

(B) Use of a Computer or Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (i) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

(B) Definition.—For purposes of subsection (c)(1), "sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

6. Upward Departure Provision.—If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).

Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level in subsection (a)(2) represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age, except when subsection (b)(2) applies. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1 (Criminal Sexual Abuse).

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

**(B) Increased Statutory Maximum in 18 U.S.C. § 2243(b)**

**§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts**

(a) Base Offense Level: [12][14][16][18][20]

(b) Specific Offense Characteristics

- (1) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.
- (2) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Minor" means (A) an individual who had not attained the age of 18; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Ward" means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.

2. Application of Subsection (b)(1).—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor.

The misrepresentation to which the enhancement in subsection (b)(1) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the

*misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.*

3. *Application of Subsection (b)(2).—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.*

~~*Background. The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.*~~

**(C) New Offense in 18 U.S.C. § 2244(a)(5)**

**§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact**

**(a) Base Offense Level:**

- (1) **20**, if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b);
- (2) **16**, if the offense involved conduct described in 18 U.S.C. § 2242; or
- (3) **12**, otherwise.

**(b) Specific Offense Characteristics**

- (1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than ~~20~~**22**, increase to level ~~20~~**22**.
- (2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.
- (3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.
- (4) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.



(c) Cross References

- (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
- (2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2244(a)(1), (2), (3). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

2. Application of Subsection (a)(1).—For purposes of subsection (a)(1), "conduct described in 18 U.S.C. § 2241(a) or (b)" is engaging in, or causing sexual contact with, or by another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.

3. Application of Subsection (a)(2).—For purposes of subsection (a)(2), "conduct described in 18



U.S.C. § 2242" is: (A) engaging in, or causing sexual contact with, or by another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (B) engaging in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

4. Application of Subsection (b)(3).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, babysitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

5. Misrepresentation of a Participant's Identity.—The enhancement in subsection (b)(4) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(4) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(4) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

6. Application of Subsection (b)(5).—Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years.

(D) Increased Penalties (statutory minimum and maximum) for 18 U.S.C. § 1591

§2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor

- (a) Base Offense Level: ~~14~~
  - (1) ~~[34]~~[36], if the offense of conviction is 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(1) of that statute; or
  - (2) ~~14~~, otherwise.
- (b) Specific Offense Characteristic
  - (1) If subsection (a)(2) applies and the offense involved fraud or coercion, increase by 4 levels.
- (c) Cross Reference
  - (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b) or 18 U.S.C. § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).
- (d) Special Instruction
  - (1) If the offense involved more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the promoting of a commercial sex act or prohibited sexual conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a victim other than a minor); 18 U.S.C. §§ 1591 (only if the offense involved a victim other than a minor), 2421 (only if the offense involved a victim other than a minor), 2422(a) (only if the offense involved a victim other than a minor).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Commercial sex act" has the meaning given that term in 18 U.S.C. § 1591(c)(1).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

*"Promoting a commercial sex act" means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.*

*"Victim" means a person transported, persuaded, induced, enticed, or coerced to engage in, or travel for the purpose of engaging in, a commercial sex act or prohibited sexual conduct, whether or not the person consented to the commercial sex act or prohibited sexual conduct. Accordingly, "victim" may include an undercover law enforcement officer.*

2. *Application of Subsection (b)(1).*—Subsection (b)(1) provides an enhancement for fraud or coercion that occurs as part of the offense and anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. *See Chapter Five, Part K (Departures).* For purposes of subsection (b)(1), "coercion" includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken. Do not apply this enhancement if the base offense level is determined under subsection (a)(1) because subsection (a)(1) necessarily involves fraud or coercion.
3. *Application of Chapter Three Adjustment.*—For the purposes of §3B1.1 (Aggravating Role), a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.
4. *Application of Subsection (c)(1).*—
  - (A) *Conduct Described in 18 U.S.C. § 2241(a) or (b).*—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person by: (i) using force against the victim; (ii) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the victim unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.
  - (B) *Conduct Described in 18 U.S.C. § 2242.*—For purposes of subsection (c)(1), conduct described in 18 U.S.C. § 2242 is: (i) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (ii) engaging in, or causing another person to engage in, a sexual act with a victim who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.
5. *Special Instruction at Subsection (d)(1).*—For the purposes of Chapter Three, Part D (Multiple Counts), each person transported, persuaded, induced, enticed, or coerced to engage in, or travel



*to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate victim. Consequently, multiple counts involving more than one victim are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes the promoting of a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.*

6. Upward Departure Provision.—*If the offense involved more than ten victims, an upward departure may be warranted.*

Background: *This guideline covers offenses that involve promoting prostitution or prohibited sexual conduct with an adult through a variety of means. Offenses that involve promoting prostitution or prohibited sexual conduct with an adult are sentenced under this guideline, unless criminal sexual abuse occurs as part of the offense, in which case the cross reference would apply.*

*This guideline also covers offenses under section 1591 of title 18, United States Code, that involve recruiting or transporting a person, other than a minor, in interstate commerce knowing that force, fraud, or coercion will be used to cause the person to engage in a commercial sex act.*

*Offenses of promoting prostitution or prohibited sexual conduct in which a minor victim is involved are to be sentenced under §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor).*

**§2G1.3. Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor**

- (a) Base Offense Level: ~~24~~
- (1) ~~[34]~~[36], if the defendant was convicted under 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(1) of that statute;
  - (2) ~~[30]~~[32], if the defendant was convicted under 18 U.S.C. § 1591 and the offense involved conduct described in subsection (b)(2) of that statute;
  - (3) ~~[28]~~[30], if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a); or
  - (4) ~~24~~, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the defendant was a parent, relative, or legal guardian of the minor; or (B) the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
- (2) If (A) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced a minor to engage in prohibited sexual conduct, increase by 2 levels.
- (3) If the offense involved the use of a computer or an interactive computer service to (A) persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor, increase by 2 levels.
- (4) If the offense involved (A) the commission of a sex act or sexual contact; or (B) a commercial sex act, increase by 2 levels.
- (5) If the offense involved a minor who had not attained the age of 12 years, increase by [4][6][8] levels.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.
- (2) If a minor was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.
- (3) If the offense involved conduct described in 18 U.S.C. § 2241 or § 2242, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to

engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the minor.

