

United States Sentencing Commission Public Meeting Minutes
June 30, 2011

Chair Patti B. Saris called the meeting to order at 1:01 p.m. in the Mecham Conference Center of the Thurgood Marshall Federal Judiciary Building, Washington, DC.

The following Commissioners were present:

- Judge Patti B. Saris, Chair
- William B. Carr, Jr., Vice Chair
- Ketanji B. Jackson, Vice Chair
- Dabney L. Friedrich, Commissioner
- Judge Ricardo H. Hinojosa, Commissioner
- Judge Beryl A. Howell, Commissioner
- Jonathan J. Wroblewski, Commissioner Ex Officio

The following Commissioner was not present:

- Isaac Fulwood, Jr., Commissioner Ex Officio

The following staff participated in the meeting:

- Judith Sheon, Staff Director
- Kenneth Cohen, General Counsel

The Chair called for a motion to adopt the April 6, 2011, public meeting minutes. Vice Chair Carr made a motion to adopt the minutes, with Commissioner Hinojosa seconding. Hearing no discussion, the Chair called for a vote, and the motion was adopted by voice vote.

Chair Saris welcomed the public and announced that the Commission will vote on whether to apply retroactively the previously promulgated permanent amendment (“Amendment 750”) implementing the Fair Sentencing Act of 2010, Pub. L. No. 111–220 (Aug. 3, 2010) (the “Act”).

Chair Saris stated that the Commission is statutorily obligated to consider applying retroactively any guidelines changes that lower penalties. The Chair emphasized that due to the importance of finality of judgments and the burdens placed on the judicial system when a guideline change is applied retroactively, the Commission does not make a decision on retroactivity lightly.

Chair Saris noted that the proposed vote on retroactivity applied to the sentencing guidelines only; the Commission’s vote will not make the changes to the statutory mandatory minimum penalties retroactive. She also noted that if the Commission voted to give retroactive effect to Amendment 750, the promulgated amendment will not become effective until November 1, 2011, provided the amendment is not disapproved by Congress. Chair Saris added that an affirmative vote on retroactivity will require every defendant moving for a reduction to have the

case considered by a federal judge who will ultimately decide whether a reduction is warranted based on the applicable statutory factors, which include the defendant's risk to public safety.

Char Saris recounted how in preparation for the vote the commissioners reviewed many of the 43,500 letters the public submitted on the issue, along with testimony given during the Commission's hearings and case law from the Supreme Court, Court of Appeals, and district courts. The Chair stated that the commissioners appreciated receiving public comment because it helps the Commission make better decisions.

The Chair called on Mr. Cohen to inform the Commission on a possible vote regarding retroactivity.

Mr. Cohen stated that the proposed amendment, attached hereto as Exhibit A, amends the policy statement at §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)), which is the policy statement governing retroactivity, in five ways:

First, the proposed amendment expands the listing in §1B1.10(c) to include Parts A and C of Amendment 750 as an amendment that may be considered for retroactive application. In response to the Act, Part A of Amendment 750 amended the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for crack cocaine offenses and made related revisions to Application Note 10 at §2D1.1. Part C deleted the cross reference in subsection (b) of §2D2.1 (Unlawful Possession; Attempt or Conspiracy) under which an offender who possessed more than five grams of crack cocaine was sentenced under §2D1.1.

Second, the proposed amendment amends §1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Under the proposed amendment, the general limitation in subsection (b)(2)(A) continues to be that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range. The proposed amendment restricts the exception in subsection (b)(2)(B) to cases involving a government motion to reflect the defendant's substantial assistance to authorities. For those cases, a reduction comparably less than the amended guideline range may be appropriate.

Third, the proposed amendment amends the commentary to §1B1.10 to address an application issue. Circuits have conflicting interpretations about when, if at all, the court applies the departure provision before determining the "applicable guideline range" for purposes of §1B1.10. Consistent with the three-step approach adopted by Amendment 741, and reflected in §1B1.1 (Application Instructions), the proposed amendment clarifies that the applicable guideline range referred to in §1B1.10 is the guideline range determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the *Guidelines Manual* or any variance.

Fourth, the proposed amendment adds an application note to §1B1.10 to specify that, consistent

with subsection (a) of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by subsection (c)(2) of section 18 U.S.C. § 3582 (Imposition of a sentence of imprisonment).

Finally, the proposed amendment adds commentary to §1B1.10 to refer to the Supreme Court decision of *Dillon v. United States*, 130 S.Ct. 2683 (2010).

Mr. Cohen advised the commissioners that a motion to promulgate the proposed amendment would be in order with a November 1, 2011 effective date, which is the same effective date as the underlying amendment itself, Amendment 750, and with staff being authorized to make technical and conforming changes if needed.

Chair Saris called for a motion as suggested by Mr. Cohen. Vice Chair Carr made a motion to promulgate the proposed amendment, with Vice Chair Jackson seconding. The Chair asked the commissioners to defer any statements on the motion until after the vote and called on Ms. Sheon to conduct a roll call vote. Chair Saris, Vice Chairs Carr and Jackson, and Commissioners Friedrich, Hinojosa, and Howell voted for the motion; no commissioner voted against. Ms. Sheon reported that the motion was adopted by a 6 to 0 vote.

