

# **REVISED AMENDMENT 3 - AMENDMENT TO IMPLEMENT THE SEXUAL PREDATORS ACT: STAFF ANALYSIS**

## **Overview of the Sexual Predators Act**

The proposed amendment responds to the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314. The Act contained the following directives to the Commission:

- (1) to provide a sentencing enhancement for offenses under Chapter 117 of title 18 (relating to the transportation of minors for illegal sexual activity) while ensuring that the sentences, guidelines, and policy statements for offenders convicted of such offenses are appropriately severe and reasonably consistent with the other relevant directives and the relevant existing guidelines;
- (2) to provide for appropriate enhancement if the defendant used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;
- (3) to provide for appropriate enhancement if the defendant knowingly misrepresented his/her actual identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual activity;
- (4) to provide for appropriate enhancement in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor; and
- (5) to clarify that the term “distribution of pornography” applies to the distribution of pornography for both monetary remuneration and a non-pecuniary interest.

The Act also requires the Commission, in carrying out these directives, to ensure reasonable consistency with other guidelines, and avoid duplicative punishment under the guidelines for substantially the same offense.

In addition, the Act contains two new crimes: (A) an offense, at 18 U.S.C. § 2425, for the transmittal of identifying information about minors for criminal sexual purposes (which carries a 5-year statutory maximum term of imprisonment); and (B) an offense, at 18 U.S.C. § 1470, for the transfer of obscene materials to minors (which carries a 10-year statutory maximum term of imprisonment).

The Commission currently has under consideration a six-part amendment to comply with most of the congressional directives contained within the Act. Due to the complexity of the issues involved, specifically those related to the directive to provide an enhancement for “pattern of activity,” the Commission will complete its compliance with the Act’s directives during the next amendment cycle.

## **The Revised Amendment**

**Part (A): New Offense of Knowing Transfer of Obscene Materials to a Minor**

This part of the amendment addresses the new offense at 18 U.S.C. § 1470, which makes it unlawful to transfer obscene materials to a minor. The statutory maximum for the offense is 10 years of imprisonment. The following changes to the guidelines are proposed.

- C The amendment proposes to reference, in the Statutory Index (Appendix A), the new offense to §2G3.1, the guideline covering the importing, mailing, or transporting obscene matter.
- C The proposed amendment includes a modification of an existing specific offense characteristic (SOC) requiring the application of the greatest of the following:
  - C an increase of at least 5-levels for distribution for pecuniary gain. (This enhancement is tied to the fraud loss table.)
  - C an increase of a proposed 5-levels for the distribution for receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain. (This enhancement is not tied to the fraud loss table, as is distribution for pecuniary gain.)
  - C a proposed 5-level increase for distribution to a minor. (This enhancement is not tied to the fraud loss table, as is distribution for pecuniary gain.)
  - C a proposed 7-level increase for “[d]istribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual conduct.” “Prohibited sexual conduct” is defined as any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography but not trafficking in or possession of child pornography. “Child pornography” is given the meaning established by Congress in 18 U.S.C. §2256(8). (This enhancement is not tied to the fraud loss table, as is distribution for pecuniary gain.)
  - C a proposed 2-level increase for distribution other than distribution as described in the other subsections.
- C The amendment proposes to modify the definition relating to “distribution” in §2G3.1 to mean as follows.
  - C “‘Distribution’ means any act, including production, transportation, and possession with intent to distribute, related to distribution of obscene matter.”
  - C “‘Distribution for pecuniary gain’ means distribution for profit.”
  - C “‘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 for a thing of value, but not for profit. ‘Thing of value’ means anything of valuable consideration.”
  - C “‘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.”

- C The proposed amendment defines “minor” as an individual who has not yet attained the age of 18 years.
- C The amendment is similar to that contained in Part (D) concerning the directive to clarify that “distribution of pornography” applies to the distribution of pornography for both monetary remuneration and a non-pecuniary interest.

### Analysis

This part of the amendment is intended to expand the definition of “distribution” to cover all acts of distribution, including those for which the distributor received nothing of value in return. Consistent with the expanded definition of “distribution,” the amendment also modifies a current specific offense characteristic to provide for additional, alternative bases for increasing the base offense level depending upon why the materials were distributed and to whom they were distributed. The addition of these alternative bases for an increase is based upon the concern expressed by Congress over the use of obscene materials by some sexual predators to entice children to engage in criminal sexual activity.

