

PROPOSED AMENDMENT: SEXUAL PREDATORS

Synopsis of Proposed Amendment: *This is a three-part amendment that includes:*

- (A) *Amendments to implement the "pattern of activity" directive in the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the "Act"), and related amendments.*
- (B) *Amendments related to grouping certain child pornography counts of conviction.*
- (C) *Amendments to implement the directive in the Act to provide an enhancement for transportation offenses under chapter 117 of title 18, United States Code, and other related amendments.*

(A) ENHANCEMENT FOR PATTERN OF ACTIVITY

Synopsis: *Part A proposes several options, including a possible combination of approaches to satisfy the Congressional directive in the Act that requires the Commission to increase the penalties in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. There are many types of conduct that may indicate a defendant is a high risk sex offender engaging in a pattern of prohibited sexual conduct. Each of these components considers various aspects of sex offenders and the types of activity involved in a pattern of behavior. There are four options presented by this amendment that could be used either in combination or alone to implement the directive. In addition to these four options, the proposal amends the guideline covering terms of supervised release, §5D1.2, to provide that the term of supervised release for a defendant convicted of a sex crime shall be the maximum term authorized by statute.*

The first option would create a new Chapter Four guideline, §4B1.5, that aims to incapacitate high risk sex offenders who have an instant offense of conviction of sexual abuse and a prior felony conviction for sexual abuse. Two options are contained within this option. Option 1A sanctions defendants whose instant offense of conviction and prior conviction involve prohibited sexual conduct. In contrast to option 1B, option 1A increases the defendant's criminal history to not less than category IV or V, as opposed to criminal history category VI. Option 1A also includes a wider range of offenses involving prohibited sexual conduct. Under Option 1A, chapter 109A offenses are bracketed for possible exclusion from the scope of instant offenses of conviction that would trigger the guideline. Excluding chapter 109A offenses focuses application of the guideline to those defendants who use the internet or other interstate means to prey on minors.

Option 1B tracks legislation from the 106th Congress that proposed a mandatory minimum life sentence for defendants whose instant offense of conviction and prior conviction involved direct sexual contact. This option provides for sentences at or near the statutory maximum for these types of defendants.

The second option would create a Chapter Four guideline, §4B1.6, that provides a five-level increase (and a minimum offense level of 32) for defendants who engage in a pattern of activity involving prohibited sexual conduct. This guideline requires that (1) the defendant's instant offense of conviction is a sex crime; and (2) the defendant previously has engaged in two or more instances of prohibited sexual conduct, whether or not that conduct resulted in a conviction.

The third option would provide a Chapter Two specific offense characteristic in the sexual abuse guidelines. This specific offense characteristic mirrors the current pattern of activity adjustment in §2G2.2, Trafficking in Material Involving the Sexual Exploitation of a Minor. A defendant who abuses or exploits a minor on two or more occasions will receive a two-level increase in offense level pursuant to this enhancement.

The fourth option provides language encouraging an upward departure for a defendant who commits repeated acts of sexual abuse of the same minor. This component would allow courts to sanction a defendant for a pattern of multiple acts of abuse of the same victim over a period of time.

Proposed Amendment:

- (1) Option One - new Chapter Four guideline for repeat and dangerous sex offender - to be used alone or in conjunction with either Option Two or Option Three:**

At the end of Chapter Four, Part B, add the following new guideline:

§4B1.5. Repeat and Dangerous Sex Offender

- (a) A defendant is a repeat and dangerous sex offender if—
- (1) the instant offense of conviction is a sex crime; and
 - (2) the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction.
- (b) If (1) a repeat and dangerous sex offender is not a career offender pursuant to §4B1.1 (Career Offender); and (2) the offense level for that repeat and dangerous sex offender from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply.

| <u>Offense</u> | <u>Statutory Maximum</u> | <u>Offense Level</u> |
|----------------|--|----------------------|
| (A) | Life | [37] |
| (B) | 25 years or more | [34] |
| (C) | 20 years or more, but less than 25 years | [32] |
| (D) | 15 years or more, but less than 20 years | [29] |
| (E) | 10 years or more, but less than 15 years | [24] |

- (F) 5 years or more, but less than 10 years [17]
- (G) More than 1 year, but less than 5 years [12].

- (c) If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the applicable offense level in subsection (b) by the number of levels corresponding to that adjustment.
- (d) A repeat and dangerous sex offender’s criminal history category in every case shall be [Option 1A: not less than Category [IV][V]] [Option 1B: Category VI].

Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

"Offense Statutory Maximum" means the maximum term of imprisonment authorized for the instant offense of conviction that is a sex crime, including any increase in that maximum term under a sentencing enhancement provision that applies to that sex crime because of the defendant’s prior criminal record (such as the sentencing enhancement provisions contained in 18 U.S.C. §§ 2247(a) and 2426(a)).

[Option 1A:

"Sex offense conviction" has the meaning given that term in 18 U.S.C. § 2426, but such term does not include trafficking in, receipt of, or possession of, child pornography.

2. Requirement of Sex Crime as Instant Offense of Conviction.—For purposes of subsection (a)(1), the instant offense of conviction must be an instant offense of conviction under [chapter 109A,] chapter 110 (not including trafficking in, receipt of, or possession of, child pornography, or recordkeeping offenses), or chapter 117 (not including transmitting information about a minor or filing a factual statement about alien individual) , of title 18, United States Code, or an attempt or a conspiracy to commit such an offense.]

[Option 1B:

"Sex offense conviction" means a prior conviction for (A) any sex crime referred to in Application Note 2; or (B) any offense under State law consisting of conduct that would have been such a sex crime if the conduct had occurred within the special maritime and territorial jurisdiction of the United States. The term "State" has the meaning given that term in 18 U.S.C. § 2426(b)(2).

2. Requirement of Sex Crime as Instant Offense of Conviction.—For purposes of subsection (a)(1), the instant offense of conviction must be an instant offense of conviction under 18 U.S.C. § 2241, § 2242, § 2243, § 2244, § 2245, § 2251A, or § 2423, including an attempt or conspiracy to commit such an offense.]

3. Determination of Prior Sex Offense Convictions Under Subsection (a)(2).—For purposes of subsection (a)(2)—

(A) the defendant must have committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction; and

(B) the date that a defendant sustained a conviction shall be the date that the guilt of the defendant was established, whether by guilty plea, trial or plea of nolo contendere.

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

[5. Departure Provision.—There may be cases in which reliable information indicates that the guideline sentence resulting from application of this guideline either understates or overstates the likelihood that the defendant will commit another sexual offense, or the seriousness of the defendant’s criminal history. In such cases, an upward or a downward departure, respectively, may be warranted. Such reliable information may include, for example, risk assessments and other expert testimony regarding the likelihood of recidivism.]

(2) **Option Two: New sexual predator guideline in Chapter Four - to be used alone or with Option One:**

§4B1.6 Sexual Predator

If—

(a) the defendant is not a career offender pursuant to §4B1.1 (Career Offender) and is not a repeat and dangerous sex offender pursuant to §4B1.5 (Repeat and Dangerous Sex Offender); and

(b) (1) the instant offense of conviction is a sex offense that the defendant committed as part of a pattern of activity involving prohibited sexual conduct [with a minor]; [[and][or] (2) the instant offense of conviction is a sex offense and the defendant is a sexual predator],

increase by [5] levels; but if the resulting offense level is less than [32][30], increase to level [32][30].

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

“Sex offense” means an offense under [chapter 109A,] chapter 110 (not including trafficking, receipt, or possession of, child pornography), or chapter 117 of title 18, United States Code, or an attempt or a conspiracy to commit any such offense.

“Pattern of activity” means any combination of two or more prior separate instances of prohibited sexual conduct [with a minor] by the defendant, whether or not the conduct resulted in a conviction for such conduct.

“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; (C) includes trafficking in child pornography if the defendant has a prior felony conviction for trafficking in child pornography; and (D) does not include possession of child pornography. “Child pornography” has the meaning given that term in 18 U.S.C. § 2256(8).

- [2. **Sexual Predator Determination.**—For purposes of this guideline, the defendant is a sexual predator if the court determines, under the totality of the circumstances, that the defendant is likely to continue to engage in prohibited sexual conduct with minors in the future. [In making this determination, the court may rely on information such as expert psychosexual evaluations and other reliable evidence.]]*
- 3. **Inapplicability in Certain Cases.**—This guideline applies only to a defendant whose pattern of activity involved a victim other than the victim of the instant offense of conviction. Therefore, a pattern of activity of which the only victim is the victim of the instant offense of conviction is not a pattern of activity under this guideline.*

***Background:** This guideline is intended to provide lengthy incarceration for offenders who present a continuing danger to the public. It applies to any offender whose instant offense of conviction is a sex offense, regardless of the specific sex offense of conviction or Chapter Two guideline under which the offender is sentenced. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant was convicted of any of several federal and state sex offenses (see 18 U.S.C. §§ 2247, 2426). In addition, section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.*

[The guideline is intended to target those dangerous offenders for whom future sex offending is likely. Research has shown that recidivism rates vary depending on characteristics of the offender that may be determined at the time of sentencing, such as a proven sexual preference for minors or other psychopathy. Psychosexual evaluations by certified professionals using empirically-validated risk assessment instruments may be useful to identify those offenders who are most likely to reoffend.]

