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January 28, 2011

**MEMORANDUM**

**TO:** Chair Saris  
Commissioners  
Judith Sheon

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

**SUBJECT:** Analysis of the Impact of Amendment to the Statutory Penalties for Crack Cocaine Offenses Made by the Fair Sentencing Act of 2010 and Corresponding Proposed Permanent Guideline Amendment if the Guideline Amendment Were Applied Retroactively

This memorandum estimates the impact on crack cocaine offenders currently incarcerated in the federal prison system of the Fair Sentencing Act of 2010 (the “FSA”)<sup>1</sup> if the United States Sentencing Commission (the “Commission”) were to permanently amend the federal sentencing guidelines to incorporate the statutory changes made by that act and make the guideline amendment retroactively applicable to offenders currently incarcerated in the federal prison system.

Section I 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 penalty structure and the possible permanent guideline amendments that might result from such statutory changes. Sections III and IV contain data analysis of the likely impact of these possible permanent guideline amendments if they were made retroactively applicable.

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<sup>1</sup> Pub. L. No. 111–220. The FSA became effective on August 3, 2010.

I. PENALY 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>2</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 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>3</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)
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>4</sup> also established a mandatory minimum penalty for simple possession of crack cocaine. Prior to August 3, 2010, the statutory

<sup>2</sup> Pub. L. No. 99–570, 100 Stat. 3207 (1986) [hereinafter 1986 Act].

<sup>3</sup> Repeat offenders are subject to increased penalties. *See* 21 U.S.C. §§ 841(b), 851.

<sup>4</sup> Pub. L. No. 100–690, 102 Stat. 4181 (1988).

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>5</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 USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) 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>6</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 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>7</sup>

<sup>5</sup> Repeat offenders are subject to increased penalties. 21 U.S.C. § 844(a).

<sup>6</sup> See United States Sentencing Commission, *Guidelines Manual*, §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) (Nov. 2009) [hereinafter USSG]. Defendants with no prior convictions or a minimal prior criminal record are assigned to Criminal History Category I. See USSG, Chapter 4.

<sup>7</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).

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>8</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>9</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>10</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>11</sup> (In this memorandum, these amendments are referred to collectively as the “2007 Crack Cocaine Guideline Amendment.”)

In 2007, the Commission voted to give retroactive effect to the 2007 Crack Cocaine Guideline Amendment pursuant to the statutory authority discussed below. The retroactive application of the 2007 Crack Cocaine Guideline 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.

### 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:

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<sup>8</sup> See USSG §2D2.1(b)(1) (Nov. 2009).

<sup>9</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>10</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>11</sup> See USSG, App. C, Amendment 715 (effective May 1, 2008).

[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>12</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>13</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:

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.

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<sup>12</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 January 11, 2011, public meeting.

<sup>13</sup> 18 U.S.C. § 3582(c)(2).

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>14</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>15</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>16</sup>

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>17</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>18</sup>

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<sup>14</sup> USSG §1B1.10(a)(2).

<sup>15</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>16</sup> USSG §1B1.10(b)(1).

<sup>17</sup> USSG §1B1.10(b)(2).

<sup>18</sup> USSG §1B1.10(b)(2)(B).

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>19</sup>

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

### A. Statutory Changes In The FSA

This section of the memorandum 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>20</sup> A first-time trafficking offense involving 280 or more grams of crack cocaine is subject to a statutory penalty range of 10 years to life imprisonment.<sup>21</sup> These changes are reflected in the table below:

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<sup>19</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>20</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).

<sup>21</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 to as an “18-to-1 drug quantity ratio.”

<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 Amendment to the *Guidelines Manual*

In October, 2010, the Commission promulgated a temporary amendment to the Drug Quantity Table in USSG §2D1.1 for offenses involving crack cocaine in light of the statutory changes made by the FSA.<sup>22</sup> The amendment, which became effective November 1, 2010, changed the base offense level for various quantities of crack cocaine assigned by the Drug Quantity Table.<sup>23</sup> Pursuant to the amendment, offenses involving 28 grams of crack cocaine 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. Through the amendment, the Commission also deleted the cross-reference in the drug possession guideline to the drug trafficking guideline for offenders who possess more than five grams of crack cocaine. (In this memorandum, these amendments are referred to collectively as the “2010 Temporary Crack Cocaine Guideline Amendment.”)

C. Assumptions Made For This Analysis

This analysis assumes that no additional statutory 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 offense will not be made retroactive so as to apply to offenders incarcerated on

<sup>22</sup> See USSG, 2010 Supp. to App. C, Amendment 748 (effective Nov. 1, 2010). The amendment was promulgated pursuant to the emergency amendment authority given to the Commission in the FSA. See, FSA at § 8.

<sup>23</sup> The base offense level to 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.



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. This analysis also assumes that the Commission would promulgate an amendment to the Drug Quantity Table in USSG §2D1.1 to permanently incorporate into the guidelines the statutory changes made by the FSA and to permanently eliminate the cross reference to USSG §2D1.1 in the simple possession guideline.<sup>24</sup>

The FSA also contains directives to the Commission that may apply to offenses discussed in this memorandum. The data analysis presented in Sections III and IV of this memorandum does not attempt to analyze the impact, if any, on the sentencing of crack cocaine offenses that might result from guideline amendments promulgated in response to these directives.

Two possible alternative approaches are analyzed in this memorandum. Under the first approach, the Commission would amend the drug quantity thresholds in the Drug Quantity Table so as to provide base offense levels corresponding to guideline ranges that are *above* the statutory mandatory minimum penalties. Specifically, the Commission would promulgate an amendment (“New Crack Amendment BOL 26”) so as to assign offenses involving 28 grams or more of crack cocaine a base offense level of 26, corresponding to a guideline range of 63 to 78 months for a defendant in Criminal History Category I. Offenses involving 280 grams or more of crack cocaine would be assigned a base offense level of 32, corresponding to a guideline range of 121 to 151 months for a defendant in Criminal History I. This first approach is consistent with how the guidelines incorporated the statutory mandatory minimum penalties for crack cocaine offenses prior to the 2007 Crack Cocaine Guideline Amendment.

Under the second approach, the Commission would amend the drug quantity thresholds in the Drug Quantity Table so as to provide base offense levels corresponding to guideline ranges that *include* the statutory mandatory minimum penalties. Specifically, the Commission would promulgate an amendment (“New Crack Amendment BOL 24”) so as to assign offenses involving 28 grams or more of crack cocaine a base offense level of 24, corresponding to a guideline range of 51 to 63 months for a defendant in Criminal History Category I. Offenses involving 280 grams or more of crack cocaine would be assigned a base offense level of 30, corresponding to a guideline range of 97 to 121 months for a defendant in Criminal History I. This second approach is consistent with how the guidelines incorporated the statutory mandatory minimum

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<sup>24</sup> The amendments to the guidelines made by the 2010 Temporary Crack Cocaine Guideline will expire on October 31, 2011, unless the Commission re-promulgates them, with or without change, as part of a permanent amendment. See Section 21(a) of the Sentencing Act of 1987 (28 U.S.C. § 994 note). The Commission has requested public comment on whether the Commission should make changes to the emergency amendment in re-promulgating it as a permanent amendment, including whether the Drug Quantity Table for crack cocaine should continue to be set so that the statutory mandatory minimum penalties correspond to base offense levels 26 and 32. See Notice of Prop. Amend’s to Sentencing Guidelines, 76 Fed. Reg. 3193 (Jan. 19, 2011).

penalties for crack cocaine offenses as a result of the 2007 Crack Cocaine Guideline Amendment.

An analysis of the data under each approach is presented below.

### III. IMPACT OF THE RETROACTIVE APPLICATION OF NEW CRACK AMENDMENT BOL 26 – BASE OFFENSE LEVEL FOR 28 GRAMS SET AT 26

#### A. Introduction to the Data Analysis

This section of the memorandum provides an analysis of the estimated impact of New Crack Amendment BOL 26, should it be made retroactive, on offenders incarcerated as of October 1, 2010, in the federal prison system.<sup>25</sup> This analysis was prepared by the Commission's Office of Research and Data (ORD). ORD estimates that 12,835 offenders sentenced between October 1, 1991, and September 30, 2009 (fiscal years 1992 through 2009),<sup>26</sup> would be eligible to receive a reduced sentence if New Crack Amendment BOL 26 were made retroactive.<sup>27</sup> If these offenders were to receive reduced sentences pursuant to New Crack Amendment BOL 26, 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 12,835 offenders would be eligible to receive a reduced sentence pursuant to New Crack Amendment BOL 26. These offenders were sentenced between October 1, 1991, and September 30, 2009 (fiscal years 1992 through 2009), and

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<sup>25</sup> This analysis does not include any estimate of the number of offenders who were sentenced during fiscal year 2010 (*i.e.*, after October 1, 2009), or the impact of New Crack Amendment BOL 26 on such offenders.

<sup>26</sup> The analysis is limited to data from fiscal year 1992 through September 30, 2009 (fiscal years 1992 through 2009) 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>27</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 12,835 offenders whose guideline range is estimated to be affected by New Crack Amendment BOL 26 (*see* Part III.B.), 5,106 submitted a request for modification of their sentence pursuant to the 2007 Crack Amendment as of March 23, 2010. The courts granted a reduction to 3,448 (67.5%) of these offenders. The average sentence reduction received by these offenders was 17.2 percent (from 180 months to 149 months). These offenders are also eligible to receive an additional reduction pursuant to New Crack Amendment BOL 26.

remained incarcerated as of October 1, 2010.<sup>28</sup> This estimate was derived through the process described below.

1. Examination of the Commission's Files for Fiscal Years 1992 Through 2009 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, 2009 (fiscal years 1992 through 2009), to determine the number of cases in those datasets in which an offender appears to be eligible to receive a reduced sentence if New Crack Amendment BOL 26 were made retroactive. For purposes of this analysis, a case was considered to be eligible for retroactive application of New Crack Amendment BOL 26 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>29</sup> and
- (c) the base offense level was not level 43.<sup>30</sup>

As described on Figure A, 1,056,855 cases sentenced under the guidelines have been reported to the Commission from fiscal years 1992 through 2009. Of these, 36.2

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<sup>28</sup> The Federal Bureau of Prisons (BOP) has informed the Commission that the BOP has records relating to 29,250 crack offenders sentenced under USSG §2D1.1 between fiscal years 1992 and 2009 who the BOP estimated (as of June, 2010) would still be incarcerated on October 1, 2010. An additional 359 offenders not included in BOP records, but who were sentenced between October 1, 2008, and September 30, 2009, according to Commission records, and who the ORD projected (as of June, 2010) would still be incarcerated on October 1, 2010, also have been included in this analysis for a total of 29,609 cases.

<sup>29</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>30</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 New Crack Amendment BOL 26.

percent (n = 382,358) involved at least one guideline calculation pursuant to USSG §2D1.1. Of these 382,358 cases, 22.7 percent (n = 86,859) involved crack cocaine. Of the offenders sentenced in these crack cocaine cases, 29,455 met the inclusion criteria and were projected to be incarcerated on October 1, 2010.

2. Total Number of Offenders Eligible for Retroactive Application of New Crack Amendment BOL 26

ORD identified 29,455 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 New Crack Amendment BOL 26 were made retroactive. ORD then recalculated the sentence for each offender using its Prison Impact Model (described below).

Using this model, of the 29,455 offenders who met the criteria for inclusion in the analysis, the retroactive application of New Crack Amendment BOL 26 would have no effect on the guideline range that was determined at the time of sentencing for 16,620 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) 5,742 offenders were originally sentenced pursuant to the Career Offender<sup>31</sup> or Armed Career Criminal<sup>32</sup> provisions and their guideline range would continue to be controlled by these provisions and would not change;

(B) 4,923 offenders were sentenced at the statutory minimum and that minimum did not change as a result of the amendment;<sup>33</sup>

(C) 1,534 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>34</sup>

(D) 2,077 offenders were convicted of an offense for which the applicable Base Offense Level did not change either because more than one drug was

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<sup>31</sup> See USSG §4B1.1.

