

REVISED AMENDMENT 3: IMPLEMENTATION OF THE SEXUAL PREDATORS ACT

Synopsis of Proposed Amendment: *This 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 required 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 contained 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).

Part (A): The New Offense of Prohibiting Transfer of Obscene Materials to a Minor

Synopsis of Proposed Amendment: *This 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’ imprisonment. The amendment proposes to reference the offense in the Statutory Index (Appendix A) to the guideline covering the importing, mailing, or transporting of obscene matter, §2G3.1.*

*The amendment also proposes to modify the distribution enhancement in §2G3.1(b)(1) so that the enhancement would apply to: (i) distribution for pecuniary gain (*i.e.*, for profit); (ii) distribution for the receipt, or expectation of receipt, of anything of value, but not for pecuniary gain; (iii) any knowing distribution to a minor; (iv) any knowing distribution to a minor with the intent to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; and (v) any other distribution, which includes distribution without the receipt, or expectation of receipt, of anything of value.*

Proposed Amendment:

§2G3.1. Importing, Mailing, or Transporting Obscene Matter, Transferring Obscene Matter to

a Minor

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(b) Specific Offense Characteristics

(1) (Apply the greatest.) If the offense involved:

- (A) ~~an act related to d~~Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by 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.

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Commentary

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

Application Note:

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

~~"Act related to distribution" as used in this guideline, is to be construed broadly and includes production, transportation, and possession with intent to distribute.~~

"Distribution" means any act, including production, transportation, and possession with intent to distribute, related to distribution of obscene matter.

"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.

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

“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).

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APPENDIX A - STATUTORY INDEX

18 U.S.C. § 1466	2G3.1
18 U.S.C. § 1468	2G3.2
18 U.S.C. § 1470	2G3.1
18 U.S.C. § 1501	2A2.2, 2A2.4

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

Issue for Comment: *This amendment addresses the new offense, at 18 U.S.C. § 2425, which prohibits the use of the mail or any facility or means of interstate commerce to knowingly transmit identifying information about a minor with the intent to entice, encourage, offer, or solicit anyone to engage in prohibited sexual activity. The amendment references the new offense in the Statutory Index to the guideline covering the promotion of prohibited sexual conduct, §2G1.1.*

Proposed Amendment:

§2G1.1. Promoting Prostitution or Prohibited Sexual Conduct

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Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422, 2423(α), 2425.

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APPENDIX A - STATUTORY INDEX

18 U.S.C. § 2423(b)	2A3.1, 2A3.2, 2A3.3
18 U.S.C. § 2425	2G1.1

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

Synopsis of Proposed Amendment: *This amendment proposes to add commentary language to the guideline covering possession of child pornography, §2G2.4, to clarify whether an individual computer file (as opposed to disk on which it and many other files may be located) is an “item” of child pornography for purposes of the enhancement in §2G2.4(b)(2), which provides a 2-level increase if more than 10 items of child*

pornography are possessed. Four circuits have held that an individual computer file does qualify as an item for purposes of the enhancement.

Proposed Amendment:

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

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Commentary

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Application Note:

1. For purposes of this guideline, “minor” means an individual who had not attained the age of 18 years.
2. A computer file containing a visual depiction involving the sexual exploitation of a minor shall be considered to be one item for purposes of subsection (b)(2). Accordingly, if a computer disk contains, for example, three separate files, each of which contains one or more such visual depictions, then those files would be counted as three items for purposes of that subsection.

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

Synopsis of Proposed Amendment: This amendment addresses the Act’s directive to clarify that the term “distribution of pornography” applies to the distribution of pornography for both pecuniary gain and any nonpecuniary interest. The amendment modifies the distribution enhancement in the pornography trafficking guideline, §2G2.2(b)(2), so that the enhancement would apply to: (i) distribution for pecuniary gain (i.e., for profit); (ii) distribution for the receipt, or expectation of receipt, of anything of value, but not for pecuniary gain; (iii) any knowing distribution to a minor; (iv) any knowing distribution to a minor with the intent to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct; and (v) any other distribution, which includes distribution without the receipt, or expectation of receipt, of anything of value.

Proposed Amendment:

§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

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(b) Specific Offense Characteristics

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(2) (Apply the greatest.) If the offense involved:

- (A) Distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by 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.