For purposes of this guideline, a “minor” is a person under the age of 18 years.

These changes to the guideline will insure that offenders who use obscene or pornographic materials to introduce children to the idea of sexual activity and then to entice them to engage in prohibited sexual activity are punished for so using the materials. The different SOCs also address the relative severity of the act of distribution based upon the purpose or audience of such.

### **Part (B): New Offense of Prohibiting Transmittal of Identifying Information about a Minor for Criminal Sexual Purposes**

This amendment addresses the new offense at 18 U.S.C. § 2425, which makes it unlawful to transmit identifying information about a minor with the intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity. The statutory maximum for the offense is five years of imprisonment. The proposed change to the guidelines is as follows.

- C The amendment proposes to reference, in the Statutory Index (Appendix A), the new offense to §2G1.1, the guideline covering the promotion of prostitution or prohibited sexual conduct.

### Analysis

This part of the amendment is intended to insure that those persons convicted of the new offense of

“unlawfully transmitting identifying information about a minor with the intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity” are punished through use of the most appropriate guideline.

It is not expected that many cases will be prosecuted under this statute. Those that are will be referred to §2G1.1 and then routed to the guideline applicable to the underlying conduct, to guidelines that provide enhancements for use of a computer and misrepresentation of identity. Although these offenses only have a five year statutory maximum, they will receive significant sentences under the appropriate guideline. The Commission will want to monitor these cases to ensure that the significant punishment levels are appropriate.

**Part (C): Clarification of the Term “Item” in the Enhancement in §2G2.4 for Possession of 10 or More Items of Child Pornography**

This amendment proposes to add language to the commentary for §2G2.4, the guideline covering the possession of child pornography. The new language clarifies that a computer file containing a visual depiction involving the sexual exploitation of a minor is to be considered one item for the purposes of subsection (b)(2) regardless of how many visual depictions are contained in the file.

The second new application note added through this part of the amendment provides that, for purposes of §2G2.4, “minor” means an individual who is under the age of 18 years.

Analysis

Each computer file on the hard drive of a computer or on a computer disk will count as a separate item regardless of whether each file contains a single depiction of sexual exploitation of a minor or numerous depictions.

For purposes of this §2G2.4, “minor” is a person under the age of 18 years.

Inasmuch as two books or two magazines are already considered two items, without regard for the number of visual depictions contained therein, this clarification will insure consistency in the application of the guideline. Moreover, it will remove the burden of visually inspecting and counting each depiction.

This clarification of the definition of “item” is consistent with the existing case law in the Second, Seventh, Eighth, and Ninth circuits.

**Part (D): The Directive to Clarify that “Distribution of Pornography” Applies to the Distribution of Pornography for Both Monetary Renumeration and a Non-pecuniary Interest**

The amendment proposes changes to §2G2.2, the guideline covering crimes arising from the

possession, receipt, transportation, advertising, and trafficking of material involving the sexual exploitation of a minor. The proposed changes are as follows.

- C The proposed amendment includes a modification of an existing specific offense characteristic (SOC) requiring the application of the greatest of the following:
  - C an increase of at least 5-levels for distribution for pecuniary gain. (This enhancement is tied to the fraud loss table.)
  - C an increase of a proposed 5-levels for the distribution for receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain. (This enhancement is not tied to the fraud loss table, as is distribution for pecuniary gain.)
  - C a proposed 5-level increase for distribution to a minor. (This enhancement is not tied to the fraud loss table, as is distribution for pecuniary gain.)
  - C a proposed 7-level increase for “[d]istribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual conduct.” “Prohibited sexual conduct” is defined as any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography but not trafficking in or possession of child pornography. “Child pornography” is given the meaning established by Congress in 18 U.S.C. §2256(8). (This enhancement is not tied to the fraud loss table, as is distribution for pecuniary gain.)
  - C a proposed 2-level increase for distribution other than distribution as described in the other subsections.
- C The amendment proposes to modify the definition relating to “distribution” in §2G2.2 to mean as follows.
  - C “‘Distribution’ means any act, including production, transportation, and possession with intent to distribute, of material involving the sexual exploitation of a minor.”
  - C “‘Distribution for pecuniary gain’ means distribution for profit.
  - C “‘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 for a thing of value, but not for profit. ‘Thing of value’ means anything of valuable consideration.”
  - C “‘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.”
- C The proposed amendment defines “minor” as an individual who has not yet attained the age of 18 years.
- C The amendment is similar to that contained in Part (A) concerning the new offense of

prohibiting transfer of obscene materials to a minor.

