

**FIFTH REVISED PROPOSED AMENDMENT:      SPECIFIC OFFENDER  
CHARACTERISTICS**

**Synopsis of Proposed Amendment:** *This fifth revised proposed amendment is a multi-part amendment that revises the introductory commentary to Chapter Five, Part H (Specific Offender Characteristics), and the policy statements relating to age, mental and emotional conditions, physical condition, and military service.*

*Part A revises the introductory commentary to Chapter Five, Part H. As amended by Part A, the introductory commentary sets forth the statutory framework for the use of specific offender characteristics in sentencing. Specifically, it outlines three categories of specific offender characteristics described in the Sentencing Reform Act and the standards that apply to each category. It also cautions that, to avoid unwarranted disparities, the court in considering specific offender characteristics should not give them excessive weight. The introductory commentary also indicates that the Commission will continue its work on specific offender characteristics to revise the guidelines and to provide information to the courts.*

*Part B revises the policy statements in Chapter Five, Part H, relating to age; mental and emotional conditions; physical condition; and military service. As amended by Part B, these policy statements -- which have provided that such characteristics are "not ordinarily relevant" -- now provide that such characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted, if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.*

*Part C makes conforming changes to §5K2.0 (Grounds for Departure).*

**Proposed Amendment:**

**(A)      Introductory Commentary**

**PART H - SPECIFIC OFFENDER CHARACTERISTICS**

*Introductory Commentary*

~~*The following policy statements address the relevance of certain offender characteristics to the determination of whether a sentence should be outside the applicable guideline range and, in certain cases, to the determination of a sentence within the applicable guideline range. Under 28 U.S.C. § 994(d), the Commission is directed to consider whether certain specific offender characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence" and to take them into account only to the extent they are determined to be relevant by the Commission.*~~

~~*This Part addresses the relevance of certain specific offender characteristics in sentencing. The Sentencing Reform Act (the "Act") contains several provisions regarding specific offender characteristics:*~~

*First, the Act directs the Commission to ensure that the guidelines and policy statements "are entirely neutral" as to five characteristics – race, sex, national origin, creed, and socioeconomic status. See 28 U.S.C. § 994(d).*

*Second, the Act directs the Commission to consider whether eleven specific offender characteristics, "among others", have any relevance to the nature, extent, place of service, or other aspects of an appropriate sentence, and to take them into account in the guidelines and policy statements only to the extent that they do have relevance. See 28 U.S.C. § 994(d).*

*Third, the Act directs the Commission to ensure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the "general inappropriateness" of considering five of those characteristics – education, vocational skills, employment record, family ties and responsibilities, and community ties. See 28 U.S.C. § 994(e).*

*Fourth, the Act also directs the sentencing court, in determining the particular sentence to be imposed, to consider, among other factors, "the history and characteristics of the defendant". See 18 U.S.C. § 3553(a)(1).*

*Specific offender characteristics are taken into account in the guidelines in several ways. One important specific offender characteristic is the defendant's criminal history, see 28 U.S.C. § 994(d)(10), which is taken into account in the guidelines in Chapter Four (Criminal History and Criminal Livelihood). See § 5H1.8 (Criminal History). Another specific offender characteristic in the guidelines is the degree of dependence upon criminal history for a livelihood, see 28 U.S.C. § 994(d)(11), which is taken into account in Chapter Four, Part B (Career Offenders and Criminal Livelihood). See § 5H1.9 (Dependence upon Criminal Activity for a Livelihood). Other specific offender characteristics are accounted for elsewhere in this manual. See, e.g., §§ 2C1.1(a)(1) and 2C1.2(a)(1) (providing alternative base offense levels if the defendant was a public official); 3B1.3 (Abuse of Position of Trust or Use of Special Skill); and 3E1.1 (Acceptance of Responsibility).*