<sup>32</sup> See USSG §4B1.4.

<sup>33</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>34</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.

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;

(E) 2,198 offenders had a guideline range that did not change;

(F) 76 offenders had an original Base Offense Level of 12, which would not be affected by the amendment;

(G) 33 offenders would receive a sentence reduction of less than one month;<sup>35</sup>

(H) 25 offenders originally received the mitigating role cap<sup>36</sup> and the estimated reduction pursuant to the amendment would not reduce the Base Offense Level below the originally applicable Base Offense Level;

(I) eight offenders 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 were sentenced to the minimum sentence required by that provision<sup>37</sup> of 24 months; and

(J) four offenders were projected to die before the end of their sentence, even if those sentences were reduced pursuant to New Crack Amendment BOL 26.<sup>38</sup>

After accounting for those offenders for whom the sentencing range would not change after application of New Crack Amendment BOL 26, the total number of crack cocaine offenders incarcerated on October 1, 2010, who are estimated to be eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) is 12,835.<sup>39</sup> Figure A summarizes the manner by which this number was derived.

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<sup>35</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>36</sup> See USSG §2D1.1(a)(3).

<sup>37</sup> 18 U.S.C. § 3553(f).

<sup>38</sup> The Commission's Prison Impact Model incorporates actuarial tables based on race and gender to predict life expectancy.

<sup>39</sup> This estimate includes 2,304 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 New Crack Amendment BOL 26 were 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 – 2009**

All cases sentenced under the guidelines between fiscal years 1992 and 2009  
N = **1,056,855**

Number of USSG §2D1.1 Guideline offenders in USSC dataset  
N = **382,358**

Number of USSG §2D1.1 Guideline crack cocaine offenders in USSC dataset  
N = **86,859**

Number of USSG §2D1.1 Guideline crack cocaine offenders still in prison  
on October 1, 2010  
N = **29,609**

Number of USSG §2D1.1 Guideline crack cocaine offenders still in prison  
on October 1, 2010, with a Base Offense Level below level 43  
N = **29,455**

Final number of offenders remaining after excluding those with no change  
in the guideline range when analyzed  
N = **12,835**

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 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 = 6,896) were sentenced between fiscal years 2006 and 2009.

**Table 1**  
**Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

<b>ELIGIBLE CRACK COCAINE OFFENDERS</b>		
<b>FISCAL YEAR</b>	<b>N</b>	<b>%</b>
<b>TOTAL</b>	<b>12,835</b>	<b>100.0</b>
<b>Fiscal Year</b>		
<b>2009</b>	2,085	16.2
<b>2008</b>	1,864	14.5
<b>2007</b>	1,592	12.4
<b>2006</b>	1,355	10.6
<b>2005</b>	1,092	8.5
<b>2004</b>	806	6.3
<b>2003</b>	729	5.7
<b>2002</b>	504	3.9
<b>2001</b>	405	3.2
<b>2000</b>	318	2.5
<b>1999</b>	350	2.7
<b>1998</b>	356	2.8
<b>1997</b>	340	2.6
<b>1996</b>	258	2.0
<b>1995</b>	245	1.9
<b>1994</b>	251	2.0
<b>1993</b>	172	1.3
<b>1992</b>	113	0.9
Total percentages may not add to exactly 100% due to rounding.		
SOURCE: U.S. Sentencing Commission, 1992 - 2009 Datafiles, USSCFY92 - USSCFY09.		

#### 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 987 offenders (in the Eastern District of Virginia, accounting for 7.7% of all eligible offenders) to two offenders (in the District of North Dakota). Nineteen of the 94 federal judicial districts account for half of all offenders eligible for retroactive application of New Crack Amendment BOL 26. Only one district accounts for four percent or more of the total number of eligible offenders (Eastern District of Virginia, 7.7%).

Table 2 presents information on the number of eligible offenders sentenced in each judicial district and, therefore, where the issue of retroactive application of New Crack Amendment BOL 26 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 2**  
**Geographic Distribution of Eligible Crack Cocaine Amendment Offenders**  
**By District**  
**(FY1992 through FY2009)**

District	N	%	District	N	%
<b>TOTAL</b>	<b>12,835</b>	<b>100.0</b>			
Eastern Virginia	987	7.7	Southern Mississippi	109	0.8
Middle Florida	452	3.5	New Jersey	108	0.8
South Carolina	451	3.5	Western New York	107	0.8
Eastern North Carolina	396	3.1	Western Pennsylvania	106	0.8
Western Texas	340	2.6	Southern Iowa	101	0.8
Northern Illinois	336	2.6	Northern New York	96	0.7
Western North Carolina	328	2.6	Northern Alabama	96	0.7
Western Virginia	317	2.5	Massachusetts	93	0.7
Middle North Carolina	312	2.4	Middle Alabama	88	0.7
Middle Pennsylvania	305	2.4	Western Kentucky	87	0.7
Southern Florida	285	2.2	Northern Georgia	87	0.7
Eastern Texas	280	2.2	Southern Indiana	83	0.6
Northern West Virginia	254	2.0	Eastern Arkansas	75	0.6
Northern Florida	252	2.0	Northern Iowa	70	0.5
Northern Texas	236	1.8	Eastern California	69	0.5
Southern New York	231	1.8	Middle Louisiana	66	0.5
Southern Alabama	224	1.7	Northern Mississippi	64	0.5
Eastern Missouri	222	1.7	Colorado	64	0.5
Maryland	216	1.7	Eastern Kentucky	58	0.5
Southern Georgia	207	1.6	Western Washington	53	0.4
Eastern Tennessee	206	1.6	Alaska	46	0.4
Central Illinois	189	1.5	Northern California	46	0.4
Western Michigan	183	1.4	Middle Tennessee	45	0.4
Southern West Virginia	179	1.4	New Mexico	44	0.3
Southern Illinois	175	1.4	Rhode Island	43	0.3
Nebraska	172	1.3	Northern Oklahoma	39	0.3
Western Louisiana	168	1.3	New Hampshire	38	0.3
Southern Texas	165	1.3	Nevada	36	0.3
Northern Indiana	159	1.2	Maine	34	0.3
Northern Ohio	157	1.2	Western Arkansas	23	0.2
Middle Georgia	157	1.2	Delaware	22	0.2
District of Columbia	156	1.2	Arizona	19	0.1
Eastern Michigan	155	1.2	Eastern Washington	19	0.1
Eastern Louisiana	149	1.2	Vermont	18	0.1
Southern Ohio	143	1.1	Oregon	16	0.1
Eastern Pennsylvania	141	1.1	Eastern Oklahoma	15	0.1
Central California	138	1.1	South Dakota	12	0.1
Connecticut	132	1.0	Southern California	11	0.1
Minnesota	123	1.0	Utah	10	0.1
Kansas	123	1.0	Virgin Islands	5	0.0
Western Wisconsin	120	0.9	Hawaii	5	0.0
Western Tennessee	116	0.9	Wyoming	5	0.0
Western Missouri	115	0.9	Montana	3	0.0
Puerto Rico	114	0.9	North Dakota	2	0.0
Eastern Wisconsin	112	0.9	Guam	0	0.0
Western Oklahoma	112	0.9	Idaho	0	0.0
Eastern New York	109	0.8	Northern Mariana Islands	0	0.0

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

SOURCE: U.S. Sentencing Commission, 1992 - 2009 Datafiles, USSCFY92 - USSCFY09.

Table 3 presents the number of eligible offenders displayed by the circuit in which the district court that imposed the sentence is located. More than 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 FY2009)**

<b>CIRCUIT</b>	<b>N</b>	<b>%</b>
Fourth Circuit	3,440	26.8
Eleventh Circuit	1,848	14.4
Fifth Circuit	1,577	12.3
Seventh Circuit	1,174	9.1
Sixth Circuit	1,150	9.0
Eighth Circuit	915	7.1
Second Circuit	693	5.4
Third Circuit	687	5.4
Ninth Circuit	461	3.6
Tenth Circuit	412	3.2
First Circuit	322	2.5
DC Circuit	156	1.2
<b>TOTAL</b>	<b>12,835</b>	<b>100.0</b>

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

SOURCE: U.S. Sentencing Commission, 1992 - 2009 Datafiles, USSCFY92 - USSCFY09.

E. Offender and Offense Characteristics

Table 4 presents information on the demographic characteristics of the offenders eligible for retroactive application of New Crack Amendment BOL 26. The vast majority are U.S. citizens (94.8%), male (95.5%), and African-American (85.0%). The average age of these offenders on October 1, 2010, will be 36 years.

**Table 4**  
**Demographic Characteristics of Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

<b>DEMOGRAPHICS</b>			
<b>Race/Ethnicity</b>			
	White	731	5.7%
	Black	10,884	85.0%
	Hispanic	1,087	8.5%
	Other	109	0.9%
	<b>Total</b>	<b>12,811</b>	<b>100.0%</b>
<b>Citizenship</b>			
	U.S. Citizen	12,152	94.8%
	Non-Citizen	672	5.2%
	<b>Total</b>	<b>12,824</b>	<b>100.0%</b>
<b>Gender</b>			
	Male	12,252	95.5%
	Female	582	4.5%
	<b>Total</b>	<b>12,834</b>	<b>100.0%</b>
<b>Average Age</b>			
		<b>36</b>	<b>31</b>
		<b>(as of October 1, 2010)</b>	<b>(at sentencing)</b>
<sup>1</sup> The analysis involves a total of 12,835 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 - 2009 Datafiles, USSCFY92 - USSCFY09.			

In order to better understand the offense conduct of the offenders who would be eligible for retroactive application of New Crack Amendment BOL 26, 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 12,835 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 October 1, 2010, 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 FY2009)**

<b>CHARACTERISTICS</b>			
<b>Average Base Offense Level</b>			<b>31</b>
<b>Weapon Specific Offense Characteristic</b>		3,752	29.2%
<b>Firearms Mandatory Minimum Applied</b>		1,810	14.2%
<b>Safety Valve §5C1.2</b>		824	6.4%
<b>Aggravating Role §3B1.1</b>		2,062	16.1%
<b>Mitigating Role §3B1.2</b>		280	2.2%
<b>Obstruction Adjustment §3C1.1</b>		1,088	8.5%
<b>Career Offender Status §4B1.1</b>		1,006	7.8%
<b><u>Criminal History Category</u></b>			
<b>I</b>		2,182	17.1%
<b>II</b>		1,328	10.4%
<b>III</b>		2,489	19.5%
<b>IV</b>		2,109	16.5%
<b>V</b>		1,520	11.9%
<b>VI</b>		3,134	24.6%
	<b>Total</b>	<b>12,762</b>	<b>100%</b>
<b><u>Sentence Relative to the Guideline Range</u></b>			
<b>Within Range</b>		9,082	71.5%
<b>Above Range</b>		149	1.2%
<b>Substantial Assistance §5K1.1</b>		1,871	14.7%
<b>Otherwise Below Range</b>		1,599	12.6%
	<b>Total</b>	<b>12,701</b>	<b>100%</b>
<sup>1</sup> The analysis involves a total of 12,835 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 - 2009 Datafiles, USSCFY92 - USSCFY09.			