(d) Special Instruction

- (1) If the offense involved more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the persuasion, enticement, coercion, travel, or transportation to engage in a commercial sex act or prohibited sexual conduct of each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328 (only if the offense involved a minor); 18 U.S.C. §§ 1591 (only if the offense involved a minor), 2421 (only if the offense involved a minor), 2422 (only if the offense involved a minor), ~~2422(b)~~, 2423, 2425.

Application Notes:

1. Definitions.—For purposes of this guideline:

"Commercial sex act" has the meaning given that term in 18 U.S.C. § 1591(c)(1).

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Illicit sexual conduct" has the meaning given that term in 18 U.S.C. § 2423(f).

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).



"Sexual contact" has the meaning given that term in 18 U.S.C. § 2246(3).

2. Application of Subsection (b)(1).—

(A) Custody, Care, or Supervisory Control.—Subsection (b)(1) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. Application of Subsection (b)(2).—

(A) Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(2)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Undue Influence.—In determining whether subsection (b)(2)(B) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.

In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B), that such participant unduly influenced the minor to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.

4. Application of Subsection (b)(3).—Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(3) would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Interaction of Subsections (a)(1) and (b)(5).—If subsection (a)(1) applies, do not apply subsection (b)(5).
56. Application of Subsection (c).—
- (A) Application of Subsection (c)(1).—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice, advertisement or other method, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), "sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).
- (B) Application of Subsection (c)(3).—For purposes of subsection (c)(3), conduct described in 18 U.S.C. § 2241 means conduct described in 18 U.S.C. § 2241(a), (b), or (c). Accordingly, for purposes of subsection (c)(3):
- (i) Conduct described in 18 U.S.C. § 2241(a) or (b) is engaging in, or causing another person to engage in, a sexual act with another person: (I) using force against the minor; (II) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (III) rendering the minor unconscious; or (IV) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.
- (ii) Conduct described in 18 U.S.C. § 2241(c) is: (I) interstate travel with intent to engage in a sexual act with a minor who has not attained the age of 12 years; (II) knowingly engaging in a sexual act with a minor who has not attained the age of 12 years; or (III) knowingly engaging in a sexual act under the circumstances described in 18 U.S.C. § 2241(a) and (b) with a minor who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging).
- (iii) Conduct described in 18 U.S.C. § 2242 is: (I) engaging in, or causing another person to engage in, a sexual act with another person by threatening or placing the minor in fear (other than by threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping); or (II) engaging in, or causing another person to engage in, a sexual act with a minor who is incapable of appraising the nature of the conduct or who is physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.
67. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor transported, persuaded, induced, enticed, or coerced to engage in, or travel to engage in, a commercial sex act or prohibited sexual conduct is to be treated as a separate minor. Consequently, multiple counts involving more than one minor are not to be grouped



together under §3D1.2 (Groups of Closely Related Counts). In addition, subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one minor, whether specifically cited in the count of conviction, each such minor shall be treated as if contained in a separate count of conviction.

78. Upward Departure Provision.—If the offense involved more than ten minors, an upward departure may be warranted.

Background: This guideline covers offenses under chapter 117 of title 18, United States Code, involving transportation of a minor for illegal sexual activity through a variety of means. This guideline also covers offenses involving a minor under section 1591 of title 18, United States Code. Offenses involving an individual who had attained the age of 18 years are covered under §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct with an Individual Other than a Minor).

(E) New Recordkeeping Offense in 18 U.S.C. § 2257A

§2G2.5. **Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email**

- (a) Base Offense Level: 6
- (b) Cross References
  - (1) If the offense reflected an effort to conceal a substantive offense that involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).
  - (2) If the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

Statutory Provisions: 15 U.S.C. § 7704(d); 18 U.S.C. §§ 2257, 2257A.



**(F) New Offense in § 2252A(g) for Child Exploitation Enterprise**

**§2G2.6. Child Exploitation Enterprises**

- (a) Base Offense Level: [34][[35][36][37]
- (b) Specific Offense Characteristics
  - (1) If a victim (A) had not attained the age of 12 years, increase by 4 levels; or (B) had attained the age of 12 years but had not attained the age of 16 years, increase by 2 levels.
  - (2) If (A) the defendant was a parent, relative, or legal guardian of a minor victim; or (B) a minor victim was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
  - (3) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2252A(g).

Application Notes:

1. Application of Subsection (b)(2).—

- (A) Custody, Care, or Supervisory Control.—Subsection (b)(2) is intended to have broad application and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.
- (B) Inapplicability of Chapter Three Adjustment.—If the enhancement under subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

2. Application of Subsection (b)(3).—For purposes of subsection (b)(3), "conduct described in 18 U.S.C. § 2241(a) or (b)" is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to

appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

3. Definition of Minor—"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

**(G) New Offense in 18 U.S.C. § 2252C for Embedding Words or Images**

**§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names**

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics
  - (1) (Apply the Greatest) If the offense involved:
    - (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.
    - (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.
    - (C) Distribution to a minor, increase by 5 levels.
    - (D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.
    - (E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.
    - (F) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.
  - ~~(2) If the offense involved the use of a misleading domain name on the Internet with the intent to deceive a minor into viewing material on the Internet that is harmful to minors, increase by 2 levels.~~

- (2) If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the sourcecode of a website, increase by [2][4] levels.
  - (3) If the offense involved the use of a computer or an interactive computer service, increase by 2 levels.
  - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
- (c) Cross Reference
- (1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) or §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465, 1466, 1470, 2252B, 2252C. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).*

*"Distribution" means any act, including possession with intent to distribute, production, advertisement, and transportation, related to the transfer of obscene matter. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.*

*"Distribution for pecuniary gain" means distribution for profit.*

*"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration.*

*"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense.*



"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Material that is harmful to minors" has the meaning given that term in 18 U.S.C. § 2252B(d).

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

2. Inapplicability of Subsection (b)(3).—If the defendant is convicted of 18 U.S.C. § 2252B or 2252C, subsection (b)(3) shall not apply. §
3. Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.

Background: Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 15.