Chair Saris asked if any commissioner wished to make a statement. Vice Chair Jackson stated that Congress in the Sentencing Reform Act of 1984, Pub. L. No. 98-473 (1984) (the "SRA"), requires the Commission to consider retroactive application of guideline penalty reductions and that the Fair Sentencing Act carries a similar degree of definitiveness as it directed the Commission to make conforming penalty reductions in the guidelines "as soon as practicable." Vice Chair Jackson added that congressional silence in the Fair Sentencing Act about retroactivity did not relieve the Commission of its statutory obligation.

Vice Chair Jackson stated that she based her vote to make Parts A and C of Amendment 750 retroactive on the testimony at the Commission's public hearings; the public comment received on this issue; an analysis of Commission data; and a thorough evaluation of the guideline amendment in light of the criteria at §1B1.10. Vice Chair Jackson believed that those criteria were satisfied, and that the statutory changes were rooted in fundamental fairness.

Vice Chair Jackson recounted how the Commission first identified the problems with federal crack cocaine sentencing policy in its 1995 report to Congress. She stated that no other federal sentencing provision is more closely identified with unwarranted disparity and perceived systemic unfairness than the 100:1 crack/powder penalty distinction and that Congress's purpose in the Act was to address this sentencing issue.

Vice Chair Jackson noted that while the Commission estimates that a substantial number offenders could be affected, witnesses testified before the Commission that retroactive application of Amendment 750 would be no more burdensome than the 2007 crack cocaine amendment.

Vice Chair Jackson emphasized that sentence reductions are not automatic under §1B1.10,

explaining that a federal judge must determine the appropriateness of a sentence reduction for each defendant, reducing the sentence only if warranted and if the risk to public safety was minimal. She recalled that more than 35 percent of the motions for retroactive application of the 2007 crack amendment were denied, demonstrating that not all offenders will receive reduced penalties.

Vice Chair Jackson explained that her vote was well-supported and fully consistent with the SRA, the Fair Sentencing Act, prior experience, and common sense. She noted that the Commission has the statutory authority to permit retroactive guideline penalty reductions, and presumably Congress provided that authority to be used when the retroactive application of a guideline penalty reduction furthers societal interests in equitable sentencing and the avoidance of unwarranted disparity.

Vice Chair Jackson expressed the view that now that Congress has taken steps to reduce the mandatory statutory penalties for crack cocaine offenses, there was no excuse for insisting that defendants continue to serve sentences received under pre-amendment guideline penalties. She stated her belief that the failure to make the amendment retroactive would harm those serving sentences pursuant to the prior guideline penalty and all who believe in equal application of the laws and the fundamental fairness of the criminal justice system.

Commissioner Howell stated that Part B of Amendment 750 incorporated aggravating and mitigating factors into the drug guidelines and is applicable to all drug offenders. She explained that Part B was not a part of the adopted retroactivity amendment because the factors in Part B would involve time-consuming and difficult-to-apply factors resulting in an administratively burdensome process.

Commissioner Howell recounted how under former Chair and current Commissioner Hinojosa the Commission in 2007 reduced guideline penalties for crack cocaine offenses by two levels and made the reduction retroactive in 2008. She also recalled that when Congress enacted significant reductions in crack penalties in the Act, the Commission acted promptly in 2010 under former Chair William K. Sessions III to enact temporary guideline amendments to implement the new law and to reduce guideline sentencing ranges for crack offenses.

Commissioner Howell thanked current Chair Saris for leading the Commission through its deliberations on Amendment 750 and the retroactivity amendment. She also recognized the work of many previous commissioners and noted that the Commission's vote marked the culmination of many years of Commission research, data collection, analysis, and report. She believed the steps the Commission took in 2007, 2008, 2010, and today's vote were the right ones. Commissioner Howell noted that regardless of the makeup of the bipartisan Commission, it has been able to come to a unified position on this issue.

Commissioner Howell stated that the Commission's work helped persuade Congress that reducing crack penalties was the right policy. She added that in making its decision, the Commission heeded the input it received both for and against retroactive application of Parts A and C of Amendment 750, and considered carefully its statutory authority to make retroactive

guideline amendments that reduce sentencing ranges.

Commissioner Howell reported that the Commission specifically considered the letters received from members of Congress, some of whom urged retroactive application of the guideline amendment, and others who did not. She recognized that the members who cautioned against retroactive application eloquently stated that silence by Congress on the issue of retroactivity in the Act should be a signal that the Commission exceeds its authority and violates congressional intent by making the amendment retroactive under any circumstances.