**Table 5A**  
**Guideline Sentencing Characteristics of Retroactive Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

	<b>Fiscal Year</b>	<b>1992</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	
Average Base Offense Level	N	37	38	38	36	35	35	35	35	34	34	34	33	32	32	31	31	29	28	
Weapon Special Offense Characteristic	N	47	59	86	93	106	114	123	141	106	136	176	260	246	322	325	461	463	488	
	%	41.6	34.3	34.3	38.0	41.1	33.5	34.6	40.3	33.3	33.6	34.9	35.7	30.5	29.5	24.0	29.0	24.8	23.4	
Firearms Mandatory Minimum	N	n/a	41	64	62	46	41	23	44	40	56	77	110	154	213	243	205	202	189	
	%	n/a	23.8	25.5	25.3	17.8	12.3	6.5	12.6	12.6	13.8	15.3	15.1	19.1	19.5	18.0	12.9	10.9	9.1	
Safety Valve	N	n/a	n/a	n/a	n/a	2	0	2	3	5	12	5	21	16	31	61	128	222	316	
	%	n/a	n/a	n/a	n/a	0.8	0.0	0.6	0.9	1.6	3.0	1.0	2.9	2.0	2.8	4.5	8.0	11.9	15.2	
Aggravating Role	N	55	85	122	115	103	141	117	106	102	109	114	131	106	128	134	158	114	122	
	%	48.7	49.4	48.6	46.9	39.9	41.5	32.9	30.3	32.1	26.9	22.6	18.0	13.2	11.7	9.9	9.9	6.1	5.9	
Mitigating Role	N	1	2	2	4	3	6	6	6	7	4	7	6	10	24	29	31	45	87	
	%	0.9	1.2	0.8	1.6	1.2	1.8	1.7	1.7	2.2	1.0	1.4	0.8	1.2	2.2	2.1	1.9	2.4	4.2	
Obstruction of Justice	N	24	38	59	53	49	66	63	50	54	62	64	73	62	71	75	79	74	72	
	%	21.2	22.1	23.5	21.6	19.0	19.4	17.7	14.3	17.0	15.3	12.7	10.0	7.7	6.5	5.5	5.0	4.0	3.5	
Career Offender	N	9	26	36	32	42	57	63	39	37	44	48	71	59	89	91	99	78	86	
	%	8.0	15.1	14.3	13.1	16.3	16.8	17.7	11.2	11.6	10.9	9.6	9.7	7.3	8.2	6.7	6.2	4.2	4.1	

The analysis involves a total of 12,835 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 - 2009 Datafiles, USSCFY92 - USSCFY09.

**Table 5B**  
**Criminal History Category of Retroactive Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

	Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Criminal History Category	N	22	49	63	58	40	63	59	51	45	56	52	106	107	127	169	231	371	513
I	%	20.2	29.5	26.1	24.3	16.4	19.1	17.6	14.7	14.2	13.8	10.3	14.5	13.3	11.6	12.5	14.5	19.9	24.6
Criminal History Category	N	19	21	27	29	32	33	37	34	28	31	45	61	91	130	123	155	200	232
II	%	17.4	12.7	11.2	12.1	13.1	10.0	11.0	9.8	8.8	7.7	8.9	8.4	11.3	11.9	9.1	9.7	10.7	11.1
Criminal History Category	N	28	30	50	40	50	69	75	67	65	88	103	149	149	201	278	317	377	353
III	%	25.7	18.1	20.7	16.7	20.5	20.9	22.3	19.3	20.4	21.7	20.4	20.4	18.5	18.4	20.5	19.9	20.2	16.9
Criminal History Category	N	14	19	24	34	36	37	56	53	47	70	76	129	159	190	255	276	302	332
IV	%	12.8	11.4	10.0	14.2	14.8	11.2	16.7	15.2	14.8	17.3	15.1	17.7	19.8	17.4	18.8	17.3	16.2	15.9
Criminal History Category	N	9	10	19	22	20	26	20	25	27	40	69	78	103	147	196	214	255	240
V	%	8.3	6.0	7.9	9.2	8.2	7.9	6.0	7.2	8.5	9.9	13.7	10.7	12.8	13.5	14.5	13.4	13.7	11.5
Criminal History Category	N	17	37	58	56	66	102	89	118	106	120	159	206	196	297	334	399	359	415
VI	%	15.6	22.3	24.1	23.4	27.0	30.9	26.5	33.9	33.3	29.6	31.5	28.3	24.3	27.2	24.6	25.1	19.3	19.9

The analysis involves a total of 12,835 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 - 2009 Datafiles, USSCFY92 - USSCFY09.

**Table 5C**

**Position of Sentence Relative to the Guideline Range of Retroactive Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

		Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Within Range	N	110	162	234	224	240	303	302	299	265	318	369	527	609	731	919	1,057	1,244	1,169	
	%	97.3	94.2	94.4	92.6	94.9	90.2	87.5	86.9	85.5	81.5	78.2	73.6	76.6	67.8	67.9	66.5	66.9	56.1	
Above Range	N	0	3	1	0	3	2	5	1	1	0	1	5	3	14	19	14	33	44	
	%	0.0	1.7	0.4	0.0	1.2	0.6	1.4	0.3	0.3	0.0	0.2	0.7	0.4	1.3	1.4	0.9	1.8	2.1	
Substantial Assistance USSG §5K1.1	N	2	3	7	11	7	16	24	33	32	45	83	137	145	187	209	276	289	365	
	%	1.8	1.7	2.8	4.5	2.8	4.8	7.0	9.6	10.3	11.5	17.6	19.1	18.2	17.3	15.4	17.4	15.5	17.5	
Otherwise Below Range	N	1	4	6	7	3	15	14	11	12	27	19	47	38	146	206	242	294	507	
	%	0.9	2.3	2.4	2.9	1.2	4.5	4.1	3.2	3.9	6.9	4.0	6.6	4.8	13.5	15.2	15.2	15.8	24.3	

The analysis involves a total of 12,835 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 - 2009 Datafiles, USSCFY92 - USSCFY09.



## 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 New Crack Amendment BOL 26 be made retroactive, provided the documentation received for that offender's case was sufficient to perform this analysis.<sup>40</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 New Crack Amendment BOL 26 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>41</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 New Crack Amendment BOL 26. 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>42</sup> The analysis

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<sup>40</sup> Of the 12,835 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 9,904 offenders.

<sup>41</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 March 28, 2010, the modified sentence was used as the original (*i.e.*, current) sentence.

<sup>42</sup> See *supra* note 19 and accompanying text.

estimates the 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>43</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>44</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>45</sup>

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<sup>43</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 2009, 95.1 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>44</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 New Crack Amendment BOL 26, 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>45</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 32.6 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 modified sentence pursuant to New Crack Amendment BOL 26 that is the same proportional distance below the amended guideline range as was the original sentence.

(3) offenders for whom the new estimated sentence is below the currently applicable mandatory minimum (five grams triggering a five-year mandatory minimum and 500 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>46</sup>

(4) offenders classified as Career Offenders<sup>47</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>48</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>49</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>50</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>51</sup> would be reduced from three levels to two levels in accordance with that guideline provision;

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<sup>46</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 New Crack Amendment BOL 26 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>47</sup> See USSG §4B1.1.

<sup>48</sup> See USSG §4B1.4.

<sup>49</sup> See §2D1.1(a)(3). There were 35 offenders in the analysis who continued to meet the criteria for application of the mitigating role cap.

<sup>50</sup> See USSG §5C1.2.

<sup>51</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>52</sup>

ORD further assumed that the effective date of New Crack Amendment BOL 26 if it were applied retroactively to these offenders would be October 1, 2010, 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.

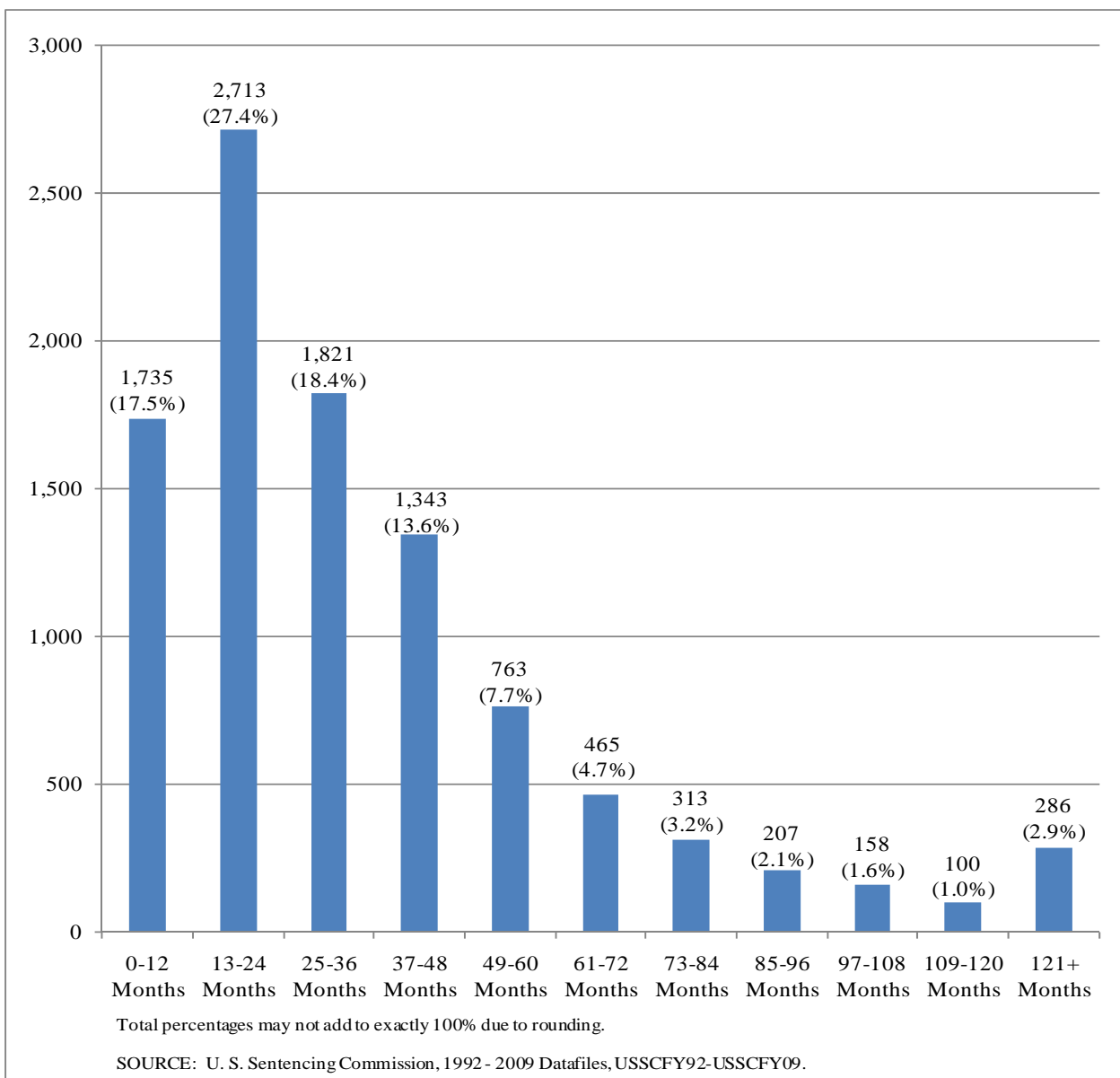
## 2. Estimated Sentence Reduction

Based on these assumptions, the average sentence reduction for all impacted offenders with sufficient information to perform this analysis would be 22.7 percent (or 37 months, from 163 months to 126 months). Table 6 shows that 7,612 offenders (76.9%) would receive a sentence reduction of 48 months or less. Conversely, 286 offenders (2.9%) would receive a sentence reduction of more than 10 years.

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<sup>52</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>53</sup>  
**(FY1992 through FY2009)**



### 3. Projected Release Dates

Offenders eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) if New Crack Amendment BOL 26 were made retroactive would be eligible for release at various times over a 30-year period. Commission records contained sufficient

<sup>53</sup> Of the 12,835 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 9,904 offenders.

information to perform this analysis for 9,904 offenders. Approximately 31 percent of these offenders (n = 3,104) would be eligible for release within the first year after October 1, 2010, if New Crack Amendment BOL 26 were made retroactive as of that date. Conversely, about 29 percent of these offenders (n = 2,834) 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 New Crack Amendment BOL 26 were not made retroactive. The most significant impact of New Crack Amendment BOL 26 is seen in the first year after it becomes retroactive. In that year, 3,104 offenders would be eligible for release if New Crack Amendment BOL 26 were made retroactive and courts were to follow the assumptions outlined above regarding resentencing. If New Crack Amendment BOL 26 were not made retroactive, 948 of those offenders will be released, a difference of 2,156 offenders. After year two, fewer offenders would be released if New Crack Amendment BOL 26 were made retroactive than would be the case if New Crack Amendment BOL 26 were not made retroactive.

