

# ESP INSIDER EXPRESS

## SPECIAL EDITION

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First Step Act

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## First Step Act

Signed Into Law on December 21<sup>st</sup>, 2018

The First Step Act (P.L. 115-391) was signed into law by the President on December 21, 2018. The Act deals mostly with reentry of the incarcerated, directing the Federal Bureau of Prisons to take specific actions regarding programming, good-time credit, and compassionate release, among other issues. The Act does not contain any directives to the Commission.

Related to its sentencing reform provisions (**Title IV**), the Act makes important changes to mandatory minimum penalties and to the safety valve provision (a provision that allows courts to sentence a defendant without regard to the mandatory minimum). Specifically, in relation to Title IV, the Act:

- reduces certain enhanced mandatory minimum penalties for some drug offenders (Section 401);
- broadens the existing safety valve at 18 U.S.C. § 3553(f), increasing the number of offenders eligible for relief from mandatory minimum penalties (Section 402);
- reduces the severity of the “stacking” of multiple § 924(c) offenses (Section 403); and
- applies retroactively the Fair Sentencing Act of 2010 which reduced mandatory minimum penalties for crack cocaine offenses (Section 404).

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First Step Act Provisions	
<b>Title I</b>	Recidivism Reduction
<b>Title II</b>	Lieutenant Osvaldo Albarati Correctional Officer Self-Protection Act of 2018
<b>Title III</b>	Restraints on Pregnant Prisoners Prohibited
<b>Title IV</b>	Sentencing Reform
<b>Title V</b>	Second Chance Act of 2007 Reauthorized
<b>Title VI</b>	Miscellaneous (includes recidivism reduction, reentry programming, prison conditions, treatment for opioid and heroin abuse, and more)



## Changes to Drug Mandatory Minimum Penalties Section 401

### DRUG OFFENSES

The First Step Act made changes to both the length of certain mandatory minimum penalties and the types of prior offenses that can trigger enhanced penalties.

Statutory Provision	Statutory Penalty	Enhanced Penalty BEFORE First Step Act	Enhanced Penalty AFTER First Step Act
21 U.S.C. § 841(b)(1)(A)	10-year Mandatory Minimum	<b>20-year</b> Mandatory Minimum (after one prior conviction for a felony drug offense)  <b>Life</b> (after two or more prior convictions for a <b>felony drug offense</b> )	<b>15-year</b> Mandatory Minimum (after one prior conviction for a serious drug felony or serious violent felony)  <b>25-year</b> Mandatory Minimum (after two or more prior convictions for a <b>serious drug felony or serious violent felony</b> )
21 U.S.C. § 841(b)(1)(B)	5-year Mandatory Minimum	<b>10-year</b> Mandatory Minimum (after one prior conviction for a <b>felony drug offense</b> )	<b>10-year</b> Mandatory Minimum (after one prior conviction for a <b>serious drug felony or serious violent felony</b> )
21 U.S.C. § 960(b)(1)	10-year Mandatory Minimum	<b>20-year</b> Mandatory Minimum (after one prior conviction for a <b>felony drug offense</b> )	<b>15-year</b> Mandatory Minimum (after one prior conviction for a <b>serious drug felony or serious violent felony</b> )
21 U.S.C. § 960(b)(2)	5-year Mandatory Minimum	<b>10-year Mandatory Minimum</b> (after one prior conviction for a <b>felony drug offense</b> )	<b>10-year</b> Mandatory Minimum (after one prior conviction for a <b>serious drug felony or serious violent felony</b> )

Note that §§841(b)(1)(C) and (D) were NOT amended.

