



**U.S. Department of Justice**

Office of Legislative Affairs

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*Office of the Assistant Attorney General*

*Washington, D.C. 20530*

April 25, 2011

The Honorable Dick Durbin  
Chairman  
Subcommittee on the Constitution,  
Civil Rights and Human Rights  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Messrs Chairmen:

This is in response to your letter dated November 17, 2010, concerning application of the Fair Sentencing Act of 2010. We apologize for our delay in responding.

We are grateful for your sustained leadership in the effort to reform federal cocaine sentencing laws, which ultimately led to the enactment of the Fair Sentencing Act. As you know, the President and the Attorney General spoke out repeatedly on the need to address the 100-to-1 quantity ratio in federal cocaine sentencing policy. The Act was a historic achievement that would not have been possible without you and all you did to see it enacted.

We share your sense of urgency over implementation of the Act. The Department of Justice worked closely with the United States Sentencing Commission to ensure that implementing sentencing guidelines were promulgated by the Commission within 90 days of the Act's enactment. Furthermore, within days of the signing of the Act, Acting Deputy Attorney General Gary G. Grindler issued guidance on its implementation to all Federal prosecutors.

As noted in this guidance, dated August 5, 2010, the Act is silent as to whether the new threshold quantities for statutory mandatory minimum sentences apply to conduct that occurred prior to its enactment. As a result, pursuant to the Savings Statute, Title 1, United States Code, section 109, the new law applies only prospectively, that is, solely to offense conduct occurring on or after the date of its enactment. *See Warren v. Marrero*, 417 U.S. 653 (1974). Every circuit court that has reviewed this issue to date has agreed.

We also have concluded that a judge lacks authority to sentence below an applicable mandatory minimum triggered by a finding of guilt for an offense that occurred prior to enactment of the Fair Sentencing Act. Thus, any request that a judge sentence a defendant below such an applicable mandatory minimum would be unsupported by and inconsistent with the law.

The Honorable Dick Durbin  
The Honorable Patrick J. Leahy  
Page Two

However, as you note in your letter, prosecutors properly exercise discretion in charging decisions. In all cases, including cases involving crack cocaine trafficking, federal prosecutors are directed to make their charging decisions consistent with the Principles of Federal Prosecution and Attorney General Holder's May 19, 2010, memorandum on charging and sentencing policy. The policies embodied in these documents require prosecutors to make an individualized assessment "of the extent to which particular charges fit the specific circumstances of the cases, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime." U.S. Attorneys' Manual, Title 9, Chapter 27. In all cases, prosecutors must fully evaluate the circumstances surrounding the case and charge accordingly. The prosecutors of the Department of Justice take very seriously their responsibilities to execute the laws as Congress has enacted them and at the same time ensure that justice is done in every case.

As you requested, we have included with this letter both the memorandum issued by Acting Deputy Attorney General Gary G. Grindler on August 5, 2010, and a second guidance memorandum issued by the Acting Deputy Attorney General to all Federal prosecutors on November 2, 2010, regarding amendments to the sentencing guidelines that had been promulgated by the U.S. Sentencing Commission.

We hope this information is helpful, and we look forward to working with the Committee to continue to improve federal sentencing policy, public safety, and the administration of justice. Please do not hesitate to contact this office if we may be of further assistance with this or any other matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark D. Agrast", followed by a checkmark.

Mark D. Agrast  
Acting Assistant Attorney General

Enclosures

cc: The Honorable Charles Grassley  
Ranking Minority Member  
Committee on the Judiciary

The Honorable Lindsey Graham  
Ranking Minority Member  
Subcommittee on the Constitution, Civil Rights and Human Rights  
Committee on the Judiciary



**U.S. Department of Justice**

Executive Office for United States Attorneys

Office of the Director


Room 2261, RFK Main Justice Building  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

(202) 514-2121

**MEMORANDUM - Sent via Electronic Mail**

DATE: **AUG - 5 2010**

TO: ALL UNITED STATES ATTORNEYS  
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS  
ALL APPELLATE CHIEFS  
ALL CRIMINAL CHIEFS

FROM:   
H. Marshall Jarrett  
Director

SUBJECT: The Fair Sentencing Act of 2010

ACTION REQUIRED: None.

CONTACT PERSONS: Jon Muschenheim  
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Phone: (202) 616-2239

Please find attached a memorandum from the Acting Deputy Attorney General regarding the application of the Fair Sentencing Act of 2010 in crack cocaine prosecutions.

Attachments

cc: ALL UNITED STATES ATTORNEYS' SECRETARIES



U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 5, 2010

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Gary G. Grindler *GGG/um*  
Acting Deputy Attorney General

SUBJECT: The Fair Sentencing Act of 2010

On August 3, 2010, the President signed into law the Fair Sentencing Act of 2010 (the "Act"). The new law amends the Controlled Substances Act and the Controlled Substances Import and Export Act by establishing new quantity thresholds that trigger statutory mandatory minimum and maximum penalties for cocaine base ("crack cocaine") offenses. Under the new law, quantities of crack cocaine triggering mandatory minimum penalties are increased such that trafficking in 28 grams (approximately one ounce) of crack cocaine will trigger the five-year mandatory minimum penalty, and trafficking in 280 grams of crack cocaine will trigger the ten-year mandatory minimum penalty. Powder cocaine quantities triggering five- and ten-year mandatory minimum penalties remain at their current levels under the new law.

Changes to Mandatory Minimum Quantity Triggers Proposed by S. 1789			
Statutory Penalty	Crack Cocaine	Powder Cocaine	New Ratio
5-year mandatory minimum	5 grams		100:1
	↘ 28 grams	500 grams	↘ 18:1
10-year mandatory minimum	50 grams		100:1
	↘ 280 grams	5,000 grams	↘ 18:1

In addition to increasing the quantities of crack cocaine that trigger mandatory minimum penalties, the Fair Sentencing Act of 2010:

- repeals the mandatory minimum sentence for simple possession of crack cocaine;
- increases fines associated with all drug trafficking offenses prohibited by 21 U.S.C. §§ 841(b) and 960(b);
- directs the U.S. Sentencing Commission to increase guideline penalties for violent drug traffickers;
- directs the U.S. Sentencing Commission to increase guideline penalties, by at least two offense levels, for drug offenses where certain aggravating factors are present (*e.g.*, witness intimidation; commission of drug trafficking as livelihood; bribery of a police officer; or distribution to a person under the age of 18 years or over the age of 64 years); and
- directs the U.S. Sentencing Commission to decrease guideline penalties, by two levels, for drug offenses where the minimal role adjustment applies and certain other mitigating factors are present.

The Act is silent regarding whether the new threshold quantities for statutory mandatory minimum sentences apply to conduct that occurred prior to its enactment. As a result of the Savings Statute, the new law will apply prospectively only to *offense conduct* occurring on or after the date of its enactment. *Warden v. Marrero*, 417 U.S. 653 (1974). The so-called Savings Statute of Title 1, United States Code, section 109, provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Accordingly, the previous statutory mandatory minimum threshold quantities (*i.e.*, five grams for the five-year mandatory minimum and 50 grams for the ten-year mandatory minimum) will continue to apply for all *offense conduct* that occurred prior to the date of enactment of the new law (*i.e.*, August 3, 2010), regardless of whether the case was charged subsequent to enactment of the new law. The new law does not provide a basis for challenging a conviction and sentence on direct appeal or by collateral attack.

In accordance with directives in the Act, we expect that the U.S. Sentencing Commission will promulgate any corresponding guidelines, policy statements, or amendments within 90 days. Any such amendments would apply to determination of a sentence within the floor and ceiling provided by the statute. It is possible that the Commission may promulgate guidelines amendments that apply retroactively to previously imposed sentences using the new 18:1 ratio or

some other ratio. It is also possible that the Commission may promulgate amendments relating to mitigating factors that apply retroactively. We will keep you informed of these developments.

