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**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**  
**WESTERN DIVISION**

11 **UNITED STATES OF AMERICA,** )

12 **Plaintiff,** )

13 **v.** )

14 **MICHAEL WEISSENFLUH,** )

15 **Defendant.** )

**NO. CR 00-684-TJH**

**POSITION OF DEFENDANT**  
**MICHAEL WEISSENFLUH WITH**  
**RESPECT TO SENTENCING**  
**FACTORS**

**Hearing Date: September 25, 2000**  
**Hearing Time: 10:00 a.m.**  
**CTRM: The Hon. Terry J. Hatter**

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19 **TO: UNITED STATES ATTORNEY ALEJANDRO MAYORKAS AND ASSISTANT**  
20 **UNITED STATES ATTORNEY LEE ARIAN:**

21 **Defendant Michael Weissenfluh hereby submits his position with respect to sentencing**  
22 **factors, including objections to the Presentence Report, which was disclosed to defense counsel**  
23 **on September 13, 2000.**

24  
25 **Respectfully submitted,**

26 **DATED: September 14, 2000**

27 \_\_\_\_\_  
28 **GREGORY NICOLAYSEN**  
**Counsel for the Defendant**

1  
2 **I. INTRODUCTION**

3 **A. Opening Statement**

4 \_\_\_\_\_ Defendant Michael Weissenfluh respectfully comes before this Court for sentencing,  
5 and requests that the Court adopt the express recommendation in the plea agreement of home  
6 detention, based on the stipulated sentencing factors set forth in the plea agreement.

7 Weissenfluh respectfully disagrees with the sentencing analysis set forth in the  
8 Presentence Report (“PSR”), as discussed below.

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10 **B. Brief Statement Of Offense Conduct**

11 The federal offense to which Weissenfluh has pleaded guilty is bank fraud (18 U.S.C.  
12 1344). As set forth in the “Factual Basis” in the plea agreement, the offense conduct consists of  
13 two occasions in early 1994 when Weissenfluh forged a client’s signature onto two separate  
14 \$25,000 checks drawn on an account at City National Bank.

15 This client, Andy Summers (“Summers”), was a client of the accounting firm of Bjerre  
16 & Miller (the “Bjerre firm”), in which Weissenfluh was a partner. Like other clients of the  
17 Bjerre firm, Summers was active at the time in the entertainment industry; and the firm  
18 customarily managed the finances and investments of its entertainment clients. In this context,  
19 Summers expressed an interest in investing in a particular feature film venture which  
20 Weissenfluh and other partners at the Bjerre firm were developing, called “Moviescope.” The  
21 entire Moviescope project, including its office space and all books and records, was handled  
22 within the offices of the Bjerre firm.

23 The misconduct to which Weissenfluh has pleaded guilty involved Weissenfluh’s effort  
24 to keep the Moviescope project afloat financially by providing additional client funding into  
25 Moviescope. While certain clients, including Summers, had authorized their funds to be used  
26 to capitalize Moviescope, Weissenfluh’s actions in signing Summers’ name to the subject  
27 checks payable to Moviescope, and depositing those checks into the Moviescope account, was  
28 done without permission and caused Summers’ financial investment in Moviescope to exceed

1 his authorized limit. The movie project ultimately failed, and Summers lost his investment.

2 The unauthorized disbursements totalling \$50,000 went directly into the Moviescope  
3 account and were not embezzled by Weissenfluh.<sup>1</sup>

4 City National Bank (the “Bank”), meanwhile, reimbursed Summers the \$50,000 which  
5 the bank paid on the two unauthorized checks. The bank then proceeded to sue Weissenfluh,  
6 obtained a judgment, and subsequently accepted a partial payment of \$12,500 in a settlement  
7 by which the Bank signed and filed a Satisfaction Of Judgment form in February 1996.<sup>2</sup>

8  
9 **D. History Of This Case**

10 During the 1997 year, Weissenfluh was interviewed by the FBI in connection with its  
11 investigation of this case. He proceeded to retain his current defense counsel, who initiated  
12 pre-indictment discussions with the U.S. Attorney’s Office to resolve the matter.

13 From the fall of 1997 - until early 1999, a number of discussions were conducted  
14 between the government and defense counsel, without any resolution. The matter then became  
15 essentially inactive for the better part of the 1999 year, without any dialogue of any kind  
16 between the government and defense.