Commissioner Howell observed the Commission has used its authority under 28 U.S.C. § 994(u) infrequently to make retroactive guideline amendments that reduce sentencing ranges because the finality of judgments is an important principle in the judicial system, and the Commission requires good reasons to disturb final judgments. She noted that while the majority of the 750 amendments to the guidelines over the last 25 years have increased guideline penalties, approximately 100 amendments reduced penalties. However, only 28 of the guideline-reducing amendments have been made retroactive.

Commissioner Howell stated that the Commission's authority to make guideline-reducing amendments retroactive is consistent with the purposes and duties in its organic statute. She noted that Congress gave the Commission both lofty goals and practical goals. The lofty goals, she believed, are to update and issue amendments to the guidelines that reflect advancements in knowledge of human behavior as it relates to the criminal justice process. She further believed that the practical goals direct the Commission to examine the capacity of prison facilities when it promulgates guideline amendments, adding that the federal prisons are now at 35 percent over-capacity.

Commissioner Howell stated that while Congress was silent in the Act about retroactive application, Congress gave the Commission very clear direction both that it must consider retroactive application of guideline-reducing amendments and that it must take into account the purposes of sentencing set out in the SRA and the Commission's statutory obligations.

Commissioner Howell noted that among the purposes of sentencing that the Commission must try to achieve are fairness, proportionality, and avoiding unwarranted sentencing disparities. She held the view that retroactive application of Parts A and C of Amendment 750 helped achieve those purposes.

Commissioner Howell stated that she agreed with the view of the Congressional Black Caucus that retroactive application of Amendment 750 would help address racial disparities and excessive sentences for crack offenders and undo a long history of injustice in federal sentencing.

Commissioner Howell understood the concern that reducing the sentences of crack offenders may send the wrong signal about being tough on crime, but that even with reduced sentences most crack offenders will still serve on average over ten years in prison. Commissioner Howell

noted that over a decade in prison is a tough sentence, and crack offenders will still serve tougher sentences than offenders convicted of dealing the same amount of powder cocaine, about 18 times tougher.

Commissioner Friedrich stated that she based her vote in favor of retroactivity on the Act, the legal standards governing retroactivity, the Commission's precedents and data, and the public comment that the Commission received, including the Criminal Law Committee's testimony in support of retroactivity.

Commissioner Friedrich noted that some members of Congress have argued that the Commission did not have the authority to give retroactive effect to Amendment 750 because the Act is silent with regard to retroactivity. She stated that while the savings statute precludes retroactive application of a statute unless Congress states a clear intent otherwise, the Act must be read in conjunction with the Commission's organic statute, especially 28 U.S.C. § 994(u). That section of the SRA requires the Commission to consider retroactivity with respect to any guideline amendment that reduces the term of imprisonment, even where that amendment is based on legislation that is silent with regard to retroactivity.

Commissioner Friedrich stated that, consistent with §1B1.10 and section 994(u), the Commission considers three factors when determining whether to give retroactive effect to a guideline amendment that reduces the term of imprisonment: 1) the purpose of the amendment, 2) the magnitude of the change as a result of the amendment, and 3) the administrative burdens associated with retroactivity. Commissioner Friedrich explained that after weighing these factors, she concluded that Amendment 750 should be given retroactive effect.

Commissioner Friedrich stated that the purpose of Amendment 750 was to implement the Act, and the Act amended the drug quantity thresholds that apply to the five- and ten-year mandatory minimum penalties such that the ratio of powder to crack cocaine for offenses committed on or after August 3, 2010, was reduced to 18:1 from 100:1 for offenses committed prior to August 3, 2010. Commissioner Friedrich stressed that the change in the ratio is consistent with the Commission's recent recommendations to Congress.

Commissioner Friedrich noted that when the Commission promulgates a guideline amendment pursuant to legislation, its role is to implement Congress's statutory directives faithfully. In the Act, Congress directed the Commission to "promulgate the guidelines, policy statements, or amendments provided for in this Act . . ." and to "make conforming amendments to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." She believed the purpose of the Act, as reflected in the title itself, is to restore fairness in cocaine sentencing. Commissioner Friedrich asserted that the Commission implemented that congressional directive through Amendment 750.

Commissioner Friedrich conceded that the fact that Congress did not express a clear intent to give retroactive effect to the new statutory mandatory minimum penalties is a factor that weighs heavily against retroactivity. However, she added, that factor is not dispositive with respect to

the issue of whether the Commission's guideline amendment should be given retroactive effect. Commissioner Friedrich noted that Amendment 750 substantially lowers guideline penalties; therefore, pursuant to section 994(u), the Commission was required to decide whether to give retroactive effect to any part of Amendment 750.

Commissioner Friedrich stated that despite the fact that the Act is silent on retroactivity, she favored retroactivity because doing so would conform the guideline penalties for crack offenses to other controlled substance offenses; ensure that crack offenders are treated consistently under the guidelines; and restore a greater degree of fairness in cocaine sentencing.

Commissioner Friedrich reported that, with respect to the magnitude of the change, the Commission estimates that approximately 12,000 offenders will be eligible for possible sentencing reductions of approximately 23 percent, on average. She also stated that these estimates are substantial and comparable to those associated with the Commission's 2007 crack amendment. Commissioner Friedrich added that the estimated savings to the Bureau of Prisons (BOP) are considerable.