*The Supreme Court has emphasized that the advisory guideline system should "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." See United States v. Booker, 543 U.S. 220, 264-65 (2005). Although the court must consider "the history and characteristics of the defendant" among other factors, see 18 U.S.C. § 3553(a), in order to avoid unwarranted sentencing disparities the court should not give them excessive weight. Generally, the most appropriate use of specific offender characteristics is to consider them not as a reason for a sentence outside the applicable guideline range but for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence. To avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, see 18 U.S.C. § 3553(a)(6), 28 U.S.C. § 991(b)(1)(B), the guideline range, which reflects the defendant's criminal conduct and the defendant's criminal history, should continue to be "the starting point and the initial benchmark." Gall v. United States, 552 U.S. 38, 49 (2007).*

*Accordingly, the purpose of this Part is to provide sentencing courts with a framework for*

addressing specific offender characteristics in a reasonably consistent manner. Using such a framework in a uniform manner will help "secure nationwide consistency," *see Gall v. United States*, 552 U.S. 38, 49 (2007), "avoid unwarranted sentencing disparities," *see* 28 U.S.C. § 991(b)(1)(B), 18 U.S.C. § 3553(a)(6), "provide certainty and fairness," *see* 28 U.S.C. § 991(b)(1)(B), and "promote respect for the law," *see* 18 U.S.C. § 3553(a)(2)(A).

*This Part allocates specific offender characteristics into three general categories.*

*In the first category are specific offender characteristics the consideration of which Congress has prohibited (e.g., §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)) or that the Commission has determined should be prohibited.*

*In the second category are specific offender characteristics that Congress directed the Commission to take into account in the guidelines only to the extent that they have relevance to sentencing. See 28 U.S.C. § 994(d). For some of these, the policy statements indicate that these characteristics may be relevant in determining whether a sentence outside the applicable guideline range is warranted (e.g., age; mental and emotional condition; physical condition). These characteristics may warrant a sentence outside the applicable guideline range if the characteristic, individually or in combination with other such characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines. These specific offender characteristics also may be considered for other reasons, such as in determining the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, and various other aspects of an appropriate sentence.*

*The Commission has determined that certain circumstances in the third category are specific offender characteristics that Congress directed the Commission to ensure are reflected in the guidelines and policy statements as generally inappropriate in recommending a term of imprisonment or length of a term of imprisonment. See 28 U.S.C. § 994(e). The policy statements indicate that these characteristics are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range. Unless expressly stated, this does not mean that the Commission views such circumstances as necessarily inappropriate to the determination of the sentence within the applicable guideline range, the type of sentence (e.g., probation or imprisonment) within the sentencing options available for the applicable Zone on the Sentencing Table, or to the determination of various other incidents/aspects of an appropriate sentence (e.g., the appropriate conditions of probation or supervised release). Furthermore, although these circumstances are not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range, they may be relevant to this determination in exceptional cases. They also may be relevant if a combination of such circumstances makes the case an exceptional one, but only if each such circumstance is identified as an affirmative ground for departure and is present in the case to a substantial degree. See §5K2.0 (Grounds for Departure).*

*In addition, 28 U.S.C. § 994(e) requires the Commission to assure that its guidelines and policy statements reflect the general inappropriateness of considering the defendant's education, vocational skills, employment record, and family ties and responsibilities in determining whether a term of imprisonment should be imposed or the length of a term of imprisonment.*

*As with the other provisions in this manual, these policy statements "are evolutionary in nature".*

*See Chapter One, Part A, Subpart 2 (Continuing Evolution and Role of the Guidelines); 28 U.S.C. § 994(o). The Commission expects, and the Sentencing Reform Act contemplates, that continuing research, experience, and analysis will result in modifications and revisions.*

*The nature, extent, and significance of specific offender characteristics can involve a range of considerations. The Commission will continue to provide information to the courts on the relevance of specific offender characteristics in sentencing, as the Sentencing Reform Act contemplates. See, e.g., 28 U.S.C. § 995(a)(12)(A) (the Commission serves as a "clearinghouse and information center" on federal sentencing). Among other things, this may include information on the use of specific offender characteristics, individually and in combination, in determining the sentence to be imposed (including, where available, information on rates of use, criteria for use, and reasons for use); the relationship, if any, between specific offender characteristics and (A) the "forbidden factors" specified in 28 U.S.C. § 994(d) and (B) the "discouraged factors" specified in 28 U.S.C. § 994(e); and the relationship, if any, between specific offender characteristics and the statutory purposes of sentencing.*

## **(B) Chapter Five, Part H Policy Statements**

### **§5H1.1. Age (Policy Statement)**

~~Age (including youth) is not ordinarily relevant in determining whether a departure is warranted~~ may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration. Physical condition, which may be related to age, is addressed at §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction).