17 In early 2000, by which time six years had passed since the offense conduct, the  
18 government called defense counsel to explore a pre-indictment disposition. While the  
19 government’s original investigation had raised the possibility of charging Weissenfluh with  
20 additional forgeries totaling \$150,000, the government agreed that good cause existed to enter  
21 into a plea disposition on a much narrower basis for a lower amount of loss. Accordingly, the  
22 plea agreement was reached, which expressly recommends home detention and limits the  
23 offense conduct to the two \$25,000 checks pertaining to Summers.

24 Importantly, the government agrees – as reflected in the plea agreement – that this is  
25 not a case that warrants incarceration.

26  
27 <sup>1</sup> The PSR acknowledges that no misappropriation by Weissenfluh occurred. The crime is  
the unauthorized disbursement of client funds into the Moviescope account. See PSR at par. 36, page 10.

28 <sup>2</sup> Defense counsel provided the Probation Office with a copy of the Satisfaction of  
Judgment form signed by the parties to the civil action.

1 **D. Key Aspects Of The Plea Agreement**

2 1. **Amount Of Loss:** The plea agreement specifically limits the amount of loss to the  
3 two Summers checks, each in the amount of \$25,000, for a total loss of \$50,000.  
4 Originally, the government’s investigation had raised the issue of additional  
5 forged signatures by Weissenfluh totalling \$100,000 for another, now-deceased  
6 client of the Bjerre firm, named Ted Bissell. Had the government indicted the  
7 case, the charges would likely have included both the Summers checks and  
8 Bissell checks, for a total alleged loss of \$150,000. In reaching this plea  
9 disposition, the parties agreed that the Bissell checks would not be included.  
10 Thus, the plea agreement does not reference the Bissell checks and Weissenfluh  
11 has not admitted any misconduct in regard to these checks.

12  
13 2. **The Sole Victim Is The Bank:** The offense of conviction in the plea agreement is  
14 bank fraud under 18 U.S.C. 1344. Thus, the only victim of the offense is the  
15 bank. The Factual Basis is specifically written to reflect this, particularly in its  
16 reference to the fact that the Bank reimbursed Summers the \$50,000 that had  
17 been paid on the two checks. It is important to note that the Bjerre firm is  
18 nowhere referenced in the plea agreement as a victim of any misconduct by  
19 Weissenfluh. While the government’s original investigation had generated  
20 interview reports with members of the Bjerre firm, including Mads Bjerre and  
21 his wife, which revealed the firm’s view that they had been victimized by  
22 Weissenfluh’s actions, this view was not pursued by the government in entering  
23 into this plea disposition. Therefore, this plea agreement does not in any way  
24 suggest that the Bjerre firm is a victim of the crime. This is an important point  
25 in regard to the loss calculation under the Relevant Conduct guideline, as  
26 discussed below in the Objections To The Presentence Report.

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3. **Downward Departure:** The plea agreement expressly recognizes that this is a case warranting a downward departure, “based on a combination of factors, including family circumstances.”<sup>3</sup>

4. **No Incarceration Is Warranted:** The plea agreement expressly recommends home detention, thus reflecting the government’s view that incarceration is not warranted in this case.

E. **Checklist Of Key Points Supporting The Plea Agreement’s Stipulated Sentence Of Home Detention**

The following points, discussed more fully in this memorandum, provide a brief checklist of key reasons as to why the stipulated sentence in the plea agreement is fair and just and should be adopted by this Court:

1. **Narrow Scope Of Offense Conduct:** The offense to which Weissenfluh has pleaded guilty is very narrow, consisting of forged client signatures on the two Summers checks. This limits the loss amount to \$50,000.

2. **History Of The Case:** The offense conduct is six years old. The case took three years in which to reach a plea disposition, which in part reflects the government’s willingness to re-examine its evidence and to recognize that the interests of justice are being served by settling this case on terms that are less punitive than the government’s original view of its case, and on terms that do not call for incarceration.

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<sup>3</sup> The PSR agrees that this is a departable case, in recommending a 3-level departure in its cover letter to the Court.

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3. **Several Grounds For Downward Departure**

- A. **Aberrant Conduct:** the offense conduct was a brief episode in 1994 in what otherwise was, for Weissenfluh, a successful and reputable career as an accountant for many years. He had been a partner in the Bjerre firm and had been well-respected for years until the circumstances of this case occurred.
- B. **Post-Offense Rehabilitation:** no criminal conduct since the offense occurred six years ago.
- C. **Family Circumstances:** Weissenfluh’s wife and children depend entirely on him for financial support, and both Weissenfluh and his wife suffer from clinically diagnosed depressions for which they have been treated by a psychiatrist over the past several years.
- D. **Collateral Consequences:** Weissenfluh has already suffered greatly by having agreed to give up his accounting license, by having suffered the huge indignity of being ousted from his accounting firm, and by having to start a new life outside Los Angeles, as he moved to Oregon and attempted to rebuild his life in a small community outside Portland.