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Commentary

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Application Notes:

1. For purposes of this guideline—

“Distribution” includes any act, including production, transportation, and possession with intent to distribute, related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute 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.

“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).

* * *

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

Synopsis of Proposed Amendment: *This amendment responds to the Act’s directives to: (i) 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; and (ii) 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 conduct.*

The amendment proposes to implement these directives by providing a [2]-level enhancement in the sexual abuse guidelines, §§2A3.1-2A3.4, the prostitution and promotion of prohibited sexual conduct guideline, §2G1.1, and the child pornography production guideline, §2G2.1, for the use of a computer or an Internet-access device to contact the minor electronically and for the misrepresentation of a criminal participant’s identity with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child to engage in any prohibited sexual conduct. With respect to §§2A3.1 and 2G2.1, the amendment treats these two factors as alternative triggers for one enhancement. With respect to §§2A3.2-2A3.4 and §2G1.1, the amendment provides separate, cumulative enhancements for these two types of offense conduct.

Proposed Amendment:

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

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(b) Specific Offense Characteristics

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- (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, increase by [2] levels.

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Commentary

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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).

“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).

* * *

The enhancement in subsection (b)(6)(A) applies to cases involving the 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. Subsection (b)(6)(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)(6)(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)(6)(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 (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. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

Subsection (b)(6)(B) provides an enhancement if 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. Subsection (b)(6)(B) 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 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.

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§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

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(b) **Specific Offense Characteristics**

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(2) If 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, increase by [2] levels.

(3) If 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, increase by [2] levels.

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Commentary

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[Application Notes 1 through 4 are redesignated as Application Notes 2 through 5, respectively.]

Application Notes:

1. For purposes of this guideline—

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

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

“Victim” means an individual who had not attained the age of 16 years.

* * *

— *The enhancement in subsection (b)(2) applies to cases involving the 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. Subsection (b)(2) is intended to apply only to misrepresentations made directly to the victim or to a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement in subsection (b)(2) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the victim.*

The misrepresentation to which the enhancement in subsection (b)(2) 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 (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. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

— *Subsection (b)(3) provides an enhancement if 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. Subsection (b)(3) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with the victim or with a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the victim from an airline’s Internet site.*

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

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(b) Specific Offense Characteristics

(1) *If 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, increase by [2] levels.

- (2) If 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, increase by [2] levels.

Commentary

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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).

“Prohibited sexual conduct” has the meaning given that term in §2A3.1 (Criminal Sexual Abuse).

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

* * *

2. The enhancement in subsection (b)(1) applies to cases involving the 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. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(1) 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)(1) may apply includes misrepresentation of a participant’s name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (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. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. Subsection (b)(2) provides an enhancement if 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. Subsection (b)(2) 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 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.

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

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(b) Specific Offense Characteristics

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(4) If 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, increase by [2] levels.

(5) If 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, increase by [2] levels.

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Commentary

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[Application Notes 1 through 5 are redesignated as Application Notes 2 through 6, respectively.]

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).

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

* * *

The enhancement in subsection (b)(4) applies to cases involving the 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. Subsection (b)(4) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

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

Subsection (b)(5) provides an enhancement if 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. Subsection (b)(5) 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 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.

§2G1.1. Promoting Prostitution or Prohibited Sexual Conduct

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(b) Specific Offense Characteristics

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(4) If 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, increase by [2] levels.

(5) If 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, increase by [2] levels.

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Application Notes:

1. For purposes of this guideline—

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“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).

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

* * *

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

The misrepresentation to which the enhancement in subsection (b)(4) may apply includes

misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

Subsection (b)(5) provides an enhancement if 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. Subsection (b)(5) 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) 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.

§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

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(b) Specific Offense Characteristics

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- (3) ~~If a computer was used to solicit participation by or with a minor in sexually explicit conduct for the purpose of producing sexually explicit material, increase by 2 levels.~~ If, 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, increase by [2] levels.

Commentary

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Application Notes:

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[Redesignate Notes 1 through 3 as Notes 2 through 4, respectively.]

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

* * *

5. *The enhancement in subsection (b)(3)(A) applies to 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)(3)(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)(3)(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)(3)(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.