## Mandatory Minimum Penalties Changes to § 851 Enhancements for Repeat Offenders

**The First Step Act not only reduced the mandatory minimum penalties, but also changed the conditions under which they apply.**

Higher mandatory minimum penalties apply if the defendant has a prior conviction for a “serious drug felony” or for a “serious violent felony” and the prosecution files a notice of enhancement under 21 U.S.C. § 851. The First Step Act not only reduced the mandatory minimum penalties, but also changed the conditions under which they apply. The defendant’s prior

convictions must meet the new definitions of “serious drug felony” or “serious violent felony.” The defendant must have served a term of imprisonment of more than 12 months on the prior offense and must have been released within 15 years of the current federal offense. In addition, for any “serious drug felony” or a “serious violent felony” based on 18 U.S.C. § 3559(c)(2), the offense must have been punishable by a term of imprisonment of 10 years or more.

# “Serious Drug Felony” & “Serious Violent Felony”

An offense prohibited by 18 U.S.C. § 924(e)(2)(A) for which the defendant served a term of imprisonment of more than 12 months and was released from any term of imprisonment within 15 years of the instant offense. Section 924(e)(2)(A) defines “serious drug felony” as an offense under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), Chapter 705 of Title 46 (Maritime Law Enforcement) or under state law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment is ten years or more.

An offense for which the defendant served a term of imprisonment of more than 12 months that is either a violation of 18 U.S.C. § 3559(c)(2) or 18 U.S.C. § 113 (assaults within maritime or territorial jurisdiction), if the offense was committed in the maritime or territorial jurisdiction of the United States. Section 3559(c)(2)(F) defines “serious violent felony” as enumerated offenses such as murder, certain sex offenses, kidnapping, extortion, arson, and certain firearms offenses, among others, or as any offense “that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense” and is punishable by a maximum term of imprisonment of ten years or more.

**Effective date of these changes:** The Act provides that these changes shall apply to any offense that was committed before the date of enactment of the Act if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018].

## Safety Valve Section 402

**NOTE**

The new statutory safety valve provision applies to crimes under Title 46 (Maritime Offenses).

### Old Limitation

- (1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines before application of subsection (b) of §4A1.3 (Departures Based on Inadequacy of Criminal History category);

...

Note that this limitation still exists in §5C1.2.

### New Limitation

- (1) The defendant does not have:
  - (A) more than four criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
  - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
  - (C) a prior 2-point violent offense, as determined under the sentencing guidelines;

**Definition of Violent Offense:** As used in this section, the term “violent offense” means a crime of violence, as defined in [18 U.S.C.] section 16, that is punishable by imprisonment.

**Effective date of these changes:** The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.



## Clarification of 924(c) Penalty Provisions Section 403

Before the Act, a second or subsequent count of conviction under section 924(c) triggered a higher mandatory minimum penalty, as well as mandatory “stacking” of these sentences for each count of conviction. This was so because, in *Deal v. United States*, 508 U.S. 129 (1993), the Supreme Court held that, even when multiple counts under section 924(c) were in the same indictment, the conviction on the first count did not have to be final before the mandatory increases and stacking provisions

were triggered. Thus, a defendant with two or more counts in one indictment was subject to a mandatory minimum of five years on the first count, and 25 years on each additional count.

The First Step Act revised section 924(c)(1)(C) by providing that the higher penalty for a “second or subsequent count of conviction” under section 924(c) is triggered only if the defendant has a prior section 924(c) conviction that has become final.

**Example:** Contemplates five-year mandatory minimum terms for using, carrying, or possessing a firearm in furtherance of a crime of violence or drug trafficking offense. Higher mandatory minimums apply depending on other factors such as whether the firearm was brandished (seven years) and whether the firearm was a machine gun (30 years) among others.

924(c) Counts of Conviction in the Same Indictment	BEFORE the First Step Act	AFTER the First Step Act
1 Count	Mandatory minimum of 5 years	Mandatory minimum of 5 years
2 Counts	Mandatory minimum of 5 + 25 = 30 years	Mandatory minimum of 5 + 5 = 10 years
3 Counts	Mandatory minimum of 5 + 25 + 25 = 55 years	Mandatory minimum of 5 + 5 + 5 = 15 years

**Effective date of these changes:** The Act provides that the amendments to section 924(c) shall apply to any offense that was committed before the date of enactment of this Act if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018].

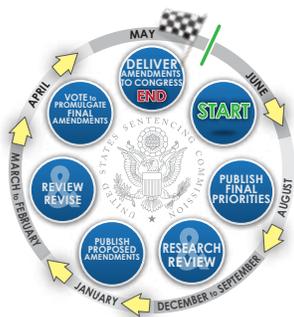
## Retroactive Application of the Fair Sentencing Act of 2010 Section 404

Any defendant sentenced before the effective date of the Fair Sentencing Act (August 3, 2010) who did not receive the benefit of the statutory penalty changes made by that Act is eligible for a sentence reduction under the First Step Act. Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggered mandatory minimum penalties. Section 3 of the Fair Sentencing Act eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine. The First Step Act authorizes the defendant, the Director of the Bureau of Prisons, the attorney for the government, or the court to make the motion.

BEFORE	The Fair Sentencing Act	AFTER
5 g 50 g	21 U.S.C. § 841 5-yr min - 40-yr max 10-yr min - life max	28 g 280 g
5 g 50 g	21 U.S.C. § 960 5-yr min - 40-yr max 10-yr min - life max	28 g 280 g



## Frequently Asked Questions



### Question 1

#### Is the Commission making any changes to the Guidelines in response to the Act?

The Act does not contain any directives to the Commission requiring action. As it does with all new crime legislation, the Commission will review the Act to determine whether guideline changes might be necessary or appropriate. Because the Act did not include “emergency amendment authority,” any changes to the guidelines in response to the Act may only be made during the Commission’s annual amendment cycle. *See* 28 U.S.C. § 994.

During the annual amendment cycle, the Commission must publish proposed guideline amendments and solicit public comment. *See* 28 U.S.C. § 994(x). In order for an amendment to move forward after that, at least four Commissioners must vote in favor of promulgating the amendment. *See* 28 U.S.C. § 994(a). Once at least four Commissioners have voted in favor, the Commission must deliver the promulgated amendment to Congress no later than May 1 for the 180-day congressional review period. *See* 28 U.S.C. § 994(p). If Congress takes no action, the amendment can take effect on November 1 of that year.

The Commission has not yet published any proposed amendments responding to the Act. The Commission currently has two voting members and thus lacks a statutory quorum to promulgate amendments.

### Changes to Mandatory Minimums

### Question 2

**For defendants facing an enhanced drug mandatory minimum penalty, the Act now requires that the defendant was convicted of a “serious drug felony” or a “serious violent felony” and that the defendant served a term of imprisonment of more than 12 months. How is time “served” determined?**

The court will have to determine the amount of time a defendant served on a prior offense. The *Guidelines Manual* does not define time “served.” Note that time “served” is not the same as the guidelines’ definition of “sentence imposed,” the term used in the criminal history provisions.

### Broadening of the Safety Valve

### Question 3

**The First Step Act states that the new safety valve provision applies to any defendant whose conviction was “entered” on or after the date of the enactment of the Act. What does that mean?**

Courts will have to interpret the meaning of “conviction entered.” The statute does not define “conviction entered,” nor does the *Guidelines Manual*.

### Question 4

**The safety valve provision at §5C1.2 of the *Guidelines Manual* is different from the statutory provision at 18 U.S.C. § 3553(f). Which one do I follow?**

Both. The changes made by the First Step Act were statutory and did not make any changes to the current text of the guidelines. Therefore, courts must use the new statutory safety valve criteria in determining whether the offender qualifies for statutory relief at 18 U.S.C. § 3553(f). One key difference between the two provisions is the number of criminal history points an offender can have. If so, the Court may impose a sentence “without regard to the mandatory minimum” that would otherwise be applicable.

USSG §2D1.1(b)(18) provides for a 2-level reduction for offenders who meet the safety valve criteria set forth in subdivisions (1)-(5) of §5C1.2. Section 5C1.2 still reflects the original statutory criteria and provides the defendant cannot have more than one criminal history point as determined under §4A1.1. Thus, as a matter of proper guideline application, the court should award the 2-level safety valve reduction at §2D1.1 only if the offender is eligible for safety valve relief according to the guideline provi-



sion. Of course, the court has authority under 18 U.S.C. § 3553(a) to grant a similar 2-level reduction to the newly eligible safety valve offenders not meeting the guideline criteria. If the court should do so, it will be considered a variance from the guidelines.

**Question 5**

**The new safety valve statute at 18 U.S.C. § 3553(f) says that a defendant with any “2-point violent offense” is ineligible for the safety valve. How should the court determine if the prior offense is a violent offense?**

The statute defines “violent offense” as a “crime of violence as defined by 18 U.S.C. § 16, that is punishable by imprisonment.” The Act does not provide any guidance as to how to determine if the prior offense is a crime of violence. Supreme Court precedent directs the use of the categorical approach to make such determinations. Notably, in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), the Supreme Court held that the “residual clause” of section 16 is unconstitutionally vague as applied to the immigration statute in that case. That part reads that a crime of violence is “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Courts may have to decide whether *Dimaya* applies in these circumstances.

**Safety Valve Application Examples:**

**SAFETY VALVE**

The analysis required by the new safety valve provision differs greatly from the analysis under the guidelines.

**A) Is there any way that a defendant with a prior violent offense can receive relief from a mandatory minimum penalty?**

Yes, if the violent offense receives only one criminal history point under the guidelines, and the defendant’s prior record does not otherwise exclude him from eligibility under 18 U.S.C. § 3553(f). For example, a defendant’s only prior conviction is for armed robbery, and he received a sentence of five years’ probation resulting in one criminal history point. This defendant would not be excluded from receiving relief from the mandatory minimum penalty under the newly amended safety valve.

**B) Defendant has four 1-point convictions and two 2-point convictions for possession of cocaine, for a total of eight criminal history points (Criminal History Category IV). Is this defendant eligible for relief from a mandatory minimum under 18 U.S.C. § 3553(f)?**

Yes. He has no more than four criminal history points excluding the 1-point convictions, no prior 3-point offenses, and no prior 2-point violent offenses. However, the defendant would not meet the criteria for the 2-level reduction at §2D1.1(b)(18), which only allows for reduction where the defendant has no more than one criminal history point.

**C) Defendant’s instant offense is Possession with Intent to Distribute Cocaine. The defendant is a Career Offender under §4B1.1 because he has a prior conviction for sale of a controlled substance and another separate prior conviction for distribution of crack. The defendant received a sentence of three years’ probation on the first conviction and 30 days imprisonment on the second conviction for a total of two criminal history points. However, the defendant is a Career Offender and his Criminal History Category is VI. Is this defendant eligible for relief under 18 U.S.C. § 3553(f)?**

Yes. Although the defendant is a Career Offender, this defendant’s prior record does not disqualify him from being eligible for relief under the revised statutory safety valve.

**D) Defendant’s instant offense is Possession with Intent to Distribute Methamphetamine. The defendant is a Career Offender under §4B1.1 because he has a prior conviction for aggravated assault and a prior conviction for distribution of methamphetamine. The defendant received a**



sentence of two years' probation on the first conviction and six months' imprisonment on the second conviction for a total of three criminal history points. However, the defendant is a Career Offender and his Criminal History Category is VI. Is this defendant eligible for relief under 18 U.S.C. § 3553(f)?

Yes. Although the defendant is a Career Offender, this defendant's prior record does not disqualify his from being eligible for relief under the revised statutory safety valve.

**E) A defendant has a total of six criminal history points. The defendant has two prior 2-point convictions (for non-violent offenses) and he also received two criminal history points for "status" under §4A1.1(d) for being under a criminal justice sentence for one of the prior 2-point convictions. Is this defendant eligible for relief from a mandatory minimum penalty under 18 U.S.C § 3553(f)?**

No. This defendant has more than four criminal history points (excluding any criminal history points resulting from a 1-point offense), and is therefore not eligible for the statutory safety valve.

