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# The Sentencing Reform Act of 2015 (H.R. 3713): A Summary

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## Summary

H.R. 3713, the Sentencing Reform Act of 2015, addresses the sentences that may be imposed in various drug and firearms cases. It proposes amendments to those areas of federal law that govern mandatory minimum sentencing requirements for drug and firearm offenses; the so-called safety valves which permits court to impose sentences below otherwise required mandatory minimums in the case of certain low-level drug offenders; and the retroactive application of the Fair Sentencing Act.

Related reports include CRS Report R44246, *Sentencing Reform: Comparison of Selected Proposals*, by Jared P. Cole and Charles Doyle.

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## Introduction

House Judiciary Committee Chairman Goodlatte introduced H.R. 3713, the Sentencing Reform Act of 2015, for himself, ranking Judiciary Committee Member Representative Conyers, and a number of others on October 8, 2015.<sup>1</sup> The proposal addresses four issues: the so-called safety valve that permits courts to disregard otherwise applicable mandatory minimum sentencing requirements in certain drug cases; the mandatory minimum sentencing requirements in such cases; the mandatory minimum sentencing requirements in firearms cases; and the retroactive application of the Fair Sentencing Act.<sup>2</sup> The bill's Senate counterpart, S. 2123, features many of the same provisions, often in identical language.

## Safety Valve

The so-called safety valve provision of 18 U.S.C. 3553(f) allows a court to sentence qualified defendants below the statutory mandatory minimum in controlled substance trafficking and possession cases.<sup>3</sup> To qualify, a defendant may not have used violence in the course of the offense.<sup>4</sup> He must not have played a managerial role in the offense if it involved group participation.<sup>5</sup> The offense must not have resulted in a death or serious bodily injury.<sup>6</sup> The defendant must make full disclosure of his involvement in the offense, providing the government with all the information and evidence at his disposal.<sup>7</sup> Finally, the defendant must have an almost

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<sup>1</sup> Cosponsors include Representatives Jackson Lee, Labrador, Bishop of Michigan, Chu of California, Chabot, Nadler, Chaffetz, Cohen, Collins of Georgia, Deutch, Mimi Walters of California, DelBene, Trott, Cicilline, Rooney of Florida, and Pierluisi.

<sup>2</sup> P.L. 111-220, 124 Stat. 2372 (2010). Much of what follows was drawn from an earlier report, CRS Report R44246, *Sentencing Reform: Comparison of Selected Proposals*, by Jared P. Cole and Charles Doyle, which in turn owes much to earlier Doyle reports, e.g., CRS Report R41412, *Federal Mandatory Minimum Sentencing: The 18 U.S.C. 924(c) Tack-On in Cases Involving Drugs or Violence*, by Charles Doyle; CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, by Charles Doyle; CRS Report R41449, *Armed Career Criminal Act (18 U.S.C. 924(e)): An Overview*, by Charles Doyle.

<sup>3</sup> 18 U.S.C. 3553(f) (“Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation....”). See generally, CRS Report R41326, *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, by Charles Doyle.

<sup>4</sup> 18 U.S.C. 3553(f)(2) (“... if the court finds at sentencing ... that ... (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense”).

<sup>5</sup> 18 U.S.C. 3553(f)(4) (“... if the court finds at sentencing ... that ... (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act”).

<sup>6</sup> 18 U.S.C. 3553(f)(3) (“... if the court finds at sentencing ... that ... (3) the offense did not result in death or serious bodily injury to any person”).

