
Public Comment



Proposed Amendments

2004

VOLUME I



Proposed Amendments to the Sentencing Guidelines

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This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments can be found in the December 30, 2003 Federal Register (68 Fed. Reg. 75339) and in the edition of the Federal Register that will be published on January 14, 2004.

**INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES AND
ISSUES FOR COMMENT PUBLISHED IN THE FEDERAL REGISTER ON
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**2004 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY
STATEMENTS, AND OFFICIAL COMMENTARY**

PROPOSED AMENDMENT 1: CHILD PORNOGRAPHY AND SEXUAL ABUSE OF MINORS

Synopsis of Proposed Amendment: *This proposed amendment contains a number of proposals designed to implement Congress's directives to the Commission regarding child pornography and sexual abuse offenses in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, (the "PROTECT Act"), Pub. L. 108–21. Furthermore, this amendment addresses a number of issues in response to comments from the Department of Justice's Child Exploitation and Obscenity Section ("CEOS"), calls to the Commission's Helpline, and issues identified through case law regarding the sexual abuse and pornography guidelines. This proposed amendment makes changes to Chapter Two, Part A (Criminal Sexual Abuse), Chapter Two, Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity), §§3D1.2 (Groups of Closely Related Counts), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), 5D1.3 (Conditions of Supervised Release), and Appendix A (Statutory Index). Several issues for comment regarding these guidelines and §4B1.5 (Repeat and Dangerous Sex Offender Against Minors) follow the proposed amendments.*

I. Child Pornography Offenses

This part of the proposed amendment covers offenses sentenced under §§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), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), and 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). Issues for comment regarding the scope of specific enhancements in these guidelines and the application of the "image tables" and "sado-masochistic" enhancements at §§2G2.2 and 2G2.4 follow the proposed amendments.

A. Trafficking Offenses under §2G2.2

Section 103 of the PROTECT Act creates five year mandatory minimum terms of imprisonment for offenses related to trafficking of child pornography under 18 U.S.C. §§ 2252(a)(1)-(3) and 2252A(a)(1), (2), (3), (4) and (6). This section also increases the statutory maximum terms of imprisonment for these offenses from 15 years to 20 years. As a result, this proposed amendment provides two options for increasing the base offense level in §2G2.2 to reflect the new five year mandatory minimum term of imprisonment. Option 1 increases the base offense level for all offenses covered by this guideline from level 17 to level [22][24][25][26]. Option 2 provides alternative base offense levels of level [20][22][24] if the conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor and level [22][24][25][26] for all other offenses.

Section 503 of the PROTECT Act creates two new offenses in 18 U.S.C. § 2252A. The new offense at 18 U.S.C. § 2252A(a)(3)(B) prohibits advertising, promoting, presenting, distributing, or

soliciting any material or purported material that the defendant believes, or intends to cause another to believe, contains actual or obscene child pornography. No actual materials need to exist in order to be convicted under this provision, thus even fraudulent offers to buy or sell such materials are covered under this provision. The new offense at 18 U.S.C. § 2252A(a)(6) prohibits using any type of real or apparent child pornography to induce a child to commit a crime. Section 513(c) of the PROTECT Act directs the Commission to review and, as appropriate, amend the guidelines to ensure that penalties are adequate to deter and punish conduct that involves a violation of these new offenses. In addition, the Commission is directed to "consider the relative culpability of promoting, presenting, describing, or distributing material" in violation of 18 U.S.C. § 2252A(a)(3)(B) as compared to soliciting such material.

In response to this directive, several options are proposed. First, the amendment refers both of these new offenses to the trafficking guideline, §2G2.2. Currently, §2G2.2(b)(2) provides for offenses involving distribution of child pornography, a two- to seven-level enhancement, depending on the type of distribution. Section 2G2.2(b)(2)(C) provides a five-level enhancement for offenses involving distribution to a minor, and §2G2.2(b)(2)(D) provides a seven-level enhancement for "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." In response to the new offense at 18 U.S.C. § 2252(A)(a)(b), the proposed amendment adds a six-level enhancement at §2G2.2(b)(2) if the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity.

This proposal addresses in two ways the directive to compare the relative culpability of a defendant who promotes, presents, describes, or distributes child pornographic material to the culpability of a defendant who merely solicits such material. First, the amendment provides an alternative base offense level "if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material." Second, the proposal amends §2G2.2(b)(2) and the commentary of that guideline to make clear that the enhancement only applies to defendants whose conduct involves some form of distribution. In addition, this proposal adds commentary to the definition of "distribution" that makes clear that distribution does not include merely soliciting child pornography. Therefore, defendants who merely solicit child pornography will not be subject to the distribution enhancement at §2G2.2(b)(2) unless their conduct involves some other act related to the transfer of material involving the sexual exploitation of a minor. Third, the amendment contains an option in the distribution enhancement at §2G2.2(b)(2) to change the enhancement from "if the offense involved" to "if the defendant's conduct involved", which would limit the defendant's exposure under the enhancement to that of the defendant's own conduct.