<b>Table 7</b>					
<b>Projected Year of Release for Retroactive Eligible Crack Cocaine Offenders</b>					
<b>(FY1992 through FY2009)</b>					
			<b>IF NEW CRACK AMENDMENT RETROACTIVE</b>	<b>IF NEW CRACK AMENDMENT NOT RETROACTIVE</b>	
	<b>Release Date</b>		<b>N</b>	<b>N</b>	
	<b>within 1 yr</b>		3,104	948	
	<b>within 2 yr</b>		1,249	1,137	
	<b>within 3 yr</b>		1,118	1,226	
	<b>within 4 yr</b>		904	1,145	
	<b>within 5 yr</b>		695	925	
	<b>within 6 yr +</b>		2,834	4,523	
Of the 12,835 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 9,904 offenders.					
SOURCE: U.S. Sentencing Commission, 1992 - 2009 Datafiles, USSCFY92 - USSCFY09.					

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 FY2009)**

CIRCUIT District	Eligible for Immediate Release 10/1/2010		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	%	
<b>TOTAL</b>	<b>1,726</b>	<b>17.4</b>	<b>1,378</b>	<b>13.9</b>	<b>1,249</b>	<b>12.6</b>	<b>1,118</b>	<b>11.3</b>	<b>904</b>	<b>9.1</b>	<b>695</b>	<b>7.0</b>	<b>2,834</b>	<b>28.6</b>	<b>9,904</b>
D.C. CIRCUIT	29	25.0	15	12.9	14	12.1	19	16.4	8	6.9	6	5.2	25	21.6	116
District of Columbia	29	25.0	15	12.9	14	12.1	19	16.4	8	6.9	6	5.2	25	21.6	116
FIRST CIRCUIT	52	20.2	47	18.2	40	15.5	26	10.1	22	8.5	18	7.0	53	20.5	258
Maine	3	10.3	3	10.3	3	10.3	2	6.9	5	17.2	2	6.9	11	37.9	29
Massachusetts	13	17.8	18	24.7	13	17.8	11	15.1	1	1.4	5	6.8	12	16.4	73
New Hampshire	12	34.3	10	28.6	6	17.1	3	8.6	1	2.9	0	0.0	3	8.6	35
Puerto Rico	15	18.5	11	13.6	13	16.0	9	11.1	11	13.6	5	6.2	17	21.0	81
Rhode Island	9	22.5	5	12.5	5	12.5	1	2.5	4	10.0	6	15.0	10	25.0	40
SECOND CIRCUIT	86	16.2	84	15.8	74	14.0	57	10.8	45	8.5	46	8.7	138	26.0	530
Connecticut	23	23.5	16	16.3	10	10.2	8	8.2	7	7.1	6	6.1	28	28.6	98
New York															
Eastern	7	10.0	11	15.7	8	11.4	9	12.9	5	7.1	10	14.3	20	28.6	70
Northern	9	11.3	10	12.5	8	10.0	15	18.8	8	10.0	9	11.3	21	26.3	80
Southern	24	14.0	24	14.0	35	20.5	14	8.2	16	9.4	12	7.0	46	26.9	171
Western	22	23.4	20	21.3	12	12.8	8	8.5	7	7.4	7	7.4	18	19.1	94
Vermont	1	5.9	3	17.6	1	5.9	3	17.6	2	11.8	2	11.8	5	29.4	17
THIRD CIRCUIT	73	14.3	100	19.6	67	13.1	66	12.9	47	9.2	33	6.5	124	24.3	510
Delaware	3	23.1	0	0.0	1	7.7	4	30.8	4	30.8	1	7.7	0	0.0	13
New Jersey	11	13.9	15	19.0	10	12.7	13	16.5	12	15.2	1	1.3	17	21.5	79
Pennsylvania															
Eastern	11	12.5	17	19.3	8	9.1	10	11.4	4	4.5	13	14.8	25	28.4	88
Middle	40	16.3	55	22.4	35	14.2	26	10.6	21	8.5	11	4.5	58	23.6	246
Western	7	8.6	12	14.8	13	16.0	13	16.0	6	7.4	7	8.6	23	28.4	81
Virgin Islands	1	33.3	1	33.3	0	0.0	0	0.0	0	0.0	0	0.0	1	33.3	3
FOURTH CIRCUIT	423	15.9	329	12.3	263	9.9	272	10.2	255	9.6	212	7.9	913	34.2	2,667
Maryland	15	13.8	9	8.3	18	16.5	14	12.8	11	10.1	6	5.5	36	33.0	109
North Carolina															
Eastern	47	15.7	30	10.0	34	11.3	25	8.3	34	11.3	25	8.3	105	35.0	300
Middle	43	16.4	30	11.5	19	7.3	22	8.4	31	11.8	25	9.5	92	35.1	262
Western	41	17.0	16	6.6	24	10.0	21	8.7	24	10.0	22	9.1	93	38.6	241
South Carolina	50	14.6	36	10.5	33	9.6	37	10.8	30	8.8	20	5.8	136	39.8	342
Virginia															
Eastern	86	11.4	86	11.4	53	7.0	83	11.0	74	9.8	78	10.3	295	39.1	755
Western	51	18.4	39	14.1	36	13.0	26	9.4	25	9.0	8	2.9	92	33.2	277
West Virginia															
Northern	53	22.2	57	23.8	32	13.4	27	11.3	15	6.3	18	7.5	37	15.5	239
Southern	37	26.1	26	18.3	14	9.9	17	12.0	11	7.7	10	7.0	27	19.0	142



**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2009)**

CIRCUIT District	Eligible for Immediate Release 10/1/2010		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>FIFTH CIRCUIT</b>	247	19.4	164	12.9	173	13.6	162	12.7	124	9.7	81	6.4	322	25.3	1,273
Louisiana															
Eastern	21	17.5	12	10.0	18	15.0	18	15.0	16	13.3	6	5.0	29	24.2	120
Middle	8	16.7	5	10.4	11	22.9	4	8.3	4	8.3	4	8.3	12	25.0	48
Western	18	12.7	11	7.7	25	17.6	18	12.7	9	6.3	11	7.7	50	35.2	142
Mississippi															
Northern	15	31.9	7	14.9	4	8.5	6	12.8	3	6.4	2	4.3	10	21.3	47
Southern	16	18.4	13	14.9	18	20.7	11	12.6	9	10.3	1	1.1	19	21.8	87
Texas															
Eastern	28	12.4	38	16.8	37	16.4	37	16.4	36	15.9	12	5.3	38	16.8	226
Northern	36	20.6	18	10.3	17	9.7	14	8.0	15	8.6	13	7.4	62	35.4	175
Southern	26	20.0	20	15.4	12	9.2	13	10.0	12	9.2	10	7.7	37	28.5	130
Western	79	26.5	40	13.4	31	10.4	41	13.8	20	6.7	22	7.4	65	21.8	298
<b>SIXTH CIRCUIT</b>	146	16.9	120	13.9	122	14.1	116	13.4	88	10.2	48	5.6	224	25.9	864
Kentucky															
Eastern	7	17.9	9	23.1	2	5.1	7	17.9	3	7.7	1	2.6	10	25.6	39
Western	7	9.7	8	11.1	19	26.4	16	22.2	3	4.2	1	1.4	18	25.0	72
Michigan															
Eastern	21	18.1	22	19.0	14	12.1	14	12.1	12	10.3	8	6.9	25	21.6	116
Western	25	17.9	17	12.1	15	10.7	22	15.7	14	10.0	8	5.7	39	27.9	140
Ohio															
Northern	26	25.7	13	12.9	10	9.9	8	7.9	14	13.9	4	4.0	26	25.7	101
Southern	14	12.2	14	12.2	25	21.7	11	9.6	12	10.4	8	7.0	31	27.0	115
Tennessee															
Eastern	25	15.8	21	13.3	17	10.8	17	10.8	19	12.0	10	6.3	49	31.0	158
Middle	2	6.7	4	13.3	6	20.0	3	10.0	2	6.7	2	6.7	11	36.7	30
Western	19	20.4	12	12.9	14	15.1	18	19.4	9	9.7	6	6.5	15	16.1	93
<b>SEVENTH CIRCUIT</b>	115	12.6	121	13.2	119	13.0	91	9.9	85	9.3	64	7.0	320	35.0	915
Illinois															
Central	19	13.6	8	5.7	14	10.0	11	7.9	15	10.7	12	8.6	61	43.6	140
Northern	22	9.6	31	13.5	34	14.8	22	9.6	20	8.7	17	7.4	83	36.2	229
Southern	25	16.2	23	14.9	18	11.7	15	9.7	9	5.8	10	6.5	54	35.1	154
Indiana															
Northern	23	15.9	23	15.9	21	14.5	17	11.7	19	13.1	8	5.5	34	23.4	145
Southern	7	12.5	5	8.9	4	7.1	7	12.5	3	5.4	6	10.7	24	42.9	56
Wisconsin															
Eastern	10	11.8	15	17.6	13	15.3	6	7.1	8	9.4	6	7.1	27	31.8	85
Western	9	8.5	16	15.1	15	14.2	13	12.3	11	10.4	5	4.7	37	34.9	106

**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2009)**

CIRCUIT District	Eligible for Immediate Release 10/1/2010		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
EIGHTH CIRCUIT	144	19.5	119	16.1	102	13.8	81	11.0	58	7.8	50	6.8	185	25.0	739
Arkansas															
Eastern	17	29.3	5	8.6	11	19.0	8	13.8	1	1.7	5	8.6	11	19.0	58
Western	7	36.8	3	15.8	2	10.5	3	15.8	0	0.0	4	21.1	0	0.0	19
Iowa															
Northern	8	14.8	10	18.5	4	7.4	5	9.3	4	7.4	7	13.0	16	29.6	54
Southern	9	12.2	3	4.1	9	12.2	2	2.7	7	9.5	9	12.2	35	47.3	74
Minnesota	18	20.2	17	19.1	16	18.0	5	5.6	5	5.6	5	5.6	23	25.8	89
Missouri															
Eastern	49	25.1	47	24.1	28	14.4	26	13.3	16	8.2	2	1.0	27	13.8	195
Western	18	19.6	15	16.3	9	9.8	11	12.0	11	12.0	10	10.9	18	19.6	92
Nebraska	18	12.2	17	11.6	21	14.3	21	14.3	13	8.8	5	3.4	52	35.4	147
North Dakota	0	0.0	1	50.0	1	50.0	0	0.0	0	0.0	0	0.0	0	0.0	2
South Dakota	0	0.0	1	11.1	1	11.1	0	0.0	1	11.1	3	33.3	3	33.3	9
NINTH CIRCUIT	49	14.1	58	16.7	46	13.3	56	16.1	34	9.8	29	8.4	75	21.6	347
Alaska	2	5.1	5	12.8	7	17.9	10	25.6	3	7.7	3	7.7	9	23.1	39
Arizona	1	8.3	2	16.7	2	16.7	2	16.7	3	25.0	0	0.0	2	16.7	12
California															
Central	17	17.9	18	18.9	10	10.5	11	11.6	8	8.4	9	9.5	22	23.2	95
Eastern	8	16.3	9	18.4	6	12.2	8	16.3	2	4.1	8	16.3	8	16.3	49
Northern	4	12.1	4	12.1	4	12.1	6	18.2	7	21.2	1	3.0	7	21.2	33
Southern	3	30.0	1	10.0	1	10.0	1	10.0	0	0.0	0	0.0	4	40.0	10
Guam	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Hawaii	0	0.0	0	0.0	2	66.7	0	0.0	0	0.0	0	0.0	1	33.3	3
Idaho	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Montana	0	0.0	0	0.0	0	0.0	1	33.3	0	0.0	0	0.0	2	66.7	3
Nevada	6	20.7	6	20.7	3	10.3	6	20.7	1	3.4	1	3.4	6	20.7	29
Northern Mariana Islands	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Oregon	2	15.4	1	7.7	3	23.1	2	15.4	2	15.4	1	7.7	2	15.4	13
Washington															
Eastern	3	17.6	2	11.8	0	0.0	4	23.5	3	17.6	2	11.8	3	17.6	17
Western	3	6.8	10	22.7	8	18.2	5	11.4	5	11.4	4	9.1	9	20.5	44