4. **Credibility Issues Affecting The Government’s Case:** As discussed below in the **Objections To The PSR**, the government’s original investigation relied heavily on interview statements by members of the Bjerre firm, who clearly were biased witnesses seeking to protect their own business interests. In the typical corporate scenario, Weissenfluh was being “hung out to dry” by his fellow partners whose focus was to protect the interests of the firm. Thus, if the case had been indicted and gone to trial, issues of credibility would have tainted the government’s case. The parties reached this plea disposition by removing this issue altogether, by agreeing that the plea would be to bank fraud, thereby

1 making the Bank the only victim and removing the credibility of the Bjerre firm  
2 as a factor in determining the outcome of this case.

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4 5. Prior Civil Disposition With The Victim-Bank: In early 1996, Weissenfluh  
5 entered into a stipulated judgment with the Bank in a civil action, by which the  
6 Bank accepted \$12,500 in restitution for the forged signatures and filed a  
7 Satisfaction Of Judgment. Thus, over four years ago, the bank settled its  
8 differences with Weissenfluh through litigation and, in all likelihood, has written  
9 off as a tax loss the difference between the civil settlement and the amount of the  
10 unauthorized checks.

11  
12 Judged by these considerations, the plea agreement clearly provides a fair and just  
13 result for this case. The government has not “given away the case” in entering into the  
14 stipulations as to loss calculation, downward departures, and home detention. To the  
15 contrary, the government has shown a willingness to take a practical and equitable approach  
16 in facilitating a plea disposition; and this disposition deserves to be adopted by the Court.

17 Unfortunately, the Probation Office has chosen to submit a sentencing analysis that  
18 undermines both the letter and the spirit of the plea agreement by greatly broadening the  
19 scope of the offense conduct; by recommending incarceration; and by recommending a  
20 restitution order that is far in excess of the amount supported by the evidence. The objections  
21 to the PSR are discussed in the following section.

1 II.

2 OBJECTIONS TO THE PRESENTENCE REPORT

3  
4 A. Offense Conduct Section: Many Facts Regarding This Case, Which Are Outside The  
5 Narrow Scope Of The Plea Agreement, Have Been In Dispute And Thus Cannot Be  
6 Relied Upon To Broaden The Scope Of The Offense Conduct

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8 The defense greatly appreciates the fact that the Probation Office provided defense  
9 counsel with a draft of the Offense Conduct narrative prior to finalizing the PSR; took the  
10 time to consider a lengthy written submission from defense counsel disputing many of the facts  
11 in that narrative; and took the time to incorporate into the final version of the PSR a number  
12 of the points raised in defense counsel's submission. [See PSR at pars 11, 14, 15, 16, 17, 19, 20,  
13 21, 27, 29, 42, 43, 45, 66]. While not all of defense counsel's comments are reflected in the final  
14 PSR, there is ample indication from the above-cited paragraphs that there has not been a  
15 meeting of the minds between the government and defense as to many of the circumstances  
16 surrounding the forged checks.

17 The defense maintains that the Bjerre firm had many of its own self-serving interests in  
18 mind in the way it presented the circumstances to the FBI. There is simply too much bias and  
19 self-interest at play here on the part of the firm to allow the statements of the Bjerres and  
20 other partners to be adopted as credible evidence on which to base a sentencing decision.

21 Therefore, the FBI interview reports that have been summarized in the Offense  
22 Conduct section of the PSR do not establish, by a preponderance of the evidence, any evidence  
23 beyond the facts to which the parties have stipulated in the plea agreement.

24 At best, the Offense Conduct section provides this Court with a flavor for the  
25 complexity of the case and the difficulties facing the parties in trying to reach a plea  
26 disposition. By reading the Offense Conduct section, the Court can appreciate that in order to  
27 settle this case, it became necessary to come to an agreement regarding offense behavior that  
28 (1) avoided adopting the statements made by the Bjerres and other members of the firm to the

1 FBI in its investigation; (2) excluded any reference to the Bjerre firm as a victim of  
2 Weissenfluh's conduct.

3 Accordingly, the bank fraud charge to which Weissenfluh has pleaded guilty, by which  
4 the offense conduct is narrowly limited to the unauthorized issuance of two checks, with the  
5 Bank as the only victim, reflects a well-reasoned settlement.