Section 504 of the PROTECT Act creates a new offense at 18 U.S.C. § 1466A that prohibits producing, distributing, receiving, possessing, or possessing with intent to distribute visual depictions (including drawings, cartoons, sculptures or paintings) that depict (1) a minor engaging in sexually explicit conduct and is obscene; or (2) an image that is, or appears to be, a minor engaging in sexually explicit conduct and lacks serious literary, artistic, political, or scientific value. Trafficking in such materials is covered under 18 U.S.C. § 1466A(a) and carries a mandatory minimum term of imprisonment of five years and a maximum term of imprisonment of 20 years. Simple possession of such materials is covered under 18 U.S.C. § 1466A(b) and punishable by a term of imprisonment of

not more than ten years. Although 18 U.S.C. § 1466A covers offenses of trafficking in, possession with intent to traffic in, and simple possession of, obscene material, section 504 of the PROTECT Act directs the Commission to punish these offenses consistent with child pornography trafficking offenses sentenced under §2G2.2. By strictly complying with the language of this directive, however, the Commission would create an anomaly with regard to simple possession cases. For example, a defendant convicted of possessing an obscene cartoon drawing depicting minors engaged in sexually explicit conduct under 18 U.S.C. § 1466A(b) would receive a sentence equivalent to a five year mandatory minimum term of imprisonment under §2G2.2, while a defendant convicted under 18 U.S.C. § 2252(a)(4) of possessing a picture of actual minors engaged in sexually explicit conduct would receive a sentence of only two years' imprisonment under §2G2.4.

According to the legislative history, the intent of the directive in section 504 was to ensure that offenses under 18 U.S.C. § 1466A are "subject to the penalties applicable to child pornography, not the lower penalties that apply to obscenity." See H.R. Conf. Rep. No. 66, 108th Cong. 1st Sess. (2003). Obscenity offenses are sentenced under §2G3.1, which has a base offense level of level 10. Simple possession offenses under 18 U.S.C. § 1466A(b) more appropriately may be covered under the simple possession guideline, §2G2.4. Therefore, the proposed amendment refers offenses under 18 U.S.C. § 1466A(a) involving trafficking and possession with intent to traffic to §2G2.2, as directed by Congress, but refers offenses under 18 U.S.C. § 1466A(b) involving simple possession to §2G2.4.

This proposed amendment also makes a number of changes to Appendix A (Statutory Index) and the statutory provisions in §2G2.2. Offenses under 18 U.S.C. §§ 2252 and 2252A currently are referenced to both §§2G2.2 and 2G2.4 because these statutes contain prohibitions on both trafficking in and simple possession of child pornography. This proposal amends Appendix A and the statutory provisions in §2G2.2 to refer trafficking offenses in 18 U.S.C. §§ 2252(a)(1)-(3) and 2252A(a)(1), (2), (3), (4), and (6) to §2G2.2 only, thereby ensuring that the trafficking offenses receive the appropriate base offense level which corresponds to the five year mandatory minimum term of imprisonment. This amendment makes a similar change with respect to offenses under 18 U.S.C. § 2251(d)(1)(A) (formerly (c)(1)(A), redesignated by the PROTECT Act). This section prohibits making, printing, or publishing any notice or advertisement seeking to receive, exchange, buy, produce, display, distribute, or reproduce, any visual depiction if the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct. Currently, these offenses are referenced to §2G2.2 instead of §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) because they are more like trafficking offenses than production offenses. However, the PROTECT Act increases the mandatory minimum term of imprisonment for these offenses from 10 to 15 years. Therefore, these offenses are proposed to be referenced to the production guideline, §2G2.1. Subpart D of the proposed amendment increases the base offense level in §2G2.1 to level [30][32][34][35][36] to reflect the increased mandatory minimum term of imprisonment.

In response to comments from CEOS, calls to the Helpline, and issues identified through case law regarding inconsistencies in the application of the use of a computer enhancement at §2G2.2(b)(5), the amendment proposes to broaden the enhancement in two ways. First, the amendment proposes to expand the enhancement to include "interactive computer devices" (e.g., Internet access devices), as defined in 47 U.S.C. § 230(f)(2). Currently, §2G2.2(b)(5) provides an enhancement if

only a computer was used for "the transmission, receipt or distribution" of the pornographic material, in contrast to similar enhancements in other pornography or sexual abuse guidelines that provide an enhancement for the use of a "computer or Internet-access device". (See United States v. Albright, 67 Fed. Appx. 751 (3d Cir. 2003) (unpub.) (use of a WebTV device used to access the Internet is not a computer for purposes of the enhancement)). Use of the term "interactive computer device" may be preferable to "Internet access device" in the applicable guidelines because it is statutorily defined. Conforming changes are proposed for §§2G1.1 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct), proposed 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; Use of Interstate Facilities to Transport Information about a Minor), 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), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), 2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts), and 2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). Second, the amendment proposes to broaden the enhancement to apply to offenses in which the computer (or an interactive computer service) was used for the possession of pornographic material. Currently, the enhancement provides a two-level increase if only a computer was used for "the transmission, receipt, or distribution" of the pornographic material.

Finally, in response to CEOS comments, calls to the Helpline, and issues identified through training, this proposal makes the following minor changes to the commentary to §2G2.2:

- (1) Provides a definition of "computer".
- (2) Makes clear that the definition of "minor" includes (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represents to a participant (i) had not attained the age of 18 years, and (ii) could be provided to a participant for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.
- (3) Provides a definition of "image" for purposes of applying the enhancement at §2G2.2(b)(6).
- (4) Makes clear that "distribution" includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include soliciting such material.

B. Simple Possession Offenses under §2G2.4

The PROTECT Act raised the statutory maximum term of imprisonment for simple possession offenses from five to ten years. As a result, this proposed amendment includes an option for increasing the base offense level from level 15 to level [18][20]. An increase in the base offense level also may

be justified to maintain proportionality with the child pornography trafficking guideline because of a proposed increase in the base offense level at §2G2.2 for trafficking and receipt cases (see subpart A of this amendment).