**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2009)**

CIRCUIT District	Eligible for Immediate Release 10/1/2010		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	60	18.9	40	12.6	46	14.5	32	10.1	40	12.6	20	6.3	80	25.2	318
Colorado	9	19.6	6	13.0	6	13.0	1	2.2	2	4.3	6	13.0	16	34.8	46
Kansas	19	18.8	17	16.8	13	12.9	10	9.9	13	12.9	7	6.9	22	21.8	101
New Mexico	8	21.1	4	10.5	9	23.7	3	7.9	7	18.4	3	7.9	4	10.5	38
Oklahoma															
Eastern	1	7.1	4	28.6	2	14.3	4	28.6	1	7.1	0	0.0	2	14.3	14
Northern	4	12.5	2	6.3	4	12.5	6	18.8	7	21.9	1	3.1	8	25.0	32
Western	16	21.3	5	6.7	10	13.3	7	9.3	9	12.0	2	2.7	26	34.7	75
Utah	3	37.5	1	12.5	2	25.0	1	12.5	1	12.5	0	0.0	0	0.0	8
Wyoming	0	0.0	1	25.0	0	0.0	0	0.0	0	0.0	1	25.0	2	50.0	4
ELEVENTH CIRCUIT	302	22.1	181	13.2	183	13.4	140	10.2	98	7.2	88	6.4	375	27.4	1,367
Alabama															
Middle	17	25.0	9	13.2	11	16.2	7	10.3	5	7.4	4	5.9	15	22.1	68
Northern	20	27.0	8	10.8	10	13.5	9	12.2	6	8.1	4	5.4	17	23.0	74
Southern	37	21.1	19	10.9	18	10.3	22	12.6	12	6.9	13	7.4	54	30.9	175
Florida															
Middle	76	23.5	52	16.0	43	13.3	29	9.0	19	5.9	28	8.6	77	23.8	324
Northern	26	15.7	10	6.0	11	6.6	9	5.4	9	5.4	6	3.6	95	57.2	166
Southern	39	19.5	36	18.0	32	16.0	17	8.5	16	8.0	12	6.0	48	24.0	200
Georgia															
Middle	26	20.3	21	16.4	26	20.3	19	14.8	8	6.3	10	7.8	18	14.1	128
Northern	16	28.1	5	8.8	6	10.5	7	12.3	4	7.0	1	1.8	18	31.6	57
Southern	45	25.7	21	12.0	26	14.9	21	12.0	19	10.9	10	5.7	33	18.9	175

Of the 12,835 offenders identified as eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 9,904 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 - 2009. Datafiles, USSCFY92 - USSCFY09.

#### IV. IMPACT OF THE RETROACTIVE APPLICATION OF NEW CRACK AMENDMENT BOL 24 – BASE OFFENSE LEVEL FOR 28 GRAMS SET AT 24

##### A. Introduction to the Data Analysis

This section of the memorandum provides an analysis of the estimated impact of New Crack Amendment BOL 24, should it be made retroactive, on offenders incarcerated on September 30, 2009, in the federal prison system.<sup>54</sup> This analysis was prepared by the Commission's Office of Research and Data (ORD). ORD estimates that 15,227 offenders sentenced between October 1, 1991, and September 30, 2009 (fiscal years 1992 through 2009),<sup>55</sup> would be eligible to receive a reduced sentence if New Crack Amendment BOL 24 were made retroactive.<sup>56</sup> If these offenders were to receive reduced sentences pursuant to New Crack Amendment BOL 24, 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 15,227 offenders would be eligible to receive a reduced sentence pursuant to New Crack Amendment BOL 24. These offenders were sentenced between October 1, 1991, and September 30, 2009 (fiscal years 1992 through 2009), and remained incarcerated as of October 1, 2010.<sup>57</sup> This estimate was derived through the process described below.

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<sup>54</sup> This analysis does not include any estimate of the number of offenders who were sentenced during fiscal year 2010 (*i.e.*, after October 1, 2009), or the impact of New Crack Amendment BOL 24 on such offenders.

<sup>55</sup> The analysis is limited to data from fiscal year 1992 through September 30, 2009 (fiscal years 1992 through 2009) 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>56</sup> As a result 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). *See supra* footnote 25. The average sentence reduction received by those offenders who are also eligible to receive a reduction pursuant to New Crack Amendment BOL 24 was 18.1 percent (from 188 months to 154 months). These offenders are also eligible to receive an additional reduction pursuant to New Crack Amendment BOL 24.

<sup>57</sup> The Federal Bureau of Prisons (BOP) has informed the Commission that the BOP has records relating to 29,250 crack offenders sentenced under USSG §2D1.1 between fiscal years 1992 and 2009 who the BOP estimated (as of June, 2010) would still be incarcerated on October 1, 2010. An additional 359 offenders not included in BOP records, but who were sentenced between October 1, 2008, and September 30, 2009, according to Commission records, and who ORD projected (as of June, 2010) would still be incarcerated on October 1, 2010, also have been included in this analysis for a total of 29,609 cases.

1. Examination of the Commission’s Files for Fiscal Years 1992 Through 2009 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

The Commission examined its datasets from October 1, 1991, through September 30, 2009 (fiscal years 1992 through 2009) to determine the number of cases in those datasets in which an offender appears to be eligible to receive a reduced sentence if New Crack Amendment BOL 24 were made retroactive. For purposes of this analysis, a case was considered to be eligible for retroactive application of New Crack Amendment BOL 24 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>58</sup> and
- (c) the base offense level was not level 43.<sup>59</sup>

As described on Figure A, 1,056,855 cases sentenced under the guidelines have been reported to the Commission from fiscal years 1992 through 2009. Of these, 36.2 percent (n = 382,358) involved at least one guideline calculation pursuant to USSG §2D1.1. Of these 382,358 cases, 22.7 percent (n = 86,859) involved crack cocaine. Of the offenders sentenced in these crack cocaine cases, 29,455 met the inclusion criteria and were projected to be incarcerated on October 1, 2010.

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<sup>58</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>59</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 New Crack Amendment BOL 24.

2. Total Number of Offenders Eligible for Retroactive Application of New Crack Amendment BOL 24

ORD identified 29,455 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 New Crack Amendment BOL 24 were made retroactive. ORD then recalculated the sentence for each offender using its Prison Impact Model (described below).

Using this model, of the 29,455 offenders who met the criteria for inclusion in the analysis, the retroactive application of New Crack Amendment BOL 24 would have no effect on the guideline range that was determined at the time of sentencing for 14,228 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) 5,917 offenders were originally sentenced pursuant to the Career Offender<sup>60</sup> or Armed Career Criminal<sup>61</sup> provisions and their guideline range would continue to be controlled by these provisions and would not change;

(B) 5,237 offenders were sentenced at the statutory minimum and that minimum did not change as a result of the amendment;<sup>62</sup>

(C) 1,811 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>63</sup>

(D) 991 offenders were convicted of an offense in 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>60</sup> See USSG §4B1.1.

<sup>61</sup> See USSG §4B1.4.

<sup>62</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>63</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.

- (E) 92 offenders had a guideline range that did not change;
- (F) 78 offenders had an original Base Offense Level of 12, which would not be affected by the amendment;
- (G) 30 offenders would receive a sentence reduction of less than one month;<sup>64</sup>
- (H) 22 offenders originally received the mitigating role cap<sup>65</sup> and the estimated reduction pursuant to the amendment would not reduce the Base Offense Level below the originally applicable Base Offense Level;
- (I) 10 offenders with a statutory minimum sentence of 60 months received relief from a statutory minimum sentence pursuant to the statutory safety valve provision<sup>66</sup> for their drug offense and were sentenced to the minimum sentence required by that provision of 24 months; and
- (J) 40 offenders were projected to die before the end of their sentence, even if those sentences were reduced pursuant to New Crack Amendment BOL 24.<sup>67</sup>

After accounting for those offenders for whom the sentencing range would not change after application of New Crack Amendment BOL 24, the total number of crack cocaine offenders incarcerated on October 1, 2010, who are estimated to be eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) is 15,227.<sup>68</sup> Figure A summarizes the manner by which this number was derived.

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<sup>64</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>65</sup> See USSG §2D1.1(a)(3).

<sup>66</sup> 18 U.S.C. § 3553(f).

<sup>67</sup> The Commission's Prison Impact Model incorporates actuarial tables based on race and gender to predict life expectancy.

<sup>68</sup> This estimate includes 2,304 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 New Crack Amendment BOL 24 were 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 – 2009**

All cases sentenced under the guidelines between fiscal years 1992 and 2009  
N = **1,056,855**

Number of USSG §2D1.1 Guideline offenders in USSC dataset  
N = **382,358**

Number of USSG §2D1.1 Guideline crack cocaine offenders in USSC dataset  
N = **86,859**

Number of USSG §2D1.1 Guideline crack cocaine offenders still in prison  
on October 1, 2010  
N = **29,609**

Number of USSG §2D1.1 Guideline crack cocaine offenders still in prison  
on October 1, 2010, with a Base Offense Level below level 43  
N = **29,455**

Final number of offenders remaining after excluding those with no change  
in the guideline range when analyzed  
N = **15,227**



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 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 = 8,159) were sentenced between fiscal years 2006 and 2009.

**Table 1**  
**Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

<b>FISCAL YEAR</b>	<b>ELIGIBLE CRACK COCAINE OFFENDERS</b>	
	<b>N</b>	<b>%</b>
<b>TOTAL</b>	<b>15,227</b>	<b>100.0</b>
<b>Fiscal Year</b>		
<b>2009</b>	2,563	16.8
<b>2008</b>	2,274	14.9
<b>2007</b>	1,786	11.7
<b>2006</b>	1,536	10.1
<b>2005</b>	1,264	8.3
<b>2004</b>	951	6.2
<b>2003</b>	871	5.7
<b>2002</b>	637	4.2
<b>2001</b>	524	3.4
<b>2000</b>	425	2.8
<b>1999</b>	422	2.8
<b>1998</b>	416	2.7
<b>1997</b>	386	2.5
<b>1996</b>	300	2.0
<b>1995</b>	286	1.9
<b>1994</b>	278	1.8
<b>1993</b>	188	1.2
<b>1992</b>	120	0.8
Total percentages may not add to exactly 100% due to rounding.		
SOURCE: U.S. Sentencing Commission, 1992 - 2009 Datafiles, USSCFY92 - USSCFY09.		

#### 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 1,226 offenders (in the Eastern District of Virginia, accounting for 8.1% of all eligible offenders) to three offenders (in the Districts of Montana and North Dakota). Nineteen of the 94 federal judicial districts account for half of all offenders eligible for retroactive application of New Crack Amendment BOL 24. Only one district accounts for four percent or more of the total number of eligible offenders (Eastern District of Virginia, 8.1%).