Commissioner Friedrich stated that concerns which were expressed in 2007 regarding the administrative burdens on the federal courts have diminished significantly as a result of the Supreme Court's decision in *Dillon v. United States*. In that case, the Court affirmed the Commission's view as expressed in §1B1.10 that section 3582(c)(2) proceedings are not full-scale resentencings.

Commissioner Friedrich recalled Judge Reggie Walton's testimony on behalf of the Criminal Law Committee of the Judicial Conference of the United States that judges, probation officers, and litigants ably implemented the 2007 amendment notwithstanding the considerable resources expended. She noted that the Commission anticipates that the number of crack offenders who will be eligible for a potential reduction in sentence will be substantially less than the number of offenders who were eligible in 2007. She further noted that the Commission anticipates that the vast majority of the anticipated section 3582(c) motions will be handled on the papers without the need for hearings or the presence of defendants.

Commissioner Friedrich noted that the Department of Justice (DOJ) supported retroactive application of Amendment 750 but urged the Commission to bar certain classes of offenders, namely those who fall within Criminal History Categories IV, V, and VI, and those who have received firearm enhancements. She stated that while she shared the DOJ's concerns, as well as the concerns of members of Congress, regarding public safety, relevant sentencing data counsels against categorically excluding those offenders who fall within these categories.

Commissioner Friedrich noted that Commission data related to the implementation of the 2007 crack amendment reveals that judges exercised their discretion pursuant to §1B1.10 to deny section 3582(c) motions on public safety grounds. She added that recently the Commission completed a three-year recidivism study in which it compared the recidivism rates of crack offenders who were released early as a result of the Commission's 2007 crack amendment to those of similarly situated crack offenders who served their entire sentences. The study found no

statistically significant difference between the recidivism rates of these two groups. Commissioner Friedrich noted that crack offenders who fall within Criminal History Categories IV, V, or VI and those who receive firearm enhancements are subject to significantly higher penalties at their initial sentencings and that any reduction in sentence that these offenders may receive as a result of Amendment 750 will in no way negate the extra prison time they are required to serve as a result of such aggravating factors.

Commissioner Friedrich made clear that reductions in sentence pursuant to section 3582(c) are not automatic but are subject to the discretion of federal judges. Section 1B1.10 requires judges to consider the risk to the public in every case.

Vice Chair Carr stated that in light of the Commission's historical position regarding crack sentencing, and considering Congress's purpose and effect in changing decades of unfair crack mandatory sentencing policy, he believed it would be incongruous for the Commission not to make Parts A and C of Amendment 750 retroactive.

Vice Chair Carr reported that the Commission estimates that the average sentence served by those crack defendants who will potentially benefit from a sentence reduction will still be in excess of ten years of imprisonment.

Vice Chair Carr also noted that the BOP is currently at 37 percent over-capacity and that the overcapacity not only creates undesirable conditions for prisoners, but also for corrections staff. He added that the BOP predicts that even with new prisons coming on line, the net effect over the next several years will be an increase of several thousand prisoners a year.

Vice Chair Carr stated that the Commission is statutorily obligated to take into account prison impact when it does its work. He recounted that according to BOP estimates for the next five years, the BOP could save in excess of \$200 million and overcrowding will be somewhat alleviated if Amendment 750 were made retroactive.

Vice Chair Carr emphasized that, while the Commission must consider the impact on the BOP, its retroactivity decision was based on fundamental fairness.

Commissioner Hinojosa acknowledged the contributions of former Chairs Richard P. Conaboy and Diana E. Murphy on the issue of federal crack cocaine sentencing policy. He added that former Chair William W. Wilkins recently wrote to the Commission in favor of retroactivity. Commissioner Hinojosa noted that every former Chair, along with the current Chair, have been in favor of reducing the crack cocaine/powder ratio.

Commissioner Hinojosa stated that 28 U.S.C. § 994(u) requires the Commission to determine when a sentence reduction in a guideline is to be made retroactive, to what extent, and under what circumstances a judge should be able make any such reduction. He also noted that §1B1.10 requires the Commission to consider three factors: the purpose of the amendment; the magnitude of the change; and the difficulty in applying the amendment retroactively.

Commissioner Hinojosa recalled that in 2007 the Commission reduced crack cocaine guideline

sentences and made the reduction retroactive. He recounted how judges, practitioners, and others in the criminal justice system commented that the 2007 retroactivity process worked well and was a much simpler process than they anticipated.

Commissioner Hinojosa noted that the Fair Sentencing Act was a bipartisan Act and it gave the Commission emergency amendment authority to amend the guidelines.

Commissioner Hinojosa stated that it was important to understand that the Commission always welcomed comments from all individuals and organizations who are interested in the criminal justice system, and he noted the Commission received many responses regarding this particular issue.