6 Therefore, in light of the substantial disputes regarding the statements in the FBI  
7 reports on which the Offense Conduct section is based, the Court should not make sentencing  
8 guideline decisions, such as the loss calculation, on the basis of the PSR. Rather, the Court  
9 should conclude that the only credible evidence on which to base a sentencing decision is  
10 contained in the Factual Basis to the plea agreement.

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12 **B. Loss Calculation: The PSR Improperly Increases The Loss Amount By Relying On The**  
13 **Unproven Statements Contained In The FBI Reports**

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15 **1. The FBI Reports Are Not Competent Evidence For Sentencing Because It Is**  
16 **Clear That Many Of The Statements In The Reports Are In Dispute**

17 The PSR improperly goes beyond the plea agreement to discuss events that have no  
18 evidentiary foundation and, at best, are based only on FBI interview reports. Relying solely on  
19 such reports, the PSR concludes that the loss amount is \$150,000, which includes not only the  
20 \$50,000 that is in the plea agreement, but also the \$100,000 figure reflecting alleged forgeries in  
21 connection with the Ted Bissell checks. There is simply no evidence before this Court as to the  
22 Bissell checks and any alleged forgeries. The FBI interview reports are not competent evidence  
23 and do not establish the additional \$100,000 in loss.

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25 **2. The Relevant Conduct Guideline Does Not Justify Increasing The Loss Amount**  
26 **For The Offense Of Conviction**

27 In the case of an individual defendant convicted of a single substantive count, the  
28 Relevant Conduct guideline expressly states that Chapter Two specific offense characteristics

1 (such as loss under 2F1.1) include “all acts...committed...or willfully caused by the  
2 defendant...that occurred during the commission of the offense of conviction...” U.S.S.G.  
3 1B1.3(a)(1)(A).

4 Here, the offense of conviction is bank fraud under 18 U.S.C. 1344, and the scheme to  
5 defraud under the statute is limited by the express terms of the plea agreement to the two  
6 Summers checks, totaling \$50,000. The totality of the scheme to defraud the bank under  
7 section 1344 is set forth in the Factual Basis to the plea agreement.

8 Because this is a single substantive count committed by a single defendant, the Relevant  
9 Conduct analysis is not the same as that in a conspiracy case, where a defendant who pleads to  
10 conspiracy is held vicariously responsible for the acts of his cohorts in jointly undertaken  
11 activity and thus faces a greater loss due to the misconduct of others [see 1B1.3(a)(1)(B)]. Nor  
12 is this a case where a greater loss can be attributed as the result of convictions on multiple  
13 counts which are grouped by virtue of being part of a common scheme or plan [see  
14 1B1.3(a)(2)].

15 In sharp contrast to these other Relevant Conduct scenarios which apply to different  
16 subsections of guideline section 1B1.3, this is a case where the offense is a single substantive act  
17 committed by a single defendant. Therefore, the Relevant Conduct analysis is confined to  
18 1B1.3(a)(1)(A), quoted above. On this basis, the defendant’s own actions in committing the  
19 offense of conviction constitute the sole basis on which to calculate loss. As stated above, the  
20 offense of conviction consists of bank fraud as to the two Summers checks. The total loss is  
21 therefore limited to \$50,000.

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23 **3. If The Court Adopts The \$150,000 Loss Figure, The Court Should Depart**  
24 **Downward For Overstatement Of Loss, As Suggested In The PSR**

25 After concluding as a matter of technical guideline analysis that the loss is \$150,000, the  
26 PSR also supports the defense position by observing that this loss amount may be overstated  
27 for reasons discussed on page 4 of the cover letter to the PSR. The PSR itself expressly  
28 recognizes that the overstatement of loss is a proper basis on which to downward depart from

1 the loss amount, pursuant to Application Note 11 to guideline section 2F1.1. [see PSR at par.  
2 141, at pages 27-28].

3 One of the key considerations in the overstatement of loss, as noted in the cover letter to  
4 the PSR, is that this is not a theft or embezzlement case. Weissenfluh did not pocket any of the  
5 money he disbursed from the Summers account. He did not steal, and he did not personally  
6 profit from the misconduct. Quite the contrary. It must be emphasized that the objective  
7 behind Weissenfluh's conduct was to seek to enhance the Moviescope venture with additional  
8 capitalization, in the hope that this would ultimately enable the venture to turn a profit for  
9 Summers and the other clients of the firm who had invested in it. Thus, in terms of one's  
10 intentions, there is an element of altruism here; although this does not excuse placing a client's  
11 funds at risk without the client's authorization.