Table 2 presents information on the number of eligible offenders sentenced in each judicial district and, therefore, where the issue of retroactive application of New Crack Amendment BOL 24 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 2**  
**Geographic Distribution of Eligible Crack Cocaine Amendment Offenders**  
**By District**  
**(FY1992 through FY2009)**

District	N	%	District	N	%
<b>TOTAL</b>	<b>15,227</b>	<b>100.0</b>			
Eastern Virginia	1,226	8.1	Western Oklahoma	126	0.8
South Carolina	592	3.9	Puerto Rico	125	0.8
Eastern North Carolina	573	3.8	Western New York	123	0.8
Middle Florida	526	3.5	New Jersey	120	0.8
Western Virginia	408	2.7	Northern Alabama	115	0.8
Western Texas	399	2.6	Western Pennsylvania	114	0.7
Western North Carolina	395	2.6	Northern New York	109	0.7
Northern Illinois	371	2.4	Massachusetts	104	0.7
Middle Pennsylvania	344	2.3	Western Kentucky	101	0.7
Middle North Carolina	331	2.2	Middle Alabama	100	0.7
Northern Florida	329	2.2	Northern Georgia	100	0.7
Eastern Texas	324	2.1	Southern Indiana	93	0.6
Southern Florida	323	2.1	Northern Iowa	88	0.6
Northern West Virginia	319	2.1	Eastern Arkansas	85	0.6
Northern Texas	297	2.0	Eastern California	82	0.5
Southern Alabama	284	1.9	Northern Mississippi	80	0.5
Eastern Missouri	251	1.6	Middle Louisiana	75	0.5
Maryland	249	1.6	Colorado	73	0.5
Southern New York	248	1.6	Western Washington	62	0.4
Central Illinois	237	1.6	Eastern Kentucky	59	0.4
Southern Georgia	232	1.5	Maine	53	0.3
Eastern Tennessee	219	1.4	Alaska	50	0.3
Western Michigan	214	1.4	Northern California	50	0.3
Southern Illinois	213	1.4	New Mexico	49	0.3
Southern West Virginia	211	1.4	Middle Tennessee	47	0.3
Nebraska	210	1.4	Rhode Island	45	0.3
Southern Texas	198	1.3	Northern Oklahoma	43	0.3
Western Louisiana	197	1.3	New Hampshire	42	0.3
Northern Indiana	187	1.2	Nevada	38	0.2
Eastern Michigan	177	1.2	Vermont	30	0.2
District of Columbia	173	1.1	Delaware	27	0.2
Eastern Louisiana	171	1.1	Western Arkansas	25	0.2
Middle Georgia	167	1.1	South Dakota	20	0.1
Connecticut	161	1.1	Eastern Washington	20	0.1
Northern Ohio	159	1.0	Oregon	19	0.1
Southern Ohio	158	1.0	Arizona	18	0.1
Kansas	158	1.0	Eastern Oklahoma	18	0.1
Central California	157	1.0	Southern California	14	0.1
Minnesota	152	1.0	Utah	11	0.1
Eastern Pennsylvania	151	1.0	Wyoming	8	0.1
Western Wisconsin	147	1.0	Hawaii	7	0.0
Western Tennessee	138	0.9	Virgin Islands	6	0.0
Western Missouri	138	0.9	North Dakota	3	0.0
Eastern Wisconsin	136	0.9	Montana	3	0.0
Southern Iowa	135	0.9	Guam	0	0.0
Southern Mississippi	134	0.9	Idaho	0	0.0
Eastern New York	128	0.8	Northern Mariana Islands	0	0.0

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

SOURCE: U.S. Sentencing Commission, 1992 - 2009 Datafiles, USSCFY92 - USSCFY09.

Table 3 presents the number of eligible offenders displayed by the circuit in which the district court that imposed the sentence is located. More than 28 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 FY2009)**

<b>CIRCUIT</b>	<b>N</b>	<b>%</b>
Fourth Circuit	4,304	28.3
Eleventh Circuit	2,176	14.3
Fifth Circuit	1,875	12.3
Seventh Circuit	1,384	9.1
Sixth Circuit	1,272	8.4
Eighth Circuit	1,107	7.3
Second Circuit	799	5.2
Third Circuit	762	5.0
Ninth Circuit	520	3.4
Tenth Circuit	486	3.2
First Circuit	369	2.4
DC Circuit	173	1.1
<b>TOTAL</b>	<b>15,227</b>	<b>100.0</b>
Total percentages may not add to exactly 100% due to rounding.		
SOURCE: U.S. Sentencing Commission, 1992 - 2009 Datafiles, USSCFY92 - USSCFY09.		

E. Offender and Offense Characteristics

Table 4 presents information on the demographic characteristics of the offenders eligible for retroactive application of New Crack Amendment BOL 24. The vast majority are U.S. citizens (94.8%), male (95.4%), and African-American (85.1%). The average age of these offenders on October 1, 2010, will be 36 years.

**Table 4**  
**Demographic Characteristics of Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

<b>DEMOGRAPHICS</b>			
<b>Race/Ethnicity</b>			
	White	868	5.7%
	Black	12,939	85.1%
	Hispanic	1,266	8.3%
	Other	124	0.8%
	<b>Total</b>	<b>15,197</b>	<b>100.0%</b>
<b>Citizenship</b>			
	U.S. Citizen	14,421	94.8%
	Non-Citizen	792	5.2%
	<b>Total</b>	<b>15,213</b>	<b>100.0%</b>
<b>Gender</b>			
	Male	14,520	95.4%
	Female	706	4.6%
	<b>Total</b>	<b>15,226</b>	<b>100.0%</b>
<b>Average Age</b>			
		<b>36</b>	<b>31</b>
		<b>(as of October 1, 2010)</b>	<b>(at sentencing)</b>
The analysis involves a total of 15,227 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 - 2009 Datafiles, USSCFY92 - USSCFY09.			

In order to better understand the offense conduct of the offenders who would be eligible for retroactive application of New Crack Amendment BOL 24, ORD analyzed offense-related factors that contributed to the sentence originally imposed on each offender. ORD staff 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 15,227 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 as of September 30, 2010, 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 FY2009)**

<b>CHARACTERISTICS</b>			
<b>Average Base Offense Level</b>			<b>32</b>
<b>Weapon Specific Offense Characteristic</b>		4,588	30.1%
<b>Firearms Mandatory Minimum Applied</b>		2,041	13.5%
<b>Safety Valve §5C1.2</b>		1,012	6.6%
<b>Aggravating Role §3B1.1</b>		2,575	16.9%
<b>Mitigating Role §3B1.2</b>		306	2.0%
<b>Obstruction Adjustment §3C1.1</b>		1,290	8.5%
<b>Career Offender Status §4B1.1</b>		1,091	7.2%
<b><u>Criminal History Category</u></b>			
<b>I</b>		2,680	17.7%
<b>II</b>		1,617	10.7%
<b>III</b>		2,989	19.7%
<b>IV</b>		2,515	16.6%
<b>V</b>		1,769	11.7%
<b>VI</b>		3,583	23.6%
	<b>Total</b>	<b>15,153</b>	<b>100%</b>
<b><u>Sentence Relative to the Guideline Range</u></b>			
<b>Within Range</b>		10,714	71.1%
<b>Above Range</b>		160	1.1%
<b>Substantial Assistance §5K1.1</b>		2,347	15.6%
<b>Otherwise Below Range</b>		1,853	12.3%
	<b>Total</b>	<b>15,074</b>	<b>100%</b>
The analysis involves a total of 15,227 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 - 2009 Datafiles, USSCFY92 - USSCFY09.			

**Table 5A**  
**Guideline Sentencing Characteristics of Retroactive Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

	<b>Fiscal Year</b>	<b>1992</b>	<b>1993</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Average Base Offense Level	N	37	37	38	36	36	36	35	35	35	34	34	33	33	32	31	31	30	29
Weapon Special Offense Characteristic	N	50	66	92	113	127	137	139	176	155	176	225	317	304	373	380	527	584	647
	%	41.7	35.1	33.1	39.5	42.3	35.5	33.4	41.7	36.5	33.6	35.3	36.4	32.0	29.5	24.7	29.5	25.7	25.2
Firearms Mandatory Minimum	N	n/a	46	75	70	53	46	29	48	56	66	84	120	166	240	262	225	238	217
	%	n/a	24.5	27.0	24.5	17.7	12.1	7.0	11.4	13.2	12.6	13.2	13.8	17.5	19.0	17.1	12.6	10.5	8.5
Safety Valve	N	n/a	n/a	n/a	n/a	2	0	2	3	8	13	6	25	20	45	78	153	269	388
	%	n/a	n/a	n/a	n/a	0.7	0.0	0.5	0.7	1.9	2.5	0.9	2.9	2.1	3.6	5.1	8.6	11.8	15.1
Aggravating Role	N	60	93	132	130	125	160	136	134	135	137	152	162	137	160	159	183	187	193
	%	50.0	49.5	47.5	45.5	41.7	41.5	32.7	31.8	31.8	26.1	23.9	18.6	14.4	12.7	10.4	10.2	8.2	7.5
Mitigating Role	N	1	2	2	5	3	8	7	8	11	4	8	6	10	24	31	33	49	94
	%	0.8	1.1	0.7	1.7	1.0	2.1	1.7	1.9	2.6	0.8	1.3	0.7	1.1	1.9	2.0	1.8	2.2	3.7
Obstruction of Justice	N	27	44	67	62	58	76	74	64	71	76	75	91	70	77	81	87	91	99
	%	22.5	23.4	24.1	21.7	19.3	19.7	17.8	15.2	16.7	14.5	11.8	10.4	7.4	6.1	5.3	4.9	4.0	3.9
Career Offender	N	9	26	36	33	42	59	62	44	41	45	52	82	66	97	103	106	89	99
	%	7.5	13.8	12.9	11.5	14.0	15.3	14.9	10.5	9.6	8.6	8.2	9.4	6.9	7.7	6.7	5.9	3.9	3.9

The analysis involves a total of 15,227 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 - 2009 Datafiles, USSCFY92 - USSCFY09.



**Table 5B**  
**Criminal History Category of Retroactive Eligible Crack Cocaine Offenders**  
**(FY1992 through FY2009)**

		Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Criminal History Category	N		24	55	71	69	55	76	72	69	65	80	73	131	135	157	197	268	452	631
I	%		20.9	30.2	26.5	24.6	19.2	20.2	18.2	16.4	15.3	15.3	11.5	15.0	14.2	12.4	12.8	15.0	19.9	24.6
Criminal History Category	N		22	23	28	31	35	41	43	46	42	48	67	82	112	152	136	191	256	262
II	%		19.1	12.6	10.4	11.1	12.2	10.9	10.9	11.0	9.9	9.2	10.5	9.4	11.8	12.0	8.9	10.7	11.3	10.2
Criminal History Category	N		28	32	56	52	58	76	88	87	91	108	134	176	171	240	322	354	464	452
III	%		24.3	17.6	20.9	18.6	20.3	20.2	22.2	20.7	21.4	20.6	21.0	20.2	18.0	19.0	21.0	19.8	20.4	17.6
Criminal History Category	N		14	21	31	37	40	45	70	59	62	92	93	156	190	218	289	306	375	417
IV	%		12.2	11.5	11.6	13.2	14.0	12.0	17.7	14.0	14.6	17.6	14.6	17.9	20.0	17.2	18.8	17.1	16.5	16.3
Criminal History Category	N		10	12	21	28	24	29	24	27	39	54	83	92	116	163	211	239	305	292
V	%		8.7	6.6	7.8	10.0	8.4	7.7	6.1	6.4	9.2	10.3	13.0	10.6	12.2	12.9	13.7	13.4	13.4	11.4
Criminal History Category	N		17	39	61	63	74	109	99	132	126	142	187	234	226	334	381	428	422	509
VI	%		14.8	21.4	22.8	22.5	25.9	29.0	25.0	31.4	29.6	27.1	29.4	26.9	23.8	26.4	24.8	24.0	18.6	19.9

The analysis involves a total of 15,227 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 - 2009 Datafiles, USSCFY92 - USSCFY09.