In response to comments from CEOS, the proposed amendment addresses a recent Seventh Circuit decision in United States v. Sromalski, 318 F.3d 748 (7th Cir. 2003), regarding the cross reference at §2G2.4(c)(2). Currently, the cross reference requires application of §2G2.2 if the offense "involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic)". In Sromalski, the appellate court found that in cases involving possession of child pornography where receipt can be shown, the cross reference at §2G2.4(c)(2) applies only if the receipt involved the intent to traffic. Thus, under the Seventh Circuit's interpretation of the guidelines, convictions for receipt of child pornography (which do not require proof of an intent to traffic) are sentenced under §2G2.2, but convictions for possession of child pornography, even where receipt can be shown, are sentenced under §2G2.4 unless there is proof of receipt with an intent to traffic. The proposed amendment provides an option that clarifies that the cross reference should be applied without regard to whether or not there was offense conduct that involved receipt with an intent to traffic.

In addition, the proposed amendment makes the following clarifying and conforming changes to §2G2.4 in response to changes made to §2G2.2:

- (1) Expands use of a computer enhancement at §2G2.4(b)(3) to include "interactive computer services".
- (2) Provides a definition of "computer".
- (3) Provides a definition of "image" for purposes of applying the enhancement at §2G2.4(b)(5).
- (4) Makes clear that, for purposes of the cross reference at §2G2.4(c)(1), the definition of "minor" includes (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; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

C. Consolidation of §§2G2.2 and 2G2.4

This part of the proposed amendment consolidates §§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), and 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct, into one guideline, §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; Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct). Consolidation addresses concerns raised over several years by probation officers, judges, and practitioners regarding difficulties in determining the appropriate guideline (§2G2.2 or §2G2.4) for cases involving convictions of 18 U.S.C. § 2252 or § 2252A. Furthermore, as a result of amendments directed by the PROTECT Act, these guidelines have a number of similar specific offense characteristics.

This proposed consolidation provides two options for the base offense level. Option One provides alternative base offense levels of (1) level [15][18][20] if (A) the conduct was limited to the possession, receipt, or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; (2) level [22][24][26] for all other offenses. Option Two provides three alternative base offense levels of (1) level [15][18][20] if the defendant's conduct was limited to the possession of material involving the sexual exploitation of a minor without an intent to traffic in, or distribute, such material; (2) level [20][22][24] if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (3) level [22][24][25][26] for all other offenses sentenced at this guideline. The proposed consolidation would subject §2G2.4 cases to enhancements if the offense involved distribution or if the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. Currently, these enhancements do not exist in §2G2.4.

D. Production Offenses Under §2G2.1

Section 103 of the PROTECT Act increases the mandatory minimum term of imprisonment from 10 to 15 years for offenses related to production of child pornography under 18 U.S.C. § 2251. This section also increases the statutory maximum term of imprisonment for these offenses from 20 to 30 years. As a result, this proposed amendment increases the base offense level in §2G2.1 from level 27 to level [30][32][34][35][36] to reflect the new 15 year mandatory minimum term of imprisonment. Furthermore, the proposed amendment adds a number of enhancements that may be associated with the production of child pornography. The addition of these enhancements also helps to maintain the proportionality between these offenses and offenses covered under §2G2.2. The proposed enhancements increase the offense level if the offense involved any of the following: (1) material that portrays sadistic or masochistic conduct, or other depictions of violence; (2) the commission of a sexual act or sexual contact; (3) conduct described in 18 U.S.C. § 2241(a) or (b); and (4) distribution.

The proposed amendment also adds to the commentary of §2G2.1 definitions of "sexual act", "sexual contact", "sexually explicit conduct", "computer", "interactive computer service", "minor", and "distribution".

II. Travel and Transportation Cases

This proposed amendment creates a new guideline, §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; Use of Interstate Facilities to Transport Information about a Minor), to specifically address offenses under Chapter 117 of title 18, United States Code (Transportation for

Illegal Sexual Activity and Related Crimes). Currently, Chapter 117 offenses, primarily 18 U.S.C. §§ 2422 (coercion and enticement) and 2423 (transportation of minors), are referenced by Appendix A to either §2G1.1 or §2A3.2. Offenses under 18 U.S.C. §§ 2422 and 2423(a) (transportation with intent to engage in criminal sexual activity) are referenced to §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct) but are cross referenced from §2G1.1 to §2A3.2 (Statutory Rape) to account for underlying behavior. Application of this cross reference has led to confusion among courts and practitioners. Offenses under 18 U.S.C. § 2423(b) (travel with intent to engage in sexual act with a juvenile) are referenced to §2A3.1, §2A3.2, or §2A3.3, but most are sentenced at §2A3.2. Until recently, the majority of cases sentenced under §2A3.2 were statutory rape cases that occurred on federal property (e.g. military bases) or Native American lands. In fiscal years 2001 and 2002, the majority of cases sentenced under the statutory rape guideline were coercion, travel, and transportation offenses. Creating a new guideline for these cases is intended to address more appropriately the issues specific to these offenses. In addition, the removal of these cases from §2A3.2 will permit the Commission more appropriately to tailor the guideline to statutory rape cases.

Currently, §2A3.2 provides alternative base offense levels of (1) level 24 for a Chapter 117 violation with a sexual act, (2) level 21 for a Chapter 117 violation with no sexual act (e.g. a sting case), or (3) level 18 for statutory rape with no travel. The PROTECT Act created a five year mandatory minimum term of imprisonment for 18 U.S.C. §§ 2422 and 2423(a) and increased the statutory maximum term of imprisonment for these offenses from 15 to 30 years. However, the PROTECT Act did not increase the penalties for offenses under 18 U.S.C. § 2243 (sexual abuse of a minor), which prohibits statutory rape.

