

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF PUERTO RICO  
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IN THE MATTER OF:

AMENDMENT 782 TO APPENDIX C  
OF THE GUIDELINES MANUAL

Misc. No. \_\_\_\_\_ (JAF)

*14-MC-298*

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6 **MEMORANDUM TO GOVERNMENT AND DEFENSE COUNSEL**

7 All concerned are aware that the United States Sentencing Commission approved  
8 Amendment 782 to Appendix C of the Guidelines Manual, generally reducing by two levels the  
9 offense levels assigned to drug quantities in USSG §2D1.1 and §2D1.11. This amendment  
10 becomes effective on November 1, 2014, if Congress does not reject or modify the amendment  
11 by that date. The general consensus is that Amendment 782 will become effective on  
12 November 1, 2014.

13 The United States Sentencing Commission has also decided to apply Amendment 782  
14 retroactively, with implementation delayed until November 1, 2015. USSG §1B1.10 has a  
15 proposed amendment to that effect.

16 District courts are not precluded from conducting sentencing reduction proceedings  
17 before November 1, 2015, as long as any order reducing a defendant's term of imprisonment has  
18 an effective date of November 1, 2015, or later. See Attachment 1 to this Memorandum.

19 The court is extremely concerned regarding tension and discrepancies that have surfaced  
20 during recent status conferences in multi-defendant cases between the government and the  
21 defense bar regarding Amendment 782, its meaning, and its implementation.

22 The court has perceived that plea-bargaining figures are being raised in order to achieve  
23 result-oriented sentences, which may include increasing the base offense levels for plea

1 bargaining to avoid the effect of the two-point reduction mandated in the amended drug tables of  
2 USSG §2D1.1 and §2D1.11.

3 Honesty in sentencing is a cardinal principle behind our sentencing statutes and  
4 guidelines and, therefore, we advise government and defense counsel that this court will  
5 carefully scrutinize plea agreements and disallow any attempt to invalidate, by plea-bargaining  
6 mathematics, the disposition of the United States Sentencing Commission in the across-the-board  
7 reduction of the drug tables by two points.

8 While it is true that courts do not, and cannot, engage in the plea-bargaining process, fair  
9 warning is given that any attempt to manipulate Amendment 782 to the detriment of its intended  
10 purpose will not be tolerated. The sentencing function in a criminal case is the court's  
11 responsibility, and a vigilant court will take whatever measures are required to assure strict  
12 compliance with the objectives of Amendment 782.

13 This court will not advance the remedies that are available. The range of remedies is  
14 ample, including that of severe sanctions against any litigant who chooses to obviate the spirit  
15 and purpose of Amendment 782.

16 Therefore, the court is giving fair warning to all concerned that plea-bargaining  
17 calculations have to be clear and transparent so that if tested for reasonability, they pass the test.

18 Be guided accordingly.

19 San Juan, Puerto Rico, this 29th day of July, 2014.

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S/José Antonio Fusté  
JOSE ANTONIO FUSTE  
U. S. DISTRICT JUDGE

UNITED STATES SENTENCING COMMISSION  
ONE COLUMBUS CIRCLE, N.E.  
SUITE 2-500, SOUTH LOBBY  
WASHINGTON, D.C. 20002-8002  
(202) 502-4500  
FAX (202) 502-4699

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July 21, 2014

MEMORANDUM

**TO:** Judges, United States Courts of Appeals  
Judges, United States District Courts  
United States Magistrate Judges  
Circuit Executives  
District Court Executives  
Clerks, United States Courts of Appeals  
Clerks, United States District Courts  
Chief Probation Officers  
Chief Pretrial Service Officers

**FROM:** United States Sentencing Commission

**SUBJECT:** Retroactive Application of Drug Amendment to Federal Sentencing Guidelines  
**Implementation Delayed Until November 1, 2015**