12 Accordingly, if this Court were to conclude that the loss is \$150,000, the defense  
13 respectfully asks the Court to adopt the Probation Office's reasoning in its cover letter and  
14 depart down to the \$50,000 amount. This departure would be separate and apart from the  
15 other departure grounds that are reflected in the plea agreement and in the PSR, specifically:  
16 aberrant conduct, post-offense rehabilitation, and family circumstances.

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19 **C. Role In The Offense: This Case Does Not Warrant An Enhancement For Abuse Of**  
20 **Position Of Trust**

21 The plea agreement does not contemplate any enhancement for abuse of position of  
22 trust and clearly seeks to bring Weissenfluh's sentencing exposure *down to Zone B* so that he  
23 can receive a sentence of home detention. Unfortunately, the PSR recommends this  
24 enhancement. This recommendation should be rejected by the Court.

25 In the first instance, the Court should not impose the enhancement because to do so  
26 would undermine the purpose of the plea agreement, even if the enhancement were applicable  
27 as a matter of law.

28 Secondly, by Ninth Circuit standards, the enhancement is not applicable. Guideline

1 section 3B1.3 states that a defendant's offense level can be increased by two "[i]f the defendant  
2 abused a position of public or private trust ... in a manner that significantly facilitated the  
3 commission or concealment of the offense." In determining whether this guideline applies, the  
4 Ninth Circuit instructs that the district court is to follow the formula set forth in *United States*  
5 *v. Hill*, 915 F.2d 502 (9th Cir.1990), cited with approval in *U.S. v. Velez*, 185 F.3d 1048, 1051  
6 (9<sup>th</sup> Cir. 1999). *See also, United States v. Oplinger*, 150 F.3d 1061, 1069 (9th Cir.1998). In *Hill*,  
7 the Circuit stated that "the primary trait that distinguishes a person in a position of trust from  
8 one who is not is the extent to which the position provides the freedom to commit a difficult-to-  
9 detect wrong." *Hill*, 915 F.2d at 506. There are two indicia of this position of trust: (1) "the  
10 inability of the trustor objectively and expediently to determine the trustee's honesty" and (2)  
11 "the ease with which the trustee's activities can be observed." *Id.*

12 Weissenfluh's position at the Bjerre firm did not provide "the freedom to commit a  
13 difficult-to-detect wrong." All of the partners at the firm had equal access to the checkbooks  
14 for client funds as Weissenfluh did, and other partners in the firm, including Mads Bjerre (the  
15 lead partner), were involved in overseeing the Moviescope project, which housed all of its  
16 books, records and business materials within the office space of the Bjerre firm. One of the  
17 hotly disputed issues in this case has been whether the other partners knew about and  
18 consented to Weissenfluh's decision to sign Summers' name on the checks in order to expedite  
19 the continued funding of the Moviescope venture with client funds, in an effort to salvage the  
20 project and ultimately turn a profit for all the firm's clients who had invested in it.

21 Of course, the firm's partners adamantly deny any such knowledge or participation;  
22 and this face-saving position is reflected in the FBI interview reports. But the reality of this  
23 case is just not that simple. The entertainment industry, and the service professions that  
24 support it, including the accountants, run the risk of destroying delicate professional  
25 relationships when investment decisions are made. Clients can easily be lost and firm  
26 reputations tarnished or ruined.

27 Thus, in this type of case which involves layers of political in-fighting and scrambling  
28 by professionals to protect their own interests in the high-stakes world of servicing

1 entertainment clients, one must be very careful not to adopt at face value the statements that  
2 were made by Bjerre, Miller and other partners to the government because there is far too  
3 much self-protection at work here. The Moviescope project collapsed; Summers and other  
4 clients lost money; the money Summers lost exceeded his authorization to invest in the project;  
5 and the defense maintains that the Bjerre firm proceeded to “circle the wagons” and ostracize  
6 Weissenfluh in an effort to cover its proverbial rear.

7 In short, the firm’s denials that it had knowledge about, or consented to, Weissenfluh’s  
8 actions, are simply not credible. The factual dispute over whether Weissenfluh had  
9 authorization from his partners to do what he did would have weighed heavily at trial if this  
10 litigation had gone forward.

11 However, this factual dispute is not germane to the plea disposition because the bank  
12 fraud in question hinges on the fact that Weissenfluh was not authorized *by the client*, whose  
13 funds were being disbursed. This lack of authorization is sufficient to lay a factual basis for  
14 the offense of conviction.