The proposed guideline provides a base offense level of level [22][24][25][26] to account for the new mandatory minimum terms of imprisonment as required by the PROTECT Act. The guideline proposes a number of enhancements, including enhancements for offenses involving victims under the age of 12 years, commission of a sexual act, use of force, use of a computer, misrepresentation of identity, and custody issues. The proposed amendment also provides two options for a specific offense characteristic to address the conduct from 18 U.S.C. § 2423(d), a new offense created by the PROTECT Act. Offenses under 18 U.S.C. § 2423(d) prohibit a person, for the purpose of commercial advantage or private financial gain, from arranging, inducing, procuring, or facilitating the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in an illicit sexual act. The maximum term of imprisonment for an offense under 18 U.S.C. § 2423(d) is 30 years.

The proposed amendment also makes conforming changes to §2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct).

In addition, an issue for comment regarding which guideline is the most appropriate for violations of 18 U.S.C. § 2425, use of interstate facilities to transport information about a minor, follows the proposed amendments.

III. Misleading Domain Names

Section 521 of the PROTECT Act creates a new offense at 18 U.S.C. § 2252B (misleading domain names on the Internet). Section 2252B of title 18, United States Code, prohibits the knowing

use of a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity, and offenses under this statute are punishable by a maximum term of imprisonment of two years, or if the misleading domain name was intended to deceive a minor into viewing material that is harmful to minors, a maximum term of imprisonment of four years. The proposed amendment refers the new offense to §2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), modifies the title of the guideline to include "Misleading Domain Names", and provides a two-level enhancement if "the offense involved the use of a misleading domain name on the Internet with the intent to deceive a [minor][person] into viewing material on the Internet that is harmful to minors." In addition, the proposed amendment also provides enhancements for the following: (1) distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity; (2) use of a computer or interactive computer service; and (3) material that was advertised or described to include minors engaged in sexually explicit conduct. Finally, the proposed amendment adds §2G3.1 to the list of guidelines at subsection (d) of §3D1.2 (Groups of Closely Related Counts). Grouping multiple counts of these offenses pursuant to §3D1.2(d) is appropriate because typically these offenses, as well as other pornography distribution offenses, are continuous and ongoing in nature. The proposal makes other minor technical changes to the Commentary to make this guideline consistent with other Chapter Two, Part G guidelines.

IV. Conditions of Supervised Release

In response to a circuit conflict, this amendment proposes amending §§5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) to add a condition "limiting [or prohibiting] the use of a computer or an interactive computer service" in cases in which the [defendant used][the offense involved the use of] such items. The circuit courts have disagreed over imposition of restrictive computer use and Internet-access conditions. Some circuit courts have refused to allow complete restrictions on computer use and Internet access (see United States v. Sofsky, 287 F.3d 122 (2nd Cir. 2002) (invalidating restrictions on computer use and Internet use); United States v. Freeman, 316 F.3d 386 (3d Cir. 2003) (same)), but some circuit courts have upheld restrictions on computer use and Internet access with probation officer permission (see United States v. Fields, 324 F.3d 1025 (8th Cir. 2003) (upholding condition prohibiting defendant from having Internet service in his home and allowing possessing of a computer only if granted permission by his probation officer); United States v. Walser, 275 F.3d 981 (10th Cir. 2001) (prohibiting Internet use but allowing Internet use with probation officer's permission); United States v. Zinn, 321 F.3d 1084 (11th Cir. 2003) (same)). Other courts have permitted a complete ban on a convicted sex offender's Internet use while on supervised release (see United States v. Paul, 274 F.3d 155 (5th Cir. 2001) (upholding complete ban of Internet use)).

In addition, this proposed amendment amends §5D1.2 (Term of Supervised Release) to make the guideline consistent with the PROTECT Act's changes to the applicable terms of supervised release under 18 U.S.C. § 3583 for sex offenders.

V. Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) Amendments

Section 401(i)(2) of the PROTECT Act directs the Commission to "amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses" under

sections 2243(b) (sexual abuse of a ward), 2244(a)(4) (sexual contact), and 2244(b) (sexual contact with a person without that person's permission) of title 18, United States Code. This amendment proposes several amendments to the guidelines in Chapter Two, Part A (Criminal Sexual Abuse) to address the directive and to account for proportionality issues created by the increases in the Chapter Two, Part G guidelines. In addition, the amendment makes changes to the Commentary to make the definitions in these guidelines consistent with the definitions in the pornography guidelines.

An issue for comment regarding proportionality issues and implementation of the directive follows the proposed amendments.

Proposed Amendment:

I. Child Pornography Offenses

A. Trafficking Offenses under §2G2.2

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

[Option 1: (a) Base Offense Level: ~~47~~ [22][24][25][26]]

[Option 2: (a) Base Offense Level: ~~47~~

(1) [20][22][24], if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; or

(2) [22][24][25][26], otherwise.]

(b) Specific Offense Characteristics

* * *

(2) (Apply the Greatest) If the offense [defendant's conduct] 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, increase by 6 levels.
- (DE) 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.
- (EF) Distribution other than distribution described in subdivisions (A) through (DE), increase by 2 levels.

* * *

- (5) If a computer or an interactive computer service was used for the [possession,] transmission, receipt, or distribution of the material or a notice or advertisement of the material, increase by 2 levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ [1466A(a).] ~~2251(c)(1)(A)~~, 2252(a)(1)-(3), 2252A(a)(1), (4), (6), 2260(b).

Application Notes:

- I. Definitions.—~~For purposes of this guideline~~:

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

"Image" means any visual depiction described in 18 U.S.C. § 2256(5) and (8).

"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)).

"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor. 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. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

"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; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims/minors; or (C) resulted in a conviction for such conduct.

"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 abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. "Sexual abuse or exploitation" does not include trafficking in material relating to the sexual abuse or exploitation of a minor.