On July 18, 2014, the United States Sentencing Commission unanimously voted to give retroactive effect to the guideline amendment regarding drug offenses, which will be designated Amendment 782 in Appendix C to the *Guidelines Manual*. The drug amendment, which generally reduced by two levels the offense levels assigned to the quantities in §2D1.1 and §2D1.11, does not become effective until November 1, 2014, because Congress can reject or modify the amendment until that date. **Therefore, neither the drug amendment nor its retroactive application is effective until November 1, 2014, absent congressional action to the contrary.**

In addition, the Commission added a new special instruction at §1B1.10(e) providing that a reduced term of imprisonment based on retroactive application of the drug amendment shall not be ordered unless the effective date of the order is November 1, 2015, or later. **As a result, offenders cannot be released from custody pursuant to retroactive application of Amendment 782 before November 1, 2015.** An application note clarifies that the delayed effective date for orders does not preclude the court from conducting sentence reduction proceedings before November 1, 2015, as long as any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

**These actions mean that on November 1, 2014, absent congressional action to the contrary, courts will be authorized to conduct sentence reduction proceedings and enter orders pursuant to 18 U.S.C. § 3582(c)(2) based on the retroactive application of Amendment 782, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.**

The Commission determined that public safety, among other factors, requires that release of offenders based upon retroactive application of the drug amendment be delayed for one year. In light of the large number of cases potentially involved, the Commission heard testimony from the Criminal Law Committee of the Judicial Conference and others that the agencies of the federal criminal justice system responsible for the offenders' reentry into society need time to prepare, and to help the offenders prepare, for that reentry. The Commission concluded that a one-year delay in the effective date of any orders granting sentence reductions under the drug amendment is needed (1) to give courts, especially those districts with heavy drug caseloads, adequate time to obtain and review the information necessary to make an individualized determination in each case of whether a sentence reduction is appropriate, (2) to ensure that, to the extent practicable, all offenders who are to be released have the opportunity to participate in reentry programs and transitional services, such as placement in halfway houses, while still in the custody of the Bureau of Prisons, which increases their likelihood of successful reentry to society and thereby promotes public safety, and (3) to permit the Probation and Pretrial Services Office to prepare for the increased responsibility of supervising these offenders upon their release.

A "reader-friendly" version of the amendment to §1B1.10, the policy statement governing retroactive application of guideline amendments, and the Chair's remarks on the retroactivity amendment vote are enclosed and can be viewed on the Commission's website at [www.ussc.gov](http://www.ussc.gov). Both §1B1.10 as amended and the drug guideline amendment will be incorporated into the *Guidelines Manual* effective November 1, 2014, which will be sent to you around that date.

In the coming weeks, the Commission intends to work closely with the Criminal Law Committee and the Administrative Office of the United States Courts to provide whatever assistance it can to facilitate the courts' processing of motions pursuant to 18 U.S.C. § 3582(c)(2) for reduction in sentence based on the retroactive application of the drug amendment, including providing lists of potentially eligible offenders to the chief judge of the district, upon request.

If you have any questions about this matter, please call Kenneth Cohen, the Commission's staff director, at (202) 502-4500.



# Amendment to the Sentencing Guidelines (Preliminary)

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**July 18, 2014**

This document contains an unofficial "reader-friendly" version of the amendment to policy statement §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), as promulgated by the Commission and made available at the Commission's public meeting on July 18, 2014. As with all amendments on which a vote to promulgate has been made but not yet officially submitted to the Federal Register, authority to make technical and conforming changes may be exercised and motions to reconsider may be made. Once submitted to the Federal Register, official text of the amendment can be found on the Commission's website at [www.ussc.gov](http://www.ussc.gov) and will appear in a forthcoming edition of the Federal Register.