**Table 5C**

**Position of Sentence Relative to the Guideline Range of Retroactive Eligible Crack Cocaine Offenders  
(FY1992 through FY2009)**

		Fiscal Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Within Range	N	117	178	259	265	280	347	359	364	355	408	466	630	716	842	1,046	1,182	1,472	1,428	
	%	97.5	94.7	94.2	93.6	94.9	90.8	88.6	87.9	85.5	81.0	77.7	73.4	76.2	67.4	68.2	66.3	64.9	55.7	
Above Range	N	0	3	3	0	3	2	5	1	1	1	1	5	3	14	19	14	36	49	
	%	0.0	1.6	1.1	0.0	1.0	0.5	1.2	0.2	0.2	0.2	0.2	0.6	0.3	1.1	1.2	0.8	1.6	1.9	
Substantial Assistance USSG §5K1.1	N	2	3	7	11	9	17	27	36	44	61	105	169	179	230	247	335	393	472	
	%	1.7	1.6	2.5	3.9	3.1	4.5	6.7	8.7	10.6	12.1	17.5	19.7	19.0	18.4	16.1	18.8	17.3	18.4	
Otherwise Below Range	N	1	4	6	7	3	16	14	13	15	34	28	54	42	164	221	251	367	613	
	%	0.8	2.1	2.2	2.5	1.0	4.2	3.5	3.1	3.6	6.7	4.7	6.3	4.5	13.1	14.4	14.1	16.2	23.9	

The analysis involves a total of 15,227 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 - 2009 Datafiles, USSCFY92 - USSCFY09.

## 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 New Crack Amendment BOL 24 be made retroactive, provided the documentation received for that offender's case was sufficient to perform this analysis.<sup>69</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 New Crack Amendment BOL 24 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>70</sup> A new release date for each offender was also 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 New Crack Amendment BOL 24. Of course, 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>71</sup> The analysis

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<sup>69</sup> Of the 15,227 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 12,385 offenders.

<sup>70</sup> As a result of the retroactive application of the Commission's 2007 Crack Cocaine Guideline Amendment (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 March 28, 2010, the modified sentence was used as the original (*i.e.*, current) sentence.

<sup>71</sup> See *supra* note 19 and accompanying text.

estimates the 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>72</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>73</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>74</sup>

(3) offenders for whom the new estimated sentence is below the currently applicable mandatory minimum (five grams triggering a five-year mandatory minimum

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<sup>72</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 2009, 95.1 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>73</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 New Crack Amendment BOL 24, 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>74</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 *Kimrough 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 32.6 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 *Kimrough* might not receive modified sentence pursuant to New Crack Amendment BOL 24 that is the same proportional distance below the amended guideline range as was the original sentence.

and 500 grams triggering a ten-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>75</sup>

(4) offenders classified as Career Offenders<sup>76</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>77</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>78</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>79</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>80</sup> would be reduced from three levels to two levels in accordance with that guideline provision;

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<sup>75</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 may currently 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, ORD's assumption that any modification of sentence pursuant to New Crack Amendment BOL 24 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>76</sup> See USSG §4B1.1.

<sup>77</sup> See USSG §4B1.4.

<sup>78</sup> USSG §2D1.1(a)(3). There were 40 offenders in the analysis who continued to meet the criteria for application of the mitigating role cap.

<sup>79</sup> See USSG §5C1.2.

<sup>80</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>81</sup>

ORD further assumed that the effective date of New Crack Amendment BOL 24 if it were applied retroactively to these offenders would be October 1, 2010, and that pursuant to 18 U.S.C. § 3582(c)(2) courts applying the amendment retroactively would adhere to the limitations of the extent of sentence reduction outlined in USSG §1B1.10.

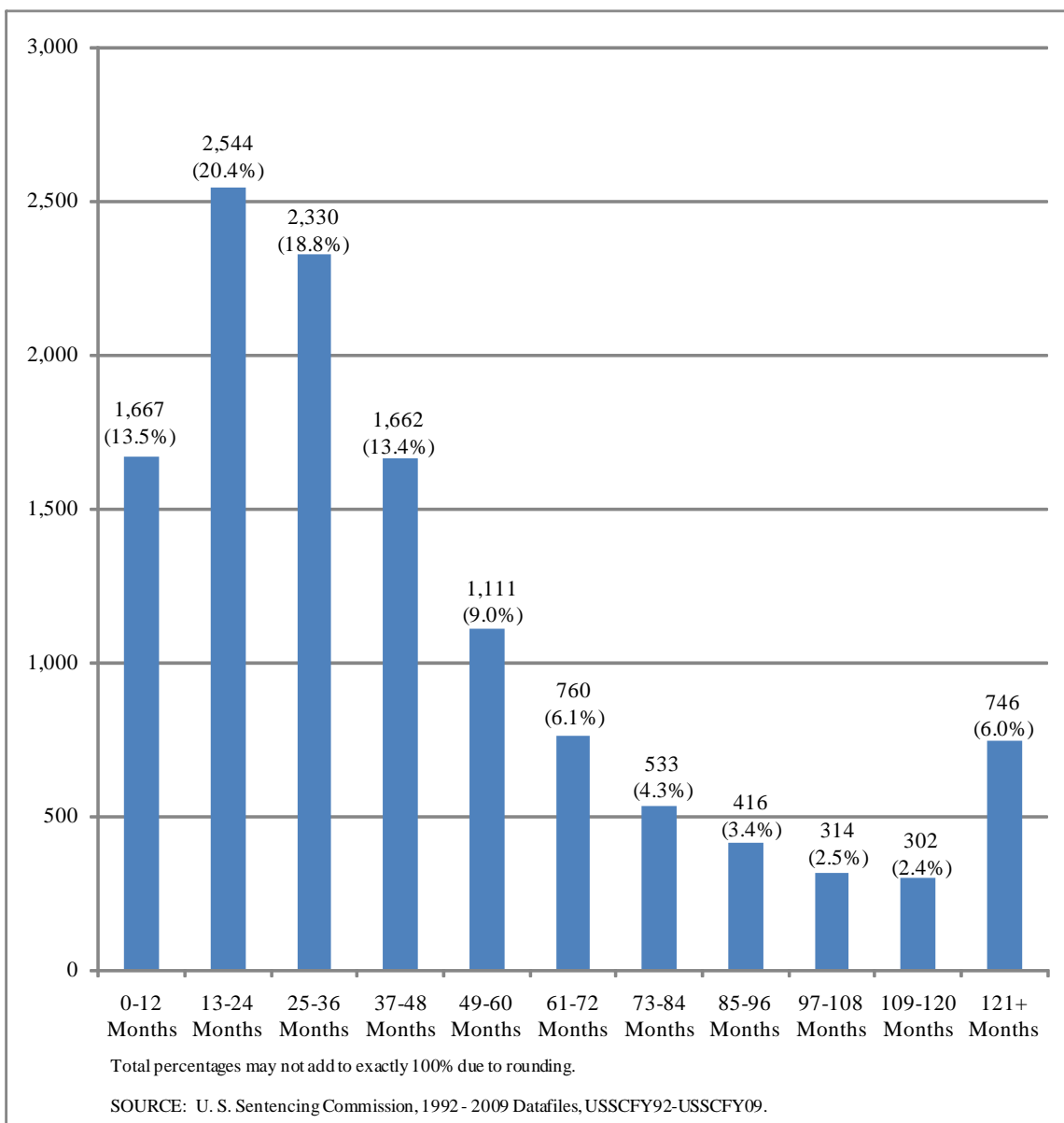
## 2. Estimated Sentence Reduction

Based on these assumptions, the average sentence reduction for all impacted offenders with sufficient information to perform this analysis would be 28.6 percent (or 48 months, from 168 months to 120 months). Table 6 shows that 8,203 offenders (66.2%) would receive a sentence reduction of 48 months or less. Conversely, 746 offenders (6.0 %) would receive a sentence reduction of more than 10 years.

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<sup>81</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>82</sup>  
**(FY1992 through FY2009)**



### 3. Projected Release Dates

Offenders eligible to receive a reduced sentence under 18 U.S.C. § 3582(c)(2) if New Crack Amendment BOL 24 were made retroactive would be eligible for release at various times over a 30-year period. Commission records contained sufficient

<sup>82</sup> Of the 15,227 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 12,385 offenders.

information to perform this analysis for 12,385 offenders. Approximately 37 percent of these offenders (n = 4,562) would be eligible for release within the first year after October 1, 2010, if New Crack Amendment BOL 24 were made retroactive as of that date. Conversely, almost 27 percent of these offenders (n = 3,300) 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 New Crack Amendment BOL 24 were not made retroactive. The most significant impact of New Crack Amendment BOL 24 is seen in the first year after it becomes retroactive. In that year, 4,562 offenders would be eligible for release if New Crack Amendment BOL 24 made retroactive and courts were to follow the assumptions outlined above regarding resentencing. If New Crack Amendment BOL 24 were not made retroactive, 1,106 of those offenders will be released, a difference of 3,456 offenders. After two years, fewer offenders would be released if New Crack Amendment BOL 24 were made retroactive than would be the case if New Crack Amendment BOL 24 were not made retroactive.

<b>Table 7</b>				
<b><u>Projected Year of Release for Retroactive Eligible Crack Cocaine Offenders</u></b>				
<b><u>(FY1992 through FY2009)</u></b>				
		<b>IF NEW CRACK AMENDMENT RETROACTIVE</b>	<b>IF NEW CRACK AMENDMENT NOT RETROACTIVE</b>	
	<b>Release Date</b>	<b>N</b>	<b>N</b>	
	<b>within 1 yr</b>	4,562	1,106	
	<b>within 2 yr</b>	1,436	1,374	
	<b>within 3 yr</b>	1,331	1,482	
	<b>within 4 yr</b>	954	1,374	
	<b>within 5 yr</b>	802	1,129	
	<b>within 6 yr +</b>	3,300	5,920	
Of the 15,227 offenders who appear to be eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 12,385 offenders.				
SOURCE: U.S. Sentencing Commission, 1992 - 2009 Datafiles, USSCFY92 - USSCFY09.				