15 Nonetheless, while this dispute does not impact on the factual basis to the plea  
16 agreement, it does bear directly on the applicability of the enhancement for abuse of trust.  
17 Because there is a clear issue of fact regarding the knowledge and consent of the other partners  
18 in Weissenfluh’s conduct, it simply cannot be concluded – certainly not on the basis of a  
19 preponderance of evidence – that Weissenfluh’s position at the firm provided him with the  
20 freedom to commit a difficult-to-detect wrong. The defense maintains that there was nothing  
21 difficult to detect about the unauthorized disbursements when other partners, including Mads  
22 Bjerre, were aware of what was happening and agreed with it (hoping that the project would  
23 ultimately turn a profit).

24 Consequently, the enhancement for abuse of trust should not be applied.  
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**III.**  
**A DOWNWARD DEPARTURE BASED ON**  
**A COMBINATION OF FACTORS SHOULD BE GRANTED,**  
**SUFFICIENT TO ENABLE WEISSENFLUH TO RECEIVE**  
**A PROBATIONARY SENTENCE**

The defense appreciates and thanks the Probation Office for the time it has spent in examining this case from a departure perspective. A downward departure of three levels is recommended in the cover letter to the PSR, based on a *combination of factors*, including aberrant conduct, post-offense rehabilitation and family circumstances, and the overstatement of loss amount. The factual assessment in the PSR regarding departure factors is correct, and the defense appreciates that the Probation Officer took the time to verify the mental health issues regarding the family circumstances departure, by speaking directly with the psychiatrist who is treating the Weissenfluh family [see PSR at pars. 141 - 145, at pages 27-28].

The PSR and defense part company as to the final sentence that should be imposed after the departure has been factored into the sentencing analysis. The different sentencing postures is reflected by different views on the loss amount and abuse of trust enhancement, both of which have been discussed earlier. But on the theoretical question of whether this is a departable case, the PSR / cover letter and the defense are in accord.

The operative consideration here from a departure standpoint is the *combination of factors*. While no single factor may, in and of itself, justify a departure low enough to warrant a probation sentence, the cumulative impact of departure considerations strongly weighs in favor of probation.

**A. Family Circumstances: The Purpose Behind This Departure Succeeds Only If Probation Is Granted**

Importantly, the family circumstances departure, which is endorsed by both the plea agreement and the Probation Office,<sup>4</sup> is a unique departure theory insofar as it can only be

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<sup>4</sup> See bottom of page 4 to cover letter to PSR.

1 fulfilled if the defendant is kept out of custody. While other departures theories can be  
2 fulfilled simply by reducing, but not altogether eliminating, the amount of time in custody, the  
3 family circumstances departure is premised on the notion that the family's ability to function,  
4 particularly where innocent children are involved, can only be sustained if the defendant is  
5 sentenced to home detention, community service, intermittent (e.g., weekend) custody, or some  
6 combination of these alternatives to actual incarceration. Once the defendant is sent to prison,  
7 the family circumstances departure is undermined.

8 Therefore, once the district court agrees that circumstances have been presented to the  
9 Court sufficient to justify a family circumstances departure, there must be a concomitant  
10 recognition that the defendant therefore must be allowed to stay out of jail.

11 Because the government and Probation Office both agree that this is a case warranting  
12 a family circumstances departure, the defense respectfully asks the Court to depart TO A  
13 DEGREE where the defendant can be sentenced to Probation.<sup>5</sup>

14  
15 **B. Aberrant Conduct / Post-Offense Rehabilitation: This Case Meets The**  
16 **Requirements For A Departure Under Either Or Both Of These Theories**

17 While the PSR does not expressly endorse aberrant conduct or post-offense  
18 rehabilitation by name as grounds for departure, the PSR / cover letter make observations  
19 supportive of both theories. The cover letter to the PSR observes that Weissenfluh  
20 "experienced a seemingly successful career as a certified public accountant following the  
21 obtainment of his bachelors degree in 1979"<sup>6</sup> and the PSR itself acknowledges, in its discussion  
22 on departures, "Weissenfluh's positive behavior since his involvement in the instant offense,  
23 living a life entirely free of criminal conduct and not engaging in any behavior remotely close

24  
25 <sup>5</sup> The PSR notes that Guideline Section 5C1.1 provides that a Zone B sentence for a Class  
26 B felony, such as the bank fraud conviction in this case, requires a minimum 30-day sentence and does  
27 allow for a sentence of home detention. Because the objective in this case in the plea agreement is home  
28 detention, the defense asks that the Court depart down to Zone A and thereby proceed to impose a home  
detention sentence, together with any additional conditions of probation that the Court deems  
appropriate, including community service.