#### Appendix A (Statutory Index)

18 U.S.C. § 2245	2A1.1
18 U.S.C. § 2250(a)	2A3.5
18 U.S.C. § 2250(c)	2A3.6
* * *	
18 U.S.C. § 2252B	2G2.5
18 U.S.C. § 2252C	2G3.1
* * *	
18 U.S.C. § 2257	2G2.5
18 U.S.C. § 2257A	2G2.5
* * *	
18 U.S.C. § 2260(b)	2G2.2
18 U.S.C. § 2260A	2A3.6

#### Part III - Other Criminal Provisions

##### (A) New Offenses in 42 U.S.C. §§ 16962 and 16984 Relating to Fingerprints

##### §2H3.1. Interception of Communications; Eavesdropping; Disclosure of Certain Personal

### Information Tax Return Information

- (a) Base Offense Level (Apply the greater):
  - (1) 9; or
  - (2) 6, if the defendant was convicted of 26 U.S.C. §§ 7213A, ~~or 26 U.S.C. § 7216~~, or 42 U.S.C. § 16984.
- (b) Specific Offense Characteristic
  - (1) If the purpose of the offense was to obtain direct or indirect commercial advantage or economic gain, increase by 3 levels.
- (c) Cross Reference
  - (1) If the purpose of the offense was to facilitate another offense, apply the guideline applicable to an attempt to commit that other offense, if the resulting offense level is greater than that determined above.

### Commentary

Statutory Provisions: 18 U.S.C. § 2511; 26 U.S.C. §§ 7213(a)(1)-(3), (a)(5), (d), 7213A, 7216; 42 U.S.C. §§ 16962, 16984; 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

### Application Notes:

1. ~~Definitions.—For purposes of this guideline, "tax return" and "tax return information" have the meaning given the terms "return" and "return information" in 26 U.S.C. § 6103(b)(1) and (2), respectively.~~
12. Satellite Cable Transmissions.—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.

Background: This section refers to conduct proscribed by 47 U.S.C. § 605 and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication.

This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, which is proscribed by 26 U.S.C. §§ 7213(a)(1)-(3), (5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax

*return information, but provide a maximum term of imprisonment of one year for violations of 26 U.S.C. §§ 7213A and 7216.*

**(B) Increased Penalty in 18 U.S.C. § 1001**

**§2J1.2. Obstruction of Justice**

- (a) Base Offense Level: **14**
- (b) Specific Offense Characteristics
  - (1) (Apply the greater):
    - (A) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by **8** levels.
    - (B) If the (i) defendant was convicted under 18 U.S.C. § 1001 or § 1505; and (ii) the statutory maximum term of imprisonment relating to international terrorism or domestic terrorism is applicable, increase by **12** levels.
    - (C) If the (i) defendant was convicted under 18 U.S.C. § 1001; and (ii) statutory maximum term of imprisonment relating to sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, is applicable, increase by **[2]-[12]** levels.
  - (2) If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.
  - (3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by **2** levels.
- (c) Cross Reference
  - (1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary



Statutory Provisions: 18 U.S.C. §§ 1001 (when the statutory maximum term of imprisonment relating to international terrorism or, domestic terrorism, or sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, is applicable), 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Domestic terrorism" has the meaning given that term in 18 U.S.C. § 2331(5).

"International terrorism" has the meaning given that term in 18 U.S.C. § 2331(1).

"Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. Chapter Three Adjustments.—

(A) Inapplicability of Chapter Three, Part C.—For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation, prosecution, or sentencing of the obstruction of justice count.

(B) Interaction with Terrorism Adjustment.—If §3A1.4 (Terrorism) applies, do not apply subsection (b)(1)(B).

3. Convictions for the Underlying Offense.—In the event that the defendant is convicted of an offense sentenced under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).

4. Upward Departure Considerations.—If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness's face), an upward departure would be warranted.

5. Subsection (b)(1).—The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

*Background:* This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence.

The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

**(C) 18 U.S.C. § 1591 Added to List of Covered Sex Offenses**

**§4B1.5. Repeat and Dangerous Sex Offender Against Minors**

(a) In any case in which the defendant’s instant offense of conviction is a covered sex crime, §4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:

(1) The offense level shall be the greater of:

(A) the offense level determined under Chapters Two and Three; or

(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from §3E1.1 (Acceptance of Responsibility):

<u>Offense Statutory Maximum</u>	<u>Offense Level</u>
(i) Life	37
(ii) 25 years or more	34
(iii) 20 years or more, but less than 25 years	32
(iv) 15 years or more, but less than 20 years	29
(v) 10 years or more, but less than 15 years	24
(vi) 5 years or more, but less than 10 years	17
(vii) More than 1 year, but less than 5 years	12.

- (2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category V.
- (b) In any case in which the defendant's instant offense of conviction is a covered sex crime, neither §4B1.1 nor subsection (a) of this guideline applies, and the defendant engaged in a pattern of activity involving prohibited sexual conduct:
  - (1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three. However, if the resulting offense level is less than level 22, the offense level shall be level 22, decreased by the number of levels corresponding to any applicable adjustment from §3E1.1.
  - (2) The criminal history category shall be the criminal history category determined under Chapter Four, Part A.

Commentary

Application Notes:

1. Definition.—For purposes of this guideline, "minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.  
  
~~"Minor victim" includes (A) an undercover law enforcement officer who represented to the defendant that the officer was a minor; or (B) any minor the officer represented to the defendant would be involved in the prohibited sexual conduct.~~
2. Covered Sex Crime as Instant Offense of Conviction.—For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iiiiv) of this note.
3. Application of Subsection (a).—
  - (A) Definitions.—For purposes of subsection (a):
    - (i) "Offense statutory maximum" means the maximum term of imprisonment authorized for the instant offense of conviction that is a covered sex crime, including any increase in that maximum term under a sentencing enhancement provision (such as a sentencing enhancement provision contained in 18 U.S.C.



§ 2247(a) or § 2426(a) that applies to that covered sex crime because of the defendant's prior criminal record.

- (ii) "Sex offense conviction" (I) means any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B), if the offense was perpetrated against a minor; and (II) does not include trafficking in, receipt of, or possession of, child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—In a case in which more than one count of the instant offense of conviction is a felony that is a covered sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (a).

4. Application of Subsection (b).—

(A) Definition.—For purposes of subsection (b), "prohibited sexual conduct" means any of the following: (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the production of child pornography; or (iii) trafficking in child pornography only if, prior to the commission of the instant offense of conviction, the defendant sustained a felony conviction for that trafficking in child pornography. It does not include receipt or possession of child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

(B) Determination of Pattern of Activity.—

(i) In General.—For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.