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 FY2009)**

CIRCUIT District	Eligible for Immediate Release 10/1/2010		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>2,904</b>	<b>23.4</b>	<b>1,658</b>	<b>13.4</b>	<b>1,436</b>	<b>11.6</b>	<b>1,331</b>	<b>10.7</b>	<b>954</b>	<b>7.7</b>	<b>802</b>	<b>6.5</b>	<b>3,300</b>	<b>26.6</b>	<b>12,385</b>
D.C. CIRCUIT	40	29.6	18	13.3	17	12.6	18	13.3	10	7.4	7	5.2	25	18.5	135
District of Columbia	40	29.6	18	13.3	17	12.6	18	13.3	10	7.4	7	5.2	25	18.5	135
FIRST CIRCUIT	79	25.8	48	15.7	41	13.4	30	9.8	28	9.2	15	4.9	65	21.2	306
Maine	5	10.2	5	10.2	8	16.3	5	10.2	7	14.3	3	6.1	16	32.7	49
Massachusetts	20	23.5	21	24.7	10	11.8	11	12.9	4	4.7	4	4.7	15	17.6	85
New Hampshire	17	44.7	7	18.4	7	18.4	2	5.3	1	2.6	0	0.0	4	10.5	38
Puerto Rico	26	28.3	8	8.7	12	13.0	9	9.8	12	13.0	6	6.5	19	20.7	92
Rhode Island	11	26.2	7	16.7	4	9.5	3	7.1	4	9.5	2	4.8	11	26.2	42
SECOND CIRCUIT	137	21.5	99	15.6	86	13.5	66	10.4	51	8.0	53	8.3	144	22.6	636
Connecticut	36	28.3	16	12.6	13	10.2	12	9.4	6	4.7	11	8.7	33	26.0	127
New York															
Eastern	18	20.2	11	12.4	10	11.2	14	15.7	11	12.4	6	6.7	19	21.3	89
Northern	15	16.1	11	11.8	13	14.0	13	14.0	8	8.6	13	14.0	20	21.5	93
Southern	35	18.6	35	18.6	30	16.0	18	9.6	12	6.4	12	6.4	46	24.5	188
Western	31	28.2	21	19.1	15	13.6	7	6.4	10	9.1	7	6.4	19	17.3	110
Vermont	2	6.9	5	17.2	5	17.2	2	6.9	4	13.8	4	13.8	7	24.1	29
THIRD CIRCUIT	131	22.2	96	16.3	80	13.6	72	12.2	44	7.5	42	7.1	125	21.2	590
Delaware	3	16.7	1	5.6	4	22.2	4	22.2	4	22.2	0	0.0	2	11.1	18
New Jersey	19	20.9	18	19.8	10	11.0	16	17.6	10	11.0	3	3.3	15	16.5	91
Pennsylvania															
Eastern	17	16.8	17	16.8	13	12.9	9	8.9	5	5.0	10	9.9	30	29.7	101
Middle	76	26.4	49	17.0	34	11.8	33	11.5	21	7.3	19	6.6	56	19.4	288
Western	15	17.0	9	10.2	19	21.6	10	11.4	4	4.5	9	10.2	22	25.0	88
Virgin Islands	1	25.0	2	50.0	0	0.0	0	0.0	0	0.0	1	25.0	0	0.0	4
FOURTH CIRCUIT	756	21.3	425	12.0	341	9.6	342	9.6	285	8.0	250	7.0	1,154	32.5	3,553
Maryland	25	17.6	23	16.2	21	14.8	13	9.2	11	7.7	4	2.8	45	31.7	142
North Carolina															
Eastern	90	18.6	51	10.5	50	10.3	46	9.5	38	7.9	29	6.0	180	37.2	484
Middle	72	25.6	39	13.9	19	6.8	22	7.8	24	8.5	25	8.9	80	28.5	281
Western	83	27.0	20	6.5	30	9.8	26	8.5	19	6.2	24	7.8	105	34.2	307
South Carolina	89	18.0	53	10.7	53	10.7	47	9.5	31	6.3	41	8.3	180	36.4	494
Virginia															
Eastern	153	15.3	106	10.6	74	7.4	110	11.0	93	9.3	78	7.8	389	38.8	1,003
Western	82	22.5	50	13.7	36	9.9	33	9.0	27	7.4	18	4.9	119	32.6	365
West Virginia															
Northern	105	34.7	54	17.8	36	11.9	28	9.2	28	9.2	18	5.9	34	11.2	303
Southern	57	32.8	29	16.7	22	12.6	17	9.8	14	8.0	13	7.5	22	12.6	174

**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2009)**

CIRCUIT District	Eligible for Immediate Release 10/1/2010		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	400	25.3	208	13.2	198	12.5	206	13.0	122	7.7	101	6.4	346	21.9	1,581
Louisiana															
Eastern	29	20.6	20	14.2	24	17.0	22	15.6	9	6.4	9	6.4	28	19.9	141
Middle	13	23.6	6	10.9	10	18.2	7	12.7	5	9.1	4	7.3	10	18.2	55
Western	30	17.6	24	14.1	27	15.9	18	10.6	10	5.9	9	5.3	52	30.6	170
Mississippi															
Northern	27	42.2	7	10.9	6	9.4	11	17.2	3	4.7	2	3.1	8	12.5	64
Southern	28	24.6	19	16.7	19	16.7	12	10.5	7	6.1	6	5.3	23	20.2	114
Texas															
Eastern	59	21.5	46	16.8	45	16.4	40	14.6	33	12.0	12	4.4	39	14.2	274
Northern	58	24.4	25	10.5	20	8.4	20	8.4	16	6.7	27	11.3	72	30.3	238
Southern	47	28.3	22	13.3	11	6.6	20	12.0	17	10.2	13	7.8	36	21.7	166
Western	109	30.4	39	10.9	36	10.0	56	15.6	22	6.1	19	5.3	78	21.7	359
SIXTH CIRCUIT	245	24.5	139	13.9	122	12.2	125	12.5	73	7.3	53	5.3	242	24.2	999
Kentucky															
Eastern	13	31.7	6	14.6	4	9.8	6	14.6	1	2.4	1	2.4	10	24.4	41
Western	17	19.5	12	13.8	15	17.2	19	21.8	1	1.1	4	4.6	19	21.8	87
Michigan															
Eastern	36	26.1	21	15.2	15	10.9	18	13.0	7	5.1	9	6.5	32	23.2	138
Western	45	26.2	21	12.2	19	11.0	19	11.0	9	5.2	9	5.2	50	29.1	172
Ohio															
Northern	34	31.2	16	14.7	10	9.2	14	12.8	11	10.1	2	1.8	22	20.2	109
Southern	26	19.5	20	15.0	16	12.0	15	11.3	10	7.5	10	7.5	36	27.1	133
Tennessee															
Eastern	40	23.1	18	10.4	19	11.0	16	9.2	24	13.9	11	6.4	45	26.0	173
Middle	6	18.2	6	18.2	3	9.1	5	15.2	3	9.1	1	3.0	9	27.3	33
Western	28	24.8	19	16.8	21	18.6	13	11.5	7	6.2	6	5.3	19	16.8	113
SEVENTH CIRCUIT	215	18.9	149	13.1	134	11.8	101	8.9	98	8.6	69	6.1	372	32.7	1,138
Illinois															
Central	26	13.7	17	8.9	21	11.1	14	7.4	22	11.6	16	8.4	74	38.9	190
Northern	49	18.4	32	12.0	32	12.0	27	10.2	27	10.2	19	7.1	80	30.1	266
Southern	44	22.8	31	16.1	21	10.9	9	4.7	13	6.7	6	3.1	69	35.8	193
Indiana															
Northern	43	24.6	24	13.7	28	16.0	23	13.1	9	5.1	4	2.3	44	25.1	175
Southern	12	16.9	5	7.0	7	9.9	6	8.5	7	9.9	4	5.6	30	42.3	71
Wisconsin															
Eastern	18	16.5	19	17.4	11	10.1	10	9.2	7	6.4	6	5.5	38	34.9	109
Western	23	17.2	21	15.7	14	10.4	12	9.0	13	9.7	14	10.4	37	27.6	134

**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2009)**

CIRCUIT District	Eligible for Immediate Release 10/1/2010		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
EIGHTH CIRCUIT	219	23.2	135	14.3	135	14.3	101	10.7	56	5.9	58	6.2	238	25.3	942
Arkansas															
Eastern	25	36.8	7	10.3	7	10.3	11	16.2	3	4.4	4	5.9	11	16.2	68
Western	9	42.9	4	19.0	4	19.0	0	0.0	2	9.5	2	9.5	0	0.0	21
Iowa															
Northern	16	22.9	8	11.4	6	8.6	8	11.4	5	7.1	5	7.1	22	31.4	70
Southern	15	13.4	5	4.5	11	9.8	11	9.8	6	5.4	9	8.0	55	49.1	112
Minnesota	31	26.1	21	17.6	17	14.3	10	8.4	4	3.4	6	5.0	30	25.2	119
Missouri															
Eastern	74	32.5	44	19.3	43	18.9	24	10.5	9	3.9	6	2.6	28	12.3	228
Western	24	20.9	17	14.8	16	13.9	13	11.3	9	7.8	13	11.3	23	20.0	115
Nebraska	24	12.7	25	13.2	29	15.3	24	12.7	17	9.0	9	4.8	61	32.3	189
North Dakota	0	0.0	2	66.7	1	33.3	0	0.0	0	0.0	0	0.0	0	0.0	3
South Dakota	1	5.9	2	11.8	1	5.9	0	0.0	1	5.9	4	23.5	8	47.1	17
NINTH CIRCUIT	78	19.0	62	15.1	63	15.4	66	16.1	45	11.0	27	6.6	69	16.8	410
Alaska	5	11.4	6	13.6	9	20.5	11	25.0	3	6.8	3	6.8	7	15.9	44
Arizona	1	7.7	3	23.1	1	7.7	2	15.4	4	30.8	1	7.7	1	7.7	13
California															
Central	22	19.6	21	18.8	16	14.3	12	10.7	11	9.8	9	8.0	21	18.8	112
Eastern	14	21.9	8	12.5	8	12.5	10	15.6	7	10.9	5	7.8	12	18.8	64
Northern	6	16.2	5	13.5	5	13.5	10	27.0	2	5.4	2	5.4	7	18.9	37
Southern	4	30.8	1	7.7	2	15.4	2	15.4	1	7.7	0	0.0	3	23.1	13
Guam	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Hawaii	2	33.3	2	33.3	1	16.7	0	0.0	1	16.7	0	0.0	0	0.0	6
Idaho	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Montana	0	0.0	0	0.0	0	0.0	1	33.3	0	0.0	0	0.0	2	66.7	3
Nevada	8	25.8	6	19.4	6	19.4	1	3.2	4	12.9	3	9.7	3	9.7	31
Northern Mariana Islands	0	--	0	--	0	--	0	--	0	--	0	--	0	--	0
Oregon	3	18.8	2	12.5	3	18.8	4	25.0	2	12.5	0	0.0	2	12.5	16
Washington															
Eastern	5	27.8	1	5.6	1	5.6	5	27.8	3	16.7	2	11.1	1	5.6	18
Western	8	15.1	7	13.2	11	20.8	8	15.1	7	13.2	2	3.8	10	18.9	53

**Table 8**  
**Possible Release Timing for Retroactive Eligible Crack Cocaine Offenders by District**  
**(FY1992 through FY2009)**

CIRCUIT District	Eligible for Immediate Release 10/1/2010		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	%	
TENTH CIRCUIT	95	24.1	59	15.0	49	12.4	41	10.4	32	8.1	29	7.4	89	22.6	394
Colorado	16	29.1	11	20.0	2	3.6	3	5.5	3	5.5	10	18.2	10	18.2	55
Kansas	33	23.9	20	14.5	14	10.1	18	13.0	11	8.0	7	5.1	35	25.4	138
New Mexico	10	23.8	5	11.9	10	23.8	4	9.5	6	14.3	3	7.1	4	9.5	42
Oklahoma															
Eastern	4	23.5	3	17.6	3	17.6	3	17.6	1	5.9	0	0.0	3	17.6	17
Northern	7	18.9	4	10.8	7	18.9	3	8.1	4	10.8	2	5.4	10	27.0	37
Western	22	24.7	13	14.6	12	13.5	8	9.0	4	4.5	7	7.9	23	25.8	89
Utah	3	33.3	2	22.2	1	11.1	1	11.1	2	22.2	0	0.0	0	0.0	9
Wyoming	0	0.0	1	14.3	0	0.0	1	14.3	1	14.3	0	0.0	4	57.1	7
ELEVENTH CIRCUIT	509	29.9	220	12.9	170	10.0	163	9.6	110	6.5	98	5.8	431	25.3	1,701
Alabama															
Middle	30	37.5	11	13.8	11	13.8	5	6.3	3	3.8	6	7.5	14	17.5	80
Northern	31	33.3	9	9.7	11	11.8	13	14.0	3	3.2	6	6.5	20	21.5	93
Southern	64	27.1	32	13.6	21	8.9	24	10.2	10	4.2	17	7.2	68	28.8	236
Florida															
Middle	140	34.8	43	10.7	41	10.2	41	10.2	30	7.5	22	5.5	85	21.1	402
Northern	51	20.9	16	6.6	12	4.9	10	4.1	17	7.0	19	7.8	119	48.8	244
Southern	62	26.4	35	14.9	30	12.8	18	7.7	18	7.7	15	6.4	57	24.3	235
Georgia															
Middle	37	26.6	35	25.2	18	12.9	17	12.2	9	6.5	7	5.0	16	11.5	139
Northern	27	38.0	9	12.7	5	7.0	8	11.3	2	2.8	2	2.8	18	25.4	71
Southern	67	33.3	30	14.9	21	10.4	27	13.4	18	9.0	4	2.0	34	16.9	201

Of the 15,227 offenders identified as eligible for relief under the amendment, Commission records contained sufficient information to perform this analysis for 12,385 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 - 2009. Datafiles, USSCFY92 - USSCFY09.