<sup>6</sup> Cover letter to PSR at page 4: last sentence in the second paragraph.

1 to the instant offense.”<sup>7</sup>

2 The theory of aberrant conduct is embodied in U.S.S.G., Ch. 1, Pt. A, intro., 4(d), and it  
3 has been endorsed by the Ninth Circuit. *See, United States v. Working*, 175 F.3d 1150 (9<sup>th</sup> Cir.  
4 1999) (Circuit upholds 21-level downward departure based on aberrance where defendant shot  
5 at her spouse). The Ninth Circuit does not require a single act of aberrant conduct but,  
6 rather, looks to a “convergence of factors,” which include the defendant’s criminal record, or  
7 lack thereof; “extreme pressures under which the defendant was operating”; and “the  
8 defendant’s motivations for committing the crime.” *Id.* at 1153.

9 These three factors weigh strongly in favor of granting a departure. Weissenfluh has no  
10 prior criminal record, nor any criminal conduct in the six years following the offense. While  
11 his behavior in disbursing client funds into Moviescope without client authorization  
12 constituted bank fraud, nonetheless, Weissenfluh felt, at the time, that he was under enormous  
13 pressure to keep the Moviescope project afloat for the benefit of the clients who had invested  
14 in the project. Moreover, his motivations for committing the crime were profit-oriented, not  
15 loss-oriented. That is, Weissenfluh was not a thief; he was hoping that by infusing additional  
16 capital into the venture, the ultimate result would be that Moviescope would succeed, thus  
17 generating profits to the clients. This motivation has been acknowledged by the Probation  
18 Office.<sup>8</sup>

19 Moreover, the Ninth Circuit has joined other circuits in endorsing both post-offense  
20 rehabilitation and post-sentencing rehabilitation as proper grounds on which to downward  
21 depart. *United States v. Green*, 152 F.3d 1202, 1207 (9<sup>th</sup> Cir. 1998). Here, the facts take the  
22 case outside the heartland of ordinary cases in which a defendant remains law-abiding  
23 between the time of the offense and the time of sentencing because that time frame in this case  
24 is unusually lengthy: six years. Moreover, during this six-year time period, Weissenfluh has  
25 lost his high-paying position as a partner in the Bjerre firm; lost his accounting license; and  
26 has been forced to start over in life. He has paid dearly for these hardships, and these

27 \_\_\_\_\_  
28 <sup>7</sup> PSR at par 143, at page 28.

<sup>8</sup> Cover letter to PSR at page 4: middle of last paragraph.

1 hardships have been not only financial, but emotional. He has been treated for severe  
2 depression, together with his wife; and mental health problems have affected at least one of his  
3 children. And yet, despite these hardships that have spanned more than half a decade, he has  
4 remained a law-abiding individual and has managed to generate income, however modest,  
5 through gainful employment, sufficient to care for his family.<sup>9</sup>

6 Under these circumstances, a departure for post-offense rehabilitation is warranted, if  
7 not on this ground alone, then at least in combination with the related theory of aberrant  
8 conduct.

9  
10 C. Collateral Consequences: The Loss Of His Partnership In The Accounting Firm,  
11 The Loss Of A High-Paying Job, And The Loss Of His Accounting License  
12 Constitute Severe Sanctions That Warrant A Downward Departure

13 The instant prosecution is the final, painful ordeal that comes at the end of a long series  
14 of painful consequences that have befallen Weissenfluh as a result of the events involved in this  
15 case. He was ousted from the Bjerre firm. That alone inflicted a great indignity on  
16 Weissenfluh. Beyond that, his ouster cost him a high-paying job as a partner in the firm.  
17 Since then, Weissenfluh has had to learn to live on much lower income, a point acknowledged  
18 by the Probation Office.<sup>10</sup> Moreover, Weissenfluh can no longer work as an accountant,  
19 having lost his license. He has truly – in the most literal sense – had to start over from scratch.

20 Professionals who find themselves in federal criminal proceedings often present such  
21 collateral consequences to the district court at the time of sentencing, and this reality clearly  
22 differentiates white collar criminal litigation from the more generic cases involving “street  
23 crimes.” Professionals like Weissenfluh work for years to attain the educational foundation  
24 and ultimately the financial security, as well as the professional reputation that comes with  
25 expertise in their field – only to lose it and suffer an intense fall from grace when circumstances  
26 such as those before this Court bring them down professionally, financially, and emotionally.