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### **§5H1.3. Mental and Emotional Conditions (Policy Statement)**

~~Mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted~~ may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines. See also, except as provided in Chapter Five, Part K, Subpart 2 (Other Grounds for Departure).

~~In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose.~~ See §5C1.1, Application Note 6.

Mental and emotional conditions may be relevant in determining the conditions of probation or supervised release; e.g., participation in a mental health program (see §§5B1.3(d)(5) and 5D1.3(d)(5)).

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**§5H1.4. Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction (Policy Statement)**

Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted. However, an extraordinary physical impairment may be a reason to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure. Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program (see §5D1.3(d)(4)). If participation in a substance abuse program is required, the length of supervised release should take into account the length of time necessary for the supervisory body/probation office to judge the success of the program.

In certain cases a downward departure may be appropriate to accomplish a specific treatment purpose. See §5C1.1, Application Note 6.

Similarly, where in a case in which a defendant who is a substance abuser is sentenced to probation, it is strongly recommended that the conditions of probation contain a requirement that the defendant participate in an appropriate substance abuse program (see §5B1.3(d)(4)).

Addiction to gambling is not a reason for a downward departure.

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**§5H1.11. Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement)**

Military service may be relevant in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines.

Military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted.

(C) §5K2.0

§5K2.0. Grounds for Departure (Policy Statement)

(a) UPWARD DEPARTURES IN GENERAL AND DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.—

(1) IN GENERAL.—The sentencing court may depart from the applicable guideline range if—

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) DEPARTURES BASED ON CIRCUMSTANCES OF A KIND NOT ADEQUATELY TAKEN INTO CONSIDERATION.—

(A) IDENTIFIED CIRCUMSTANCES.—This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.

(B) UNIDENTIFIED CIRCUMSTANCES.—A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) DEPARTURES BASED ON CIRCUMSTANCES PRESENT TO A DEGREE NOT ADEQUATELY TAKEN INTO CONSIDERATION.—A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into

consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) DEPARTURES BASED ON NOT ORDINARILY RELEVANT OFFENDER CHARACTERISTICS AND OTHER CIRCUMSTANCES.—An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.—Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that—

- (1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;
- (2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and
- (3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) LIMITATION ON DEPARTURES BASED ON MULTIPLE CIRCUMSTANCES.—The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if—

- (1) such offender characteristics or other circumstances, taken together, make

the case an exceptional one; and

- (2) each such offender characteristic or other circumstance is—
  - (A) present to a substantial degree; and
  - (B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.
- (d) **PROHIBITED DEPARTURES.**—Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:
  - (1) Any circumstance specifically prohibited as a ground for departure in §§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), ~~the third and last sentences~~ ~~last sentence~~ of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).
  - (2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).
  - (3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.
  - (4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreement).
  - (5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).
  - (6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.
- (e) **REQUIREMENT OF SPECIFIC WRITTEN REASONS FOR DEPARTURE.**—If the court departs from the applicable guideline range, it shall state, pursuant to 18

U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the written judgment and commitment order.

Commentary

Application Notes:

1. Definitions.—For purposes of this policy statement:

"Circumstance" includes, as appropriate, an offender characteristic or any other offense factor.

"Depart", "departure", "downward departure", and "upward departure" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Scope of this Policy Statement.—

(A) Departures Covered by this Policy Statement.—This policy statement covers departures from the applicable guideline range based on offense characteristics or offender characteristics of a kind, or to a degree, not adequately taken into consideration in determining that range. See 18 U.S.C. § 3553(b).

Subsection (a) of this policy statement applies to upward departures in all cases covered by the guidelines and to downward departures in all such cases except for downward departures in child crimes and sexual offenses.

Subsection (b) of this policy statement applies only to downward departures in child crimes and sexual offenses.