## PROPOSED AMENDMENT: RETROACTIVE APPLICATION OF AMENDMENT 782

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

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

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

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

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

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

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

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

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

**Proposed Amendment:**

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

(a) Authority.—

- (1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (d) below, the court may reduce the defendant’s term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant’s term of imprisonment shall be consistent with this policy statement.
- (2) Exclusions.—A reduction in the defendant’s term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—
  - (A) none of the amendments listed in subsection (d) is applicable to the defendant; or
  - (B) an amendment listed in subsection (d) does not have the effect of lowering the defendant’s applicable guideline range.
- (3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

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

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

- (A) Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.
  - (B) Exception for Substantial Assistance.—If the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate.
  - (C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.
- (c) Cases Involving Mandatory Minimum Sentences and Substantial Assistance.—If the case involves a statutorily required minimum sentence and the court had the authority to impose a sentence below the statutorily required minimum sentence pursuant to a government motion to reflect the defendant's substantial assistance to authorities, then for purposes of this policy statement the amended guideline range shall be determined without regard to the operation of §5G1.1 (Sentencing on a Single Count of Conviction) and §5G1.2 (Sentencing on Multiple Counts of Conviction).
- (d) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, 715, and 750 (parts A and C only), and 782 (subject to subsection (e)(1)).
- (e) Special Instruction.—
- (1) The court shall not order a reduced term of imprisonment based on Amendment 782 unless the effective date of the court's order is November 1, 2015, or later.

Commentary

Application Notes:

1. Application of Subsection (a).—

- (A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (d) that lowers the applicable guideline range (*i.e.*,

*the guideline range that corresponds to the offense level and criminal history category determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance). Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (d) is applicable to the defendant; or (ii) an amendment listed in subsection (d) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).*

(B) Factors for Consideration.—

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

2. Application of Subsection (b)(1).—*In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (d) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*

3. Application of Subsection (b)(2).—*Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, as provided in subsection (b)(2)(A), if the term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court may reduce the defendant's term of imprisonment to a term that is no less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the term of imprisonment imposed was 70 months; and (C) the amended guideline range determined under subsection (b)(1) is 51 to 63 months, the court may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.*

*If the term of imprisonment imposed was outside the guideline range applicable to the defendant at the time of sentencing, the limitation in subsection (b)(2)(A) also applies. Thus, if the term of imprisonment imposed in the example provided above was not a sentence of 70 months (within the guidelines range) but instead was a sentence of 56 months (constituting a downward departure or variance), the court likewise may reduce the defendant's term of imprisonment, but shall not reduce it to a term less than 51 months.*

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

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

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

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

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

amended guideline range to 120 to 135 months, to reflect the mandatory minimum term of imprisonment. For purposes of this policy statement, however, the amended guideline range remains 108 to 135 months.

To the extent the court considers it appropriate to provide a reduction comparably less than the amended guideline range pursuant to subsection (b)(2)(B), Defendant A's original sentence of 101 months amounted to a reduction of approximately 25 percent below the minimum of the original guideline range of 135 months. Therefore, an amended sentence of 81 months (representing a reduction of approximately 25 percent below the minimum of the amended guideline range of 108 months) would amount to a comparable reduction and may be appropriate.

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

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

5. Application to Amendment 750 (Parts A and C Only).—As specified in subsection (d), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to the Drug Equivalency Tables in the Commentary to §2D1.1 (see §2D1.1, comment. (n.8)). Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.
6. Application to Amendment 782.—As specified in subsection (d) and (e)(1), Amendment 782 (generally revising the Drug Quantity Table and chemical quantity tables across drug and chemical types) is covered by this policy statement only in cases in which the order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.

A reduction based on retroactive application of Amendment 782 that does not comply with the requirement that the order take effect on November 1, 2015, or later is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2).

*Subsection (e)(1) does not preclude the court from conducting sentence reduction proceedings and entering orders under 18 U.S.C. § 3582(c)(2) and this policy statement before November 1, 2015, provided that any order reducing the defendant's term of imprisonment has an effective date of November 1, 2015, or later.*

67. Supervised Release.—

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

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

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

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." The Supreme Court has concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and this policy statement remains binding on courts in such proceedings. See *Dillon v. United States*, 130 S. Ct. 2683 (2010).

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

*The listing of an amendment in subsection (d) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.*

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

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

**Chief Judge Patti B. Saris**  
**Chair, United States Sentencing Commission**  
**Remarks for Public Meeting**  
**July 18, 2014**

Thank you all for coming to this public meeting of the United States Sentencing Commission. Once again, your attendance here is a testament to the extraordinary interest in federal sentencing issues right now and specifically in the issue that the Commission is considering today – whether the amendment the Commission approved unanimously in April to reduce the guideline levels applicable to the drug quantity table by two levels should be made retroactive for those eligible offenders currently in prison.