In the meantime, prosecutors should continue to ask courts to calculate the applicable guidelines sentence in crack cocaine cases. Until the U.S. Sentencing Commission promulgates guidelines implementing the new law, prosecutors may inform courts that they have the legal authority to disagree with policy judgments reflected in the current guidelines, *i.e.*, the current ratio of approximately 80:1. In developing sentencing recommendations in individual cases, prosecutors should consider what the guidelines sentence would be consistent with the 18:1 ratio reflected in the new law as well as the enhancements and mitigating factors described in the directives to the Sentencing Commission contained in the new law.<sup>1</sup> Variances in guidelines sentences may be based on the factors set forth in 18 U.S.C. § 3553(a) as discussed in the guidance provided by Attorney General Eric Holder in his memorandum regarding Department policy on charging and sentencing, dated May 19, 2010.

As always, consistent with the U.S. Attorneys' Manual, in cases where a court improperly imposes a sentence below the applicable statutory mandatory minimum penalty, prosecutors should report such a sentence to the Department as an adverse decision.

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<sup>1</sup> We have attached a table that estimates the amended Drug Quantity Table in §2D1.1 of the Sentencing Guidelines under the new law.

**DRUG QUANTITY TABLE for Cocaine Base**  
**(Estimated Amended Levels under Fair Sentencing Act of 2010)**

<b>Controlled Substance and Quantity</b>	<b>Base Offense Level</b>
(1) 8400 G or more of Cocaine Base	<b>Level 38</b>
(2) At least 2800 G but less than 8400 G of Cocaine Base	<b>Level 36</b>
(3) At least 840 G but less than 2800 G of Cocaine Base	<b>Level 34</b>
(4) At least 280 G but less than 840 G of Cocaine Base	<b>Level 32</b>
(5) At least 196 G but less than 280 G of Cocaine Base	<b>Level 30</b>
(6) At least 112 G but less than 196 G of Cocaine Base	<b>Level 28</b>
(7) At least 28 G but less than 112 G of Cocaine Base	<b>Level 26</b>
(8) At least 22 G but less than 28 G of Cocaine Base	<b>Level 24</b>
(9) At least 17 G but less than 22 G of Cocaine Base	<b>Level 22</b>
(10) At least 11 G but less than 17 G of Cocaine Base	<b>Level 20</b>
(11) At least 6 G but less than 11 G of Cocaine Base	<b>Level 18</b>
(12) At least 3 G but less than 6 G of Cocaine Base	<b>Level 16</b>
(13) At least 1 G but less than 3 G of Cocaine Base	<b>Level 14</b>
(14) Less than 1 G of Cocaine Base	<b>Level 12</b>



U.S. Department of Justice

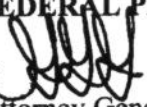
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

November 2, 2010

**MEMORANDUM TO ALL FEDERAL PROSECUTORS**

**FROM:** Gary G. Grindler   
Acting Deputy Attorney General

**SUBJECT:** U.S. Sentencing Commission's Temporary, Emergency Amendments to  
Implement the Fair Sentencing Act of 2010

Several weeks ago, I sent a memorandum to all federal prosecutors indicating that the U.S. Sentencing Commission would soon amend the Federal Sentencing Guidelines to reflect changes in federal drug sentencing policy – particularly “crack” cocaine sentencing policy – resulting from the August 3, 2010, enactment of the Fair Sentencing Act of 2010. *See* Memorandum from Acting Deputy Attorney General Grindler to All Federal Prosecutors (regarding application of the Fair Sentencing Act of 2010), dated Aug. 5, 2010. On October 15, 2010, the Sentencing Commission indeed voted to promulgate temporary, emergency amendments to the Federal Sentencing Guidelines to implement the Act. A reader-friendly version of the amendments is attached to this memorandum.

As we previously advised, the *statutory* mandatory minimum threshold quantities in effect before the new law (*i.e.*, five grams for the five-year mandatory minimum and 50 grams for the ten-year mandatory minimum) will continue to apply for all offense conduct that occurred prior to the date of enactment of the Act (*i.e.*, August 3, 2010) notwithstanding the fact that a case was charged subsequent to enactment. *See Warden v. Marrero*, 417 U.S. 653 (1974); 1 U.S.C. § 109.