<sup>7</sup> 18 U.S.C. 3553(f)(5) (“... if the court finds at sentencing ... that ... (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement”).

spotless criminal record. Any past conviction that resulted in a sentence of more than 60 days, that is, a sentence meriting the assignment of more than 1 criminal history point, is disqualifying.<sup>8</sup>

Criminal history points are a feature of the U.S. Sentencing Commission's Sentencing Guidelines. The Guidelines assign points based on the sentences imposed for prior state and federal convictions. For example, the Guidelines assign 1 point for any past conviction that resulted in a sentence of less than 60 days incarceration; 2 points for any conviction that resulted in a sentence of incarceration for 60 days or more; and 3 points for any conviction that resulted in a sentence of incarceration of more than a year and a month.<sup>9</sup>

The Sentencing Commission's report on mandatory minimum sentences suggested that Congress consider expanding safety valve eligibility to defendants with 2 or possibly 3 criminal history points.<sup>10</sup> The report indicated that under the Guidelines a defendant's criminal record "can have a disproportionate and excessively severe cumulative sentencing impact on certain drug offenders."<sup>11</sup> The commission explained that the Guidelines are construed to ensure that the sentence they recommend in a given case calls for a term of imprisonment that is not less than an applicable mandatory minimum.<sup>12</sup> In addition, the drug offenses have escalated mandatory minimums for repeat offenders.<sup>13</sup> Moreover, similarly situated drug offenders may be treated differently, because the states punish simple drug possession differently and prosecutors decide when to press recidivism qualifications differently.<sup>14</sup>

H.R. 3713 would change the safety valve in two ways. First, a defendant would be safety valve eligible with 4 or fewer criminal history points if he had not been convicted previously of a 2-point drug trafficking or violent crime (one that resulted in a sentence of 60 days or more), or any 3-point offense (one for which he was incarcerated for more than 13 months).<sup>15</sup>

Second, the proposal would permit the court to waive the criminal history disqualification, in cases other than those involving a past serious drug felony or serious violent felony conviction, if it concluded that the defendant's criminal history score overstated the seriousness of his criminal record or the likelihood that he would commit other offenses.<sup>16</sup>

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<sup>8</sup> 18 U.S.C. 3553(f)(1) ("... if the court finds at sentencing ... that - (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines").

<sup>9</sup> U.S.S.G. §4A1.1.

<sup>10</sup> United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 355 (Oct. 2011).

<sup>11</sup> *Id.* at 352.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 353 ("Interviews of prosecutors and defense attorneys in 13 districts confirm that different districts have adopted different practices with respect to filing the necessary information required to seek an enhanced penalty under 21 U.S.C. §851 [relating to proof of a prior conviction] in part because of its severity. The structure of the recidivist provisions in 21 U.S.C. §§841 and 960 fosters inconsistent application, in part, because their applicability turns on the varying statutory maximum penalties for state drug offenses").

<sup>15</sup> H.R. 3713, §3(1); proposed 18 U.S.C. 3553(f)(1). It would define "drug trafficking offense" for these purposes as a state, federal, or foreign drug trafficking offense without reference to the attendant penalties; it would define "violent offense" as a crime punishable by imprisonment which is described in 18 U.S.C. 16 (i.e., a crime one of whose elements is the use or threat of physical force or a felony that by its nature involves a substantial risk of the use of physical force), H.R. 3713, §2(a)(2), proposed 18 U.S.C. 3553(h).

<sup>16</sup> H.R. 3713, §§3(a)(2), 2(a)(1); proposed 18 U.S.C. 3553(g)(1).

## Controlled Substances Mandatory Minimums

The Controlled Substances Act and the Controlled Substances Import and Export Act establish a series of mandatory minimum sentences for violations of their prohibitions.<sup>17</sup> Class A offenses involve trafficking—that is, importing, exporting, or manufacturing, growing, possessing with the intent to distribute—a very substantial amount of various highly addictive substances, such as more than 10 grams of LSD. Class A offenses carry a sentence of imprisonment for not less than 10 years or more than life.<sup>18</sup> Class B offenses involve substantial but lesser amounts, such as 1 gram of LSD. Class B offenses carry a sentence of imprisonment for not less than 5 years or more than life, and imprisonment for not less than 10 years or more than life in the case of a subsequent conviction.<sup>19</sup> Penalties for both sets of offenses increase if the crime results in a death or if the defendant has a prior conviction for a drug felony.<sup>20</sup>