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

2. *Application of Subsection (b)(4).—Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*
23. *Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.*

~~*Prior convictions taken into account under subsection (b)(4) are also counted for purposes*~~

~~of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).~~

34. Cross Reference at Subsection (c)(1).— The cross reference in subsection (c)(1) is to be construed broadly to include 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. Simple Possession of Pornography Under §2G2.4

§2G2.4. Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct

(a) Base Offense Level: ~~15~~ [18][20]

(b) Specific Offense Characteristics

(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.

~~[(2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by 2 levels.]~~

~~(3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by 2 levels.~~

(2) If the [defendant's possession of the material resulted from the defendant's][offense involved the] use of a computer or an interactive computer service, increase by 2 levels.

(43) * * *

(54) * * *

* * *

(c) Cross References

* * *

(2) If the offense involved trafficking in material involving the sexual exploitation of a minor (~~including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic~~)including (A) receiving material involving the

sexual exploitation of a minor [with intent to traffic]; (B) transporting, shipping, or advertising material involving the sexual exploitation of a minor; or (C) possessing with intent to traffic 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).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A(b), 2252(a)(4), 2252A(a)(5).

Application Notes:

1. Definitions.—~~For purposes of this guideline—~~

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

~~"Image" means any visual depiction described in 18 U.S.C. § 2256(5) and (8).~~

~~"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 an individual who had not attained the age of 18 years.—~~

~~"Visual depiction" means any visual depiction described in 18 U.S.C. § 2256(5) and (8).—~~

~~[2. For purposes of subsection (b)(2), a file that (A) contains a visual depiction; and (B) is stored on a magnetic, optical, digital, other electronic, or other storage medium or device, shall be considered to be one item.~~

~~If the offense involved a large number of visual depictions, an upward departure may be warranted, regardless of whether subsection (b)(2) applies.]~~

2. Cross Reference at Subsection (c)(1).—For purposes of subsection (c)(1), "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; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

3. Upward Departure Provision.—If the offense involved substantially more than 600 images, an upward departure may be warranted, regardless of whether subsection (b)(5) applies.

* * *

APPENDIX A - STATUTORY INDEX

* * *

18 U.S.C. § 1466	2G3.1
18 U.S.C. § 1466A(a)	2G2.2
18 U.S.C. § 1466A(b)	2G2.4

* * *

18 U.S.C. § 2252(a)(1)-(3)	2G2.2, 2G2.4
18 U.S.C. § 2252(a)(4)	2G2.4
18 U.S.C. § 2252A(a)(1)-(4), (6)	2G2.2, 2G2.4
18 U.S.C. § 2252A(a)(5)	2G2.4

* * *

18 U.S.C. § 2260	2G2.1, 2G2.2
18 U.S.C. § 2260(a)	2G2.1
18 U.S.C. § 2260(b)	2G2.2

C. Consolidation of §§2G2.2 and 2G2.4

~~§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~~

~~(a) Base Offense Level: 17~~

~~(b) Specific Offense Characteristics~~

~~(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.~~

~~(2) (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, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.~~
- ~~(E) — Distribution other than distribution described in subdivisions (A) through (D), increase by 2 levels.~~
- ~~(3) — If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.~~
- ~~(4) — If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.~~
- ~~(5) — If a computer was used for the transmission, receipt, or distribution of the material or a notice or advertisement of the material, increase by 2 levels.~~
- ~~(6) — If the offense involved —~~
 - ~~(A) — at least 10 images, but fewer than 150, increase by 2 levels;~~
 - ~~(B) — at least 150 images, but fewer than 300, increase by 3 levels;~~
 - ~~(C) — at least 300 images, but fewer than 600, increase by 4 levels; and~~
 - ~~(D) — 600 or more images, increase by 5 levels.~~

~~(c) — Cross Reference~~

- ~~(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.~~

Commentary

Statutory Provisions: ~~18 U.S.C. §§ 2251(c)(1)(A), 2252(a)(1)-(3), 2260.~~

Application Notes:

1. ~~For purposes of this guideline—~~

~~"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor.~~

~~"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. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.~~

~~"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.—~~

~~"Minor" means an individual who had not attained the age of 18 years.—~~

~~"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.—~~

~~"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 abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses.—"Sexual abuse or~~

~~exploitation" does not include trafficking in material relating to the sexual abuse or exploitation of a minor.—~~

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

2. ~~If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.—~~

~~Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).~~

~~3. The cross reference in subsection (c)(1) is to be construed broadly to include 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.~~

~~Background: Section 401(i)(1)(C) of Public Law 108-21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003.~~

~~§2G2.4. Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct~~

~~(a) Base Offense Level: 15~~

~~(b) Specific Offense Characteristics~~

~~(1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.~~

~~(2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by 2 levels.~~

~~(3) If the defendant's possession of the material resulted from the defendant's use of a computer, 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.~~

~~(5) If the offense involved—~~

~~(A) at least 10 images, but fewer than 150, increase by 2 levels;~~

~~(B) at least 150 images, but fewer than 300, increase by 3 levels;~~

~~(C) at least 300 images, but fewer than 600, increase by 4 levels; and~~

~~(D) 600 or more images, increase by 5 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):~~

- ~~(2) If the offense involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, 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, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic):~~

Commentary

~~Statutory Provision: 18 U.S.C. § 2252(a)(4).~~

~~Application Notes:~~

~~1. For purposes of this guideline—~~

~~"Minor" means an individual who had not attained the age of 18 years.—~~

~~"Visual depiction" means any visual depiction described in 18 U.S.C. § 2256(5) and (8).—~~

~~2. For purposes of subsection (b)(2), a file that (A) contains a visual depiction, and (B) is stored on a magnetic, optical, digital, other electronic, or other storage medium or device, shall be considered to be one item.~~