The temporary Federal Sentencing Guidelines amendments, which take effect on November 1, 2010, were promulgated under the Sentencing Commission's emergency amendment authority and, accordingly, will expire no later than November 1, 2011, unless re-promulgated (either in their current or a revised form) as permanent amendments during the Sentencing Commission's regular amendment cycle. Because the Sentencing Commission promulgated these amendments pursuant to its emergency powers, there was no authority for the Commission to give the temporary amendments retroactive effect. Accordingly, the guidelines and policy statements resulting from the emergency amendments will generally apply, going forward until their expiration, to all sentencings that occur on or after November 1, 2010.<sup>1</sup>

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<sup>1</sup> Because the guideline amendments include new aggravating factors, they may implicate the Constitution's *ex post facto* clause. While the Department has taken the position that the clause is no longer implicated for guideline amendments in an advisory guideline system, some courts have ruled otherwise. In cases that may implicate the *ex post facto* clause, please review the applicable case law in your jurisdiction as well as section 1B1.11 of the Sentencing Guidelines.



**A. Changes to Statutory Terms of Imprisonment/Crack-Powder Cocaine Disparity Reduction**

The guideline amendments first respond to the Fair Sentencing Act's reduction of the disparity in penalties applicable to crack and powder cocaine offenses.<sup>2</sup> Specifically, the amendments revise the Drug Quantity Table in USSG §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to set the new 28-gram five-year mandatory minimum quantity threshold at base offense level 26 and the new 280-gram ten-year mandatory minimum quantity threshold at base offense level 32 – with corresponding crack quantity-based offense levels extrapolated up and down the Drug Quantity Table.

While the attached amendments contain the complete Drug Quantity Table, the following chart highlights just the crack cocaine quantities for your convenience.

**DRUG QUANTITY TABLE for Cocaine Base**  
**Pre-Amendment Levels and Amended Levels under Fair Sentencing Act of 2010**

<b>Original Quantity and BOL Pre-Fair Sentencing Act</b>	<b>BOL</b>	<b>Amended Quantity and BOL Post-Implementation of Fair Sentencing Act</b>
4500 g or more	<b>38</b>	8400 g or more
At least 1500 g but less than 4500 g	<b>36</b>	At least 2800 g but less than 8400 g
At least 500 g but less than 1500 g	<b>34</b>	At least 840 g but less than 2800 g
At least 150 g but less than 500 g	<b>32</b>	At least 280 g but less than 840 g
At least 50 g but less than 150 g	<b>30</b>	At least 196 g but less than 280 g
At least 35 g but less than 150 g	<b>28</b>	At least 112 g but less than 196 g
At least 20 g but less than 35 g	<b>26</b>	At least 28 g but less than 112 g
At least 5 g but less than 20 g	<b>24</b>	At least 22.4 g but less than 28 g
At least 4 g but less than 5 g	<b>22</b>	At least 16.8 g but less than 22.4 g
At least 3 g but less than 4 g	<b>20</b>	At least 11.2 g but less than 16.8 g
At least 2 g but less than 3 g	<b>18</b>	At least 5.6 g but less than 11.2 g
At least 1 g but less than 2 g	<b>16</b>	At least 2.8 g but less than 5.6 g
At least 500 mg but less than 1 g	<b>14</b>	At least 1.4 g but less than 2.8 g
Less than 500 mg	<b>12</b>	Less than 1.4 g

<sup>2</sup> The Fair Sentencing Act amended the Controlled Substances Act and the Controlled Substances Import and Export Act by establishing new drug quantity thresholds that trigger statutory mandatory minimum penalties for crack cocaine offenses. Under the Act, quantities of crack cocaine triggering mandatory minimum penalties are increased such that trafficking in 28 grams (approximately one ounce) of crack cocaine will trigger the five-year mandatory minimum penalty, and trafficking in 280 grams of crack cocaine will trigger the ten-year mandatory minimum penalty. Powder cocaine quantities triggering the five- and ten-year mandatory minimum penalties remain at their previous levels.

Set at these levels, an 18:1 ratio between crack and powder cocaine is maintained *at every point* in the drug table continuum. Accordingly, the emergency amendments reflect the important 18:1 compromise that ultimately led to the bi-partisan Congressional support for the Fair Sentencing Act.

The amendments next respond to the Act's repeal of the five-year mandatory minimum penalty for simple possession of crack cocaine by deleting former USSG §2D2.1(b)(1) which instructed manual users to use the drug trafficking guideline to calculate sentences for offenders possessing more than five grams of crack cocaine.