H.R. 3713 would create a mini-safety valve to reduce the mandatory minimum for Class A offenses to imprisonment for not less than 5 years, unless the offender had used violence in the commission of the offense; had acted as a supervisor, leader, supplier, or importer for a drug undertaking; sold to minors; failed to fully reveal all the information or evidence at his disposal relating to the offense or related offenses; or had prior serious drug or violent felony convictions.<sup>21</sup>

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<sup>17</sup> Portions of this report have been borrowed from earlier reports on mandatory minimum sentencing by Charles Doyle.

<sup>18</sup> 21 U.S.C. 841(b)(1)(A); 21 U.S.C. 960(b)(1). The threshold amounts covered by the sections are “(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin; (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of- (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III); (iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base; (iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP); (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide; (vii) 1,000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers.” 21 U.S.C. 841(b)(1)(ii)-(vii).

<sup>19</sup> 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2). The threshold amounts for the substances in §841(b)(1)(A) are 10 times the threshold amounts for those in §841(b)(1)(B), e.g., for heroin, 1,000 grams (1 kilogram) v. 100 grams. The same ratio applies in the case of exporting or importing these substances, §§960(b)(1), 960(b)(2).

<sup>20</sup> 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2).

<sup>21</sup> S. 2123, §103(a)/H.R. 3713, §4(a), proposed 18 U.S.C. 3553(i). A “serious drug felony” would be a state or federal offense for which the maximum penalty is imprisonment for not more than 10 years and which resulted in a sentence of imprisonment for more than 1 year. A “serious violent felony” is an offense which resulted in a sentence of imprisonment for more than 1 year and is either an assault as described in 18 U.S.C. 113 or an offense described in 18 U.S.C. 3559(c)(2)(F). Under 18 U.S.C. 3559(c)(2)(F), “‘serious violent felony’ means - (i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); ... aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and (ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that (continued...)

H.R. 3713 would both expand and contract the recidivist mandatory minimums. Under existing law, any prior drug felony conviction triggers the enhanced recidivist mandatory minimum.<sup>22</sup> Under H.R. 3713, only drug convictions carrying a maximum penalty of 10 years or more and resulting in a sentence of a year or more would trigger the increased recidivist mandatory minimums.<sup>23</sup> On the other hand, convictions for kidnapping, burglary, arson or other serious violent crimes would also serve as a basis for the recidivist mandatory minimums.<sup>24</sup>

In addition, it would reduce the mandatory minimums for Class A recidivists. A defendant with a single qualifying prior offense would face a mandatory minimum of not less than 10 years rather than one of not less than 15 years.<sup>25</sup> The defendant with two or more prior qualifying offenses could expect a mandatory minimum of not less than 25 years instead of a mandatory life sentence.<sup>26</sup>

The bill would allow the courts, on their own motion or that of the defendant or the Bureau of Prisons, to resentence defendants, convicted prior to H.R. 3713's enactment, as though the bill's reduced recidivist mandatory minimums were in place at the time of prior sentencing. In doing so, the courts would be compelled to consider: the nature and seriousness of the risks to an individual or the community; the defendant's conduct following his initial sentencing; and the statutory sentencing factors that they must ordinarily weigh before imposing punishment.<sup>27</sup>

H.R. 3713 would insist on a sentence of imprisonment for not more than 5 years to be added to, and to be served after, any sentence imposed for the drug trafficking, exporting, or importing offenses, when fentanyl, a chemical used to "cut" heroin, is involved.<sup>28</sup>

## Firearms

There are two firearms-related offenses that call for the imposition of a mandatory minimum sentence of imprisonment. One, the so-called three strikes provision, also known as the Armed Career Criminal Act (ACCA), imposes a 15-year mandatory minimum sentence on an offender convicted of unlawful possession of a firearm who has three prior convictions for a drug offense or a violent felony.<sup>29</sup> The other, 18 U.S.C. 924(c), imposes one of a series of mandatory terms of imprisonment upon a defendant convicted of the use of a firearm during the course of a drug offense or a crime of violence.<sup>30</sup>

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(...continued)

physical force against the person of another may be used in the course of committing the offense.”