### Analysis

This part of the amendment is intended to expand the definition of “distribution” to cover all acts of distribution, including those for which the distributor received nothing of value in return. Consistent with the expanded definition of “distribution,” the amendment also modifies a current specific offense characteristic to provide for additional, alternative bases for increasing the base offense level depending upon why the materials were distributed and to whom they were distributed. The addition of these alternative bases for an increase is based upon the concern expressed by Congress over the use of obscene materials by some sexual predators to entice children to engage in criminal sexual activity.

For purposes of §2G2.2, a “minor” is a person under the age of 18 years.

These changes to the guideline will insure that offenders who use obscene or pornographic materials to introduce children to the idea of sexual activity and then to entice them to engage in prohibited sexual activity are punished for so using the materials. The different SOCs also address the relative severity of the act of distribution based upon the purpose or audience of such.

The proposed amendment would also resolve a circuit split.

#### **Part (E): The Directive to Provide an Enhancement for the Use of a Computer and the Misrepresentation of the Defendant’s Identity**

The amendment proposes changes to §§2A3.1 through 2A3.4, and §§2G1.1 and 2G2.1. The proposed changes to the guidelines are as follows.

#### **C Guideline §2A3.1: Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse**

C The amendment proposes to add a specific offense characteristic (SOC) to §2A3.1. The new SOC provides for a single 2-level increase “[i]f, 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.” “Participant” is given the meaning provided in Application Note 1 of the Commentary to §3B1.1. “Prohibited sexual conduct” is defined as any sexual activity for which a person can be charged with a criminal offense, including the production of child pornography but not trafficking in or possession of child pornography. “Child pornography” is given the meaning established by Congress in 18 U.S.C. § 2256(8).

- C The proposed amendment defines “minor” as an individual who has not yet attained the age of 18 years.
- C The proposed amendment to §2A3.1 includes commentary language which clarifies when the new enhancements apply and provides examples.
- C Guideline §2A3.2: Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts
  - C The amendment proposes to add two separate specific offense characteristics (SOC) to §2A3.1.
  - C The first proposed SOC provides for a 2-level increase “[i]f the offense involved the knowing misrepresentation of a participant’s identity, to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct.”
  - C The second proposed SOC provides for a 2-level increase “[i]f a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct.”
  - C The amendment also includes definitions to be included in Application Note 1 of the Commentary. “Participant” is given the same meaning as found in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role). “Prohibited sexual conduct” is given the same meaning as found in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse).
  - C The proposed amendment defines “victim” as an individual who has not yet attained the age of 16 years.
  - C The proposed amendment to §2A3.2 includes commentary language which clarifies when the new enhancements apply and provides examples.
- C Guideline §2A3.3: Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts
  - C The amendment proposes to add two separate specific offense characteristics (SOC) to §2A3.3. These SOC are almost identical to those proposed for inclusion in §§2A3.2 and 2A3.4.
  - C The first proposed SOC provides for a 2-level increase “[i]f the

offense involved the knowing misrepresentation of a participant's identity, to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct."

C The second proposed SOC provides for a 2-level increase "[i]f a computer or an Internet-access device was used to (A) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct."

C The amendment also includes definitions to be included in Application Note 1 of the Commentary. "Participant" is given the same meaning as found in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role). "Prohibited sexual conduct" is given the same meaning as found in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse). These definitions are the same as proposed for inclusion in §§2A3.2 and 2A3.4. The amendment proposes the inclusion of an additional definition; "ward" is defined as "a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant."

C The proposed amendment defines "minor" as an individual who has not yet attained the age of 18 years.