(ii) Occasion of Prohibited Sexual Conduct.—An occasion of prohibited sexual conduct may be considered for purposes of subsection (b) without regard to whether the occasion (I) occurred during the course of the instant offense; or (II) resulted in a conviction for the conduct that occurred on that occasion.

5. Treatment and Monitoring.—

(A) Recommended Maximum Term of Supervised Release.—The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline.

(B) Recommended Conditions of Probation and Supervised Release.—Treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of any term of probation or supervised release that is imposed.

Background: This guideline applies to offenders whose instant offense of conviction is a sex offense committed against a minor ~~is intended to provide lengthy incarceration for offenders who commit sex offenses against minors and who present a continuing danger to the public. It applies to offenders whose instant offense of conviction is a sex offense committed against a minor victim.~~ The relevant criminal

provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (see 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Public Law 102–141 and section 505 of Public Law 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

Section 401(i)(1)(A) of Public Law 108–21 directly amended Application Note 4(b)(i), effective April 30, 2003.

## APPENDIX A (STATUTORY INDEX)

18 U.S.C. § 1001	2B1.1, 2J1.2 (when the statutory maximum term of imprisonment relating to international terrorism or, domestic terrorism, or sex offenses under 18 U.S.C. § 1591 or chapters 109A, 109B, 110, or 117 of title 18, United States Code, is applicable)
------------------	--

\* \* \*

42 U.S.C. § 14905	2B1.1
42 U.S.C. § 16962	2H3.1
42 U.S.C. § 16984	2H3.1

## Part VI - Provisions Regarding Probation and Supervised Release

### §5B1.3. Conditions of Probation

#### (a) Mandatory Conditions--

- (1) for any offense, the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3563(a));
- (2) for a felony, the defendant shall (A) make restitution, (B) give notice to victims of the offense pursuant to 18 U.S.C. § 3555, or (C) reside, or refrain from residing, in a specified place or area, unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under 18 U.S.C. § 3563(b) (see 18 U.S.C. § 3563(a)(2));

Note: Section 3563(a)(2) of Title 18, United States Code, provides that, absent unusual circumstances, a defendant convicted of a felony shall abide by at least one of the conditions set forth in 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13). Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), and community service ((b)(13)). Whether or not the change was intended, the Act deleted the fine condition and renumbered the restitution and community service conditions in 18 U.S.C. § 3563(b), but failed to make a corresponding change in

the referenced paragraphs under 18 U.S.C. § 3563(a)(2). Accordingly, the conditions now referenced are restitution ((b)(2)), notice to victims pursuant to 18 U.S.C. § 3555 ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specified place or area ((b)(13)).

- (3) for any offense, the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3563(a));
- (4) for a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3563(a));
- (5) for any offense, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3563(a));
- (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;
- (7) the defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments (see 18 U.S.C. § 3563(a));
- (8) if the court has imposed a fine, the defendant shall pay the fine or adhere to a court-established payment schedule (see 18 U.S.C. § 3563(a));
- (9) ~~a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; a sex offender shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913) by (A) registering, and keeping such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction~~



of residence; (B) providing information required by 42 U.S.C. § 16914; and (C) keeping such registration current for the full registration period as set forth in 42 U.S.C. § 16915;

(10) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).

(b) The court may impose other conditions of probation to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (C) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (D) the need to protect the public from further crimes of the defendant; and (E) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve only such deprivations of liberty or property as are reasonably necessary for the purposes of sentencing indicated in 18 U.S.C. § 3553(a) (see 18 U.S.C. § 3563(b)).

(c) (Policy Statement) The following "standard" conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

- (1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
- (2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- (3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- (4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
- (5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

- (6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;
  - (7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
  - (8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
  - (9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
  - (10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
  - (11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
  - (12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
  - (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
  - (14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.
- (d) (Policy Statement) The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed -  
- a condition prohibiting the defendant from incurring new credit charges  
or opening additional lines of credit without approval of the probation  
officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to  
victims, or orders the defendant to pay a fine -- a condition requiring the  
defendant to provide the probation officer access to any requested  
financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of  
narcotics, other controlled substances or alcohol -- a condition requiring  
the defendant to participate in a program approved by the United States  
Probation Office for substance abuse, which program may include testing  
to determine whether the defendant has reverted to the use of drugs or  
alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of  
psychological or psychiatric treatment -- a condition requiring that the  
defendant participate in a mental health program approved by the United  
States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of  
deportation pursuant to section 238(c)(5) of the Immigration and  
Nationality Act (8 U.S.C. § 1228(c)(5)\*); or (B) in the absence of a  
stipulation of deportation, if, after notice and hearing pursuant to such  
section, the Attorney General demonstrates by clear and convincing  
evidence that the alien is deportable -- a condition ordering deportation  
by a United States district court or a United States magistrate judge.

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in  
Application Note 1 of the Commentary to §5D1.2 (Term of Supervised  
Release) --

(A) A condition requiring the defendant to participate in a program  
approved by the United States Probation Office for the treatment



and monitoring of sex offenders.

- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.
- (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects, upon reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

\*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation.

(2) Home Detention

Home detention may be imposed as a condition of probation but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of probation. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and

nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation.

**§5D1.2. Term of Supervised Release**

(a) Except as provided in subsections (b) and (c), if a term of supervised release is ordered, the length of the term shall be:

(1) At least three years but not more than five years for a defendant convicted of a Class A or B felony.

(2) At least two years but not more than three years for a defendant convicted of a Class C or D felony.

(3) One year for a defendant convicted of a Class E felony or a Class A misdemeanor.

(b) Notwithstanding subdivisions (a)(1) through (3), the length of the term of supervised release shall be not less than the minimum term of years specified for

the offense under subdivisions (a)(1) through (3) and may be up to life, if the offense is—

(1) any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person; or

(2) a sex offense.

(Policy Statement) If the instant offense of conviction is a sex offense, however, the statutory maximum term of supervised release is recommended.

(c) The term of supervised release imposed shall be not less than any statutorily required term of supervised release.