(B) Departures Covered by Other Guidelines.—This policy statement does not cover the following departures, which are addressed elsewhere in the guidelines: (i) departures based on the defendant's criminal history (see Chapter Four (Criminal History and Criminal Livelihood), particularly §4A1.3 (Departures Based on Inadequacy of Criminal History Category)); (ii) departures based on the defendant's substantial assistance to the authorities (see §5K1.1 (Substantial Assistance to Authorities)); and (iii) departures based on early disposition programs (see §5K3.1 (Early Disposition Programs)).

3. Kinds and Expected Frequency of Departures under Subsection (a).—As set forth in subsection (a), there generally are two kinds of departures from the guidelines based on offense characteristics and/or offender characteristics: (A) departures based on circumstances of a kind not adequately taken into consideration in the guidelines; and (B) departures based on circumstances that are present to a degree not adequately taken into consideration in the guidelines.

(A) Departures Based on Circumstances of a Kind Not Adequately Taken into Account in Guidelines.—Subsection (a)(2) authorizes the court to depart if there exists an aggravating

or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), of a kind not adequately taken into consideration in the guidelines.

- (i) Identified Circumstances.—This subpart (Chapter Five, Part K, Subpart 2) identifies several circumstances that the Commission may have not adequately taken into consideration in setting the offense level for certain cases. Offense guidelines in Chapter Two (Offense Conduct) and adjustments in Chapter Three (Adjustments) sometimes identify circumstances the Commission may have not adequately taken into consideration in setting the offense level for offenses covered by those guidelines. If the offense guideline in Chapter Two or an adjustment in Chapter Three does not adequately take that circumstance into consideration in setting the offense level for the offense, and only to the extent not adequately taken into consideration, a departure based on that circumstance may be warranted.
- (ii) Unidentified Circumstances.—A case may involve circumstances, in addition to those identified by the guidelines, that have not adequately been taken into consideration by the Commission, and the presence of any such circumstance may warrant departure from the guidelines in that case. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to take into consideration relevant circumstances in sentencing, it is expected that departures based on such unidentified circumstances will occur rarely and only in exceptional cases.

(B) Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration in Guidelines.—

- (i) In General.—Subsection (a)(3) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstance in a case under 18 U.S.C. § 3553(b)(2)(A)(i), to a degree not adequately taken into consideration in the guidelines. However, inasmuch as the Commission has continued to monitor and refine the guidelines since their inception to determine the most appropriate weight to be accorded the mitigating and aggravating circumstances specified in the guidelines, it is expected that departures based on the weight accorded to any such circumstance will occur rarely and only in exceptional cases.
- (ii) Examples.—As set forth in subsection (a)(3), if the applicable offense guideline and adjustments take into consideration a circumstance identified in this subpart, departure is warranted only if the circumstance is present to a degree substantially in excess of that which ordinarily is involved in the offense. Accordingly, a departure pursuant to §5K2.7 for the disruption of a governmental function would have to be substantial to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the guideline covering the mailing of injurious articles is applicable, however, and the offense caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not

warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure may be warranted if several persons were injured.

- (C) Departures Based on Circumstances Identified as Not Ordinarily Relevant.—Because certain circumstances are specified in the guidelines as not ordinarily relevant to sentencing (see, e.g., Chapter Five, Part H (Specific Offender Characteristics)), a departure based on any one of such circumstances should occur only in exceptional cases, and only if the circumstance is present in the case to an exceptional degree. If two or more of such circumstances each is present in the case to a substantial degree, however, and taken together make the case an exceptional one, the court may consider whether a departure would be warranted pursuant to subsection (c). Departures based on a combination of not ordinarily relevant circumstances that are present to a substantial degree should occur extremely rarely and only in exceptional cases.

As required by subsection (e), each circumstance forming the basis for a departure described in this subdivision shall be stated with specificity in the written judgment and commitment order.

4. Downward Departures in Child Crimes and Sexual Offenses.—

- (A) Definition.—For purposes of this policy statement, the term "child crimes and sexual offenses" means offenses under any of the following: 18 U.S.C. § 1201 (involving a minor victim), 18 U.S.C. § 1591, or chapter 71, 109A, 110, or 117 of title 18, United States Code.