~~If the offense involved a large number of visual depictions, an upward departure may be warranted, regardless of whether subsection (b)(2) applies.~~

~~Background: Section 401(i)(1)(B) of Public Law 108-21 directly amended subsection (b) to add subdivisions (4) and (5), effective April 30, 2003.~~

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Depicting a Minor Engaged in Sexually Explicit Conduct

(a) Base Offense Level:

- [Option 1:
- (1) [15][18][20], if (A) the defendant's conduct was limited to the possession, receipt, or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; or
 - (2) [22][24][25][26], otherwise.]
- [Option 2:
- (1) [15][18][20], if the defendant's conduct was limited to the possession of material involving the sexual exploitation of a minor without an intent to traffic in, or distribute, such material;
 - (2) [20][22][24], if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material; or
 - (3) [22][24][25][26], otherwise.]
- (b) Specific Offense Characteristics
- (1) If the material involved a prepubescent minor or a minor under the age of 12 years, increase by 2 levels.
 - (2) (Apply the Greatest) If the [defendant's conduct][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, 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.

- (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
- (4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.
- (5) If a computer or an interactive computer service was used for the possession, transmission, receipt, or distribution of the material or a notice or advertisement of the material, increase by 2 levels.
- (6) If the offense involved—
 - (A) at least 10 images, but fewer than 150, increase by 2 levels;
 - (B) at least 150 images, but fewer than 300, increase by 3 levels;
 - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
 - (D) 600 or more images, increase by 5 levels.

(c) Cross Reference

- (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.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A, 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

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

"Image" means any visual depiction described in 18 U.S.C. § 2256(5) and (8).

"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)).

"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor. 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. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense, knowing or believing the individual is a minor at that time.

"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; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

"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 abuse or exploitation" means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. "Sexual abuse or exploitation" does not include trafficking in material relating to the sexual abuse or exploitation of a minor.

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

2. Application of Subsection (b)(4).—Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
3. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation

of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(4) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

4. Cross Reference at Subsection (c)(1).—The cross reference in subsection (c)(1) is to be construed broadly to include 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.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (6), effective April 30, 2003.

D. Production of Offenses Under §2G2.1

§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

- (a) Base Offense Level: ~~27~~ [30][32][34][35][36]
- (b) Specific Offense Characteristics
- (1) If the offense involved a ~~victim~~ minor who had (A) not attained the age of twelve years, increase by 4 levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by 2 levels.
 - (2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by [2][4] levels.
 - (3) If the offense involved the commission of a sexual act or sexual contact, increase by 2 levels.
 - (4) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by [2][4] levels.
 - (5) If the offense involved distribution, increase by [2][5][7] levels.

(26) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.

(37) If, for the purpose of producing sexually explicit material, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an ~~Internet-access device~~ interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by 2 levels.

(c) Cross reference

(1) If the victim was killed in 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.

(c) Special Instruction

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a), (b), (c)(1)(B), 2260.

Application Notes:

~~1. For purposes of this guideline, "minor" means an individual who had not attained the age of 18 years.~~

~~2. For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.~~

~~3. Subsection (b)(2) is intended to have broad application and includes offenses involving a minor 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 adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.~~

~~4. If the adjustment in subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill):~~

1. Definitions.—For purposes of this guideline:

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

"Conduct described in 18 U.S.C. § 2241(a) or (b)" is: using force against the minor; threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; rendering the minor unconscious; or 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.

"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of material involving the sexual exploitation of a minor. 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.

"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; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"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).

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

2. Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(6) is intended to have broad application and includes offenses involving a minor 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 adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.

- (B) Inapplicability of Enhancement.—If the adjustment in subsection (b)(6) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

53. Application of Subsection (b)(7)(A).—

- (A) Misrepresentation of Participant's Identity.— The enhancement in subsection (b)(37)(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 sexually explicit conduct for the purpose of producing sexually explicit material. Subsection (b)(37)(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)(37)(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)(37)(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 sexually explicit conduct for the purpose of producing sexually explicit material. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

- (B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(37)(B)(i) provides an enhancement if a computer or an ~~Internet-access device~~ interactive computer service was used to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or otherwise to solicit participation by a minor in such conduct for such purpose. Subsection (b)(37)(B)(i) is intended to apply only to the use of a computer or an ~~Internet-access device~~ 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 ~~Internet-access device~~ interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

4. Special Instruction at Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if

contained in a separate count of conviction.

65. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 ~~victims~~ minors.

II. Travel and Transportation Cases

Chapter Two, Part G, Subpart 1 is amended by adding at the end the following new guideline and accompanying commentary:

§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; Use of Interstate Facilities to Transport Information about a Minor

- (a) Base Offense Level: [22][24][25][26]
- (b) Specific Offense Characteristics
- (1) If the offense involved a sexual act or sexual contact, increase by 2 levels.
- (2) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.
- [Option 1A: (3) If the offense involved a minor who had not attained the age of 12 years, increase by [4][6][8] levels.]
- (4) If (A) the minor sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) the minor sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.
- (5) If the defendant was a parent, relative, or legal guardian of the minor; or the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
- (6) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of the minor to engage in a commercial sex act or prohibited sexual conduct, increase by 2 levels.
- (7) If [the defendant used][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 a commercial sex act or

prohibited sexual conduct; or (B) entice, encourage, offer, or solicit a person to engage in a commercial sex act or prohibited sexual conduct with the minor, increase by 2 levels.

[Option 2A: (8) If, for the purposes of commercial advantage or private financial gain, the defendant knowingly arranged, induced, procured, or facilitated the travel of a participant knowing that the participant was traveling for the purpose of engaging in illicit sexual conduct, increase by [2] levels.]