Commentary

Application Notes:

~~1. Definition.—For purposes of this guideline, "sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code, (ii) chapter 110 of such title, not including a recordkeeping offense, or (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual, or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.~~

1. Definitions.—For purposes of this guideline:

"Sex offense" means (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 109B of such title; (iii) chapter 110 of such title, not including a recordkeeping offense; (iv) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; (v) an offense under 18 U.S.C. § 1201; or (vi) an offense under 18 U.S.C. § 1591; or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (vi) of this note.

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2. Safety Valve Cases.—A defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).

3. Substantial Assistance Cases.—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (b) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

### **§5D1.3. Conditions of Supervised Release**

#### (a) Mandatory Conditions--

- (1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));
- (2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));
- (3) the defendant who is convicted for a domestic violence crime as defined



in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));

- (4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));
  - (5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));
  - (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;
  - (7) ~~a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student;~~ a sex offender shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16913) by (A) registering, and keeping such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (B) providing information required by 42 U.S.C. § 16914; and (C) keeping such registration current for the full registration period as set forth in 42 U.S.C. § 16915;
  - (8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- (b) The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the

need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

- (c) (Policy Statement) The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:
- (1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
  - (2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
  - (3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
  - (4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
  - (5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
  - (6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;
  - (7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
  - (8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
  - (9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

- (10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
  - (11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
  - (12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
  - (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
  - (14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;
  - (15) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.
- (d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:
- (1) Possession of Weapons  
If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.
  - (2) Debt Obligations  
If an installment schedule of payment of restitution or a fine is imposed - - a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.
  - (3) Access to Financial Information  
If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the



defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and Nationality Act (8 U.S.C. § 1228(c)(5)<sup>\*</sup>); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) --

- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.
- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.
- (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects

upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

\*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement\*

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

\*Note: Section 3583(d) of title 18, United States Code, provides that "[t]he court may order, as a further condition of supervised release...any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate." Subsection (b)(11) of section 3563 of title 18, United States Code, is explicitly excluded as a condition of supervised release. Before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, the condition at 18 U.S.C. § 3563(b)(11) was intermittent confinement. The Act deleted 18 U.S.C. § 3563(b)(2), authorizing the payment of a fine as a condition of probation, and redesignated the remaining conditions of probation set forth in 18 U.S.C. § 3563(b); intermittent confinement is now set forth at subsection (b)(10), whereas subsection (b)(11) sets forth the condition of residency at a community corrections facility. It would appear that intermittent confinement now is authorized as a condition of supervised release and that community confinement now is not authorized as a condition of supervised release.

However, there is some question as to whether Congress intended this result. Although the Antiterrorism and Effective Death Penalty Act of 1996 redesignated the remaining paragraphs of section 3563(b), it failed to make the corresponding redesignations in 18 U.S.C. § 3583(d), regarding discretionary conditions of supervised release.

(2) Home Detention

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of supervised release. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

**Part V - Issues for Comment:**

1. *The Commission requests comment regarding how it should incorporate the mandatory minimum terms of imprisonment created or increased by the Adam Walsh Child Protection Act of 2006. There are four potential approaches to consider. First, the Commission can set the base offense level to correspond to the first offense level on the sentencing table with a guideline range in excess of the mandatory minimum. Historically, this is the approach the Commission has taken with respect to drug offenses. For example, a 10-year mandatory minimum would correspond to a base offense level of 32 (121 - 151 months). Second, the Commission can set the base offense level such that the guideline range is the first on the sentencing table to include the mandatory minimum term of imprisonment at any point within the range. Under this approach, a 10-year mandatory minimum would correspond to a base offense level of 31 (108 - 135 months). Third, the Commission could set the base offense level such that the corresponding guideline range is lower than the mandatory minimum term of imprisonment but then anticipate that certain frequently applied specific offense characteristics would increase the offense level and corresponding guideline range to encompass the mandatory minimum. The Commission took this approach in 2004 when it implemented the PROTECT Act. Fourth, the Commission could decide not to change the base offense levels and allow §5G1.1(b) to operate. Section 5G1.1(b) provides that if a mandatory minimum term of imprisonment is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.*
2. *Pursuant to the directive in section 141 of the Act, the Commission must consider, "whether the person committed an offense against a minor in connection with, or during, the period for which the person failed to register." In light of this consideration, the Commission requests comment regarding the scope of the proposed enhancement in §2A3.5(b)(1) of Option 1 and §2A3.5(b)(2) of Option 2 with respect to minors. Should the Commission expand the proposed six-level enhancement so that it would apply in the case of any non-sexual offense committed against a minor? As an alternative to providing tiered enhancements based on the type of offense committed against a minor (as presented in the proposed amendment), should the Commission structure the enhancement so that any offense committed against a minor would warrant an eight-level enhancement and any offense committed against a person other than a minor would warrant a six-level enhancement? If so, should the enhancement also provide a minimum offense level of [24]-[28]?*



3. *The proposed amendment provides in §2A3.5 a [2][4]-level reduction if the defendant voluntarily attempted to correct the failure to register. The Commission requests comment regarding this reduction. Specifically, how should the Commission address circumstances in which it was impossible for the defendant to register, for example, the defendant had a debilitating illness or severe mental impairment, or the jurisdiction in which the defendant works or is a student does not allow non-residents to register. Should the proposed reduction be extended to such circumstances or is there an alternative way in which the Commission should take such circumstances into account in the guidelines?*

*The Commission also requests comment regarding whether it should provide an instruction that the reduction does not apply if any of the proposed specific offense characteristics also apply.*