C The proposed amendment to §2A3.3 includes commentary language which clarifies when the new enhancements apply and provides examples. This language is almost identical to that proposed for inclusion in the Commentary to §§2A3.2 and 2A3.4.

C Guideline §2A3.4: Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

C The amendment proposes to add two separate specific offense characteristics (SOC) to §2A3.4. These SOCs are almost identical to those proposed for inclusion in §§2A3.2 and 2A3.3 (the difference being the use of "victim" instead of "minor" in §2A3.2).

C The first proposed SOCs provides for a 2-level increase "[i]f the offense involved the knowing misrepresentation of a participant's identity, to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct."

C The second proposed SOC provides for a 2-level increase "[i]f a computer or an Internet-access device was used to (A) persuade,



induce, entice, or coerce a minor to engage in prohibited sexual conduct, or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct.”

C The amendment also includes definitions to be included in Application Note 1 of the Commentary. “Participant” is given the same meaning as found in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role). “Prohibited sexual conduct” is given the same meaning as found in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse). These same definitions are proposed for inclusion in §§2A3.2 and 2A3.3.

C The proposed amendment defines “minor” as an individual who has not yet attained the age of 18 years.

C The proposed amendment to §2A3.4 includes commentary language which clarifies when the new enhancements apply and provides examples. This language is almost identical to that proposed for inclusion in the Commentary to §§2A3.2 and 2A3.3.

C Guideline §2G1.1: Promoting Prostitution or Prohibited Sexual Conduct

C The amendment proposes to add two separate specific offense characteristics (SOC) to §2A3.2. These SOCs are similar to those proposed for inclusion in §§2A3.2 and 2A3.3.

C The first proposed SOC provides for a 2-level increase “[i]f the offense involved the knowing misrepresentation of a participant’s identity to persuade, induce, entice, or coerce, or facilitate the travel of a minor to engage in prostitution.”

C The second proposed SOC provides for a 2-level increase “[i]f a computer or an Internet-access device was used to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution.”

C The amendment also includes definitions to be included in Application Note 1 of the Commentary. “Participant” is given the same meaning as found in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role). “Prohibited sexual conduct” is given the same meaning as found in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse). These same definitions are proposed for inclusion in §§2A3.2 through 2A3.4.

C The proposed amendment defines “minor” as an individual who has not yet attained the age of 18 years.

C The proposed amendment to §2G1.1 includes commentary language

which clarifies when the new enhancements apply and provides examples. This language is almost identical to that proposed for inclusion in the Commentary to §§2A3.2 through 2A3.4.

C Guideline §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

C The amendment proposes to add a single specific offense characteristic (SOC) to §2G2.1. The new SOC provides for a single 2-level increase “[i]f, 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, the offense involved: (A) the knowing misrepresentation of a participant’s identity; or (B) the use of a computer or an Internet-access device.”

C The proposed amendment defines “minor” as an individual who has not yet attained the age of 18 years.

C The proposed amendment to §2G1.1 includes commentary language which clarifies when the new enhancements apply and provides examples. This language is almost identical to that proposed for inclusion in the Commentary to §§2A3.2 through 2A3.4.

### Analysis

The proposed enhancements reflect the concern of Congress over the increased access to children provided by computers and the Internet, and the “anonymous nature” of on-line relationships, which allow users to misrepresent their identity.

This part of the amendment would add two separate two-level enhancements in the sexual abuse guidelines, §2A3.2 through §2A3.4, and the prostitution and promotion of prohibited sexual conduct guideline, §2G1.1, that applies in either of two circumstances. The first enhancement would apply if the offense involved the use of a computer or Internet-access device with the intent to persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual conduct. The second enhancement would apply if the offense involved the knowing misrepresentation of a criminal participant’s identity. Under the amendment as drafted, these enhancements would be cumulative in that an offender who both used a computer and misrepresented his/her identity with the intent to persuade or entice a minor to engage in prohibited sexual activity would receive both enhancements for a four-level total increase in his/her base offense level.

The amendment would add a single two-level enhancement in §§2A3.1 and 2G2.1 that would apply if the offense involved either the use of a computer or Internet-access device with the intent to persuade, induce, entice, coerce, or facilitate the transport of, the minor to engage in prohibited sexual conduct, or the knowing misrepresentation of a criminal participant’s identity. For these two guidelines, these enhancements are not cumulative because of the seriousness of the offenses sentenced under them and the higher base offense levels they contain. The use of a computer or misrepresentation of identity is felt to be more tangential to these crimes than to those crimes for which

the offenders are sentenced under the other sexual abuse and pornography guidelines.

