



U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

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MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Gary G. Grindler *GGG/AM*
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	500 grams	100:1
	28 grams		18:1
10-year mandatory minimum	50 grams	5,000 grams	100:1
	280 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.¹ 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.

¹ 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)

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