4. *The Adam Walsh Child Protection Act created a new offense at 18 U.S.C. § 2244(a)(5), with a statutory maximum term of imprisonment of life, for sexual contact that would have violated 18 U.S.C. § 2241(c) (Aggravated sexual abuse with children) had the sexual contact been a sexual act. The proposed amendment addresses this new offense in §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) by increasing the minimum offense level in subsection (b)(1)(if the victim was under the age of 12 years) from level 20 to level 22. The Commission requests comment regarding whether it should amend §2A3.4 to account specifically for this new offense or whether the current provisions of the guideline are adequate to account for this new offense.*
5. *The proposed amendment references 18 U.S.C. § 2257A (Record keeping requirements) to §2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Email). For offenses in which the defendant refused to allow an inspection of records in violation of 18 U.S.C. § 2257(f)(5) or § 2257A, the Commission requests comment regarding whether it should provide an application note that provides for an upward departure in such cases or instructs the court to apply §3C1.1.*
6. *The Commission requests comment regarding the proposed new guideline in §2G2.6 that would implement 18 U.S.C. § 2252A(g). Specifically, the Commission requests comment regarding the appropriate base offense level for this new guideline given that the statute provides a mandatory minimum term of imprisonment of 20 years. Additionally, the proposed specific offense characteristics are targeted to offense conduct involving minors. Section 1591 is included as one of the predicate offenses under 18 U.S.C. § 2252A(g) but it is not limited to offenses committed against minors. The Commission requests comment regarding whether it should provide a specific offense characteristic, or expand a proposed specific offense characteristic, to cover all 18 U.S.C. § 1591 offenses. With respect to enhancements, is there additional conduct for which the Commission should consider providing specific offense characteristics? If so, for what conduct, and what is an appropriate increase for that conduct? The Commission further requests comment regarding whether this guideline should provide a decrease if the defendant's conduct was limited to possession or receipt of material involving the sexual exploitation of a minor and the defendant did not intend to traffic in or distribute such material.*

*The Commission also requests comment regarding whether it should provide an enhancement for the use of a computer or interactive an interactive computer service and if so, what would be an appropriate increase for such conduct. The Commission specifically asks whether this enhancement is appropriate if the base offense level is at the lower end of the proposed options.*

7. *The proposed amendment adds to the misleading domain name enhancement in subsection (b)(5) of §2G3.1 the use of embedded words or digital images in the source code of a website to deceive a minor into viewing matter that would be harmful to the minor. The Commission requests comment regarding whether it also should include an enhancement if the offense involved the use of embedded words or digital images to deceive a person other than a minor into viewing obscenity. If so, how many levels would be appropriate for such an enhancement? For example, should the Commission provide two levels for such an enhancement and four levels if the offense deceived a minor into viewing harmful matter?*
8. *The Commission requests comment regarding the interaction of the age enhancement in §2G1.3(b)(5) and the proposed base offense levels. The proposed amendment presents options for reducing the age enhancement in §2G1.3(b)(5) to as far as four levels. Should the Commission consider providing an increase of less than eight levels in any case in which the age of the minor victim is taken into account by the base offense level (because age is an element of the offense)? For example, should four levels be applied if the base offense level takes into account the age of the minor and eight levels be applied if the base offense level does not take age into account?*
9. *The Commission requests comment regarding the interaction of §2G1.3 and §2A3.1, particularly with respect to the application of the cross reference in §2G1.3(c)(3) and the proportionality of resulting offenses levels for a case involving a minor who had not attained the age 12 years. Do any of the proposed offense levels in either guideline need to be increased in order to provide proportionality between §§2G1.3 and 2A1.3 in cases involving a minor who had not attained the age of 12 years, taking into account the new mandatory minimum penalties provided for offenses referenced to these two guidelines? For example, the proposed amendment provides a base offense level of [28][30] if the defendant was convicted under 18 U.S.C. § 2422(b) or § 2423(a). If §2G1.3(c)(3) applies because, for example, the offense involved interstate travel with a minor who had not attained the age of 12 years, the court would apply §2A3.1 and the resulting offense level under that guideline would be 34 (BOL of 30 plus 4 levels for age of minor). If the court does not apply the cross reference and stays in §2G1.3, the resulting offense level would be [36][38] (BOL of [28][30] plus 8 levels for the age of the minor). Are these offense levels appropriate given new mandatory minimum penalties and offense levels currently provided in §2G1.3 and §2A3.1, respectively, or should the Commission provide higher base offense levels in §2G1.3?*



### 3. Technical and Clarifying Amendments to the Sentencing Guidelines

**Synopsis of Proposed Amendment:** *This proposed amendment makes various technical and conforming changes to the guidelines.*

*Specifically, Part A of the proposed amendment corrects typographical errors in §§2B1.1(b)(13)(C), 2D1.11(a), 2K2.1 (Application Note 14), and 2L1.1(b)(1). The proposed amendment also updates Appendix A by eliminating an outdated statutory reference and by including a statutory reference for 18 U.S.C. § 931 to §2K2.6 (Possessing, Purchasing, or Owning Body Armor by Violent Felons).*

*In Part B, the proposed amendment addresses application of the grouping rules when a defendant is sentenced on multiple counts contained in different indictments as, for example, when a case is transferred to another district for purposes of sentencing, pursuant to Fed. R. Crim.P. 20(a). Section 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) is silent as to this issue. The four circuits that have addressed the issue have concluded that the grouping rules apply when a defendant is sentenced on multiple indictments. *See United States v. Hernandez Coplin*, 24 F.3d 312 (1st Cir. 1994) (holding that §5G1.2's rules regarding sentences imposed at the same time for different indictments must apply to Chapter 3, Part D); *United States v. Herula*, 464 F.3d 1132 (10th Cir. 2006) (holding that §5G1.2 required that §3D1.4 apply in cases involving multiple counts in separate indictments); *United States v. Tolbert*, 306 F.3d 244 (5th Cir. 2002) (holding that §5G1.2 requires that total punishment be determined by the grouping principles from Chapter 3, Part D, thus requiring grouping for counts contained in different indictments). *See also United States v. Greer*, 91 F.3d 996 (7th Cir. 1996) (holding that the district court had erred by not using §5G1.2 to sentence the defendant, who was sentenced for two separate crimes within minutes of each other).*

*The proposed amendment adopts the reasoning of these cases and clarifies that the grouping rules apply not only to multiple counts in the same indictment but also to multiple counts contained in different indictments when a defendant is sentenced on the indictments simultaneously. The proposed amendment provides clarifying language in the Introductory Commentary of Chapter Three, Part D, as well as in §3D1.1. The proposed language is the same language that currently is provided in §5G1.2 (Sentencing on Multiple Counts of Conviction) and relied on by the courts cited in the previous paragraph.*

#### **Proposed Amendment:**

##### **Part A:**

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

(13) (Apply the greater) If—

(A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or



- (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by 4 levels.
- (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(12)(B) shall not exceed 8 levels, except as provided in subdivision (D).
- (D) If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

\* \* \*

**§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy**

- (a) Base Offense Level: The offense level from the Chemical Quantity Table set forth in subsection (d) or (e), as appropriate, except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (e)(d) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.

