

**ADDRESSES:** Send comments to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2-500, South Lobby, Washington, DC 20002-8002, Attention: Public Affairs-Public Comment.

**FOR FURTHER INFORMATION CONTACT:** Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

**SUPPLEMENTARY INFORMATION:** The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a) and sometimes pursuant to other specific statutory authority. The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p).

Rule 4.4 of the Commission's Rules of Practice and Procedure provides that, with respect to proposed amendments and issues for comment, the Commission shall, "to the extent practicable, provide a minimum period of public comment of at least 60 calendar days prior to final Commission action." Because section 401(m) of the PROTECT Act requires the Commission to promulgate amendments implementing the directive regarding downward departures from the sentencing guidelines not later than 180 days after the date of enactment of the PROTECT Act (*i.e.*, not later than October 27, 2003), it is not practicable to provide a comment period of at least 60 days on the following issues for comment. Accordingly, the Commission voted at its public meeting on June 24, 2003, to provide a comment period until August 1, 2003, in order to allow the Commission sufficient time to develop guideline amendments that implement the directive in section 401(m) of the PROTECT Act.

**Authority:** 28 U.S.C. 994(a), (o); section 401 of the PROTECT Act, Pub. L. 108-21; and USSC Rules of Practice and Procedure 4.4.

**Diana E. Murphy,**  
*Chair.*

#### Issues for Comment

Section 401(m) of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Public Law 108-21 (the "PROTECT Act"), directs the Commission as follows:

(m) REFORM OF EXISTING PERMISSIBLE GROUNDS OF DOWNWARD DEPARTURES.—Not later than 180 days after the enactment of this Act, the United States Sentencing Commission shall—

(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 are substantially reduced;

(B) A policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney; and

(C) Any other conforming amendments to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission necessitated by this Act, including a revision of paragraph 4(b) of part A of chapter 1 and a revision of section 5K2.0.

The Commission requests comment regarding how it might best implement the directive described above and generally welcomes any comments and suggestions for how the Commission might restructure or otherwise amend the guidelines to accomplish this directive.

In addition, the Commission specifically requests comment on the following:

(1) How should subsection (a) of section 5K2.0 (Grounds for Departure) and/or the commentary to section 5K2.0 (and/or Part A of Chapter One) be revised?

Section 3553(b) of title 18, United States Code, and section 5K2.0(a) authorize the sentencing court to depart downward in cases in which there exists a mitigating factor not adequately taken into consideration by the Commission in formulating the guidelines. Should the Commission provide additional and/or more restrictive guidance on such mitigating factors, particularly those described in other provisions of Chapter Five, Part K, that may warrant a downward departure?

Section 5K2.0(a) also states that "the court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (*e.g.*, a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is [inadequate or]

excessive." Are there factors in Chapter Two (Offense Conduct), Chapter Three (Adjustments), or Chapter Four (Criminal History) to which the Commission has attached excessive weight, and if so, should the Commission change the weight attached to those factors, thereby reducing the likelihood that a departure is warranted in a particular case?

Commentary to section 5K2.0 also states in part that "[t]he Commission does not foreclose the possibility of an extraordinary case that, because of a combination of [offender] characteristics or [not ordinarily relevant] circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare." Should this commentary be revised, and, if so, how?

(2) How, if at all, should Chapter Five, Part H be revised?

Should the Commission provide additional and/or more restrictive guidance on the offender characteristics described in provisions of Chapter Five, Part H, that may warrant a downward departure?

Should, for example, the Commission provide additional guidance regarding the circumstances under which an offender characteristic that is ordinarily not relevant in sentencing may become relevant?

(3) How, if at all, should guideline provisions governing downward departures for criminal history be revised? Commission data preliminarily indicate that the over-representation of the defendant's criminal history is a frequent basis for downward departure.

Section 4A1.3 (Adequacy of Criminal History Category) states in part that "[t]here may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines."