



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, DC 20530-0001

August 1, 2003

Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Judge Murphy:

Under the Sentencing Reform Act of 1984, the Criminal Division is required to submit to the United States Sentencing Commission, at least annually, a report commenting on the operation of the sentencing guidelines, suggesting changes that appear to be warranted, and otherwise assessing the Commission's work. 28 U.S.C. § 994(o). We are pleased to submit this report pursuant to that provision. This report also responds to the Notice of Proposed Priorities and Notice of Issues for Comment on the PROTECT Act, both published in the Federal Register on July 1, 2003.

I. Operation of the Sentencing Guidelines

On the whole, we believe that the sentencing guidelines are operating reasonably well.¹ Many of the proposals to amend the guidelines described below constitute discrete and sometimes technical improvements as opposed to broad substantive reforms. However, as we have discussed with the Commission before and as addressed by the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. 108-21, 117 Stat. 650 (Apr. 30, 2003) ("PROTECT Act"), we believe that the guidelines require significant improvement and reform to address the growing incidence of non-substantial assistance downward departures over the past several years. We discuss the issue of downward departures

¹We note that when asked to provide a general overall rating of effectiveness of the federal sentencing guidelines in achieving the purposes of sentencing, approximately 77% of district court judges and 79% of circuit court judges reported a moderate or high degree of effectiveness. *Summary Report, U.S. Sentencing Commission's Survey of Article III Judges; A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate* (December 2002), Q.18, p. 1.

and how we believe the Commission should address the issue in significant detail below (*see* section III, *infra*).

We recognize, however, that changes in the Guidelines Manual alone, while necessary to achieve the promise of sentencing reform, are not sufficient. Because the Justice Department alone represents the Executive branch in carrying out its “core executive constitutional function” in bringing and pursuing federal prosecutions, *United States v. Armstrong*, 517 U.S. 456, 465 (1996), the Department has the unique responsibility to ensure that its actions fully support the Sentencing Reform Act as well as the important reforms that are part of the PROTECT Act. In order to carry out this responsibility most effectively, the Department, over the past several months, has begun a comprehensive review of its policies regarding federal charging and sentencing practices.

Already as a result of this review, and consistent with section 401(*l*) of the PROTECT Act, the Attorney General earlier this week issued a new policy directive to all federal prosecutors concerning sentencing recommendations and appeals. In his memorandum to all federal prosecutors, the Attorney General prohibits prosecutors from engaging in any type of “fact bargaining”; agreements about the applicability of the sentencing guidelines must be fully consistent with the readily provable facts. Furthermore, if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office. (This latter instruction specifically addresses a concern that has been raised in the past by the Commission.) Prosecutors now also have an affirmative obligation to oppose any sentencing adjustment, including downward departures, that are not supported by the facts and the law. Regarding appeals, the new policy requires that federal prosecutors promptly report adverse, appealable decisions to the appellate section of the appropriate division of the Department in a variety of specifically articulated circumstances and that each of those cases be reviewed for appealability. For example, all downward departures that reduce an offense level from Zone C or Zone D to a lower zone and that result in a non-imprisonment sentence must be reported and considered for an appeal.

Over the coming weeks, the Department will complete a review of its charging and plea policies and practices, and we anticipate a new policy statement from the Attorney General addressing these matters. In addition, the Attorney General will be issuing new guidance to ensure that expedited disposition (or “fast track”) programs are only authorized where warranted.²

Taken as a whole, we believe these new charging, plea, appeal, and fast track policies will be an important reaffirmation of the Justice Department’s commitment to the principles of consistency and effective deterrence embodied in the Sentencing Reform Act and the sentencing

²In response to the Commission’s letter to the Deputy Attorney General requesting data on the current use of fast track programs, the Department is presently compiling such data and will supply that data to the Commission as soon as possible.

guidelines. We also believe they will be important, practical steps that will have a real impact on criminal practice in the federal courts. Together with reform to the law of downward departures and the improvement in the guidelines that takes place as part of the regular, ongoing work of the Sentencing Commission, we are confident these changes will bring significant improvement to federal sentencing.

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II. Priorities and Proposals for Improvement in the Sentencing Guidelines

Based on the Notice of Proposed Priorities, published in the Federal Register on July 1, 2003, and due in large part to the passage of the PROTECT Act, the upcoming amendment year is shaping up to be a very full one.

A. The PROTECT Act

Implementation of the PROTECT Act and other crime legislation, we believe, must be the top Commission priority for this amendment year. In addition to the requirement that the Commission reduce the incidence of downward departures, the PROTECT Act creates new crimes, changes maximum and minimum penalties, addresses supervised release terms for sex offenders and revocation terms for all offenders, and in general, will require much Commission action. The Commission staff has already ably itemized the specific work required of the Commission, and we will not address each of the relevant PROTECT Act provisions here. The implementation work has indeed already begun, and we have already met at the staff level with the Commission on many of the pending issues. This notwithstanding, there are two specific PROTECT Act issues which we think it important to highlight here so they are not overlooked.

1. Data

Section 401(h) of the PROTECT Act was intended to improve the Commission's data collection work. It requires the Chief Judge of each district court to ensure that each sentencing court submit to the Commission a set of documents to allow the Commission to gather important sentencing statistics. Section 401(h) also requires the Commission, upon request, to make available to the House and Senate Committees on the Judiciary all of the documents submitted by the courts to the Commission.

Already, in the first months since the PROTECT Act was signed into law, significant issues have arisen in courts around the country about section 401(h), including whether the requirement that all documents be made available to the Congress essentially makes public otherwise sensitive court documents. We believe it is critical both that the Commission receive documentation of all cases sentenced under the guidelines and that the confidentiality of sensitive court information be maintained. As to confidentiality, we are especially concerned that making available to the public defendant cooperation agreements may, in certain cases, jeopardize the

cooperating defendant as well as law enforcement officers and public safety generally. We think the Commission should work quickly with the Judicial Conference, the Congress, and others to resolve any outstanding issues so that the intent of Congress to improve the Commission's data collection work is achieved and that appropriate confidentiality is maintained. We pledge our support to assist the Commission in any way we can on this matter.

2. Supervised Release

Section 101 of the PROTECT Act makes significant changes in the law of supervised release. This section amends 18 U.S.C. § 3583 to provide a judge with the discretion to impose up to a life term of post-release supervision for sex offenders. Prior to the PROTECT Act, the statutory maximum period of post-release supervision in federal cases was generally five years even for the most serious crimes, and the guideline maximum period for most offenses was three years or less. This section responds to the longstanding concerns of federal judges and prosecutors regarding the inadequacy of the supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison.

Section 101 also changes the maximum term of imprisonment allowed upon revocation of supervised release. Prior to the PROTECT Act, the maximum term of imprisonment upon revocation was five years for any one offender. This section amends Title 18 to now permit up to five years imprisonment for each individual revocation, thus permitting a defendant to receive a series of imprisonment terms which could equal an extended period of time.

We think these and other related changes (*see* the discussion of circuit conflicts, *infra*) require careful and significant Commission consideration, and will require appropriate amendments to Chapter Seven of the guidelines. Indeed, we also think this may be the right time for the Commission to undertake a more comprehensive revision of Chapter Seven of the guidelines and other relevant provisions addressing supervised release and supervised release revocations.

B. Circuit Conflicts And Case Law Generally

The Supreme Court explicitly recognized that Congress gave the Commission the responsibility for resolving circuit conflicts involving guideline interpretation issues. Over the past few years, the Commission has addressed only a limited number of circuit conflicts. It has always been important to the Justice Department, and in particular the Solicitor General's Office, that the Commission fulfill this responsibility by actively addressing circuit conflicts. We think it critically important to do this in each amendment year. We raise two specific issues here that we believe are ripe for resolution, although we know many others exist and warrant consideration. In the first, courts of appeals have reached differing outcomes in reviewing computer and Internet access restrictions in child pornography cases and have disagreed about

the extent to which Internet access limitations may be justified. While these cases do not raise a direct conflict of law, we believe this issue – and the tension among the circuits on the issue – is precisely the type the Commission was meant to address. The second, where there is a clearer split among the circuits, involves when a defendant must provide truthful information to the government to be eligible for a “safety valve” sentence reduction.

1. Conditions Of Supervised Release For Certain Sex Offenders

We believe the Commission should address the issue of the appropriateness of restricting computer and/or Internet use as a condition of supervised release for offenses under Title 18, Chapters 110 and 117 that involved the defendant’s use of a computer or the Internet. Recognizing the pivotal role that access to computers and the Internet play in facilitating these crimes, some courts have upheld bans on access to computers or the Internet as conditions of supervised release. While this tack clearly has the legitimate goal of preventing recidivism and protecting society, other courts have concluded in other circumstances that precluding access to computers as a condition of supervised release is too onerous a deprivation of personal liberty. Ultimately, the Commission should address this issue and the appropriate circumstances for restricting computer and Internet access. We believe a policy statement is needed to provide guidance to the courts and ensure that conditions of supervised release effectuate both deterrence and protection of the public.

a. Background

In addition to the mandatory conditions of supervised release set forth in §5D1.3(a) of the sentencing guidelines, courts are permitted to impose other conditions if those conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) deterring future criminal conduct; (3) protecting the public from further crimes of the defendant; and (4) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§ 3583(d), 3553(a). The conditions must also involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and must be consistent with any pertinent policy statements issued by the Sentencing Commission. *Id.*; *see also* USSG §5D1.3(b) (setting forth equivalent requirements for any special conditions of supervised release imposed by court).

Accordingly, the Commission has issued Policy Statements reflecting both “standard” conditions recommended for all instances of supervised release, as well as “special” conditions recommended for supervised release in certain circumstances. *See* §5D1.3(c), (d). With respect to the latter category, conditions are often tailored to the crime committed. For example, if the instant conviction is for a felony or the defendant was previously convicted of a felony or used a firearm in the instant offense, the guidelines recommend as a special condition that defendant be

prohibited from possessing a firearm. *See id.* at § (d)(1).³ In many instances, by limiting defendant's access to the very instrument of the crime committed, such special conditions substantially reduce the potential for recidivism and increase protection of the public.

b. Recent Case Law

Several courts have upheld restrictions on computer or Internet use as a special condition of supervised release for child exploitation offenders. For example, in *United States v. Crandon*, 173 F.3d 122 (3d Cir.), *cert. denied*, 528 U.S. 855 (1999), the defendant developed a relationship via the Internet with a 14-year-old girl and later traveled interstate to engage in sexual relationships with her and took photographs of their encounter. The defendant pled guilty to one count of receiving child pornography and was sentenced to 78 months in prison and a three-year term of supervised release, during which he could not “possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the United States Probation Office.” *Id.* at 125. The defendant argued on appeal that given the prevalence of computers, the condition could limit his employment opportunities and his freedom of speech. *Id.* at 128. Nevertheless, the Third Circuit concluded that “in this case the restrictions on employment and First Amendment freedoms are permissible because the special condition is narrowly tailored and is directly related to deterring [defendant] and protecting the public.” *Id.*

The Fifth Circuit has upheld a more severe condition that absolutely banned the defendant from “possess[ing] or hav[ing] access to computers [or] the Internet” during his three-year term of supervised release. *United States v. Paul*, 274 F.3d 155, 160 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 1571 (2002). The defendant in *Paul* had stored over 1,200 images of child pornography on his computer and had used the Internet to access child pornography chat rooms, bulletin boards and newsgroups. *Id.* at 168. In addition, he communicated with like-minded individuals via e-mail about how to “scout” for vulnerable children. *Id.* Relying in part on *Crandon*, the Fifth Circuit concluded that the special condition prohibiting computer and Internet access was “reasonably related to [the defendant’s] offense and to the need to prevent recidivism and protect the public.” *Id.* at 169. The court expressly stated that even though the condition was broader than the condition imposed in *Crandon* in that it did not allow a probation officer to permit

³ *See also, United States v. Kingsley*, 241 F.3d 828 (6th Cir. 2001) (affirming special condition barring defendant from driving during 3-year supervised release because condition was reasonably related to defendant’s past automotive violations and to his weapons conviction involving transportation of weapons in his vehicle for purposes of intimidating and coercing victims); *United States v. Bee*, 162 F.3d 1232, 1235-36 (9th Cir. 1998), *cert. denied*, 526 U.S. 1093 (1999) (upholding condition that barred defendant from having contact with minors and loitering in places primarily used by minors where defendant was convicted of abusive sexual contact with six-year-old girl); *United States v. Szenay*, 1999 WL 426886 at *3 (6th Cir. June 15, 1999) (*unpublished*) (defendant convicted of credit card fraud prohibited from incurring credit card charges without probation officer’s approval).

computer or Internet access, the condition was nevertheless appropriate. *Id.* Courts in the Eighth and Tenth Circuits have upheld similar restrictions for child exploitation offenders.⁴

Some courts, however, hesitate to impose restrictive conditions on computer and Internet use for child exploitation offenders under some circumstances. In *United States v. Sofsky*, 287 F.3d 122 (2d Cir. 2002), the defendant was accused of receiving more than 1,000 moving and still images of child pornography on his home computer via the Internet and exchanging images on the Internet. He pled guilty and was sentenced to 121 months with three years of supervised release. *Id.* at 124. The Second Circuit vacated a special condition of supervised release that would have prohibited the defendant from accessing a computer, the Internet, or a bulletin board system unless approved by the probation officer. *Id.* According to the Second Circuit, the ban prevented “common-place computer uses” such as email communication, conducting research, obtaining a weather forecast, or reading a newspaper, and therefore, “inflict[ed] a greater deprivation on [defendant’s] liberty than [was] reasonably necessary.” *Id.* at 126; *see also United States v. Carlson*, No. 01-1570, 2002 WL 31119859 (2d Cir. Sept. 25, 2002) (*unpublished*) (remanding for more restricted condition in light of *Sofsky*); *United States v. Peterson*, 248 F.3d 79 (2d Cir. 2001) (special condition prohibiting Internet access and computer use was neither reasonably related to conviction nor reasonably necessary to achieve sentencing goals where defendant was convicted of bank larceny, worked in computer field, and prior state conviction for incest had no connection to computers or Internet).

The Tenth Circuit has similarly vacated a special condition that prohibited a defendant convicted of receiving child pornography from “possess[ing] a computer with Internet access throughout his period of supervised release.” *United States v. White*, 244 F.3d 1199, 1201 (10th Cir. 2001). The Tenth Circuit remanded for the district court to revise the condition, concluding

⁴*See United States v. Fields*, 324 F.3d 1025, 1026 (8th Cir. 2003) (upholding complete ban on Internet access where defendant had created child-pornography website; noting such restrictions have been upheld “[i]n cases where defendants used computers or the internet to commit crimes involving greater exploitation”); *United States v. Walser*, 275 F.3d 981, 985 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1943 (2002) (upholding condition prohibiting access to Internet without prior permission of probation officer for a defendant who possessed images of child pornography on his computer); *United States v. Deaton*, 204 F.Supp.2d 1181 (E.D. Ark. 2002) (court modified condition for a defendant found guilty of possessing child pornography to prohibit him from subscribing to any Internet service providers or using services of Internet without permission of probation officer). *See also, United States v. Suggs*, Nos. 01-6080, 01-6081, 2002 WL 31428630 (6th Cir. Oct. 29, 2002) (*unpublished*) (upholding special condition of supervised release that prohibited the defendant convicted of mail fraud, wire fraud and money laundering from having access to personal computers); *United States v. Mitnick*, 145 F.3d 1342 (9th Cir.), *cert. denied*, 525 U.S. 917 (1998) (*unpublished*) (a defendant convicted of computer “hacking” offenses was properly restricted from accessing computers and computer-related equipment without prior approval of probation officer).

that the condition was both too narrow (because it did not bar the defendant from accessing the Internet through channels other than his own computer) and too broad (because it precluded him from using a computer for benign purposes). *Id.* at 1205-06; compare *Walser*, 275 F.3d at 987-88 (Tenth Circuit upheld condition that the defendant not access the Internet unless approved by a probation office because it was less restrictive than the absolute ban imposed in *White*); see also *Paul*, 274 F.3d at 169-70 (“we reject the *White* court’s implication that an absolute prohibition on accessing computers or the Internet is *per se* an unacceptable condition of supervised release [S]uch a . . . condition can be acceptable if it is reasonably necessary to serve the statutory goals outlined in 18 U.S.C. § 3583(d)”).

Likewise, the Third Circuit recently cut back on *Crandon* and held that a special condition prohibiting the defendant from possessing a computer in his home or using any on-line computer service without the written approval of his probation officer was overly broad. *United States v. Freeman*, 316 F.3d 386 (3d Cir. 2003). The defendant in *Freeman* pled guilty to receipt and possession of child pornography after an investigation in which the defendant admitted to storing images of child pornography on his laptop computer. The Third Circuit held that the district court erred both in not stating a basis for the restriction and in imposing the restriction. Citing the Second Circuit’s *Sofsky* decision, the court stated that the condition involved a greater deprivation of liberty than reasonably necessary: “There is no need to cut off [the defendant’s] access to email or benign internet usage when a more focused restriction, limited to pornography sites and images, can be enforced by unannounced inspections of material stored on [the defendant’s] hard drive or removable disks.” The Third Circuit went on to expressly distinguish its prior holding in *Crandon*, stating that this type of restriction was acceptable in *Crandon* because that defendant used the Internet to contact young children, whereas the defendant in *Freeman* had not. The court also allowed that a more restrictive condition might be appropriate if the defendant in *Freeman* ultimately did not abide by the condition permitting benign use of the Internet.

c. Time for Resolution

We think the time is right for the Commission to address this issue. A special condition imposing significant restrictions, and in some cases a total ban on access to a computer or the Internet, provides the greatest assurance that a defendant will not repeat his computer-related child exploitation crime. Such restrictions would not only hinder a defendant’s access to the illegal materials themselves, but also would deprive him of access to like-minded individuals who supply such materials and are, but for their on-line personas, typically unknown to the defendant.

2. Safety Valve

A defendant is eligible for the so-called safety valve reduction, 18 U.S.C. § 3553(f) and USSG §5C1.2, only if

not later than the time of the sentencing hearing, [he] 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 . . .

In *United States v. Madrigal*, _____ F.3d _____, 2003 WL _____, No. 01-2250 (8th Cir. Apr. 28, 2003) the defendant falsely denied that he had participated in prior related conduct. At the sentencing hearing, the government opposed the application of the safety valve on the ground that full and truthful information had not been timely provided. Instead of denying the safety valve reduction, the district court continued the sentencing hearing to allow the defendant to make a new proffer that would meet the requirements of the safety valve provision. In his second proffer, the defendant admitted he had lied about participating in the prior conduct, but also provided other information that the government believed to be false. Despite the government's objections, the district court found that the defendant had truthfully revealed substantially all offense-related information he knew of when the sentencing hearing was reconvened and awarded a sentencing reduction under the safety valve provision.

The government appealed, and the Eighth Circuit unanimously affirmed. The appellate panel recognized that other circuits have adopted the rule that, in order to qualify for the safety valve, a defendant must provide complete and truthful information before the commencement of the sentencing hearing. Slip op. 11-12 (citing *United States v. Marin*, 144 F.3d 1085, 1091 (7th Cir. 1998); *United States v. Brenes*, 250 F.3d 290, 293 (5th Cir. 2001); and *United States v. Schreiber*, 191 F.3d 103, 107 (2nd Cir. 1999)). Nonetheless, the court ruled otherwise. Slip op. 11-12. The court stated that neither the statute nor the guidelines provision contained the word "commencement," but instead use the "somewhat ambiguous" language "not later than the time of the sentencing hearing." Slip op. 13. We think this issue is also now ripe for Commission consideration, and we urge the Commission to address it by adding a policy statement following the Fifth, Seventh, and Second Circuit holdings.

C. Alien Smuggling, Immigration and Related Crimes

We think the Commission has appropriately identified in its notice of tentative priorities sentencing policy for alien smuggling and other immigration offenses as warranting review. As you may know, last week, the Senate Judiciary Committee held a hearing on alien smuggling offenses at which John Malcolm, Deputy Assistant Attorney General for the Criminal Division, Jane Boyle, United States Attorney for the Northern District of Texas, and Paul Charlton, United States Attorney for the District of Arizona, testified. Their testimony highlighted some significant sentencing issues that are of concern to the Justice Department, and we look forward to working with the Commission to review these concerns and to develop appropriate policy responses. We also believe the Commission should examine more broadly some related crimes, such as passport and visa fraud, and the sentencing guidelines applicable to these offenses. The sentencing guidelines may provide insufficient penalties for these offenses, at least in some cases.

D. Homicide/Murder/Manslaughter/Attempted Murder

We commend the Commission for the amendments passed earlier this year relating to involuntary manslaughter offenses and for agreeing to consider that issue further this amendment year. But as we have stated on several occasions, the guideline penalties for all homicide, other than for first degree murder, are inadequate and in need of review. While the number of homicides prosecuted in federal court is relatively small because of the limitations of federal jurisdiction, the relevant guidelines are extremely important because of the seriousness of the crimes.

The guidelines for second degree murder and attempted murder are particularly problematic. A defendant who accepts responsibility for a second degree murder, §2A1.2, and falls within either Criminal History Category I or II is eligible to receive a sentence of less than 10 years' imprisonment. Even a defendant who falls within the most serious criminal history category is eligible to receive a sentence of just 14 years.

First and second degree murder have much in common under federal law. Both are the "unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). The difference in the two degrees of murder is that the more serious form is accomplished with premeditation or in the perpetration of certain enumerated felonies. However, the presence or absence of premeditation is a jury matter that sometimes turns on fine distinctions; in many cases, the difference turns on the degree of intoxication (which may negate the existence of premeditation). Because both are extremely serious offenses, the relatively low guideline sentence for second degree murder fails adequately to recognize the similarity between the two crimes or the maximum life sentence available for second-degree murder. The inadequate guideline sentence for second degree murder also creates a significant gap with the mandatory life sentence applicable to first degree murder.

We urge the Commission to evaluate the operation of the second degree murder guideline carefully. First, the Commission should consider whether the base offense level of 33 is appropriate relative to the guideline sentences for other forms of homicide and for other offenses. For example, the offense level for second degree murder is lower than that for certain bank robberies that result in injury but not death, §2B3.1. Next, the Commission should determine if the second degree murder guideline should be amended to include specific offense characteristics, which it currently lacks. Some forms of second degree murder are especially aggravated because of prolonged conduct or dominance over the victim, or because the means of killing is especially cruel. The guideline could account for such facts.

We are also concerned about how attempted murder is treated under the current guidelines, especially where the attempt, had it been successful, would have caused the death of many people (*e.g.*, a bomb on a plane, ship, subway, in a federal building, etc.) The attempt may not have been successful because of bad design or interruption by law enforcement or a good Samaritan. In these situations, the defendant should, we believe, be sentenced close to the level

which would have been applicable had he been successful. Elsewhere in the guidelines, an attempt is usually treated three levels lower than the underlying offense under §2X1.1(b)(1). However, "attempted murder" can be 15 levels lower than the underlying crime, pursuant to §2A2.1. We think this is something that the Commission ought to reexamine.

In sum, the guidelines relevant to second degree murder, attempted murder, voluntary manslaughter, and involuntary manslaughter should be the subject of careful study by the Commission. The need to arrive at sentences that serve the purposes of sentencing – just punishment, deterrence, incapacitation, and rehabilitation – is paramount for all offenses, especially those that result in the taking of human life.

E. Public Corruption

We are pleased that the Commission has indicated that it will consider amendment proposals related to the guidelines for public corruption offenses. We have already begun working with the Commission staff on this issue.

F. MANPADS

Portable rockets and missiles are a category of destructive device that pose a particular risk due to their potential range, accuracy, portability, and destructive power. Included within this category of destructive devices are MANPADS (man-portable air defense systems) and similar weapons that have been used by terrorists, for example, in the 2002 attack in Kenya on an Israeli aircraft using a shoulder-fired missile. They have the ability to inflict death or injury on large numbers of persons if fired at a building, aircraft, train, or similar target. Even if death or injury does not result from such an attack, there may be significant economic consequences and adverse effects on public confidence in the transportation industry. For example, if a MANPAD were fired at a commercial aircraft, but no casualties resulted, the news alone that an attempted attack had occurred would severely harm the vulnerable airline industry and create a potential domino effect on industries involved in other forms of transportation.

MANPADS and similar weapons are currently highly regulated under the National Firearms Act ("NFA"), 26 U.S.C. Chapter 53, and the Gun Control Act of 1968 ("GCA"), 18 U.S.C. Chapter 44. Under the NFA, such weapons are classified as "destructive devices." *See* 26 U.S.C. § 5845(f). Currently, the sentencing guidelines provide for a two-level increase to the base offense level applicable to unlawful possession and certain other offenses involving NFA weapons if the offense involves a destructive device. However, the sentencing guidelines do not provide for an increase specifically addressing MANPADS and similar weapons. *See* USSG §2K2.1. As a result, an offender who unlawfully possesses a MANPAD would face a guideline offense level of 20, which requires only 33-41 months of imprisonment if the defendant is in criminal history category I.

We think the Commission should correct the low current sentences applicable to possession and related offenses involving MANPADS and other portable rockets and missiles. In addition, we believe the Commission should consider raising penalties for an attempt or conspiracy to commit any of several serious offenses in connection with a crime of violence if the attempt or conspiracy involved a portable rocket or missile or a device intended for launching such a rocket or missile. These serious offenses include: destruction of an aircraft or aircraft facilities, 18 U.S.C. § 32; terrorist attacks and other acts of violence against mass transportation systems, 18 U.S.C. § 1993; and use of certain weapons of mass destruction, 18 U.S.C. § 2332a.

The sentencing guidelines currently applicable to attempts and conspiracies to violate the serious offenses listed above produce relatively low penalties. For example, for a violation of 18 U.S.C. § 1993(a)(8), which includes attempts, threats, and conspiracies to wreck or disable a mass transportation vehicle (including a plane), the guidelines direct the user to the guideline applicable to threatening or harassing communications, §2A6.1. However, this guideline is not appropriate for attempts and conspiracies to violate § 1993 and produces an offense level of just 22 (41-51 months of imprisonment for an offender in the lowest criminal history category), even with the application of specific offenses characteristics from this guideline that might apply. While the sentencing guidelines would direct the user to more appropriate guidelines for cases involving aggravated violations, 18 U.S.C. § 1993(b), we believe the Commission should clarify the application in the case of attempts and conspiracies to commit aggravated offenses and should also raise penalties so that any applicable reduction for incomplete attempts and conspiracies pursuant to §2X1.1 of the guidelines would not apply. In short, the guidelines should assure that attempts and conspiracies to use MANPADS and similar weapons in connection with a crime of violence, such as shooting down a plane, produce extremely long sentences – longer than currently produced even with a consecutive sentence under 18 U.S.C. § 924(c) for using or carrying a firearm (including a destructive device) during and in relation to a crime of violence.

G. Miscellaneous Drug Issues

We are pleased the Commission has agreed to examine miscellaneous drug issues, including sentencing policy for offenses involving the unlawful sale or transportation of drug paraphernalia. We note here a number of other such miscellaneous issues, some that have already been brought to the Commission's attention. We hope the Commission can address as many of these issues as possible in the coming amendment year.

1. GHB

In addition to considering amendments for GHB, as required by the PROTECT Act, the Commission should also consider amending the guidelines for GHB precursors and analogues, such as GBL (gamma-butyrolactone).

2. Ketamine

The Commission should consider increasing the sentences for ketamine – a Schedule III and “emerging,” diverted “club drug,” which is sometimes used to facilitate sexual assault.

3. Marihuana Equivalencies

We think the Commission should consider establishing marihuana equivalencies for the following drugs:

- (a) 2C-B
- (b) N-benzylpiperazine (BZP)
- (c) 1-(3-trifluoromethylphenyl) piperazine (TFMPP)
- (d) 2,5-dimethoxy-4-(n)-propylthiophenethylamine (2C-T-7)
- (e) alpha-methyltryptamine (AMT)
- (f) 5-methoxy-N,N-diisopropyltryptamine (5-MeO-DIPT (“Foxy”))⁵

4. White Phosphorous and Hypophosphorous Acid

Last year, the Commission amended the guidelines to provide for a sentencing structure for Red Phosphorous. The Commission should now address the penalties for White Phosphorous and Hypophosphorous Acid (also methamphetamine manufacturing chemicals).

5. Anhydrous Ammonia Theft

The guideline for anhydrous ammonia theft (21 U.S.C. § 864) usually yields a 15 month sentence on a ten-year statutory maximum penalty. We believe this guideline is insufficient and should be reconsidered. In a typical case where individuals tap a pipeline or container to steal anhydrous ammonia, the highest applicable guideline, USSG §2D1.12, sets a base offense level of 12 plus 2 points for intending or at least having reasonable cause to believe the chemical would be used to manufacture methamphetamine. The corresponding sentence is 15-21 months (criminal history category I).

⁵The drugs in subsections (b), (c), and (d) listed above are recently scheduled, formerly legal substances that were marketed on the Internet as legal alternatives to MDMA. The drugs in subsections (e) and (f) are recently scheduled hallucinogenic/stimulant substances also popular at raves and other venues. These five substances were placed in Schedule I in 2002 and 2003 pursuant to 21 U.S.C. §811(h) (temporary emergency scheduling authority). In addition, a number of cases have arisen involving 4-Bromo-2,5-dimethoxyphenethylamine (2-CB or Nexus – a Schedule I hallucinogen); 2C-B should be given a guideline equivalency.

6. Chemical Offenses

We appreciate the Commission's consideration of the guideline sentences for chemical offenses. The Commission should consider developing a new guideline for violations of 21 U.S.C. §§ 843(a)(6) and (a)(7), and 960(d)(6). The statutory scheme for chemical offenses has a continuum of violations and the guidelines scheme generally evinces an intent to create a continuum of penalties. However, the sentencing guidelines for chemical offenses do not offer a useable middle ground between severe sentences for overt chemical trafficking and minimal sentences for regulatory type offenses.

7. Drug cap

The Department strongly adheres to its view that Amendment 640 should be repealed to the extent that it amended §2D1.1(a)(3) and the commentary to §3B1.2.

H. Sentencing Policy for Illegal Transportation of Hazardous Materials

Illegal transportation of hazardous materials has emerged as a significant terrorist vulnerability in the aftermath of the attacks of September 11, 2001. More than a billion tons of hazardous materials⁶ are shipped yearly across the United States by road, rail, pipeline, ship and air. Serious incidents involving these materials have the potential to cause widespread disruption, death, injury, and harm to property and the environment.⁷

The Department's Environment and Natural Resources Division ("ENRD") recently launched a hazardous materials ("hazmat") transportation initiative to enforce more strictly the federal Hazardous Materials Transportation Law, 49 U.S.C. §§ 5101-5127.⁸ The purpose of this initiative is to make it more difficult for terrorists and other criminals to transport hazardous materials illegally, and to ensure that industries regulated under the hazardous materials transportation laws comply with those laws so as to reduce the inherent risks posed by the transportation of hazardous materials.

⁶A hazardous material is defined as a substance or material that the Secretary of Transportation has determined is capable of posing an unreasonable risk to health, safety, and property when transported in commerce. 49 U.S.C. § 5103.

⁷*See, e.g.*, GAO Report, "Rail Safety and Security: Some Actions Already Taken to Enhance Rail Security, but Risk-based Plan Needed" at 1 (April 2003) (GAO-03-435); GAO Report, "Aviation Safety: Undeclared Air Shipments of Dangerous Goods and DOT's Enforcement Approach" at 11 (January 2003) (GAO-03-22).

⁸This law is administered by the Department of Transportation ("DOT") and the Department of Homeland Security ("DHS") now that the Coast Guard and the Transportation Security Administration have been transferred from the former to the latter.

In preparing to launch its hazmat initiative, the Department reviewed the sentencing guideline applicable to hazmat crimes – §2Q1.2 – and determined that it is not adequately suited to such crimes. As a result, application of §2Q1.2 to hazmat crimes may well generate total offense levels that provide neither adequate punishment nor adequate deterrence for these felonies.⁹ Accordingly, we believe the Commission should consider possible ways to improve sentencing policy for these offenses.

Section 2Q1.2 was originally adopted to deal with violations of statutes involving hazardous or toxic substances or pesticides in an environmental protection context.¹⁰ In 1993, hazmat crimes were added to §2Q1.2 although no attendant changes were made to the specific offense characteristics or the application notes, nor was an explanation for the consolidation offered by the Sentencing Commission. *See* 58 Fed. Reg. 27148 (May 6, 1993).¹¹ For several reasons, the incorporation of hazmat violations into §2Q1.2 has never been an entirely good fit, a fact highlighted by the homeland security concerns that have taken on greater prominence in the wake of the events of September 11, 2001.

1. Hazmat Offenses are Different from the Pollution Offenses Covered in §2Q1.2 and have Characteristics that are not Adequately Addressed by that Guideline

Incidents resulting from hazmat offenses are likely to pose a great risk of harm to human life, health, property and the environment largely because hazardous materials are, by definition, moving in commerce. Therefore, such incidents are likely to occur along heavily traveled arteries, often in proximity to populated areas. In this respect, they are unlike many environmental crimes, which often involve illegal disposal of wastes in less populated, and thus less visible, areas (*e.g.*, “midnight dumping”).

The mobile nature of hazardous materials also makes it more difficult for first responders and others to address hazmat incidents. First, incidents involving hazardous materials can occur

⁹ There are exceptions, for example, when a hazmat crime overlaps with a hazardous waste transportation crime under the Resource Conservation and Recovery Act (“RCRA”). In those circumstances, specific offense characteristics driven by the RCRA crime may raise the total offense level to an appropriate level. Those few exceptions, however, underscore the need for a new guideline section that generates appropriate offense levels for all hazmat crimes.

¹⁰These statutes include the Toxic Substances Control Act (“TSCA”), the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), the Clean Air Act (“CAA”), the Clean Water Act (“CWA”) and RCRA.

¹¹Hazmat crimes were originally addressed in §2K3.1, although that section simply provided that the guideline provision for §2Q1.2 was to be applied. *See* 52 Fed. Reg. 18046 (May 13, 1987).

anywhere. As a result, first responders must attempt to prepare for emergency situations where it is impossible to know in advance what substance or substances will be involved (*e.g.*, flammable, toxic, corrosive), whether there will be vulnerable facilities nearby (*e.g.*, schools, hospitals, government facilities), and how the topography of the incident location (*e.g.*, urban, rural) will affect the response.

Second, because millions of tons of explosive, poisonous, corrosive, flammable, and radioactive materials are transported every day, hazardous materials transportation is a “target rich” environment. The problem of securing so many potential terrorist targets – all of which are mobile – is compounded by the legal requirement that hazmat shipments be conspicuously identified to aid responders in the event of an incident. Consequently, a potential terrorist would have little problem determining whether a particular truck or tanker car was transporting a hazardous material, and targeting that vehicle for nefarious purposes, such as hijacking and subsequent use as an explosive device.

Third, because so many different parties (*e.g.*, shippers, carriers, freight forwarders, brokers, agents and others) are routinely involved in moving hazardous materials, as a practical matter no single party can be exclusively responsible for its safety. This multiplies the potential opportunities for theft, tampering, sabotage, contamination and misuse of hazardous materials.

2. The Specific Offense Characteristics of §2Q1.2 are not a Good Fit for Hazmat Offenses

In addition to the particular risks and vulnerabilities associated with hazardous materials transportation, incidents resulting from hazmat crimes are not well described by the specific offense characteristics of §2Q1.2. Indeed, in some instances, the specific offense characteristics of §2Q1.2 are inapplicable.

For example, §2Q1.2(b)(1)(A) increases the base offense level for violations that result in an ongoing, continuous or repetitive release to the environment. If a hazmat crime results in a release to the environment, that release is likely to be a one-time, often sudden catastrophic occurrence, such as the ignition of mislabeled chemical oxygen generators that caused the 1996 crash of a ValuJet plane into the Florida Everglades. *See, U.S. v. Sabretech*, 271 F.3d 1018 (11th Cir. 2001).

Similarly, §2Q1.2(b)(4) increases the base offense level for violations involving transportation, treatment, storage or disposal without, or in violation of, a permit. While the environmental laws regulating hazardous substances, toxics and pesticides typically require a person to obtain a permit from EPA before importing, selling, or releasing such substances, the

laws governing the transportation of hazardous materials do not require persons involved with such activities to obtain a permit from DOT or DHS.¹²

Finally, §2Q1.2 lacks specific offense characteristics for certain types of hazmat crimes. For example, §2Q1.2 does not address concealment of hazardous materials during transportation, one of the factors that make these crimes especially dangerous. It also does not take into account the mode of transportation aboard which the results of a hazmat offense may unfold. If an incident arising from a hazmat crime takes place on a passenger-carrying aircraft where there is little room for error or time to take corrective action, and the options for escape may be non-existent, no enhancement is available under the specific offense characteristics of §2Q1.2.¹³

To more adequately deter and punish hazmat offenses, we recommend that the Commission undertake a review of such offenses and determine the best means of addressing them in a manner tailored specifically for their characteristics. We are considering various possibilities, and we hope we soon can begin discussions with the Commission on them.

I. Grouping Rules As Applied To Tax Cases

The current grouping rules as applied to certain tax offenses deserve consideration because they have produced widely varying judicial conclusions as to their appropriateness. *See e.g., Weinberger v. United States*, 268 F.3d 346, 352-55 (6th Cir. 2001) (holding that fraud and tax evasion counts are not grouped under either §3D1.2(c) or §3D1.2(d)); *United States v. Fitzgerald*, 232 F.3d 315, 319-21 (2d Cir. 2000) (holding that tax evasion, fraud and conversions counts could be grouped under USSG §3D1.2(d) and the loss attributable to all of defendant's offenses aggregated); *United States v. Vitale*, 159 F.3d 810, 813-15 (3d Cir. 1998) (rejecting claim that wire fraud and tax evasion counts should be grouped under §3D1.2(c), as such grouping would have no incremental effect on sentencing for tax evasion count); *United States v. Haltom*, 113 F.3d 43, 45-47 (5th Cir. 1997) (holding that tax evasion and mail fraud counts must be grouped under §3D1.2(c)); *United States v. Astorri*, 923 F.2d 1052, 1055-57 (3d Cir. 1991) (concluding that wire fraud and tax evasion counts were properly grouped under §3D1.2(c), and adding that under §3D1.4, the court correctly added two units or levels to the fraud offense calculation).

The Commission considered amending the grouping rules as to tax crimes during the 2001 amendment year, but withdrew its proposal after the Department and the Tax Division pointed out that the Commission's proposal would not "provide incremental punishment for

¹²There is one exception. Motor carriers that transport certain especially dangerous hazardous materials (e.g., explosives and radioactive materials) must obtain a safety permit from DOT. 49 U.S.C. § 5109.

¹³At the same time, there plainly are overlaps between the two. For example, either type of crime may cause disruption such as evacuations, and may result in substantial cleanup costs.

significant additional conduct." USSG Ch. 3. Part D, intro. comment. When it removed the grouping issue from consideration, the Commission indicated that it would be seeking input from the Department on the issue. We believe that the time is right for the Commission to address the grouping issue, either as part of its 15-year study of the guidelines or as a stand-alone area.

J. Enhancement to the Guidelines For Certain Tax Offenses

We urge consideration of a new upward adjustment in §2T1.4, dealing with aiding, assisting, or advising tax fraud (violations of 26 U.S.C. § 7206(2)), where 50 or more tax returns are involved, such as in an abusive tax shelter program or a fraudulent refund scheme. During consideration of the Sarbanes-Oxley implementing amendments in 2002, the Department suggested this additional enhancement as a tax analog to the 50-victim enhancement in §2B1.1 for fraud and theft offenses. Such an enhancement is warranted because these widespread schemes pose a far-greater threat to the tax system than an individual's mere failure to file a tax return or underreporting of income.

* * * * *

III. Implementing Section 401(m) of the PROTECT Act

A. Downward Departures Generally

By establishing a guideline range for all individual cases, the Commission contemplated that the vast majority of defendants would be sentenced within the applicable range. USSG Ch. 1, Pt. A, intro. comment 4(b) ("the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice."). Departures based upon factors not mentioned in the sentencing guidelines are to be "highly infrequent." USSG Ch. 1, Pt. A. Discouraged factors (those defined in the guidelines as "not ordinarily relevant") may be the basis of a downward departure, but only in "exceptional cases." USSG Ch. 5, Pt. H, intro. comment (citing the Commentary to §5K2.0 ("the commission believes that such cases will be extremely rare.")).

Unfortunately, these hortatory provisions have proved insufficient to ensure the consistency that Congress sought to achieve in the Sentencing Reform Act. While the Commission has not established quantitative benchmarks for the terms "not very often", "highly infrequent," "exceptional," and "extremely rare," the national percentage of non-substantial assistance downward departures ("NSADD") and many individual district NSADD percentages have been, we believe, out of compliance with all of these standards. Unless the Commission adopts more specific measures to regulate the ability to depart, unjustifiably wide variability in departure rates would likely continue – contrary to Congress' mandate in the PROTECT Act.

B. Steps to Implement Section 401(m) of the PROTECT Act

To comply with the PROTECT Act, the Commission should take several definitive steps to implement the key directives of section 401(m), *i.e.*, to formally authorize departures for “early disposition” programs, and to otherwise significantly reduce the rate of non-substantial-assistance downward departures.

1. Departures for Early Disposition Programs

Section 401(m) of the PROTECT Act requires that the Commission promulgate a policy statement authorizing a downward departure of not more than four 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. We think the policy statement should simply restate the legislative language and, for at least the time being, leave to the sentencing court the extent of the departure under these early disposition programs. It may be appropriate at some later date to review how these early disposition programs are actually being implemented and whether further guidance to the courts might be useful.

2. Comprehensive Review of Other Mentioned Departure Factors

First, the Commission should comprehensively review all other non-substantial-assistance departure factors now mentioned in the Guidelines Manual.

We think the Commission should make it a goal to catalogue *all* such factors in Chapter Five of the guidelines within the next two amendment years. Wherever possible, the Commission should replace departures authorized in Chapter Two with appropriate amendments to the underlying guideline (*e.g.*, by addition of new specific offense characteristics). We would be pleased to work with Commission staff in developing specific proposals to accomplish this goal.

The Commission should also carefully review and reform the existing grounds of departure authorized in Chapter Five. Consistent with concerns we previously voiced to the Commission and to Congress during the debate over implementation of the Sarbanes-Oxley Act, we believe the Commission should convert certain disfavored departure factors – factors often associated with white-collar and fraud defendants – to prohibited factors or, at the very least, severely limit the availability of these factors as a basis for departure as well as the extent of the permissible departure. These factors include community service (§5H1.11), age (§5H1.1), employment record (§5H1.5), civic or charitable service or prior good works (§5H1.11), rehabilitation (§5K2.19), physical condition (§5H1.4), and gambling abuse/dependence (§5H1.4). Health and/or mental and emotional conditions should be prohibited factors unless the Bureau of Prisons indicates it does not have the capacity to accommodate the specific medical problems of the defendant. We also believe a defendant’s willingness to be deported should be a prohibited departure factor.