### Clarification of Section 924(c)

#### SECTION 924(c)

The clarification of Section 924(c) penalties could greatly reduce sentences for those convicted of multiple counts in the same indictment.

#### Question 6

**If a defendant is convicted of more than one count of 18 U.S.C. § 924(c), how should the court sentence the defendant?**

The First Step Act revised section 924(c)(1)(C) by providing that the higher penalty for a "second or subsequent count of conviction" under section 924(c) is triggered only if the defendant has a prior section 924(c) conviction that has become final. The Act did not change any other subsections of the statute. So, if a defendant has two or more counts of conviction for section 924(c) in the same indictment, the court should impose the mandatory minimum penalty for each count. See section 924(c)(1)(A), (B). Section 924(c)(1)(D) remains in effect, requiring that the court impose consecutive sentences. The guideline for this statute is found at USSG §2K2.4.

### Application of the Fair Sentencing Act

#### Question 7

**Who is eligible for a sentence reduction based on the retroactive application of the Fair Sentencing Act of 2010?**

Any defendant sentenced for a crack cocaine offense before the effective date of the Fair Sentencing Act of 2010 who did not receive the benefit of the statutory penalty changes made by that Act is eligible for a sentence reduction under the First Step Act. Section 2 of the Fair Sentencing Act increased the quantity of crack cocaine that triggered mandatory minimum penalties. Section 3 of the Fair Sentencing Act eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine. For certain defendants, these changes may have reduced or eliminated the mandatory minimum penalty, while also reducing the statutory maximum penalty.

#### Question 8

Are there any limitations on who is eligible for a sentence reduction based on the retroactive application of the Fair Sentencing Act of 2010?

Yes. A defendant is not eligible for a sentence reduction if 1) a defendant's sentence was previously imposed or reduced in accordance with Sections 2 and 3 of the Fair Sentencing Act; or 2) the defendant previously filed a motion under section 404 of the First Step Act, and the court denied the motion after complete review on the merits. Courts also retain their discretion to deny motions of otherwise eligible offenders, since "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." See First Step Act, Section 404(c).



**Question 9**

**Can a defendant sentenced as a Career Offender under USSG §4B1.1 receive a sentence reduction under the First Step Act?**

Yes, provided that the statutory maximum penalty applicable to the defendant under the Fair Sentencing Act is lower than the statutory maximum penalty in effect on the date of the original sentencing.

**Question 10**

**What role do the guidelines play in a resentencing authorized by the First Step Act?**

Section 404 of the First Step Act provides that “[a] court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if section 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat 2372) were in effect at the time the covered offense was committed.” *See* First Step Act, Section 404(b). Thus, the First Step Act provides statutory authorization to the sentencing court to modify a previously imposed term of imprisonment. *See* 18 U.S.C. § 3582(c)(1)(B). Courts will have to decide whether a resentencing under the Act is a plenary resentencing proceeding or a more limited resentencing. In either instance, the Act made no changes to 18 U.S.C. § 3553(a), so the courts should consider the guidelines and policy statements, along with the other 3553(a) factors, during the resentencing.

**Question 11**

**Is the Commission able to compile a list of defendants who might benefit from the retroactive application of the Fair Sentencing Act?**

The Commission has provided an overall analysis of the estimated sentencing and imprisonment, impact of the Act, and has posted on its website here:

<https://go.usa.gov/xEUTG>

The Commission will compile and send a specific list of offenders who may be eligible for a sentence reduction under the Act’s provisions *only upon request by the Chief Judge of each district*. Unlike a sentence reduction under §3582(c), where a party must petition the Court, the Act allows judges, on their own motion, to reduce sentences for eligible offenders. If you are a Chief Judge and would like to receive a list of possible eligible offenders, please contact Glenn Schmitt, the Director of the Commission’s Office of Research and Data, at 202-502-4531 or [gschmitt@ussc.gov](mailto:gschmitt@ussc.gov).