Specifically, we will vote today on whether to grant retroactive application of the drug guideline amendment to all offenders subject to a special instruction that reduced sentences shall not take effect until November 1, 2015, or later. Before any offender would be released, a federal judge would have to decide that the offender would not pose a public safety risk and whether release is appropriate. As we always do for retroactivity questions, we considered the purposes of the amendment, the magnitude of the change, and the difficulty of applying the change retroactively.

The massive response to our request for public comment also speaks to the interest in this issue. We received well over 60,000 letters during our public comment period. I want to thank the members of Congress who submitted letters: Senators Leahy, Durbin, Whitehouse, and Paul, and Congressmen Conyers, Scott, Cardenas, Cohen, Johnson, O'Rourke, and Richmond. I also want to thank the Criminal Law Committee of the Judicial Conference, the Department of Justice, the Federal Public and Community Defenders, our advisory groups, and the many advocacy groups, law enforcement organizations, and of course individuals who submitted views. Your input was once again of paramount importance in this process.

After much discussion and consideration, the Commission voted unanimously in April to reduce the guidelines applicable to the drug quantity table by two levels, across all drug types. That amendment to the guidelines is now before Congress. Unless Congress acts to disapprove the amendment, it will become effective on November 1.

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

Several changes in the guidelines and the law support lowering the drug quantity table by two levels. When the drug quantity tables were set at their current level, above the mandatory minimum penalties, drug quantity was the primary driver of drug sentences. There was only one

other specific offense characteristic in the drug guideline. Now, there are fourteen enhancements for factors like violence, firearms, and aggravating role. Quantity, while still an important proxy for seriousness, no longer needs to be quite as central to the calculation.

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

Indeed, when the Commission reduced guideline levels for crack offenses by two levels in 2007, the overall rates at which crack cocaine defendants pled guilty and cooperated with the government remained relatively stable. This recent experience indicates that this year’s amendment, which is similar in nature to the 2007 crack cocaine amendment, should not affect the willingness of defendants to plead guilty and cooperate with authorities.

Many of the same factors which led us to vote in April to reduce drug guidelines support making those reductions retroactive. The same changes in the guidelines and laws I mentioned earlier that made the lower guideline levels more appropriate prospectively also make lower guideline levels appropriate for those offenders already in prison, most of whom were convicted after many of these statutory and guideline changes were already in place.

In addition, retroactive application of the amendment would have a significant impact on reducing prison costs and overcapacity, which was an important purpose of the amendment, and the impact would come much more quickly than from a prospective change alone.

With respect to the magnitude of the change, if the Commission votes today to make the amendment retroactive for all offenders subject to a special instruction that reduced sentences shall not take effect until November 1, 2015, that would make an estimated 46,290 offenders eligible for reduced sentences. These offenders would be eligible to have their sentences reduced by an average of 25 months or 18.8 percent. They would still serve 108 months, on average. This potential reduction would result over time in a savings of 79,740 prison bed years. The magnitude of the change, both collectively and for individual offenders, is significant. Retroactive application of this change in the guidelines would make a real short-term and long-term difference as we seek to help get the federal prison budget and population under control.

We have heard from many in Congress, as well as federal judges, advocacy organizations, faith organizations, academics, and many thousands of citizens urging us to make the amendment reducing drug guideline levels fully retroactive. They have argued that retroactivity leads to a fair and just result, that it will promote rather than hinder public safety, and that judges are well positioned to determine in which cases sentences should and should not be reduced.

We have also listened very carefully to the law enforcement community and paid close attention to the concerns raised by many in law enforcement and by some judges about the public safety implications of applying this amendment retroactively. Some, like the Major Cities Chiefs Association and the Department of Justice, have been supportive of retroactivity but urged that it be done in a way that safeguards public safety. Others, like the Fraternal Order of Police, the National Association of Assistant United States Attorneys, and the National Narcotics Officers' Associations' Coalition, have opposed retroactivity based on public safety concerns. We take very seriously our duty to promote public safety and appreciate the hard work law enforcement officers do every day to protect all of our safety.