We are concerned that the availability of certain downward departures pursuant to §5K2.0 – civic or charitable work (§5H1.11), aberrant behavior (§5K2.20), employment record (§5H1.5), family ties (§5H1.6), diminished capacity (§5K2.13), physical condition (§5H1.4), mental condition (§5H1.3), and even so-called “extraordinary” acceptance of responsibility – are fodder in virtually every fraud and tax sentencing, given the community standing and background of many white collar defendants, as well as the sophistication of their legal counsel, experts, and consultants. Despite the fact that existing policy statements generally discourage such grounds for departure, prosecutors report an ever-increasing number of cases where these departures are granted. This phenomenon further erodes the relatively less onerous guideline ranges in white-collar cases, and feeds the public perception that businesspeople who steal get unduly lenient sentences.

A recent example of the need for significant review of these factors is *United States v. Cockett*, 330 F.3d 706 (6th Cir. 2003), which upheld a downward departure for diminished capacity. The defendant was convicted of aiding and abetting a number of women in filing false tax returns, claiming refunds to which they were not entitled. Although the jury necessarily found that the defendant knew tax returns had to be truthful and that she voluntarily and intentionally assisted in filing false returns, the majority affirmed because of psychological testimony that her reasoning had been impaired and that she had rationalized the lies of the women she abetted.

The decision endorses downward departures for misguided motives, which frequently exist in tax cases – *e.g.*, the owner of a business cheated on employment taxes because he was trying to save the business and the jobs of his employees; a tax protestor filed a false return because it was the only way he could challenge the legality of the tax laws, etc. It illustrates why the Commission should seriously consider the impact of all of the departures factors described above, especially in white-collar cases.

3. Criminal History Departures

In 2001, district courts departed 1,315 times on the basis that the defendant’s criminal history “overrepresented” his involvement in the criminal justice system. In some of those cases, the departure was substantial. S. 151, as passed by the House and supported by the Department, would have effectively banned such downward departures entirely. We continue to adhere to that goal. To the extent that the Commission believes that this would result in unduly severe sentences for certain offenders, it should attempt, in light of the 15 years’ experience under the guidelines, to articulate such circumstances by making appropriate adjustments to the underlying rules that govern the calculation of criminal history categories.

At a minimum, we believe the Commission should make significant reforms concerning the use of this departure (*see* §4A1.3). Instead of allowing an unlimited reduction in the offense level or the overall sentence, the guidelines should explicitly cap such departures to a specified

reduction in criminal history category. We further think such a reduction should in no event exceed one criminal history category.

In addition, in some circuits, this departure factor is available for career offenders. *See, e.g., United States v. Lindia*, 82 F.3d 1154, 1165 (1st Cir.1996). There is also some question in some circuits whether a court may depart because a career offender's predicate convictions were "minor" (for example, the *en banc* First Circuit split three-three on this issue in *United States v. Perez*, 160 F.3d 87 (1st Cir.1998) (*en banc*)). We believe such departures run afoul of 28 U.S.C. § 994(h) and that the guidelines should explicitly prohibit these criminal history departures for career offenders.

4. Use of Unmentioned Factors

The version of the PROTECT Act initially passed by the House and supported by the Department would have effectively banned all unmentioned factors as grounds for downward departure in all cases. That across-the-board reform, however, was not included in the final legislation, which preserved in many cases the authority to depart if the statutory standards in 18 U.S.C. § 3553 are met (which incorporate by reference the applicable provisions of the Guidelines Manual). Instead, the Congress directed the Commission, *inter alia*, to take measures to ensure that the rates of downward departure would be "substantially reduced." We believe that a centerpiece of that effort must be the adoption of additional measures to ensure that the use of unmentioned factors is very sharply reduced.

The Commission's initial rationale for allowing unmentioned departure factors was "for two reasons." USSG, Ch. 1, Pt. A. First, the Commission noted that it could not prescribe a single set of provisions governing all relevant human conduct and that it did not need to do so at the outset, because, "over time" it would "be able to refine the guidelines to specify more precisely when departures should and should not be permitted." *Id.* Second, the Commission stated its belief that, "despite the courts' legal freedom to depart from the guidelines, they will not do so very often." *Id.* Both rationales have been vitiated by the passage of time. The Commission now has 15 years of experience under the Guidelines, and greater specificity is both possible and warranted. Moreover, the prediction that courts would not depart "very often" has not proved to be accurate.

We think the Commission should, given its exhaustive and comprehensive work now spanning 15 years, promulgate a policy statement that establishes a strong and effective presumption that, in establishing the applicable guideline and specific offense characteristics and in cataloguing permissible and impermissible grounds of departure, the Commission has indeed considered virtually all factors that might be relevant to setting the guidelines range at sentencing, leaving other factors to be considered, as appropriate, only in determining the sentence within the range. The exact formulation of such a policy statement must be carefully considered, especially in light of the fact that the existing policy statement stating that such departures should be "highly infrequent" has proved to be ineffective. In conjunction with

issuing such a new policy statement, the Commission may wish to consider whether there are any unmentioned factors that should be specifically mentioned. We also believe that, thereafter, the Commission should, annually, review departures based on unmentioned factors and consider whether to address them in the Guidelines Manual. We would be pleased to work with Commission staff in developing proposals in this area.

5. Combination of Factors

The commentary to §5K2.0 currently provides that in an extraordinary case in which a combination of offender characteristics or not ordinarily relevant circumstances takes a case out of the "heartland," even though none of the characteristics or circumstances individually distinguishes the case, a departure may be warranted. Since this provision was enacted, despite the commentary that such cases will be extremely rare, this amorphous, catch-all provision has been urged on sentencing courts all too frequently by defendants and has been relied upon by the courts to grant downward departures.

We believe the Commission should seriously reconsider combination departures. At the very least, we believe the Commission should provide further guidance to ensure that such combination departures are and will be, as originally intended, extremely rare. For example, district courts, could be required to provide extensive fact-finding to justify this type of departure. We would be pleased to work with Commission staff in developing such proposals.

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We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

Eric H. Jaso
Counselor to the Assistant Attorney General