Subsection (b)(3)(B) provides an enhancement if a computer or an Internet-access device 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. Subsection (b)(3)(B) 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 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.

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

Synopsis of Proposed Amendment: *This part of the amendment responds to the congressional directive in the Protection of Children Against Sexual Predators Act of 1998 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. The major features of this proposed amendment are the following:*

(1) It proposes two options in the base offense level in §2A3.2. Option 1 provides a base offense level of level 18 (for cases that do not involve aggravating conduct), to implement more fully a directive in the Sex Crimes Against Children Prevention Act of 1995 to provide at least a three-level increase for offenses under 18 U.S.C. § 2423(a) involving the transportation of minors for prostitution or other prohibited sexual conduct. In 1996, the Commission partially implemented this directive by providing a three-level increase in §2G1.1. However, since many of these cases are cross-referenced under §2G1.1 to §2A3.2, adding a three-level enhancement to §2A3.2 would more fully implement that directive. (In addition, the three-level increase that previously was added to §2G1.1(b)(2) is proposed to be moved from subsection (b)(2) to the base offense level, where it arguably more appropriately belongs.) Option 1 also provides a three-level reduction, at subsection (b)(4), if none of the aggravating factors listed in subsection (b)(1) through (b)(3) applies. Option 2 proposes to maintain the base offense level of level 15.

(2) It proposes to address the directive in the Protection of Children from Sexual Predators Act of 1998 to provide a sentencing enhancement for offenses under Chapter 117 of Title 18 (relating to the transportation of minors for illegal sexual activity) by providing a two-pronged enhancement in §§2A3.2 and 2G1.1, that is applicable if: (A) a participant misrepresented the participant's identity (this prong fulfills another directive in the Protection of Children Against Sexual Predators Act), or (B) a participant otherwise unduly influenced the victim to engage in the prohibited sexual conduct. A rebuttable presumption is created that the offense involved undue influence if a participant was at least 10 years older than the victim. Commission research has indicated that a number of the cases prosecuted under the statutory rape statute, 18 U.S.C. § 2243(a), as well as a number of cases prosecuted under Chapter 117 of title 18, United States Code, and cross referenced to §2A3.2, involve some aspect of undue influence over the victim on the part of the defendant or other criminally responsible person.

(3) It provides an enhancement in both §§2A3.2 and 2G1.1 for the use of a computer or an Internet-access device to solicit a minor's participation in the offense, in fulfillment of other directives in the Protection of Children Against Sexual Predators Act of 1998.

Proposed Amendment:

§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts

[Option 1: (a) Base Offense Level: ~~15~~18]

[Option 2: (a) Base Offense Level: 15]

(b) Specific Offense Characteristics

(1) If the victim was in the custody, care, or supervisory control of the

defendant, increase by 2 levels.

(2) If subsection (b)(1) 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,

increase by [2] levels.

(3) If 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, increase by [2] levels.

[Option 1: (4) If none of subsections (b)(1) through (b)(3) applies, decrease by 3 levels.]

(c) Cross Reference

(1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse) shall apply, regardless of the “consent” of the victim.

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). 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 16 years.

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

“Prohibited sexual conduct” (A) means any sexual activity with a minor 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).

±2. If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as

pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).

23. *Subsection (b)(1) 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.*

34. *If the adjustment in subsection (b)(1) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

5. *The enhancement in subsection (b)(2)(A) applies to cases involving the 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. Subsection (b)(2)(A) is intended to apply only to misrepresentations made directly to the victim or to a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement in subsection (b)(2)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the victim.*

The misrepresentation to which the enhancement in subsection (b)(2)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (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. 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)(2)(B) applies, the court should closely consider the facts of the case to determine whether the participant's influence over the victim, if any, compromised the voluntariness of the victim's behavior.

In 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.

If the victim has been threatened or placed in fear, the cross reference in subsection (c)(1) will apply.

6. *Subsection (b)(3) provides an enhancement if a computer or an Internet-access device was used to (A) persuade, induce, entice, 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. Subsection (b)(3) is intended to apply only to the use of a computer or an Internet-access device to communicate directly with the victim or with a person who exercises custody, care, or supervisory control of the victim. Accordingly, the enhancement would not apply to the use of a computer or an Internet-access device to obtain airline tickets for the victim from an airline's Internet site.*

7. 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 shall apply if: (A) the victim had not attained the age of twelve years (*see* 18 U.S.C. §2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (*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 kidnaping (*see* 18 U.S.C. § 2242(1)).
48. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.