Commissioner Hinojosa reported that the Commission heard from members of Congress who held different views regarding retroactivity. He also noted that the Commission has heard from the Executive Branch, the Judicial Branch, and the public, as well as from the Federal Public Defenders and individual defense attorneys. He stated that the role of the Commission is to decide, after having carefully reviewed all of the comments, what the right thing to do is.

Commissioner Hinojosa made clear that in light of its decision the Commission did not mean to imply that any comment was ignored or was not taken seriously. On the contrary, he continued, just as judges do when they receive comments in the courtroom and have received evidence on a particular matter, every comment and every letter, as well as testimony, has been considered, and the Commission has come unanimously to this decision.

Commissioner Hinojosa explained that it is important to bear in mind that all the Commission has done is make certain defendants eligible for a reduction in sentence, but that the decision to reduce a sentence will continue to be in the hands of the judges, who will make a decision on an individual basis. He noted that judges are directed in the guidelines themselves to determine whether a reduction is appropriate, and to what extent it is appropriate, within the limits that are set in §1B1.10.

Commissioner Hinojosa agreed with interested parties who suggested that distinctions should be made for defendants in certain criminal history categories, who use or possess a firearm, or for relevant conduct purposes. However, the guidelines already take these factors into consideration. Commissioner Hinojosa stated that all of these aggravating factors have already been considered in the sentences that have been handed down.

Commissioner Hinojosa noted that the SRA was a bipartisan piece of legislation that attempted to create a fairer system, avoid unwarranted disparity, provide more transparency, and create one nation-wide system. He recalled that Senators Edward Kennedy, Orrin Hatch, and Strom Thurmond, along with many others, worked hard to create a fairer sentencing system. Commissioner Hinojosa observed that the SRA created a bipartisan Commission to take the sentencing policy decisions out of the political process.

Commissioner Hinojosa stated that the Commission has always fulfilled its statutory duties regarding decisions about retroactivity of a particular guideline amendment. He added that the

Commission has acted in its belief that judges will make their individual decisions in a particular case, considering whether it is the right thing to do in that particular situation. Commissioner Hinojosa stated that the decision made by each commissioner was based on the consideration of all of the principles required to be considered regarding retroactive application of a guideline sentencing reduction.

Commissioner Wroblewski suggested that, in addition to the individuals already recognized, it was important to recognize others who have been involved in this issue over the last 17 years. Acknowledging that it was impossible to name all of them, he noted members of Congress, current and past members of the Commission, the Judicial Conference, Commission staff, and advocacy groups involved in the issue.

Commissioner Wroblewski also acknowledged the assistant United States attorneys, assistant federal public defenders, probation officers, and judges across the country who will be called upon to implement the Commission's decision on retroactivity. He believed they all take their responsibilities seriously and will faithfully execute the law and their duty to the best of their abilities.

Commissioner Wroblewski observed that the SRA was an historic piece of legislation, addressing one of the single most important issues affecting trust and confidence in the federal criminal justice system and noted that the SRA was passed on a bipartisan basis after many years of debate.

Commissioner Wroblewski recalled that U.S. Attorney General Eric Holder testified in person before the Commission in support of retroactive application of Amendment 750. He noted that the Attorney General spoke about his personal experience, about the importance of this issue to him, and the cause of justice. Commissioner Wroblewski expressed the DOJ's gratitude to the Commission for considering its views.

Commissioner Wroblewski stated that with the Commission's vote comes many months of implementation, and it is imperative that the Commission help facilitate the implementation of retroactivity. He added that the DOJ appreciates the discussions that the Commission has already had and the planning that the Commission and staff have already done.

Commissioner Wroblewski pledged the DOJ's support to see that retroactivity is done in an efficient way that ensures that courts get the information they need to make informed decisions on the thousands of sentence modification requests that are certain to be filed.

Commissioner Wroblewski stated that the DOJ is committed to implementing the Commission's decision to achieve the twin goals of public safety and justice. He recalled that the Attorney General indicated some of the DOJ's public safety concerns about retroactivity, and that everyone involved must ensure that the thousands of case-by-case retroactivity determinations are indeed robust, and that thoughtful decisions are made in every case.

Commissioner Wroblewski observed that violent crime rates across the country are at

generational lows and part of the reason is tough sentencing policy. He stated that the DOJ continues to believe in the necessity of strong sentencing policy. Commissioner Wroblewski advised tough sentencing policy can also be fair sentencing policy, and the Act and the Commission's actions are consistent with both tough and fair sentencing.

Chair Saris stated she was proud to preside as Chair of the Commission at this historic moment. She observed that the commissioners worked hard over the last months before voting unanimously to make retroactive the amendment to the guidelines that reduced penalties for selling and possessing crack cocaine.

Chair Saris noted that, as passed, the retroactivity amendment will permit an estimated 12,000 prisoners over more than a 30-year period to petition a court for early release. She further noted that as many as 2,000 prisoners might be eligible to file a petition in court in the first year. She reminded the public that before any prisoner is released, the court has an obligation to consider whether release will create a risk to public safety.