27 \_\_\_\_\_  
28 <sup>9</sup> These circumstances are acknowledged in the cover letter to the PSR, at pages 4-5.

<sup>10</sup> Cover letter to PSR, at page 4: middle of second paragraph.



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**B. Weissenfluh’s capacity to pay restitution is very limited. On this point, the PSR is severely Draconian in making such suggestions as (a) liquidation of Weissenfluh’s retirement fund<sup>11</sup>, college fund and meager savings in order to make restitution;<sup>12</sup> (2) elimination of his health and life insurance policies so that he can apply those premiums towards restitution;<sup>13</sup> (3) elimination of his pets, since he has multiple cats, dogs, birds and goats<sup>14</sup>; and (4) further reduction in his lifestyle, despite the fact that the home visit by the Probation Officer in Oregon confirmed that Weissenfluh lives in a very meager home setting that demonstrates quite clearly a subsistence level of existence.<sup>15</sup>**

**The Probation Office is being unnecessarily aggressive in seeking restitution. This is not a case where Weissenfluh is being asked to divest himself of ill-gotten gains from his criminal conduct. This is not the telemarketer who has deprived vulnerable victims of their own retirements and thus should pay in kind by divesting himself of his own retirement, as well as surrendering assets purchased with criminally-derived proceeds. *This is not that case.* All of the assets are legitimate monies earned by Weissenfluh over the years in his work.**

**The following points should be emphasized:**

**(1) First, as noted above, the Bank has settled its differences financially with Weissenfluh;**

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<sup>11</sup> The PSR acknowledges, in par 123 at page 24, that the retirement fund is an IRA. Thus, if it is liquidated, Weissenfluh not only loses his retirement, but he also must pay significant penalties to the IRS.

<sup>12</sup> PSR at pars 123 - 124, at pages 24-25; cover letter to PSR, at page 5: second paragraph.

<sup>13</sup> PSR at par 124, at page 25.

<sup>14</sup> PSR at par. 124, at page 25.

<sup>15</sup> PSR at par 121, at page 24. In addition, defense counsel wishes to inform the Court that counsel charged Weissenfluh only \$2,500 for representation in this case, which is less than even a CJA voucher for this type of case, let alone private market rates.



1 authority to designate a defendant to a CCC for sentences up to 18 months, the district court  
2 can only *recommend* such placement. Thus, the BOP is free to reject the recommendation and  
3 place the defendant in custody.<sup>17</sup>

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7 Respectfully submitted,

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9 DATED: September 15, 2000

10 GREGORY NICOLAYSEN  
11 Counsel for the Defendant,  
12 Michael Weissenfluh

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23 <sup>17</sup> Placement in a CCC is also not feasible for the additional reason that Weissenfluh lives  
24 with his family in a rural area of Oregon that is approximately two hours from Portland. In all  
25 likelihood, any CCC facility would be located in the Portland area. Thus, if he is required to reside in a  
26 CCC, Weissenfluh, who works out of his home office, would not only be cut off from his family but would  
27 also be unable to continue his professional work, which entails servicing an established client base in a  
28 field unrelated to accounting. As the Court knows, the BOP wants its CCC residents to be employed.  
Therefore, for Weissenfluh to move into a CCC means that he would lose his existing professional work  
and clientele and have to seek new employment for the few months he resides at the CCC, then return  
home and have to start over again rebuilding his self-employment. This renders the concept of CCC  
placement impractical and unduly punitive. If Weissenfluh lived in the Portland metropolitan area, the  
CCC option might be more feasible.

1 **PROOF OF SERVICE**

2  
3 **UNITED STATES DISTRICT COURT**  
4 **CENTRAL DISTRICT OF CALIFORNIA**

5 **I am employed in the county of Los Angeles, State of California. I am over the age of**  
6 **eighteen and not a party to the within action. My business address is 8530 Wilshire Blvd,**  
7 **Suite 404, Beverly Hills, CA. 90211.**

8 **On September 15, 2000, I served the foregoing document described as Sentencing**  
9 **Position Paper For Defendant Michael Weissenfluh, by delivering a true copy to:**

10 **Lee Arian**  
11 **Ass't U.S. Attorney**  
12 **312 No. Spring St.**  
13 **Los Angeles, Ca. 90012**

14 **Executed on September 15, 2000, at Northridge, CA. I declare under penalty of perjury**  
15 **under the laws of the State of California that the above is true and correct.**

16 **GREGORY NICOLAYSEN**