The proposal we vote on today seeks to address these concerns about public safety. It is important to note that the Commission was informed by studies we conducted comparing the recidivism rates for offenders who were released early as a result of retroactive application of the Commission's 2007 amendment reducing guideline levels for crack cocaine offenders with a control group of offenders who served their full terms of imprisonment. The Commission detected no statistically significant difference in the rates of recidivism for the two groups of offenders after two years, and again after five years. This study suggests that retroactive application of modest reductions in drug penalties such as those in the amendment we vote on today will not increase the risk of recidivism.

Nonetheless, we recognize the reasonable concerns we have heard that releasing a large number of offenders within a short period of time can create risks. I believe the proposal we vote on today takes steps that will effectively address those risks, as well as reduce the difficulty of applying the change retroactively. Specifically, under the amendment we vote on today, judges will be able to begin considering motions to reduce sentences based on retroactive application of the drug amendment this November. However, any order reducing terms of imprisonment cannot be effective until November 1, 2015, meaning that no offenders will actually be released early until November 2015.

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

Second, the delayed implementation will ensure that the Bureau of Prisons has enough time to give every offender the usual transitional services and opportunities that help increase the chances of successful reentry into society. In the regular course, many offenders transition from prison to halfway houses or home confinement before their ultimate release. Officials from the Bureau of Prisons have emphasized that these transitions help ensure that offenders have the services, support, and skills they need to live productive lives. We heard testimony in June that, without a period of delay when a guideline reduction was applied retroactively in the past, some offenders were released without a reentry plan and services. The special instruction on timing in the proposed amendment we will vote on today will mean that, this time, no offenders will be released without having had the opportunity for this regular transition.

Third, the delay will allow the Office of Probation and Pretrial Services adequate time to prepare so that released offenders can be effectively supervised. This delay will allow probation officers to be transferred or hired and trained and allow them to prepare for supervising additional offenders. With time to prepare, the Office of Probation and Pretrial Services will be able to ensure more effective supervision, which will increase the chance of successful offender reentry and help ensure public safety. We have heard from judges and probation officers that additional time for this step is essential to protecting public safety, and today's proposed amendment directly addresses that concern.

I understand that the special instruction on the effective date of reduced sentences under retroactive application of the drug amendment will reduce somewhat the number of offenders who will benefit. But I believe this limitation is necessary to ease the difficulty in applying the amendment retroactively by enabling appropriate consideration of individual petitions, ensuring sufficient staffing and preparation to effectively supervise offenders upon release, and allowing for effective reentry plans. All of these steps will ultimately help to protect public safety and, we believe, make this delay necessary.

I am convinced that today's proposed amendment is a well-reasoned approach to appropriately reduce prison costs and overcapacity, while safeguarding public safety. That is why I will vote for retroactive application today.

Members of the Commission come from across the country and across the political spectrum. I am proud that we have not only worked hard, listened to each other, and given this important issue the very serious consideration it deserves, but that we have also so often been able to reach consensus. By working together, we have reached results that are balanced and supported by empirical evidence. We voted unanimously in April to reduce guideline levels for drug offenses.

We have worked hard to achieve similar consensus today. This amendment received unanimous support because it is a measured approach to reducing prison costs and populations and responding to statutory and guidelines changes, while reducing the difficulty of application and safeguarding public safety.

We also hope that Congress can work together to pass legislation to address the many problems the Commission has found with the current statutory mandatory minimum penalties. The step the Commission is taking today is an important one, but only Congress can bring about the more

comprehensive reforms needed to reduce disparities, fully address prison costs and populations, and make the federal criminal justice system work better.

I want to again thank all of you for coming and all of the members of Congress, judges, organizations, and members of the public who submitted comments and contributed so much to this process. Thank you also to my fellow Commissioners who considered this important issues so carefully and worked to ensure a thoughtful and appropriate result.

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