The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline. In addition, treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of the term of supervised release that is imposed.]

(3) Option Three: Enhancement for pattern of activity in Chapter Two, Part A - to be used alone or with Option One:

At the end of subsection (b) of each of §§2A3.1, 2A3.2, 2A3.3, and 2A3.4, add the following:

"() If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels."

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At the end of the Commentary captioned "Application Notes" in each of §§2A3.1, 2A3.2, 2A3.3, and 2A3.4, add the following:

" . Pattern of Activity Enhancement.—

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

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

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

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

(4) Option Four: Upward departure provision for repeated acts with same victim - to be used with Option One or Option Two:

At the end of the Commentary captioned "Application Notes" in each of §§2A3.1, 2A3.2, 2A3.3, and 2A3.4, add the following:

" . Upward Departure Provision.—*If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted."*

(5) Supervised Release Provision

§5D1.2. Term of Supervised Release

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(b) Except as otherwise provided;

- (1) the term of supervised release imposed shall not be less than any statutorily required term of supervised release; and
- (2) if the instant offense of conviction is a sex offense, the term of supervised release shall be the maximum term of supervised release authorized by statute.

Commentary

Application Notes:

- 1. Definitions.—For purposes of this guideline, the term “sex offense” means an offense under [chapter 109A,] chapter 110 (not including trafficking, receipt, or possession of, child pornography), or chapter 117 of title 18, United States Code, or an attempt or a conspiracy to commit any such offense.
- 12. Safety Valve Cases.—A defendant who qualifies under §5C1.2 (Applicability of Statutory Minimum Sentence in Certain Cases) is not subject to any statutory minimum sentence of supervised release. See 18 U.S.C. § 3553(f). In such a case, the term of supervised release shall be determined under subsection (a).
- 23. Supervised Release Cases.—Upon motion of the Government, a defendant who has provided substantial assistance in the investigation or prosecution of another person who has committed an offense may be sentenced to a term of supervised release that is less than any minimum required by statute or the guidelines. See 18 U.S.C. § 3553(e), §5K1.1 (Substantial Assistance to Authorities).

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(6) Conforming Amendments for all four options:

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

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Application Notes:

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- 5. ~~If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.~~

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- 7. ~~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.~~

§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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Application Notes:

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~~8. 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.~~

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

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Application Notes:

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~~4. 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.~~

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

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Application Notes:

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~~8. 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.~~

Issue for Comment: *Option Two proposes a new guideline at §4B1.6 that would provide a five-level increase and a minimum offense level of level [32] if the defendant is a sexual predator. As highlighted by the bracketed language "[and][or]" in §4B1.6(b)(2), the Commission invites comment regarding whether the court must find both that the defendant is a sexual predator and that the defendant engaged in a pattern of activity involving sexual abuse or exploitation, or whether a finding of one of these factors would be sufficient in order for the five-level increase to apply.*

(B) GROUPING

Synopsis: *Part B of the proposed amendment resolves a circuit conflict regarding who the "victim" is in child pornography cases for purposes of grouping of multiple counts. The amendment proposes two options for resolving the circuit conflict on the grouping of multiple counts of child pornography trafficking, receipt, and possession. Option One would allow grouping of child pornography trafficking and possession counts pursuant to §3D1.2(d). This grouping provision does not require a determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction. Option Two would not permit the grouping of multiple counts of child pornography trafficking and possession pursuant to §3D1.2. This option is based on the premise that multiple acts of possession or trafficking represent separate instances of fear and risk of harm, and would require the assignment of units pursuant to §3D1.4.*

Proposed Amendment:

Option 1: Allow grouping of child pornography receipt and possession counts under §3D1.2(d):

§3D1.2. Groups of Closely Related Counts

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

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

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§§2F1.1, 2F1.2;
§§2G2.2, 2G2.4;
§2K2.1;

* * *

Option Two: Do not allow grouping of child pornography and possession counts:

§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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Commentary

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Application Notes:

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

Similarly, [multiple counts involving the exploitation of the same minor are not to be grouped under §3D1.2 and] counts involving the production of material involving the exploitation of a minor are not to be grouped under §3D1.2 with counts involving the trafficking of material involving the exploitation of a minor, even in cases in which the production count and the trafficking count involve the same minor (i.e., cases that involve both a count of producing material involving the exploitation of a minor and a count of trafficking in the same material). In such cases, the harm involved in producing the material is separate and distinct from the harm involved in trafficking in that material.