In order to assuage the concerns expressed by FPDO, the amendment also clarifies that, for purposes of §2A3.2, a “victim” is an individual under the age of 16 years. “Minor” is defined for the remaining sexual abuse, pornography and obscenity guidelines as an individual under the age of 18 years. This distinction in the definition of “minor” is consistent with the definitions utilized in the statutes referenced to these guidelines.

Regarding the enhancement for misrepresentation, the Application Notes make it clear that the enhancement should apply to more than the misidentification of a participant’s name, but do not address FPDO’s concern that it could apply to a tangential misrepresentation or to “puffing,” *i.e.*, a 19-year old telling a 13-year-old he is 21 to impress her or a defendant lying about his occupation and income not to gain access, like telling the child he is a coach when he is not, but to appear more prosperous. To address the concerns of FPDO, the Commission may wish to add language to the Application Notes to further clarify that the misrepresentation of identity must have been material to the defendant’s access to the child.

**Part (F): The Directive to Provide an Enhancement for Chapter 117 Offenses**

The amendment proposes changes to §§2A3.2 and 2G1.1. The proposed changes are as follows.

- C Guideline §2A3.2: Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts
  - C The amendment proposes to add an alternative base offense level of level 18 with a new specific offense characteristic (SOC) providing for a three-level decrease in the base offense level if none of the other SOCs apply. Another option would retain the current base offense level of level 15.
  - C The amendment creates two other new SOCs.
    - C The second new SOC provides for a 2-level increase if subsection (b)(1)(If the victim was in the custody, care, or supervisory control of the defendant) does not apply and “(A) the offense involved the knowing misrepresentation of a participant’s identity to (i) persuade, induce, entice, or coerce the victim to engage in prohibited sexual conduct, or (ii) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct; or (B) a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct.”
    - C The third new SOC provides for a 2-level increase “[i]f a computer or an Internet-access device was used to (A) persuade, induce, entice, coerce, or the victim to engage in

prohibited sexual conduct, or (B) facilitate transportation or travel, by the victim or a participant, to engage in prohibited sexual conduct.”

C The amendment clarifies the cross reference to §2A3.1 to make clear that the cross-reference applies “[i]f the victim had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse) shall apply, regardless of the ‘consent’ of the victim.”

C The amendment also includes definitions to be included in Application Note 1 of the Commentary. “Minor” is an individual under the age of 16 years. “Participant” is given the same meaning as found in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role). “Prohibited sexual conduct” is given the same meaning as found in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse). These same definitions are proposed for inclusion in §§2A3.2 through 2A3.4.

C The proposed amendment to §2A3.2 includes commentary language which clarifies when the new enhancements apply and provides examples. Some of this same commentary is proposed for inclusion in other parts of the amendment.

Among the additional language in the proposed commentary is the provision that “[i]n a case in which any participant is at least [10] years older than the victim, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B), that such participant unduly influenced the victim to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the victim.”

C The amendment includes language to be added to the Background information for the guideline clarifying which cases should and should not be sentenced under §2A3.2.

#### C Guideline §2G1.1: Promoting Prostitution or Prohibited Sexual Conduct

C The amendment proposes to add an alternative base offense level of 19 if the offense involved a minor.

C The amendment modifies an existing specific offense characteristic (SOC) to provide for a 4-level increase “[i]f the offense involved (A) prostitution, and (B) the use of physical force or coercion by threats or drugs or in any manner.”

C The amendment modifies an existing SOC to provide for reduced graduated level-increases based upon the age of the victim: “If the offense involved a victim 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.”

