



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!

S. 1789, the Fair Sentencing Act of 2010, was passed by the House of Representatives on July 28, 2010. President Obama signed the bill into law on August 3, 2010. S. 1789 changes the current 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. S. 1789 does not change the powder cocaine triggering weights. S. 1789 also eliminates the current 5-year mandatory minimum for simple possession (without intent to distribute) of crack cocaine. **The new crack law (S. 1789) 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 S. 1789 may benefit them.**

Q-1: Can the changes to crack mandatory minimum sentences made by S. 1789 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 prisoners, 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. FAMM is urging Congress to make crack reforms retroactive. 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 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 S. 1789, 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 S. 1789 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 new crack law 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 new crack law retroactive?

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

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

A: No. The Commission can only make changes to the U.S. Sentencing Guidelines retroactive. S. 1789 changes mandatory minimum sentencing laws, *not* guidelines. Only Congress can make changes to mandatory minimums 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." S. 1789 changes the amount of crack it takes to trigger the current 5- 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: Does S. 1789 allow the Sentencing Commission to amend the crack guidelines?

A: Yes. S. 1789 directs the Commission to amend the crack sentencing guidelines so that they agree with the new law. S. 1789 gives the Commission "emergency authority" to amend the crack sentencing guidelines within 90 days of the date S. 1789 was signed into law (by November 1, 2010). Amending the guidelines ensures that the new 18-to-1 crack-powder ratio is reflected in the advisory sentencing guidelines. The Commission's changes – contained in what is known as a "temporary emergency amendment" – will only affect sentencing guideline ranges, not mandatory minimums, for federal crack cocaine offenses.

FAMM does not know when or how quickly the Commission will amend the crack guidelines, but it must do so by November 1, 2010. We will keep our members updated on the Commission's decisions at www.famm.org.



Q-9: Will the Commission make the temporary emergency amendment retroactive? If so, when?

A: FAMM does not know if or when the Commission might make the temporary emergency amendments to the crack guidelines retroactive. Whether the Commission has the authority to make a temporary amendment retroactive is an open question. We will keep you updated as the Commission makes these determinations.

Q-10: When will the Commission make the crack guideline changes permanent?

A: To pass a permanent amendment, the Commission must follow certain rules and timetables:

STEP 1: By May 1, 2011, after seeking and considering public comment, the Commission must submit the temporary crack guideline amendment as a proposed (permanent) crack guideline amendment, along with the other proposed amendments, to Congress.

STEP 2: Between May 1 and November 1, 2011, Congress can vote (by a majority vote in both houses) to reject the Commission's proposed permanent crack guideline amendment.

STEP 3: If Congress does not reject the proposed permanent crack guideline amendment, the amendment becomes a permanent part of the guidelines and goes into effect on November 1, 2011. Those changes apply to everyone sentenced *on or after* November 1, 2011.

Q-11: Will the Commission make the permanent guideline amendment retroactive? If so, when?

A: We do not know if the Commission will make the permanent crack guideline amendment retroactive. The Commission votes on retroactivity on or after the date it votes to submit the amendment to Congress (that is, by May 1, 2011). Sometimes, the Commission decides on retroactivity at the same time it proposes a permanent amendment (i.e., May 1, 2011), but the Commission can also wait until a later date to decide whether an amendment will be retroactive.

The permanent crack guideline amendments would go into effect on November 1, 2011. If the Commission votes to make the permanent amendments retroactive, retroactivity of the permanent amendment would go into effect on or after November 1, 2011. Congress does not have any say over whether a guideline amendment becomes retroactive.

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

Q-12: Can the Sentencing Commission amend the crack guideline ranges so that they reflect a one-to-one ratio?

A: Technically, yes, but it is highly unlikely that the Commission will do this. The Commission will most likely follow the 18-to-1 ratio that passed both houses of Congress.



Q-13: 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 amends the sentencing guidelines and makes those changes 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 change or has changed the crack sentencing guidelines and will make those changes retroactive. *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-14: If a person is awaiting sentencing (or resentencing after an appeal), should that person postpone sentencing (or resentencing) until the new law is made retroactive or until the Commission amends the guidelines and makes those 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 new crack law or any 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-15: Can FAMM tell me how S. 1789 will affect people awaiting sentencing?

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 S. 1789 might help them.

LEGAL DISCLAIMER

FAMM cannot provide legal advice, representation, referrals, research, or guidance to those who need legal help. Nothing on this form is intended to be legal advice or should be relied on as legal advice. If you or your loved one feel that you need legal advice, you should speak with an attorney.