Chair Saris recognized that there were disagreements at the Commission's hearings and during testimony about the precise form that retroactivity should take but observed that retroactivity in some form has been supported by the Attorney General of the United States; the Criminal Law Committee of the Judicial Conference, which represents the federal judges; Senators Patrick Leahy, Richard Durbin, Al Franken, and Christopher Coons; Representative Bobby Scott; many members of the Congressional Black Caucus; the American Bar Association; Families Against Mandatory Minimums; and many other advocacy groups.

Chair Saris recounted that a broad bipartisan coalition in Congress led by Senator Richard Durbin of Illinois and Senator Jeff Sessions of Alabama worked to pass the Act in the Senate, and Representatives Scott of Virginia and John Conyers of Michigan took the lead to get the new law passed in the House.

Chair Saris stated that not all prisoners will be entitled to a reduction for several reasons. First, prisoners who at their initial sentencing received a departure or variance below the equivalent of the guideline range will not be entitled to any further reductions unless they received departures for substantial assistance. Based on its data, the Commission estimates that over 750 prisoners already received reductions below the proposed new guideline range as a result of these departures and variances. Second, she continued, career offenders - people who have a very serious criminal record - will not generally receive the reduction. Third, many prisoners will be bound by statutory minimums set under the previous statute.

Chair Saris recalled that at the Commission's 2011 March hearing, the proposed retroactive application of Amendment 750 prompted some criticism from the "boots-on-the-ground" law enforcement community, and by some members of Congress like Representative Lamar Smith and Senators Charles Grassley and Jeff Sessions. Chair Saris stated that their concern was that the early release of crack offenders would create a threat to public safety. She asserted that the Commission weighed these thoughtful criticisms with care, but that it ultimately decided that these policy concerns did not prevail based upon the data and the Commission's past experience.

Chair Saris stated the Commission appreciates and acknowledges the concerns raised about the use of judicial resources, particularly in the current economy. However the Commission heard testimony that retroactive application of the 2007 amendment, which involved a much larger number of potentially eligible offenders, did not overly burden or tax the criminal justice resources.

Chair Saris believed that the clarity of its policy statement, training by Commission staff, and past experience will ensure minimal disruption this time, as well. She noted that the Commission had received the commitment from all of the actors in the criminal justice system to work collaboratively to make sure that the amendment applies to only the appropriate prisoners.

Chair Saris observed that at the hearing on retroactivity the BOP reported that a year of incarceration costs about \$27,000 per prisoner, and that the prisons are over-crowded by about 37 percent. She reported over the next five years the BOP estimates that it will save more than \$200 million because of today's retroactivity decision. Chair Saris acknowledged that while cost savings alone should not be the reason for retroactivity, it should be taken into account in the decision.

Chair Saris recounted that as former Chair Wilkins, the first Chair of the Commission, wrote in his letter: "If the law was unfair going forward, it was unfair for those already sentenced under it."

Chair Saris closed by thanking the public for its interest.

Commissioner Hinojosa thanked Chair Saris on behalf of the commissioners for her leadership and for the work that she did in preparation of today's vote, as well as the work of the staff lead by Staff Director Judy Sheon.

Chair Saris asked if there was any further business before the Commission and hearing none, asked if there was a motion to adjourn the meeting. Commissioner Hinojosa made a motion to adjourn, with Vice Chair Carr seconding. The Chair called for a vote on the motion, and the motion was adopted by a voice vote. The meeting was adjourned at 2:06 p.m.

EXHIBIT A

PROPOSED AMENDMENT: RETROACTIVITY OF AMENDMENT 750 (PARTS A AND C)

Synopsis of Proposed Amendment: *This proposed amendment amends §1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range) (Policy Statement) in four ways. First, it expands the listing in §1B1.10(c) to implement the directive in 28 U.S.C. § 994(u) with respect to guideline amendments that may be considered for retroactive application. Second, it amends §1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Third, it amends the commentary to §1B1.10 to address an application issue about what constitutes the "applicable guideline range" for purposes of §1B1.10. Fourth, it adds an application note to §1B1.10 to specify that the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).*

First, the Commission has determined, under the applicable standards set forth in the background commentary to §1B1.10, that Amendment 750 (Parts A and C only) should be included in §1B1.10(c) as an amendment that may be considered for retroactive application. Part A amended the Drug Quantity Table in §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) for crack cocaine and made related revisions to Application Note 10 to §2D1.1. Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

Under the applicable standards set forth in the background commentary to §1B1.10, the Commission considers, among other factors, (1) the purpose of the amendment, (2) the magnitude of the change in the guideline range made by the amendment, and (3) the difficulty of applying the amendment retroactively. See §1B1.10, comment. (backg'd.). Applying those standards to Parts A and C of Amendment 750, the Commission determined that, among other factors:

- (1) *The purpose of Parts A and C of Amendment 750 was to account for the changes in the statutory penalties made by the Fair Sentencing Act of 2010, Pub. L. 111–220, 124 Stat. 2372, for offenses involving cocaine base ("crack cocaine"). See USSG App. C, Amend. 750 (Reason for Amendment). The Fair Sentencing Act of 2010 did not contain a provision making the statutory changes retroactive. The Act directed the Commission to promulgate guideline amendments implementing the Act. The guideline amendments implementing the Act have the effect of reducing the term of imprisonment recommended in the guidelines for certain defendants, and the Commission has a statutory duty to consider whether the resulting guideline amendments should be made available for retroactive application. See 28 U.S.C. § 994(u) ("If the Commission reduces the term of imprisonment recommended in the guidelines . . . it shall specify in what circumstances and by what amount sentences of prisoners . . . may be reduced."). In carrying out its statutory duty to consider whether to give Amendment 750 retroactive effect, the Commission also considered the purpose of the underlying statutory changes made by the Act. Those statutory changes reflect congressional action consistent with the Commission's long-held position that the then-existing statutory penalty structure for crack cocaine "significantly undermines the various congressional objectives set forth in the Sentencing Reform Act and elsewhere" (see USSG App. C, Amend. 706 (Reason for Amendment)). The Fair Sentencing Act of 2010 specified in its statutory text that its purpose was to "restore fairness to Federal cocaine sentencing" and provide "cocaine*

sentencing disparity reduction". See 124 Stat. at 2372.

It is important to note that the inclusion of Amendment 750 (Parts A and C) in §1B1.10(c) only allows the guideline changes to be considered for retroactive application; it does not make any of the statutory changes in the Fair Sentencing Act of 2010 retroactive.

- (2) *The number of cases potentially involved is substantial, and the magnitude of the change in the guideline range is significant. As indicated in the Commission's analysis of cases potentially eligible for retroactive application of Parts A and C of Amendment 750, approximately 12,000 offenders would be eligible to seek a reduced sentence and the average sentence reduction would be approximately 23 percent.*
- (3) *The administrative burdens of applying Parts A and C of Amendment 750 retroactively are manageable. This determination was informed by testimony at the Commission's June 1, 2011, public hearing on retroactivity and by other public comment received by the Commission on retroactivity. The Commission also considered the administrative burdens that were involved when its 2007 crack cocaine amendments were applied retroactively. See USSG App. C, Amendments 706 and 711 (amending the guidelines applicable to crack cocaine, effective November 1, 2007) and Amendment 713 (expanding the listing in §1B1.10(c) to include Amendments 706 and 711 as amendments that may be considered for retroactive application, effective March 3, 2008). The Commission received comment and testimony indicating that those burdens were manageable and that motions routinely were decided based on the filings, without the need for a hearing or the presence of the defendant, and did not constitute full resentencings. The Commission determined that applying Parts A and C of Amendment 750 would likewise be manageable, given that, among other things, significantly fewer cases would be involved. As indicated in the Commission's Preliminary Crack Cocaine Retroactivity Report (April 2011 Data) regarding retroactive application of the 2007 crack cocaine amendments, approximately 25,500 offenders have requested a sentence reduction pursuant to retroactive application of the 2007 crack cocaine amendments and approximately 16,500 of those requests have been granted.*

In addition, public safety will be considered in every case because §1B1.10 requires the court, in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted, to consider the nature and seriousness of the danger to any person or the community that may be posed by such a reduction. See §1B1.10, comment. (n.1(B)(ii)).

Second, in light of public comment and testimony and recent case law, the proposed amendment amends §1B1.10 to change the limitations that apply in cases in which the term of imprisonment was less than the minimum of the applicable guideline range at the time of sentencing. Under the proposed amendment, the general limitation in subsection (b)(2)(A) continues to be that the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum of the amended guideline range. The proposed amendment restricts the exception in subsection (b)(2)(B) to cases involving a government motion to reflect the defendant's substantial assistance to authorities (i.e., under §5K1.1 (Substantial Assistance to Authorities), 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35(b)). For those cases, a reduction comparably less than the amended guideline range may be appropriate.

The version of §1B1.10 currently in effect draws a different distinction for cases in which the term of imprisonment was less than the minimum of the applicable guideline range, one rule for downward

departures (stating that "a reduction comparably less than the amended guideline range . . . may be appropriate") and another rule for variances (stating that "a further reduction generally would not be appropriate"). *See* §1B1.10(b)(2)(B). The Commission has received public comment and testimony indicating that this distinction has been difficult to apply and has prompted litigation. The Commission has determined that, in the specific context of §1B1.10, a single limitation applicable to both departures and variances furthers the need to avoid unwarranted sentencing disparities and avoids litigation in individual cases. The limitation that prohibits a reduction below the amended guideline range in such cases promotes conformity with the amended guideline range and avoids undue complexity and litigation.