\* \* \*

**§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

14. "In Connection With".—

- (A) In General.—Subsections (b)(6) and (c)(1) apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.
- (B) Application When Other Offense is Burglary or Drug Offense.—Subsections (b)(6) and (c)(1) apply (i) in a case in which a defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking

*offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia. In these cases, application of subsections (b)(6) and (c)(1) is warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively.*

(C) Definitions.—

*"Another felony offense", for purposes of subsection (b)(6), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained.*

*"Another offense", for purposes of subsection (c)(1), means any federal, state, or local offense, other than the explosive or firearms possession or trafficking offense, regardless of whether a criminal charge was brought, or a conviction obtained.*

(D) Upward Departure Provision.—*In a case in which the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.*

**§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien**

(a) Base Offense Level:

- (1) **25**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who was inadmissible under 8 U.S.C. § 1182(a)(3);
- (2) **23**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
- (3) **12**, otherwise.

(b) Specific Offense Characteristics

- (1) If (A) the offense was committed other than for profit, or the offense involved the smuggling, transporting, or harboring only of the defendant's spouse or child (or both the defendant's spouse and child), and (B) the base offense level is determined under subsection (a)(3), decrease by 3 levels.

\* \* \*

**Appendix A (Statutory Index)**

\* \* \*

18 U.S.C. § 930           2K2.5  
18 U.S.C. § 931           2K2.6  
\* \* \*  
~~18 U.S.C. § 3174~~       ~~2J1.7~~

**Part B:**  
**Chapter 3, Part D - Multiple Counts**

*Introductory Commentary*

*This part provides rules for determining a single offense level that encompasses all the counts of which the defendant is convicted. These rules apply to multiple counts of conviction (A) contained in the same indictment or information, or (B) contained in different indictments or informations for which sentences are to be imposed at the same time or in a consolidated proceeding. The single, "combined" offense level that results from applying these rules is used, after adjustment pursuant to the guidelines in subsequent parts, to determine the sentence. These rules have been designed primarily with the more commonly prosecuted federal offenses in mind.*

**§3D1.1.           Procedure for Determining Offense Level on Multiple Counts**

\* \* \*  
*Commentary*

*Application Notes:*

1. *In General.*—For purposes of sentencing multiple counts of conviction, counts can be (A) contained in the same indictment or information; (B) contained in different indictments or informations for which sentences are to be imposed at the same time or contained in a consolidated proceeding.

~~±~~2.

\* \* \*



#### 4. Miscellaneous Laws

**Synopsis of Proposed Amendment:** *This is a two-part amendment that implements recently enacted legislation. Part One of this proposed amendment operates to support the Respect for America's Fallen Heroes Act, Pub. L. 109–228, which created a new offense in 38 U.S.C. § 2413, prohibiting certain demonstrations at Arlington National Cemetery and at cemeteries under control of the National Cemetery Administration. The penalty for a violation of 38 U.S.C. § 2413 is imprisonment of not more than one year, a fine, or both.*

*The proposed amendment references this new crime to §2B2.3, because the new crime shares with other crimes that are referred to the trespass guideline the basic element of unauthorized access to particular federal land or site. The proposed amendment expands the two-level enhancement in §2B2.3(b)(1) to include Arlington National Cemetery or a cemetery under the control of the National Cemetery Association. (Arlington National Cemetery is, of course, considered a national cemetery, but it is not maintained by the National Cemetery Administration. Rather, it is maintained by the Department of the Army and should be named separately in the Guidelines.)*

*Part Two of this proposed amendment operates to support the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA), Pub.L. 109–162. VAWA includes the International Marriage Broker Regulation Act of 2005 (IMBRA), which requires marriage brokers to collect background information about United States clients and places limitations on the marriage brokers' sharing of information about foreign national clients. A violation of 8 U.S.C. § 1375a(d)(3)(C) is subject to a misdemeanor conviction with a base offense level of 6. The felony offenses covered under 8 U.S.C. § 1375a(d)(5)(B) will receive a base offense level of 9.*

*The proposed amendment refers the new offense to §2H3.1 (Interception of Communications; Eavesdropping; Disclosure of Tax Return Information) and expands the heading of the guideline to include the unauthorized disclosure of private information. Currently, the guideline covers the wrongful disclosure of certain tax information. In addition to expanding the guideline to cover IMBRA offenses, the Commission also may wish to consider referencing other similar privacy statutes to this guideline, such as 18 U.S.C. § 1905 (Disclosure of confidential information generally (by an officer or employee of the US)), 42 U.S.C. § 405(c)(2)(C)(viii)(I)-(IV) (pertaining to the unauthorized willful disclosure of social security account numbers and related information), and 42 U.S.C. § 1320d(6) (wrongful disclosure of individually identifiable health information), which currently are not included in Appendix A. The proposed amendment brackets language that would include the wrongful disclosure of confidential information covered by these additional statutes.*

*Following the proposed amendment is an issue for comment regarding implementation of 31 U.S.C. § 5363, which prohibits the acceptance of any financial instrument for unlawful Internet gambling. The offense was created by the Safety and Accountability for Every Port Act (SAFE Port Act), Pub. L. 109–347.*

#### **Proposed Amendment**

##### **I. Respect for America's Fallen Heroes Act (Public Law 109–228)**

##### **§2B2.3. Trespass**

- (a) Base Offense Level: 4
- (b) Specific Offense Characteristics
  - (1) If the trespass occurred (A) at a secured government facility; (B) at a nuclear energy facility; (C) on a vessel or aircraft of the United States; (D) in a secured area of an airport; (E) at a residence; (F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; ~~(F)~~ (G) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by 2 levels.
  - (2) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.
  - (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- (c) Cross Reference
  - (1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(3), 1036; 38 U.S.C. § 2413; 42 U.S.C. § 7270b. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Airport" has the meaning given that term in section 47102 of title 49, United States Code.*

*"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that*

*provide essential services to the public.*

*"Felony offense" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought or a conviction was obtained.*

*"Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).*

*"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).*

*"Protected computer" means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).*

2. *Valuation of loss is discussed in the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).*

*Background: Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secured government installations, such as nuclear facilities, to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.*

\* \* \*

## APPENDIX A (Statutory Index)

38 U.S.C. § 787	2B1.1
38 U.S.C. § 2413	2B2.3

## II. Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109–162)

### §2H3.1. Interception of Communications; Eavesdropping; Disclosure of Tax Return—Certain Personal Information

(a) Base Offense Level (Apply the greater):

(1) **9**; or

(2) **6**, if the defendant was convicted of 8 U.S.C. § 1375a(d)(3)(C); 18 U.S.C. § 1905; 26 U.S.C. § 7213A; [or] 26 U.S.C. § 7216[; 42 U.S.C. § 405(c)(2)(C)(viii)(I)-(IV); or 42 U.S.C. § 1320d-6].