[Option 2B: (8) If the offense involved conduct described in 18 U.S.C. § 2423(d), increase by [2] levels.]

(c) Cross Reference

(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.

[Option 1B: (3) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, 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 criminal sexual abuse of 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 victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the travel or transportation to engage in 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 who had not attained the

age of 18 years at the time of the commission of the offense); 18 U.S.C. §§ 1591 (only if the offense involved a victim who had not attained the age of 18 years at the time of the commission of the offense), 2421 (only if the offense involved a victim who had not attained the age of 18 years at the time of the commission of the offense), 2422 (only if the offense involved a victim who had not attained the age of 18 years at the time of the commission of the offense), 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; and (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 §3B1.1 (Aggravating Role).

"Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"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).

"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)(2).—"Conduct described in 18 U.S.C. § 2241(a) or (b)" is: using force against the minor; threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; rendering the minor unconscious; or 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. Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(5) 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, 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 Enhancement.—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(6) 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 a commercial sex act or prohibited sexual conduct. Subsection (b)(6) 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)(6) 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)(6) 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 a commercial sex act or prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

5. Use of a Computer or an Interactive Computer Service.—Subsection (b)(7) 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)(7) 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.

6. Cross Reference.—The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age 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.

7. Special Instruction for Cases Involving Multiple Victims at Subsection (d)(1).—

- (A) In General.—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 travel or transportation to engage in 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.
- (B) Definition of Victim.—For purposes of subsection (d)(1), a victim includes (A) an individual who had not attained the age of 18 years; or (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; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

8. Aggravating Role.—For the purposes of §3B1.1 (Aggravating Role), a minor, as defined in this guideline, is considered a participant only if that minor assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another minor.

9. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than ten victims.

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.

~~§2G1.1. — Promoting A Commercial Sex Act or Prohibited Sexual Conduct~~

~~(a) — Base Offense Level:~~

~~(1) — 19, if the offense involved a minor; or~~

~~(2) — 14, otherwise.~~

~~(b) — Specific Offense Characteristics~~

~~(1) — If the offense involved (A) a commercial sex act, and (B) the use of physical force, fraud, or coercion, increase by 4 levels.~~

~~(2) — If the offense involved a victim who had (A) not attained the age of 12~~

~~years, increase by 4 levels; or (B) attained the age of 12 years but not attained the age of 16 years, increase by 2 levels.~~

~~(3) If subsection (b)(2) applies; and~~

~~(A) the defendant was a parent, relative, or legal guardian of the victim;
or~~

~~(B) the victim was otherwise in the custody, care, or supervisory control of the defendant,~~

~~increase by 2 levels.~~

~~(4) If subsection (b)(3) does not apply; and~~

~~(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 a commercial sex act;
or~~

~~(B) a participant otherwise unduly influenced a minor to engage in a commercial sex act,~~

~~increase by 2 levels.~~

~~(5) If a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act; or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor, increase by 2 levels.~~

~~(c) Cross References~~

~~(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age 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 involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the offense involved criminal sexual abuse of a minor who had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the~~

victim:

~~(3) If the offense did not involve promoting a commercial sex act, and neither subsection (c)(1) nor (c)(2) is applicable, apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.~~

~~(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; 18 U.S.C. §§ 1591, 2421, 2422, 2423(a), 2425.~~

Application Notes:

~~1. For purposes of this guideline—~~

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

~~"Minor" means an individual who had not attained the age of 18 years.~~

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

~~"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. Subsection (b)(1) provides an enhancement for physical force, fraud, or coercion, that occurs as part of a commercial sex act 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)(B), "coercion" includes any form of conduct that negates the~~

~~voluntariness of the behavior 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. In the case of an adult victim, rather than a victim less than 18 years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.~~

- ~~3. 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. 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.~~
- ~~5. Subsection (b)(3) 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 victim and not simply to the legal status of the defendant-victim relationship.~~
- ~~6. If the enhancement in subsection (b)(3) applies, do not apply subsection (b)(4) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~
- ~~7. The enhancement in subsection (b)(4)(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 a commercial sex act. Subsection (b)(4)(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)(4)(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)(4)(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 a commercial sex act. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.~~

~~In determining whether subsection (b)(4)(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)(4)(B), that such participant unduly influenced the minor to engage in a commercial sex act. 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.~~

- ~~8. Subsection (b)(5) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act, or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor. Subsection (b)(5)(A) is intended to apply only to the use of a computer or an Internet-access device 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)(5)(A) would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the minor from an airline's Internet site.~~
- ~~9. The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age 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.~~
- ~~10. Subsection (c)(2) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if the offense involved criminal sexual abuse, and (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but had not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2242(1)).~~
- ~~11. The cross reference in subsection (c)(3) addresses the case in which the offense did not involve promoting a commercial sex act, neither subsection (c)(1) nor (c)(2) is applicable, and the offense involved prohibited sexual conduct other than the conduct covered by subsection (c)(1) or (c)(2). In such case, the guideline for the underlying prohibited sexual conduct is to be used, i.e., §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact).~~
- ~~12. Upward Departure Provision. An upward departure may be warranted if the offense involved more than 10 victims.~~

~~Background: This guideline covers offenses under chapter 117 of title 18, United States Code. Those~~

~~offenses involve promoting prostitution or prohibited sexual conduct through a variety of means. Offenses that involve promoting prostitution under chapter 117 of such title are sentenced under this guideline, unless other prohibited sexual conduct occurs as part of the prostitution offense, in which case one of the cross references would apply. Offenses under chapter 117 of such title that do not involve promoting prostitution are to be sentenced under §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), §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse), §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate, pursuant to the cross references provided in subsection (c).~~

~~This guideline also covers offenses under section 1591 of title 18, United States Code. These offenses involve recruiting or transporting a person in interstate commerce knowing either that (1) force, fraud, or coercion will be used to cause the person to engage in a commercial sex act; or (2) the person (A) had not attained the age of 18 years; and (B) will be caused to engage in a commercial sex act.~~

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

- (a) Base Offense Level: 14
- (b) Specific Offense Characteristic
 - (1) If the offense involved the use of physical force, fraud, or coercion, increase by 4 levels.
- (c) Cross Reference
 - (1) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, 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 who had attained the age

of 18 years at the time of the commission of the offense); 18 U.S.C. §§ 1591 (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense), 2421 (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense), 2422(a) (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense).