Nonetheless, the Commission has determined that, in a case in which the term of imprisonment was below the guideline range pursuant to a government motion to reflect the defendant's substantial assistance to authorities (*e.g.*, under §5K1.1), a reduction comparably less than the amended guideline range may be appropriate. Section 5K1.1 implements the directive to the Commission in its organic statute to "assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." *See* 28 U.S.C. § 994(n). For other provisions authorizing such a government motion, *see* 18 U.S.C. § 3553(e) (authorizing the court, upon government motion, to impose a sentence below a statutory minimum to reflect a defendant's substantial assistance); *Fed. R. Crim. P.* 35(b) (authorizing the court, upon government motion, to reduce a sentence to reflect a defendant's substantial assistance). The guidelines and the relevant statutes have long recognized that defendants who provide substantial assistance are differently situated than other defendants and should be considered for a sentence below a guideline or statutory minimum even when defendants who are otherwise similar (but did not provide substantial assistance) are subject to a guideline or statutory minimum. Applying this principle when the guideline range has been reduced and made available for retroactive application under section 3582(c)(2) appropriately maintains this distinction and furthers the purposes of sentencing.

Third, the proposed amendment amends the commentary to §1B1.10 to address an application issue. Circuits have conflicting interpretations about when, if at all, the court applies a departure provision before determining the "applicable guideline range" for purposes of §1B1.10. The First, Second, and Fourth Circuits have held that, for §1B1.10 purposes, at least some departures (*e.g.*, departures under §4A1.3 (Departures Based on Inadequacy of Criminal History Category) (Policy Statement)) are considered before determining the applicable guideline range, while the Sixth, Eighth, and Tenth Circuits have held that "the only applicable guideline range is the one established before any departures". *See United States v. Guyton*, 636 F.3d 316, 320 (7th Cir. 2011) (collecting and discussing cases; holding that departures under §5K1.1 are considered after determining the applicable guideline range but declining to address whether departures under §4A1.3 are considered before or after). Effective November 1, 2010, the Commission amended §1B1.1 (Application Instructions) to provide a three-step approach in determining the sentence to be imposed. *See* USSG App. C, Amend. 741 (Reason for Amendment). Under §1B1.1 as so amended, the court first determines the guideline range and then considers departures. *Id.* ("As amended, subsection (a) addresses how to apply the provisions in the Guidelines Manual to properly determine the kinds of sentence and the guideline range. Subsection (b) addresses the need to consider the policy statements and commentary to determine whether a departure is warranted."). Consistent with the three-step approach adopted by Amendment 741 and reflected in §1B1.1, the proposed amendment adopts the approach of the Sixth, Eighth, and Tenth Circuits and amends Application Note 1 to clarify that the applicable guideline range referred to in §1B1.10 is the guideline range determined pursuant to §1B1.1(a), which is determined before consideration of any departure provision in the Guidelines Manual or any variance.

Fourth, the proposed amendment adds an application note to §1B1.10 to specify that, consistent with

subsection (a) of §1B1.11 (*Use of Guidelines Manual in Effect on Date of Sentencing*), the court shall use the version of §1B1.10 that is in effect on the date on which the court reduces the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2).

Finally, the proposed amendment amends the commentary to §1B1.10 to refer to *Dillon v. United States*, 130 S. Ct. 2683 (2010). In *Dillon*, the Supreme Court concluded that proceedings under section 3582(c)(2) are not governed by *United States v. Booker*, 543 U.S. 220 (2005), and that §1B1.10 remains binding on courts in such proceedings.

Proposed Amendment:

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

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (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.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

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

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (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.

(2) Limitations and Prohibition on Extent of Reduction.—

(A) ~~In General~~Limitation.—Except as provided in subdivision (B), the court shall not reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception for Substantial Assistance.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect the defendant's substantial assistance to authorities, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, ~~and~~ 715, and 750 (parts A and C only).

Commentary

Application Notes:

1. Application of Subsection (a).—

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

imprisonment).

(B) Factors for Consideration.—

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

- 2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.
- 3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant’s term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, **as provided in subsection (b)(2)(A)**, if the ~~original~~ term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court ~~shall not~~ **may** reduce the defendant’s term of imprisonment to a term that is **no** less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was ~~41 to 51~~ **70 to 87** months; (B) the ~~original~~ term of imprisonment imposed was ~~41~~ **70** months; and (C) the amended guideline range determined under subsection (b)(1) is ~~30 to 37~~ **51 to 63** months, the court ~~shall not~~ **may** reduce the defendant’s term of imprisonment, **but shall not reduce it** to a term less than ~~30~~ **51** months.

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

Subsection (b)(2)(B) provides an exception to this limitation, which applies if the term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing pursuant to a government motion to reflect

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

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

~~*If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.*~~

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

4. Application to Amendment 750 (Parts A and C Only).—As specified in subsection (c), the parts of Amendment 750 that are covered by this policy statement are Parts A and C only. Part A amended the Drug Quantity Table in §2D1.1 for crack cocaine and made related revisions to Application Note 10 to §2D1.1. Part C deleted the cross reference in §2D2.1(b) under which an offender who possessed more than 5 grams of crack cocaine was sentenced under §2D1.1.

45. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C)

relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

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

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

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

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

The listing of an amendment in subsection (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. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative

history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

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