The amendments also establish a marijuana equivalency for crack cocaine for use in calculating the sentencing guidelines in multi-drug cases. Accordingly, the guidelines now indicate that, for the purpose of calculating the guidelines, one gram of crack cocaine is equivalent to 3,571 grams of marijuana. To conform further with the statutory changes of the Fair Sentencing Act, the guidelines commentary of Note 10(D) of USSG §2D1.1 now deletes as obsolete the rule regarding cases involving both crack cocaine and one or more other controlled substances.

## B. Increased Emphasis on Defendant's Role and Other Factors

### 1. Enhancement Based on Violence

In Section 5 of the new law, Congress directed the Commission to ensure that the guidelines provide an additional penalty increase of at least two offense levels where a defendant, during a drug trafficking offense, used violence, made a credible threat to use violence, or directed the use of violence. The Sentencing Commission responded to this directive by amending USSG §2D1.1 to provide a new specific offense characteristic at subsection (b)(2). This enhancement will apply to all drug trafficking offenses regardless of the drug involved.

Federal prosecutors should note that the commentary of USSG §2D1.1, note 3, addresses the interaction between subsections (b)(1) (which relates to weapon possession) and (b)(2) (which relates to violence). The commentary indicates that subsections (b)(1) and (b)(2) may be applied cumulatively *except* where mere possession of the weapon was not accompanied by violence or a credible threat of violence. Federal prosecutors also should note the conforming changes made to the commentary of USSG §2K2.4, note 4, which indicate that where a defendant is sentenced both for a drug trafficking offense under §2D1.1 and an 18 U.S.C. § 924(c) weapons offense under §2K2.4, the enhancements of §§2D1.1(b)(1) and 2D1.1(b)(?) will *not* apply.

### 2. Enhancements Based on Defendant's Role and Super-Aggravators

In Section 6 of the Act, Congress directed the Commission to provide for an additional penalty increase of at least two offense levels if a defendant (a) bribed or attempted to bribe a

law enforcement official in connection with a drug trafficking offense; (b) maintained a drug establishment as described in 21 U.S.C. § 856; or (c) was involved in drug trafficking activity as an organizer, leader, manager, or supervisor where, in addition, one or more of five "super-aggravating" factors also was present. The Sentencing Commission responded to this directive by establishing three new separate enhancements at subsections (b)(11) (bribery), (b)(12) (maintaining drug premises), and (b)(14) (§3B1.1 aggravating role adjustment in conjunction with certain aggravating circumstances) of USSG §2D1.1. Each of the three enhancements provides for an increase of two levels and will apply across all drug types.

Federal prosecutors should note the new commentary to §2D1.1 – at notes 27, 28, and 29, as well as the commentary to §§3B1.4 (relating to using a minor to commit a crime) and 3C1.1 (relating to obstructing or impeding the administration of justice) – which explains how these enhancements are intended to interact with other guideline enhancements.

### 3. Reductions and Caps Based on Defendant's Role

Additionally, Section 7(2) of the Act directed the Sentencing Commission to ensure an additional reduction of two offense levels if the defendant qualified for a minimal role adjustment under the guidelines, was to receive no monetary compensation from the illegal transaction, and was motivated by intimate or familial relationship or by threats or fear when otherwise unlikely to commit such an offense. To reflect this aspect of the new law, the Commission, in §2D1.1(b)(15), provided for a two-level reduction if the defendant received the "mitigating role" reduction of §3B1.2(a) *and if each* of the three factors set forth in the directive applies.

The Commission also amended the guidelines to add a new sentence at the end of §2D1.1(a)(5) to reflect the so-called "*minimal* role cap" at level 32 as required by the directive in Section 7(1) of the Act.

\* \* \*

In light of the U.S. Sentencing Commission's promulgation of these emergency amendments implementing the Fair Sentencing Act, Department prosecutors should continue to ask the court to calculate the guideline sentence applicable in crack cocaine cases, and should advocate for a sentence within the applicable federal sentencing guideline range in the typical crack cocaine case. *See* Memo of Attorney General Holder on Charging and Sentencing Policy, dated May 19, 2010, at 2.