- C The amendment creates two new SOC's.
  - C The first new SOC provides for a 2-level increase 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 prostitution; or (B) a participant otherwise unduly influenced a minor to engage in prostitution.”
  - C The second proposed SOC provides for a 2-level increase “[i]f a computer or Internet-access device was used to [(A)] persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution[, or (B) entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor]....”
- C The amendment clarifies the cross reference to §2A3.1 to make clear that the cross-reference to it applies “[i]f the victim involved criminal sexual abuse with a minor who had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse) shall apply, regardless of the ‘consent’ of the victim.”
- C The amendment also includes new definitions or modifications to existing definitions in the guideline. These definitions are to be included in Application Note 1 of the Commentary.
  - C “Participant” is given the same meaning as found in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).
  - C “‘Promoting prostitution’ means persuading, inducing, enticing, or coercing a person to engage in prostitution, or to travel to engage in, prostitution.”
  - C The definition of “victim” is expanded to include undercover law enforcement officers.
  - C “[C]oercion’ includes any form of conduct that negates the voluntariness of the behavior of the victim.”
  - C “Sexually explicit conduct” is given the same meaning as found in 18 U.S.C. §2256.
- C The proposed amendment to §2A3.2 includes commentary language which clarifies when the new enhancements apply and provides examples. Some of this same commentary is proposed for inclusion in other parts of the amendment.
- C The amendment includes language to be added to the Background

information for the guideline clarifying which cases should and should not be sentenced under §2A3.2.

### Analysis

To more fully implement the congressional directive in the Sex Crimes Against Children Prevention Act of 1995, three levels were added to the current base offense level to provide a base offense level of level 18 in §2A3.2 if certain aggravating conduct is involved in the offense. If the Commission chooses to adopt this base offense level, it could also adopt a new SOC providing for a three-level decrease if none of the other SOC's apply. An alternative option is provided to retain the current base offense level of level 15.

The proposal to increase the base offense level to level 18 would not only increase the base for offenders of the type that frequently are involved in Chapter 117 offenses (those who misrepresent, use undue influence, or use computers), it would also increase the base for incest offenders on federal territory or reservations. As previously reported, there have been a number of downward departures in cases that began with the current base offense level of level 15. With the exception of informal input from the Department of Justice, the Commission has received no public comment on the advisability of substantial increases to the base offense level for such offenders. This may be due in part to the general nature of the published issues for comment. The Commission could decide to maintain the current base offense level of level 15, and reserve a decision on additional increases until the next amendment cycle when it will likely address the issue of how to address the congressional concern regarding "pattern of activity."

The new SOC's relating to misrepresentation of identity or exercise of undue influence, and to use of a computer or Internet-access device are in response to the congressional directives contained in the Protection of Children Against Sexual Predators Act of 1998.

It is essential to keep in mind that "different" types of cases and perpetrators will be sentenced under §2A3.2 -- some because the law requires that they be so sentenced and some, as the case studies have established, because the parties have negotiated their way under the guideline for sentencing purposes. One category includes those cases involving sexual activity that would have been legal but for the age of the victim; these types of cases are actually those for which the original base offense level of 15 was intended. Another category includes incest type crimes. And yet a third category includes those crimes in which the offenders meet their "victims" over the Internet and, believing the victims are minors, arrange to meet them in person. This last category of cases often involves offenders who are apprehended before any sexual contact is made.

Under the proposed amendments to §2A3.2 (and assuming the offenders fall within the same criminal history category), the offenders in the last category of cases could receive a higher sentence than an offender who committed incest or otherwise actually engaged in prohibited sexual contact with a victim. This is so because, as all of the relevant 1998 cases sentenced under this guideline showed, those offenders would get both the two-level offense enhancement for either misrepresentation of identity or undue influence and the two-level offense enhancement for use of a computer for a four-level total increase in the base offense level; an offender sentenced for an incest type crime would, at the most, receive only the two-level enhancement for the victim being in his/her custody or care.

The Commission will have to determine, as a matter of policy, if it wishes to punish these types of

crimes in the same manner. And, if not, which should be punished more severely. The Commission may wish to defer consideration of the relative severity of the punishment for these different types of crimes until the next amendment cycle when it addresses the congressional directive relating to “pattern of activity.”

The amendment to §2G1.1 includes an alternative base offense level of 19 if the offense involved a minor. This alternative level was determined by adding five levels to the current base offense level of 14 and reducing the enhancements found in the second SOC, which are based on the age of the victim, by a corresponding five levels. The adoption of these two specific portions of the amendment would essentially leave the guideline as is.