA, as promulgated in Part B of the FSA Guideline Amendment, modified subsection (a)(5) of USSG §2D1.1 (often referred to as the "mitigating role cap") to provide that the base offense level for those offenders who receive a minimal participant reduction be capped at level 32. The offenders eligible for this reduction are necessarily a subset of the 273 offenders identified above. Like the 273 offenders described above, these offenders must have received the 4-level reduction for minimal participant and must not be subject to any statutory or guideline provisions that provides for a higher guideline range. In addition, these offenders must have received a Base Offense Level greater than Level 32. Of the 273 offenders, 88 offenders met this

additional criterion and may be eligible for retroactive application of this portion of the amendment.