Background: This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the victim, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a) or Chapter 117 of title 18, United States Code, in which a participant has taken active measure(s) to unduly influence the victim to engage in prohibited sexual conduct and, thus, the voluntariness of the victim's behavior has been compromised. A [2]-level enhancement is provided in subsection (b)(2) for such cases because they are more serious than cases that involve purely consensual sexual acts that would be lawful but for the age of the victim. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). An enhancement is provided for a defendant who victimizes a minor under his supervision or care. However, if the victim has not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse) will apply, regardless of the "consent" of the victim.

* * *

PART G - OFFENSES INVOLVING PROSTITUTION, SEXUAL EXPLOITATION OF MINORS, AND OBSCENITY

1. PROMOTING PROSTITUTION OR PROHIBITED SEXUAL CONDUCT

§2G1.1. Promoting Prostitution 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) prostitution, and (B) the use of physical force, or coercion by threats or drugs or in any manner, increase by **4** levels.
 - (2) If the offense involved a victim who had (A) not attained the age of twelve years, increase by **94** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **72** levels; or (C) attained the age of sixteen years but not attained the age of eighteen years, increase by **5** 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 prostitution; or
 - (B) a participant otherwise unduly influenced a minor to engage in prostitution,
 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 prostitution[, 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 eighteen 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 or Assault with the Intent to Commit Criminal Sexual Abuse). If the offense 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.
- (3) If the offense did not involve promoting prostitution, and neither subsection (c)(1) nor (c)(2) is applicable, ~~use the offense guideline applicable to the underlying prohibited sexual conduct. If no offense guideline is applicable to the prohibited sexual conduct, apply §2X5.1 (Other Offenses);~~ apply §2A3.2 (Criminal Sexual Abuse of a Minor 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 prostitution 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. §§ 2421, 2422, 2423(α), 2425.

Application Notes:

1. *For purposes of this guideline—*

~~"Coercion" includes any form of conduct that negates the voluntariness of the behavior of the victim. Coercion would apply, for example, where 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 eighteen years of age, this characteristic generally will not apply if the drug or alcohol was voluntarily taken.~~

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

~~"Promoting prostitution or prohibited sexual conduct" means (A) transporting a person for the purpose of prostitution or prohibited sexual conduct, or (B) persuading, inducing, enticing, or coercing a person to engage in, or travel for the purpose of engaging in, prostitution or prohibited sexual conduct.~~ persuading, inducing, enticing, or coercing a person to engage in prostitution, or to travel to engage in, prostitution.

~~"Sexually explicit conduct" has the meaning set forth in 18 U.S.C. § 2256.~~

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

2. ~~The~~ Subsection (b)(1) provides an enhancement for physical force, or coercion that occurs as part of a prostitution 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 this subsection, "coercion" includes any form of conduct that negates the voluntariness of the behavior of the victim. Coercion would apply, for example, where 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 eighteen 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 prostitution 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, prostitution 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 prostitution or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction or not, 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 eighteen 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 adjustment, 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 adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*
7. *The enhancement in subsection (b)(4)(A) applies to cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution. 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 prostitution. 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 the participant's influence over the minor, if any, compromised the voluntariness of the minor's behavior.

In a case in which any 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 prostitution. 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 (A) to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in prostitution[, or (B) to 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.*
79. *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 person less than eighteen 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 shall apply if the offense involved criminal sexual abuse and (A) the victim had not attained the age of twelve years (*see* 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (*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 kidnaping (*see* 18 U.S.C. § 2242(1)).
811. The cross reference at subsection (c)(3) addresses the ~~unusual~~ case in which the offense did not involve promoting prostitution ~~and~~, 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; *e.g.i.e.*, §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact). ~~If there is no offense guideline for the underlying prohibited sexual conduct, §2X5.1 (Other Offenses) is to be used.~~

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 or Assault with the Intent to Commit Criminal Sexual Abuse), §2A3.2 (Criminal Sexual Abuse of a Minor 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).

* * *