(b) Specific Offense Characteristic

(1) If the purpose of the offense was to obtain direct or indirect commercial



advantage or economic gain, increase by 3 levels.

(c) Cross Reference

- (1) If the purpose of the offense was to facilitate another offense, apply the guideline applicable to an attempt to commit that other offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 8 U.S.C. § 1375a(d)(3)(C), (d)(5)(B); 18 U.S.C. §§ 1905, 2511; 26 U.S.C. §§ 7213(a)(1)-(3), (a)(5), (d), 7213A, 7216; [42 U.S.C. §§ 405(c)(2)(C)(viii)(I)-(IV), 1320d-6;] 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline, "tax return" and "tax return information" have the meaning given the terms "return" and "return information" in 26 U.S.C. § 6103(b)(1) and (2), respectively.
2. Satellite Cable Transmissions.—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.

Background: This section refers to conduct proscribed by 47 U.S.C. § 605 and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication.

This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, 26 U.S.C. §§ 7213(a)(1)-(3), (5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax return information, but provide a maximum term of imprisonment of one year for violations of 26 U.S.C. §§ 7213A and 7216.

\* \* \*

**APPENDIX A (Statutory Index)**

8 U.S.C. § 1328	2G1.1, 2G1.3
8 U.S.C. § 1375a	2H3.1

\* \* \*

42 U.S.C. § 300i-1	2Q1.4
[42 U.S.C. § 405(c)(2)(C)(viii)(1)-(IV)	2H3.1]
* * *	

42 U.S.C. § 1320a-7b	2B1.1, 2B4.1
[42 U.S.C. § 1320d-6	2H3.1]

**Issue for Comment:**

*The SAFE Port Act, Pub. L. 109–347, created a new offense in 31 U.S.C. § 5363, prohibiting the acceptance of any financial instrument for unlawful Internet gambling Section 5366 of title 31, United States Code, and providing a statutory maximum term of imprisonment of not more than 5 years. The Commission requests comment regarding how it should implement the new offense. Specifically, should the offense be referenced to §2E3.1 (Gambling Offenses), which provides a base offense level of 6 or, alternatively, a base offense level of 12, if the offense was (A) engaging in a gambling business; (B) transmission of wagering information; or (C) committed as part of, or to facilitate, a commercial gambling operation. If the Commission should reference this statute to §2E3.1, are there additional amendments that should be made to this guideline in order to implement fully the new offense? For example, should the Commission provide a cross reference to either §2S1.1 (Laundering of Monetary Instruments) or §2S1.3 (Structuring Transactions to Evade Reporting Requirements) if the offense involves conduct more adequately covered by either of those guidelines? Alternatively, should 31 U.S.C. § 5363 be referenced to either §2S1.1 or §2S1.3 instead of §2E3.1, and if so, what other modifications, if any, should be made in those guidelines to implement fully the new offense?*

## 5. Re-Promulgation of Emergency Intellectual Property Amendment

**Synopsis of Proposed Amendment:** *This proposed amendment re-promulgates the emergency amendment, effective September 12, 2006, that responded to the directive contained in section 1(c) of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. 109–181. The directive, which required the Commission to promulgate an amendment under emergency amendment authority by September 12, 2006, instructs the Commission to "review, and if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of any offense under section 2318 or 2320 of title 18, United States Code." The directive further provides that the Commission shall:*

*determine whether the definition of "infringement amount" set forth in application note 2 of section 2B5.3 of the Federal sentencing guidelines is adequate to address situations in which the defendant has been convicted of one of the offenses [under section 2318 or 2320 of title 18, United States Code] and the item in which the defendant trafficked was not an infringing item but rather was intended to facilitate infringement, such as an anti-circumvention device, or the item in which the defendant trafficked was infringing and also was intended to facilitate infringement in another good or service, such as a counterfeit label, documentation, or packaging, taking into account cases such as U.S. v. Sung, 87 F.3d 194 (7th Cir. 1996).*

*The emergency amendment added subdivision (vii) to Application Note 2(A) of §2B5.3 (Criminal Infringement of Copyright or Trademark) to provide that the infringement amount is based on the retail value of the infringed item in a case under 18 U.S.C. §§ 2318 or 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service. This proposed amendment would re-promulgate this application note as a permanent amendment to §2B5.3.*

*The emergency amendment did not address the portion of the directive pertaining to anti-circumvention devices. This proposed amendment addresses that portion of the directive in two ways. First, the proposed amendment presents two options for addressing the trafficking in devices that circumvent a technological measure. Option One expands the specific offense characteristic in §2B5.3(b)(3) to include convictions under 17 U.S.C. § 1201(b) for trafficking in devices that circumvent a technological measure. Currently, §2B5.3(b)(3) provides a two-level enhancement and a minimum offense level of 12 for cases involving the manufacture, importation, or uploading of infringing items. The purpose of the enhancement in §2B5.3(b)(3) is to provide greater punishment for defendants who put infringing items into the stream of commerce, thereby enabling other individuals to infringe the copyright or trademark. See App. C (Amendment 594, effective Nov. 1, 2000). A defendant who traffics in devices that circumvent a technological measure similarly enables others to infringe a copyright and arguably warrants greater punishment. The minimum offense level guarantees the defendant will be in Zone D of the Sentencing Table. Under this option, the minimum offense level also works as a proxy for the infringement amount.*

*Options Two and Three address trafficking in devices used to circumvent a technological measure by providing a special rule under Application Note 1 for determining the infringement amount. Option Two adds trafficking cases to the note pertaining to the retail value of the infringing item. Under this option, the court would use the retail value of the device (the "infringing item") multiplied by the number of devices involved in the offense. Option Three is similar but provides two alternative measures under a new Application Note 1(C). It instructs the court to determine the infringement amount by using the*