(B) Standard for Departure.—

- (i) Requirement of Affirmative and Specific Identification of Departure Ground.—The standard for a downward departure in child crimes and sexual offenses differs from the standard for other departures under this policy statement in that it includes a requirement, set forth in 18 U.S.C. § 3553(b)(2)(A)(ii)(I) and subsection (b)(1) of this guideline, that any mitigating circumstance that forms the basis for such a downward departure be affirmatively and specifically identified as a ground for downward departure in this part (i.e., Chapter Five, Part K).
- (ii) Application of Subsection (b)(2).—The commentary in Application Note 3 of this policy statement, except for the commentary in Application Note 3(A)(ii) relating to unidentified circumstances, shall apply to the court's determination of whether a case meets the requirement, set forth in subsection 18 U.S.C. § 3553(b)(2)(A)(ii)(II) and subsection (b)(2) of this policy statement, that the mitigating circumstance forming the basis for a downward departure in child crimes and sexual offenses be of kind, or to a degree, not adequately taken into consideration by the Commission.

5. Departures Based on Plea Agreements.—Subsection (d)(4) prohibits a downward departure based

only on the defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense. Even though a departure may not be based merely on the fact that the defendant agreed to plead guilty or enter a plea agreement, a departure may be based on justifiable, non-prohibited reasons for departure as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreements). In cases in which the court departs based on such reasons as set forth in the plea agreement, the court must state the reasons for departure with specificity in the written judgment and commitment order, as required by subsection (e).

Background: This policy statement sets forth the standards for departing from the applicable guideline range based on offense and offender characteristics of a kind, or to a degree, not adequately considered by the Commission. Circumstances the Commission has determined are not ordinarily relevant to determining whether a departure is warranted or are prohibited as bases for departure are addressed in Chapter Five, Part H (Offender Characteristics) and in this policy statement. Other departures, such as those based on the defendant's criminal history, the defendant's substantial assistance to authorities, and early disposition programs, are addressed elsewhere in the guidelines.

As acknowledged by Congress in the Sentencing Reform Act and by the Commission when the first set of guidelines was promulgated, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision." (See Chapter One, Part A). Departures, therefore, perform an integral function in the sentencing guideline system. Departures permit courts to impose an appropriate sentence in the exceptional case in which mechanical application of the guidelines would fail to achieve the statutory purposes and goals of sentencing. Departures also help maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, along with appellate cases reviewing these departures, the Commission can further refine the guidelines to specify more precisely when departures should and should not be permitted.

As reaffirmed in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108-21), circumstances warranting departure should be rare. Departures were never intended to permit sentencing courts to substitute their policy judgments for those of Congress and the Sentencing Commission. Departure in such circumstances would produce unwarranted sentencing disparity, which the Sentencing Reform Act was designed to avoid.

In order for appellate courts to fulfill their statutory duties under 18 U.S.C. § 3742 and for the Commission to fulfill its ongoing responsibility to refine the guidelines in light of information it receives on departures, it is essential that sentencing courts state with specificity the reasons for departure, as required by the PROTECT Act.

This policy statement, including its commentary, was substantially revised, effective October 27, 2003, in response to directives contained in the PROTECT Act, particularly the directive in section 401(m) of that Act to—

- "(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and
- (2) promulgate, pursuant to section 994 of title 28, United States Code—
  - (A) appropriate amendments to the sentencing guidelines, policy statements, and official

*commentary to ensure that the incidence of downward departures is substantially reduced;*  
*(B) a policy statement authorizing a departure pursuant to an early disposition program;*  
*and*  
*(C) any other conforming amendments to the sentencing guidelines, policy statements, and*  
*official commentary of the Sentencing Commission necessitated by the Act, including a*  
*revision of ...section 5K2.0".*

*The substantial revision of this policy statement in response to the PROTECT Act was intended to refine the standards applicable to departures while giving due regard for concepts, such as the "heartland", that have evolved in departure jurisprudence over time.*

*Section 401(b)(1) of the PROTECT Act directly amended this policy statement to add subsection (b), effective April 30, 2003.*

