

amendment also reduces the incidence of downward departures generally by restructuring departure provisions throughout the Guidelines Manual to track more closely both the statutory criteria for imposing a sentence outside the guideline sentencing range and the newly enacted statutory requirement that reasons for departure be stated with specificity in the written order of judgment and commitment. *See* 18 U.S.C. 3553 (Imposition of a sentence), 3742(e) (Review of a sentence). The Commission determined that requiring sentencing courts to document reasons for departure with greater specificity complements the findings required of sentencing courts by the PROTECT Act, increases the accountability of sentencing courts for departures by facilitating appellate review, and improves the Commission's ability to monitor departure decisions and refine the guidelines as necessary.

The eight-part amendment makes modifications to § 5K2.0 (Grounds for Departure), § 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), 5H1.8 (Criminal History), § 5K2.10 (Victim's Conduct), § 5K2.12 (Coercion and Duress), § 5K2.13 (Diminished Capacity), § 5K2.20 (Aberrant Behavior), § 4A1.3 (Departures Based on Inadequacy of Criminal History Category), and § 6B1.2 (Standards for Acceptance of Plea Agreements). The amendment also creates one new policy statement, § 5K3.1 (Early Disposition Programs), and one new guideline, § 1A1.1 (Authority), among other changes.

Part I of the amendment makes several significant modifications to § 5K2.0 (Grounds for Departure) to limit, and in certain circumstances, to prohibit downward departures. The amendment generally restructures § 5K2.0 to set forth more clearly the standards governing departures in order to facilitate and emphasize the analysis required of the court. The amendment does so by: (1) Integrating throughout the policy statement the statutory language of 18 U.S.C. 3553(b) and 3742(e), as amended by the PROTECT Act, which provide the statutory criteria for sentencing outside the guideline range; (2) adopting, when provided in the policy statement, a uniform qualitative description of the type of case in which a departure may be warranted, the "exceptional case"; (3) restating in the application notes and background commentary to § 5K2.0 longstanding commentary in the Guidelines Manual, which was

reaffirmed by the PROTECT Act, that the frequency of departures under § 5K2.0 generally should be rare, and that certain types of departures under § 5K2.0 should be extremely rare; and (4) deleting certain language in the commentary taken from *Koon v. United States*, 518 U.S. 81 (1996) that effectively was overruled by the PROTECT Act.

Accordingly, § 5K2.0(a) sets forth the general governing principle that, in cases other than child crimes and sexual offenses, the sentencing court may depart if the court finds pursuant to 18 U.S.C. 3553(b)(1) that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission that, in order to advance the objectives set forth in 18 U.S.C. 3553(a)(2), should result in a sentence different from a sentence within the applicable guideline range.

The amendment also prohibits several grounds for departure, in addition to the departure prohibitions in § 5K2.0 for child crimes and sexual offenses enacted by the PROTECT Act, and other prohibitions elsewhere in the Guidelines Manual. The amendment creates a new subsection, § 5K2.0(d), that clearly lists the forbidden departure grounds. These include several longstanding prohibitions, as well as a number of new prohibitions added by the amendment, specifically: (1) The defendant's acceptance of responsibility; (2) the defendant's aggravating or mitigating role in the offense; (3) the defendant's decision, in itself, to plead guilty to the offense or to enter into a plea agreement with respect to the offense; and (4) the defendant's fulfillment of restitution only to the extent required by law, including the guidelines. The Commission determined that these circumstances are never appropriate grounds for departure.

The amendment also revises § 5K2.0 to restrict the availability of departures based on multiple circumstances, often referred to as a "combination of factors." The Commission determined that heightened criteria are appropriate for cases in which no single offender characteristic or other circumstance independently is sufficient to provide a basis for departure. Under § 5K2.0(c) a departure based on multiple circumstances can be based only on offender characteristics or other circumstances that are identified in the guidelines as permissible grounds for departure. Circumstances unmentioned in the guidelines, therefore, can no longer be used for a departure based on multiple circumstances pursuant to § 5K2.0(c). In addition, in order to

support a departure based on a combination of circumstances, each offender characteristic or other circumstance must be present individually to a substantial degree and must make the case exceptional when considered together. Emphasizing the Commission's expectation as to the infrequency of such departures, the accompanying application note retains previously existing guidance and states that departures under § 5K2.0(c) based on a combination of not ordinarily relevant circumstances should occur extremely rarely.

In addition, the amendment clarifies when a departure may be based on a circumstance present to a degree not adequately taken into consideration. Section 5K2.0(a)(3) provides that a departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration, only if the court determines that such circumstance is present to a degree substantially different from that ordinarily involved in that kind of offense.

The amendment also modifies § 5K2.0 in two additional ways to underscore the need for courts to state with specificity their reasons for departure. First, § 5K2.0(e) provides that if the court departs, it shall state, pursuant to 18 U.S.C. 3553(c), as amended by the PROTECT Act, 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 factors with specificity in the written judgment and commitment order. Second, Application Note 5 provides that in cases in which the court departs based on reasons set forth in a plea agreement, the court must state the reasons for departure with specificity in the written judgment and commitment order.

Part II of the amendment limits several departure provisions in Chapter Five, Part H (Specific Offender Characteristics). First, the amendment adds a prohibition to § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction) against departures based on addiction to gambling and renames the policy statement accordingly. The Commission determined that addiction to gambling is never a relevant ground for departure.

Second, the amendment limits the availability of departures pursuant to § 5H1.6 (Family Ties and Responsibilities) by requiring the court to conduct certain more rigorous analyses. In determining whether a departure is warranted under this policy