<sup>22</sup> 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 802(44).

<sup>23</sup> H.R. 3713, §§2(a)(1), (2), 2(b)(1),(2); proposed 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2), 802(57).

<sup>24</sup> H.R. 3713, §§2(a)(1), (a)(2), 2(b)(1),(2); proposed 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 960(b)(1), 960(b)(2), 802(58).

<sup>25</sup> H.R. 3713, §§2(a)(1), (a)(2)(A)(i), (2)(b)(1); proposed 21 U.S.C. 841(b)(1)(A), 960(b)(1), 802(58).

<sup>26</sup> H.R. 3713, §§2(a)(1), (a)(2)(A)(ii), (2)(b)(2); proposed 21 U.S.C. 841(b)(1)(A), 960(b)(1), 802(58).

<sup>27</sup> H.R. 3713, §2(c)(2). H.R. 3713 alone would preclude retroactive application where the prior offense is a serious violent felony.

<sup>28</sup> H.R. 3713, §§2(a)(3), 2(b)(3); proposed 21 U.S.C. 841(a)(8), (9), 960(b)(8), (b)(9).

<sup>29</sup> 18 U.S.C. 924(e). See, generally, CRS Report R41449, *Armed Career Criminal Act (18 U.S.C. 924(e)): An Overview*, by Charles Doyle.

<sup>30</sup> See, generally, CRS Report R41412, *Federal Mandatory Minimum Sentencing: The 18 U.S.C. 924(c) Tack-On in Cases Involving Drugs or Violence*, by Charles Doyle.

The ACCA limits qualifying state and federal drug offenses to those punishable by imprisonment for more than 10 years.<sup>31</sup> The qualifying federal and state violent felonies are burglary, arson, extortion, the use of explosives, and any other felony that either has the use or threat of physical force as an element.<sup>32</sup> H.R. 3713 would reduce the mandatory minimum penalty from 15 years to 10 years.<sup>33</sup> It also would make the modification retroactively applicable in the same manner as the proposed mandatory minimum reductions in the case of controlled substances. That is, H.R. 3713 would permit federal courts to reduce the terms of imprisonment of defendants previously sentenced, after considering the defendant’s conduct after his initial sentence, “the nature and seriousness of the danger to any person or the community,” and the generally applicable sentencing factors of 18 U.S.C. 3553(a).<sup>34</sup> H.R. 3713’s retroactivity would apply to defendants without a prior drug offenses but not to those with serious violent felony convictions.<sup>35</sup>

Section 924(c) brings firearm mandatory minimum tack-on status to any federal drug felony and to any other federal felony, that by its nature involves a substantial risk of the use of physical force or that features the use of physical force or threat of physical force as an element.<sup>36</sup>

The ACCA calls for a single 15-year mandatory minimum. Section 924(c), in contrast, imposes one of several different minimum sentences when a firearm is used or possessed in furtherance of another federal crime of violence or of drug trafficking. The mandatory minimums, imposed in addition to the sentence imposed for the underlying crime of violence or drug trafficking, vary depending upon the circumstances:

- imprisonment for not less than 5 years, unless one of the higher mandatory minimums below applies;
- imprisonment for not less than 7 years, if a firearm is brandished;
- imprisonment for not less than 10 years, if a firearm is discharged;
- imprisonment for not less than 10 years, if a firearm is a short-barreled rifle or shotgun or is a semi-automatic weapon;
- imprisonment for not less than 15 years, if the offense involves armor-piercing ammunition;
- imprisonment for not less than 25 years, if the offender has a prior conviction for violation of 18 U.S.C. 924(c);
- imprisonment for not less than 30 years, if the firearm is a machine gun or destructive device or is equipped with a silencer; and
- imprisonment for life, if the offender has a prior conviction for violation of 18 U.S.C. 924(c) and if the firearm is a machine gun or destructive device or is equipped with a silencer.<sup>37</sup>

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<sup>31</sup> 18 U.S.C. 924(e)(2)(A).

<sup>32</sup> 18 U.S.C. 924(e)(2)(B). The statute includes a third category of violent felonies: that is, crimes like the enumerated crimes (burglary, arson, etc.) which present a serious potential risk of physical injury, 18 U.S.C. 924(e)(2)(B)(ii). The Supreme Court recently held this third category unconstitutionally vague and an impermissible bases for imposition of an enhanced sentence under §924(e). *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

<sup>33</sup> H.R. 3713, §6(a)(2); proposed 18 U.S.C. 924(e)(1).

<sup>34</sup> S. 2123, §105(c)(2); H.R. 3713, §6(b)(2).

<sup>35</sup> H.R. 3713, §§6(b)(2), 2(a)(1).

<sup>36</sup> 18 U.S.C. 924(c)(2), (3).

<sup>37</sup> 18 U.S.C. 924(c)(1), (5).



Section 924(c)'s repeat offender provision is somewhat distinctive. Most recidivist statutes assess a more severe penalty if the defendant commits a second offense after proceedings for the first have become final. Section 924(c) assesses successively more severe penalties for each count within the same prosecution.<sup>38</sup> Under this stacking of counts, a defendant convicted of several counts arising out of a single crime spree involving the robbery of several convenience stores, for example, may face a mandatory term of imprisonment of well over 100 years.<sup>39</sup>

H.R. 3713 would make clear that a conviction must have become final before it could be counted for purposes of enhancing the mandatory minimum.<sup>40</sup> H.R. 3713 also would reduce the repeat offender mandatory minimum assessment from imprisonment for not less than 25 years to not less than 15 years.<sup>41</sup> The assessment however, would encompass recidivists with prior equivalent state convictions as well.<sup>42</sup>

Except for defendants with prior serious violent felony convictions,<sup>43</sup> H.R. 3713 it would permit courts to apply its amendments to 18 U.S.C. 924(c) retroactively, provided they took into account the defendant's post-conviction conduct, the nature and seriousness of threats to individual or community safety, and the generally applicable sentencing factors.<sup>44</sup>

H.R. 3713 contains a third firearms amendment that, although not a strict mandatory minimum amendment, would increase the likelihood of imprisonment by operation of implementing sentencing guidelines by simply increasing the maximum sentence authorized for the offense or offenses.<sup>45</sup> More precisely, it would increase from imprisonment for not more than 10 years to not more than 15 years the sentences for the following firearms offenses:<sup>46</sup>

- false statements in connection with the purchase of a firearm or ammunition;<sup>47</sup>
- sale of a firearm or ammunition to, or possession by, a convicted felon or other disqualified individual;<sup>48</sup>

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<sup>38</sup> E.g., *United States v. Penny*, 576 F.3d 297, 316 (6<sup>th</sup> Cir. 2009) (“[W]hen two separate predicate offenses for triggering §924(c)(1) are charged and proved, a defendant may be convicted and sentenced for two separate crimes, even if both offenses were committed in the course of the same event”); *United States v. Sandstrom*, 594 F.3d 634, 658 (8<sup>th</sup> Cir. 2010) (“[M]ultiple underlying offenses support multiple §924(c) convictions”).

<sup>39</sup> E.g., *United States v. Richardson*, 793 F.3d 612, 633 (6<sup>th</sup> Cir. 2015) (“We have regularly upheld sentences exceeding 1,494 months for §924(c) violations related to armed robberies”).

<sup>40</sup> H.R. 3713, §5(a)(1); proposed 18 U.S.C. 924(c)(1)(C). The provision would read: “(C) in the case of a violation of this subsection that occurs after a prior conviction under this subsection or under State law for a crime of violence that contains as an element of the offense the carrying, brandishing, or use of a firearm has become final.”

<sup>41</sup> H.R. 3713, §5(a)(2); proposed 18 U.S.C. 924(c)(1)(C)(i).

<sup>42</sup> H.R. 3713, §5(a)(1); proposed 18 U.S.C. 924(c)(1)(C)(i).

<sup>43</sup> H.R. 3713, §5(b)(2).

<sup>44</sup> H.R. 3713, §5(b)(2).

<sup>45</sup> The maximum penalty which Congress assigns to a crime is one mark of how serious Congress considers the offense. The Sentencing Guidelines are designed to ensure that comparable offenders receive comparable punishment, U.S.S.G. ch.1, pt. A, 3. When Congress increases the maximum penalty assigned to a crime, the Sentencing Commission would ordinarily adjust the pertinent sentencing guideline to reflect the appropriate increased level of severity, and thereby increase the likelihood of sentencing range that would require imprisonment.

<sup>46</sup> S. 2123, §105(a)(1); H.R. 3713, §6(a)(1); proposed 18 U.S.C. 924(a)(2).

<sup>47</sup> 18 U.S.C. 922(a)(6).

<sup>48</sup> 18 U.S.C. 922(d), (g). A disqualified individual is one who (1) has been convicted of a felony; (2) is a fugitive from justice; (3) is an unlawful user or addicted to a controlled substance; (4) has been adjudicated a mental defective; (5) is an illegal alien; (6) was dishonorably discharged from the Armed Forces; (7) has renounced his U.S. citizenship; (8) is the subject of certain domestic violence restraining orders; or (9) has been convicted of a domestic violence misdemeanor. *Id.*

- while in the employ of a disqualified individual, receipt or possession of a firearm or ammunition;<sup>49</sup>
- knowing transportation of stolen firearms or ammunition;<sup>50</sup>
- knowing sale, possession, or pledge as security of stolen firearms or ammunition;<sup>51</sup> or
- transfer or possession of a machine gun under certain circumstances.<sup>52</sup>

## Fair Sentencing Act

Originally, the Controlled Substances Act made no distinction between powder cocaine and crack cocaine (cocaine base).<sup>53</sup> The 1986 Anti-Drug Abuse Act introduced a 100-1 sentencing ratio between the two, so that trafficking in 50 grams of crack cocaine carried the same penalties as trafficking in 5,000 grams of powder cocaine.<sup>54</sup> The 2010 Fair Sentencing Act (FSA) replaced the 5,000 to 50 ratio with the present 500-28 ratio, so that trafficking in 280 grams of crack cocaine carries the same penalties as 5,000 grams of powder cocaine.<sup>55</sup> The Sentencing Commission subsequently adjusted the Sentencing Guidelines to reflect the change and made the modification retroactively applicable at the discretion of the sentencing court.<sup>56</sup>

The FSA reductions apply to cocaine offenses committed thereafter. They also apply to offenses committed beforehand when sentencing occurred after the time of enactment.<sup>57</sup> Federal courts have discretion to reduce a sentence imposed under a Sentencing Guideline that was subsequently substantially reduced.<sup>58</sup> The FSA, however, does not apply to sentences imposed prior to its enactment,<sup>59</sup> and it does not apply in sentence reduction hearings triggered by new Sentencing Guidelines.<sup>60</sup> In such proceedings, the courts remain bound by the mandatory minimums in effect prior to enactment of the FSA,<sup>61</sup> so in some instances they may not reduce a previously imposed sentence to the full extent recommended by the FSA-adjusted Sentencing Guidelines.