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 physical force, fraud, or coercion, that occurs as part of a commercial sex act 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)(B), "coercion" includes any form of conduct that negates the voluntariness of the behavior 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.

3. Application of Aggravating Role Enhancement.—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. Cross Reference at Subsection (c)(1).—Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if the offense involved criminal sexual abuse and the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnapping (see 18 U.S.C. § 2242(1)).

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.—An upward departure may be warranted if the offense involved more than ten victims.

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 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 Prostitution 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; Use of Interstate Facilities to Transport Information about a Minor).

III. Misleading Domain Names

§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, increase by 6 levels.
 - (DE) 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.
 - (EF) Distribution other than distribution described in subdivisions (A) through (DE), 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][person] into viewing material on the Internet that is harmful to minors, increase by 2 levels.
 - (3) If the defendant used][offense involved the use of] a computer or an interactive computer service, increase by 2 levels.
 - (24) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
 - [(5) If the offense involved material that was advertised or described to include a minor engaged in sexually explicit conduct, increase by [2][4] levels.]

* * *

Commentary

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

Application Notes:

1. Definitions.—~~For purposes of this guideline~~:

"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to the transfer of obscene matter. Accordingly, distribution includes posting material on a website for public viewing.

"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, knowing or believing the individual is a minor at that time.

"Material that is harmful to minors" has the meaning given that term in 18 U.S.C. § 2252B(d)(3).

~~"Minor" means an individual who had not attained the age of 16 years~~

"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; and (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)(A).

2. Use of a Computer or an Interactive Computer Service.—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. Accordingly, the enhancement in subsection (b)(5) 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.

§3D1.2. Groups of Closely Related Counts

* * *

- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.7, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G2.4, 2G3.1;

* * *

APPENDIX A - STATUTORY INDEX

18 U.S.C. § 2252B 2G3.1
18 U.S.C. § 2257 2G2.5

* * *

* * *

IV. Conditions of Supervised Release and Terms of Supervised Release

§5B1.3. Conditions of Probation

* * *

(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:

* * *

(7) Sex Offenses

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

(A) aA 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 [or prohibiting] the use of a computer or an interactive computer service in cases in which the [defendant used][offense involved] the use of such items.]

* * *

§5D1.2. Term of Supervised Release

(a) ~~Subject to~~ Except as provided in subsection (b), 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.

Notwithstanding subdivisions (1) through (3), the length of the term of supervised release for 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 (A) shall be not less than the minimum term of years specified for that class of offense under subdivisions (1) through (3); and (B) may be up to life.

- (b) Except as otherwise provided, the term of supervised release imposed (1) shall not be less than any statutorily required term of supervised release; or (2) in the case of a sex offense conviction, shall be not less than the minimum term of years specified for that class of offense under subdivisions (a)(1) through (a)(3), and may be up to life.
- (c) (Policy Statement) If the instant offense of conviction is a sex offense, the statutory maximum term of supervised release is recommended.

§5D1.3. Conditions of Supervised Release

* * *

- (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:

* * *

(7) Sex Offenses

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

- (A) ~~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 [or prohibiting] the use of a computer or an interactive computer service in cases in which the [defendant used][offense involved] the use of such items.]

V. Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) Amendments

§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

~~(a) Base Offense Level: 27~~

[Option 1:

(a) Base Offense Level:

(1) [30][32][34][36], if the offense involved a minor; or

(2) [27-30], otherwise.]

[Option 2:

~~(a) Base Offense Level: 27~~

(a) Base Offense Level: [27-30]

(b) Specific Offense Characteristics

(1) If the offense ~~was committed by the means set forth~~ involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.]

* * *

(6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an ~~Internet-access device~~interactive computer service, increase by 2 levels.

[Option 2:

(7) If (A) a minor was involved; and (B) the offense was committed in connection with the possession, distribution, or production of child pornography, increase by [3][5][7] levels.]

[Option 3:

(c) Cross References

(1) If a victim 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.

(2) 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.]

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. ~~For purposes of this guideline—~~

~~"Minor" means an individual who 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).~~

~~"Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).~~

~~"Prohibited sexual conduct" means any sexual activity for which a person can be charged with a criminal offense. "Prohibited sexual conduct" includes the production of child pornography, but does not include trafficking in, or possession of, child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).~~

~~"The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim, by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnaping; by rendering the victim unconscious, or by 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.~~

1. Definitions.—For purposes of this guideline:

"Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

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

"Distribution" means any act, including production, transportation, and possession with intent

to distribute, related to the transfer of material involving the sexual exploitation of a minor. 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.

"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; and (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).

"Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"Prohibited sexual conduct" (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; and (C) does not include trafficking in, or possession of, child pornography. "Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

"Conduct described in 18 U.S.C. § 2241(a) or (b)" is: using force against the victim; threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; rendering the victim unconscious; or 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.

"Victim" includes an undercover law enforcement officer.

~~2. Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, 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, 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 victim and not simply to the legal status of the defendant-victim relationship.~~

~~3. If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust~~