



FREQUENTLY ASKED QUESTIONS ABOUT MAKING FEDERAL CRACK REFORMS RETROACTIVE

ATTENTION: This FAQ should answer most of your questions. It is lengthy. Please read the entire document! This factsheet includes information on how the federal crack sentencing guidelines may change in 2011.

S. 1789, the Fair Sentencing Act of 2010 (the FSA), was passed by the House of Representatives on July 28, 2010. President Obama signed the bill into law on August 3, 2010. The FSA changed the 100-to-1 crack-powder cocaine ratio to a ratio of 18-to-one. Under the new law, possession with intent to distribute 28 grams of crack triggers a 5-year mandatory minimum, and 280 grams of crack triggers a 10-year mandatory minimum. The FSA does not change the powder cocaine triggering weights. The FSA also eliminated the 5-year mandatory minimum for simple possession (without intent to distribute) of crack cocaine. **The FSA is not retroactive, which means that changes to the mandatory minimum sentences do not benefit anyone who has already been sentenced for a federal crack cocaine offense. That said, people awaiting sentencing (or resentencing after an appeal), even if they're in prison, should speak with their lawyers about whether the FSA may benefit them.**

Q-1: Can the changes to crack mandatory minimum sentences made by the FSA be made retroactive?

A: Yes, but only Congress can make changes to the crack mandatory minimum sentences retroactive. To make those changes retroactive so that they affect people in prison who were sentenced under the old law, Congress must pass a new law. This will require getting a member of Congress to introduce a new bill and getting that bill passed by the House of Representatives and the Senate and signed into law by the president. Making a sentencing reform retroactive is controversial and extremely rare, but not impossible. As of February 3, 2011, there are no bills pending in Congress that would make the FSA retroactive. FAMM is urging Congress to make crack reforms retroactive, but we do not know if or when a retroactivity bill will be introduced. We will update members of our progress and how they can help at www.famm.org.

Q-2: What can prisoners and their families do right now to help make the FSA's changes to mandatory minimum crack sentences retroactive?

A: The best advice FAMM can give prisoners and their families right now is to call their federal Representative and Senators in Congress and (1) thank them for passing the FSA, and (2) ask them to make the changes to mandatory minimum crack sentences retroactive. You can find out who your members of Congress are and see a sample letter on our website, www.famm.org.

Q-3: Should people serving a federal prison sentence for a crack offense begin looking for or hiring attorneys to help them get a sentence reduction in the event Congress makes the changes to mandatory minimum crack sentences retroactive?

A: FAMM cannot give legal advice. If you have a lawyer, speak with your lawyer about whether the FSA may benefit you. We do not know if or when the changes will be made retroactive to help people in prison. People should be extremely cautious about paying or hiring



anyone who promises that changes to mandatory minimum crack sentences are or will be made retroactive or will benefit people who have already been sentenced. *If* the changes are made retroactive, FAMM will update its members on how the courts, prosecutors, and defense attorneys plan to handle requests for sentence reductions.

Q-4: Can FAMM tell me how the FSA will affect me or my loved one if changes to mandatory minimum laws are made retroactive?

A: No. FAMM does not give legal advice, and we do not know all the details of each person's case. *If* the changes to crack mandatory minimums are made retroactive, FAMM will provide its members with information on how they can seek legal help for requesting a sentence reduction.

Q-5: Can President Obama or Attorney General Eric Holder make the FSA retroactive?

A: No. Only Congress can make changes to mandatory minimum sentencing laws retroactive.

Q-6: Can the U.S. Sentencing Commission make the FSA's changes to crack mandatory minimum sentences retroactive?

A: No. The Commission can only make changes to the U.S. Sentencing Guidelines retroactive. The FSA changed mandatory minimum sentencing laws, *not* guidelines. Only Congress can make changes to mandatory minimum laws retroactive.

Q-7: What's the difference between mandatory minimums and sentencing guidelines?

A: Sentencing laws are created by Congress. For every crime, Congress creates a law that includes a maximum sentence (called a "statutory maximum") for the crime. Sometimes, Congress also creates a minimum punishment for that crime. These minimum sentences are called "mandatory minimums." The FSA changes the amount of crack it takes to trigger the current five- and 10-year mandatory minimums for crack crimes (see 21 U.S.C. § 841(b)). Only Congress can change these sentencing laws, and only Congress can decide if changes to these laws are retroactive.

The sentencing guidelines are not mandatory minimums. Guidelines cannot change or get rid of mandatory minimums. The U.S. Sentencing Commission writes guidelines. The U.S. Congress writes and passes mandatory minimums.

Q-8: Did the Sentencing Commission amend the crack guidelines?