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<sup>49</sup> 18 U.S.C. 922(h).

<sup>50</sup> 18 U.S.C. 922(i).

<sup>51</sup> 18 U.S.C. 922(j).

<sup>52</sup> 18 U.S.C. 922(o).

<sup>53</sup> P.L. 91-513, §§401, 1010; 84 Stat. 1260, 1290 (1970); 21 U.S.C. 841, 960 (1970 ed.).

<sup>54</sup> P.L. 99-570, §§1002, 1004; 100 Stat. 3707-2, 3207-6 (1986); 21 U.S.C. 841, 960 (1988 ed.).

<sup>55</sup> P.L. 111-220, §2; 124 Stat. 2372 (2010); 21 U.S.C. 841, 960.

<sup>56</sup> 18 U.S.C. 3582(c); U.S.S.G. §1B1.10; U.S.S.G. App. C, Amends. 750, 759 (eff. Nov. 1, 2012).

<sup>57</sup> *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012).

<sup>58</sup> 18 U.S.C. 3582(c)(2).

<sup>59</sup> *United States v. Santos-Rivera*, 726 F.3d 17, 28 (1<sup>st</sup> Cir. 2013)(internal citations omitted)(“[I]n *United States v. Goncalves*, we joined ten other Circuit Courts of Appeal in concluding that the FSA is not retroactive for the benefit of a defendant like *Carrasquillo-Ocasio*, whose criminal conduct and sentencing occurred before the FSA became law”); see also, *United States v. Hodge*, 721 F.3d 1279, 1281 (10<sup>th</sup> Cir. 2013).

<sup>60</sup> *United States v. Swangin*, 726 F.3d 205, 208 (D.C. Cir. 2013)(“Finally, we note that every circuit that has addressed the question post-*Dorsey* has likewise concluded that courts cannot retroactively apply the Fair Sentencing Act’s new mandatory minimums in §3582(c)(2) proceedings to defendants who were sentenced before the Act’s effective date”); *United States v. Hodge*, 721 F.3d at 1281 (“As an initial matter, the FSA does not provide an independent basis for a sentence reduction; only the statutory exceptions in 18 U.S.C. §3882 provide such grounds. In a §3882 proceeding, the court applies the statutory penalties in effect at the time of the original sentencing”).

<sup>61</sup> *United States v. Reeves*, 717 F.3d 647, 650 (8<sup>th</sup> Cir. 2013)(“[E]ight of the nine federal circuits to address the issue have held that the statutory provisions applicable when the defendant was originally sentenced – not the statutory (continued...)”).

H.R. 3713 would change that. It would allow a court to reduce a sentence that was imposed for an offense committed prior to the FSA, to reflect the FSA amendments, unless the court had already done so or unless the original sentence was imposed consistent with the FSA amendments.<sup>62</sup>

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(...continued)

provisions in the Fair Sentencing Act – apply in section 3582(c)(2) proceedings”). The single contrary option was later vacated for en banc rehearing, *United States v. Blewett*, 719 F.3d 482 (6<sup>th</sup> Cir. 2013). The divided *Blewett* panel held that defendants sentenced prior the Fair Sentencing Act’s enactment were entitled to its reductions as a matter of equal protection, *United States v. Blewett*, 719 F.3d at 494.

<sup>62</sup> H.R. 3713, §7(c). The section, with appearing in italics would read: “No court shall entertain a motion made under this section to reduce a sentence if the sentence was imposed or reduced *to a sentence greater than the applicable mandatory minimum* in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010)(P.L. 111-220; 124 Stat. 2372), or if a motion made *pursuant to sections 2 or 3 of the Sentencing Act* or under this section to reduce the sentence was *denied by a court because a reduction in the defendant’s term of imprisonment would pose a danger to any person or the community or was denied by a court because of the defendant’s post-sentencing conduct*. Nothing in this section shall require a court to reduce any sentence pursuant to this section.”