

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of (1) amendments to the sentencing guidelines made pursuant to the directive in section 401(m) of the PROTECT Act, Public Law 108–21; and (2) conforming amendments to the congressional amendments to the guidelines made directly by the PROTECT Act and effective on May 30, 2003.

SUMMARY: Section 401(m) of the PROTECT Act requires the Commission, “[n]ot later than 180 days after the enactment of [the] Act” (*i.e.*, October 27, 2003) to “review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary.” Section 401(m) also requires the Commission to promulgate, pursuant to section 994 of title 28, United States Code, amendments that “ensure that the incidence of downward departures are substantially reduced,” that authorize a downward departure of “not more than four levels if the Government files a motion for such departure pursuant to an early disposition program,” and that make any conforming changes necessitated by the Act. Pursuant to section 401(m) of the Act and section 994 of title 28, United States Code, the Commission has promulgated amendments to the following: (1)(A) Chapter Five, Part K, including §§ 5K2.0 (Grounds for Departure), 5K2.10 (Victim’s Conduct), 5K2.12 (Coercion and Duress), 5K1.13 (Diminished Capacity), and 5K2.20 (Aberrant Behavior), and the promulgation of a new policy statement, § 5K3.1 (Early Disposition Programs); (B) Chapter Five, Part H, including §§ 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), 5H1.6 (Family Ties and Responsibilities), 5H1.7 (Role in the Offense), and 5H1.8 (Criminal History); (C) §§ 4A1.1 (Criminal History Category) and 4A1.3 (Departures Based on Inadequacy of Criminal History Category); (D) § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases); (E) Chapter One, Part A, including promulgation of a new guideline, § 1A1.1 (Authority); (F) § 6B1.2 (Standards for Acceptance of Plea Agreements); and (G) § 1B1.1 (Application Instructions); and (2) § 2A4.1 (Kidnapping, Abduction, Unlawful Restraint) in order to make

conforming changes necessitated by the congressional amendments to the guidelines made directly by the PROTECT Act and effective on May 30, 2003.

Section 994(x) of title 28, United States Code, requires the Commission to comply with the notice and comment procedures set forth in 5 U.S.C. 553. Section 553 provides, however, a “good cause” exception to the general notice and comment requirements, including the requirement that notice of final agency action be published not later than 30 days before the effective date of that action, if the “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b), (d)(3). The 180-day deadline noted in the previous paragraph with respect to promulgation of these amendments, the extensive nature of these amendments, and limited Commission resources made it impracticable to publish the amendments in the **Federal Register** within the otherwise applicable 30-day period. The Commission therefore had good cause not to publish these amendments within that time period.

DATES: The effective date for the amendments set forth in this notice is October 27, 2003.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, 202–502–4590. The amendments set forth in this notice also may be accessed through the Commission’s Web site at <http://www.ussc.gov>. The *Guidelines Manual* effective November 1, 2003, will incorporate the amendments set forth in this notice and may be accessed through the Commission’s Web site as well. Please note that due to the timing of the promulgation of these amendments and the time required for publication of the *Guidelines Manual*, the Commission will be unable to distribute copies of the *Guidelines Manual* before November 1, 2003. They will be distributed as soon as practicable thereafter.

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). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and generally submits guideline amendments to Congress pursuant to 28

U.S.C. 994(p) not later than the first day of May each year. Absent action of Congress to the contrary, submitted amendments become effective by operation of law on the date specified by the Commission (generally November 1 of the year in which the amendments are submitted to Congress).

Authority: 28 U.S.C. 994(a), (o), and (p); USSC Rule of Practice and Procedure 4.1.

Diana E. Murphy,
Chair.

1. Amendment: Section 5K2.0 is amended to read as follows:

“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.