A: Yes. The FSA directed the Commission to amend the crack sentencing guidelines so that they agree with the new law. The FSA gave the Commission "emergency authority" to amend the crack sentencing guidelines within 90 days of the date the FSA was signed into law (by November 1, 2010). On October 15, 2010, the Commission issued a "temporary emergency amendment" to ensure that the FSA's 18-to-1 crack-powder ratio is reflected in the advisory sentencing guidelines. The temporary emergency amendment to the crack guidelines sets new drug weights, based roughly on those in the FSA, for the base offense levels for crack cocaine sentences. This amendment went into effect on November 1, 2010, and it applies to everyone sentenced *on or after* that date. **It is not retroactive; it does not benefit anyone sentenced for a crack offense before November 1, 2010.**



The Commission's temporary emergency amendment only affects *sentencing guideline ranges*, not mandatory minimums, for federal crack cocaine offenses. The amendment also adds new guideline enhancements that could increase drug sentences if the crime involved violence, bribing law enforcement officers, or maintaining a drug house. Other new enhancements could increase drug sentences if the defendant was a leader, manager, or supervisor in the offense and engaged in other aggravated conduct, such as involving vulnerable individuals in the offense or using fear or affection to involve minor players in the crime. The temporary emergency amendment also provides for sentence reductions for minimal participants (e.g., girlfriends) who were involved in a drug offense because of a relationship but did not earn any money from the drug activity.

You can read the full temporary emergency amendment at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20101021_RF_Amendments.pdf.

What about crack minus two? The temporary crack guideline amendment did not repeal the Commission's retroactive 2007 "crack minus two" amendment. That amendment reduced crack guideline sentences by two offense levels and did not change any mandatory minimum crack sentences. The "crack minus two" amendment is still in effect and is still retroactive for people sentenced before November 1, 2007. Federal crack offenders who were sentenced before November 1, 2007 and have not sought the benefit of that amendment yet can still do so. To request that the retroactive "crack minus two" amendment be applied to your case, file a motion under 18 U.S.C. § 3582(c)(2) in the court that sentenced you. Contact a lawyer if you need legal help (the Federal Public and Community Defenders have represented many prisoners seeking the reduction). FAMM cannot give you legal advice or help you file a motion for a sentence reduction.

Q-9: Will the Commission's temporary emergency crack amendment become a permanent part of the sentencing guidelines?

A: Most likely yes – but not necessarily in the same form (see next question). To become a permanent part of the guidelines, the Commission must submit a permanent amendment that will replace the temporary emergency amendment and must send it through the process of becoming a permanent part of the guidelines. In January 2011, that's exactly what the Commission did.

Q-10: What might the Commission's permanent crack amendments look like?

A: In January 2011, the Commission announced that it plans to propose a permanent amendment to replace the temporary crack guideline amendment. The Commission offered several options for how the permanent amendment might change the crack guidelines. One of those options is to do exactly what the temporary emergency amendment did, with no changes. Another option is to change the crack quantities to allow for even shorter crack cocaine sentences.

Here are the two options the Commission has offered for changing the crack guidelines:

	Old Crack Guidelines	Option 1: Use the drug weights from the Temporary Emergency Amendment	Option 2: Use different drug weights
Base Offense Level	Amount of Crack	5-year mandatory minimum set at level 26; 10-year mandatory minimum set at level 32	5-year mandatory minimum set at level 24; 10-year mandatory minimum set at level 30
38	4.5 KG or more	8.4 KG or more	25.2 KG or more
36	At least 1.5 KG but less than 4.5 KG	At least 2.8 KG but less than 8.4 KG	At least 8.4 KG but less than 25.2 KG
34	At least 500 G but less than 1.5 KG	At least 840 G but less than 2.8 KG	At least 2.8 KG but less than 8.4 KG
32	At least 150 G but less than 500 G	At least 280 G but less than 840 G (10-year mandatory minimum)	At least 840 G but less than 2.8 KG
30	At least 50 G but less than 150 G	At least 196 G but less than 280 G	At least 280 G but less than 840 G (10 year mandatory minimum)
28	At least 35 G but less than 50 G	At least 112 G but less than 196 G	At least 196 G but less than 280 G
26	At least 20 G but less than 35 G	At least 28 G but less than 112 G (5-year mandatory minimum)	At least 112 G but less than 196 G
24	At least 5 G but less than 20 G	At least 22.4 G but less than 28 G	At least 28 G but less than 112 G (5-year mandatory minimum)
22	At least 4 G but less than 5 G	At least 16.8 G but less than 22.4 G	At least 22.4 G but less than 28 G
20	At least 3 G but less than 4 G	At least 11.2 G but less than 16.8 G	At least 16.8 G but less than 22.4 G
18	At least 2 G but less than 3 G	At least 5.6 G but less than 11.2 G	At least 11.2 G but less than 16.8 G
16	At least 1 G but less than 2 G	At least 2.8 G but less than 5.6 G	At least 5.6 G but less than 11.2 G
14	At least 500 MG but less than 1 G	At least 1.4 G but less than 2.8 G	At least 2.8 G but less than 5.6 G
12	Less than 500 MG	Less than 1.4 G	Less than 2.8 G



Q-11: Which option will the Commission choose for the permanent crack guideline amendment?

A: We do not know. The Commission asked the public to submit its thoughts on how the Commission should permanently change the crack guidelines. FAMM will be sending its thoughts to the Commission and ask the Commission to use Option 2 (see above), because that option will produce fairer sentences and will not subject people whose cases involved 28 or 280 grams to guideline ranges that are longer than the mandatory minimums. **Remember:** the permanent crack guideline amendment will only change crack sentencing guidelines, *not* mandatory minimum sentences for crack crimes.

The Commission has also asked the public to send its thoughts on whether the permanent crack guideline amendment should be made retroactive so that it can benefit people sentenced before it goes into effect, on November 1, 2011. FAMM is urging the Commission to make its permanent crack guideline amendment retroactive.

To submit a letter to the Commission supporting Option 2 and urging the Commission to make the permanent crack guideline amendment retroactive, go to <http://www.famm.org/FederalSentencing/USSentencingGuidelines/USSentencingGuidelinesUpdates.aspx> and use FAMM's form letter. Letters and comments must be received by the Commission by March 21, 2011.

Q-12: When will the Commission choose which option it will use for the permanent crack guideline amendment?

A: By May 1, 2011, the Commission must submit its final proposed amendment to Congress.

Q-13: What happens after the Commission proposes the permanent crack amendment on May 1, 2011?

A: Once the Commission submits its proposed amendment, it will become permanent unless both the House and the Senate vote to reject it by October 31, 2011. To reject the amendment, a majority of both houses of Congress must vote against it. If Congress does not reject the proposed permanent crack amendment, it goes into effect on November 1, 2011.

Q-14: If the proposed permanent crack amendment goes into effect on November 1, 2011, who will it affect?

A: If Congress does not reject the Commission's proposed permanent crack guideline amendment, the amendment's changes will affect only people sentenced *on or after* November 1, 2011. Crack offenders sentenced *before* November 1, 2011 *cannot* benefit from the permanent guideline amendment unless the Commission votes to make that amendment retroactive (see next question).

Q-15: Will the Commission make the permanent guideline amendment retroactive? If so, when?

A: We do not know if or when the Commission will make the permanent crack guideline amendment retroactive. The Commission may never take a vote on retroactivity. Or, the



Commission can vote on retroactivity at the same time it votes on the permanent amendment. Or, the Commission can vote on retroactivity after it sends the proposed permanent amendment to Congress on May 1, 2011. By the way, Congress does not have any say over whether a guideline amendment becomes retroactive. That is the Commission's decision alone.

Remember: The Commission cannot make the FSA's changes to mandatory minimum laws retroactive. Only Congress can change mandatory minimum laws and make those changes retroactive.

Q-16: Can the Sentencing Commission amend the crack guideline ranges so that they reflect a one-to-one ratio?

A: Technically, yes, but as a practical matter it won't. The Commission will follow the FSA's 18-to-1 ratio.

Q-17: Should people serving a federal prison sentence for a crack offense begin looking for or hiring attorneys to help them get a sentence reduction in the event the Commission makes the permanent crack guideline amendments retroactive?

A. FAMM cannot give legal advice, but we will say this: People should be extremely cautious about paying or hiring anyone who promises that the Commission will make its permanent changes to the crack sentencing guidelines retroactive. There is no guarantee and many steps to take before the retroactivity decision is made, if ever. *If* the Commission makes changes to the crack guidelines retroactive, FAMM will update its members on how the courts, prosecutors, and defense attorneys plan to handle requests for sentence reductions.

Q-18: If a person is awaiting sentencing (or resentencing after an appeal), should that person postpone sentencing (or resentencing) until the FSA is made retroactive or until the Commission makes the permanent crack guideline changes retroactive?

A: People who are awaiting trial, sentencing, or resentencing for a federal crack offense committed before August 3, 2010 should **discuss this question with their lawyers**. Whether, how, and/or when such a person can receive the benefit of the FSA or any crack guideline amendments made by the Commission depends on many factors. For example, for people who may be subject to a mandatory minimum but have not yet been charged or convicted, prosecutors may have some discretion to decide or bargain with defendants over the facts or charges they will bring. There is also litigation over whether people who have already been convicted of a mandatory minimum offense but have not yet been sentenced (or resentenced) can benefit from the new law. FAMM cannot provide its members with legal advice or opinions on this issue. Again, people with questions about this issue should speak with their lawyers.

Q-19: Can FAMM tell me how the FSA or the temporary or permanent crack amendments will affect people awaiting sentencing for a crack offense?

A: No. FAMM does not give legal advice, and we do not know all the details of each person's case. People awaiting sentencing for a federal crack offense should talk to their lawyers about how and if the FSA and the temporary or permanent crack amendments might help them.



LEGAL DISCLAIMER

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