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

Commentary

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Application Notes:

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4. *For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving trafficking in, receiving, transporting, shipping, advertising, or possessing with the intent to distribute, material involving the exploitation of a minor are not to be grouped under §3D1.2 (Groups of Closely Related Counts). Such counts do not involve "substantially the same harm" for purposes of §3D1.2.*

Similarly, such counts are not to be grouped under §3D1.2 with counts involving the production of material involving the exploitation of a minor, even in cases in which the production count and the trafficking count involve the same minor (i.e., cases that involve both a count of producing material involving the exploitation of a minor and a count of trafficking in the same material). In such cases, the harm involved in producing the material is separate and distinct from the harm involved in trafficking in that material.

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

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Commentary

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Application Notes:

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3. *For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving the possession of material involving the exploitation of a minor are not to be grouped under §3D1.2 (Groups of Closely Related Counts). Such counts do not involve "substantially the same harm" for purposes of §3D1.2.*

§3D1.2. Groups of Closely Related Counts

* * *

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

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Specifically excluded from the operation of this subsection are:

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§§2G1.1, 2G2.1, 2G2.2, 2G2.4;

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(C) ENHANCEMENT FOR TRANSPORTATION OFFENSES AND OTHER AMENDMENTS

Synopsis: *Part C of the proposed amendment responds to the directive in the Act to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. Pursuant to the authority in the Act and pursuant to the Commission's general authority under 28 U.S.C. § 994 to promulgate guideline amendments, the amendment proposes a number of offense level increases in §2A3.2, the "statutory rape" guideline, and in §2A3.4, the abusive sexual contact guideline. Specifically, the amendment proposes to do the following:*

(1) Distinguish between chapter 117 violations that involve the commission of an underlying sexual act and those violations (e.g., sting cases) that do not, by providing in an alternative base offense level in §2A3.2 three additional levels for chapter 117 violations that also involve an underlying sexual act.

(2) Provide an across-the-board three-level increase in the base offense level for offenses sentenced under §2A3.2, such that the base offense level (A) for statutory rape in its most basic form unaccompanied by aggravating conduct is increased from level 15 to level 18; (B) for a chapter 117 violation (unaccompanied by a sexual act) is increased from level 18 to level 21; and (C) a chapter 117 violation (accompanied by a sexual act) results in a base offense level of level 24. This increase also maintains the proportionality between §§2A3.2 and 2G2.2.

(3) Provide an enhancement of 4 levels if the offense involved incest as an additional enhancement to the two-level enhancement for custody, care, or supervisory control, and provide in the Commentary a definition of "incest" that tracks that found in the Model Penal Code. A review of the 228 case files from FY 99 that involved sex crimes against children revealed that 26% of the offenders were parents or relatives of the victim. Additionally, 45 other offenders were either the boyfriend/girlfriend of the parent, or a step-parent or step grandparent of the victim.

(4) Amend the Statutory Index to include a reference to the statutory rape guideline, §2A3.2, for chapter 117 offenses. Often in "sting" cases, the defendant travels across state lines in order to meet a minor for what the defendant believes will be an encounter involving consensual sexual activity.

(5) Make conforming changes to the existing three-level decrease for chapter 117 violations that do not include aggravating conduct so that such violations receive the offense level applicable to statutory rape in its basic form.

(6) Make technical changes (such as the addition of headings and the reordering of applications notes) not intended to have substantive effect.

In addition, the amendment proposes to amend the guideline covering the production of child pornography, §2G2.1, to provide additional enhancements to account for aggravating conduct that may be present in such cases, specifically, the production of sadistic or masochistic material, serious bodily injury, or the trafficking of produced materials. These amendments also are intended to restore proportionality in sentences between child pornography production offenses and child pornography trafficking offenses.

Proposed Amendment:

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

(b) Specific Offense Characteristics

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(3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by 2 levels. If the offense involved incest, increase by an additional 2 levels.

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Commentary

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Application Notes:

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1. Definitions.—For purposes of this guideline—

"Incest" means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (e.g., parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.

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

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

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

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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

(a) Base Offense Level:

- (1) [24], if the offense involved a violation of chapter 117 of title 18, United States Code and the commission, or attempted commission, of a sexual act;
- (+2) 18[21], if the offense involved a violation of chapter 117 of title 18, United States Code but not the commission, or not the attempted commission, of a sexual act; or
- (-3) [15][18], otherwise.

(b) Specific Offense Characteristics

- (1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels. If the offense involved incest, increase by an additional 2 levels.

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- ~~(4) If (A) subsection (a)(1) applies; and (B) none of subsections (b)(1) through (b)(3) applies, decrease by [3] levels.~~

- (4) If (A) none of subsections (b)(1) through (b)(3) applies; and (B) subsection (a)(1) applies, decrease by 6 levels.

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline—

"Incest" means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (e.g., parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.

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

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

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

"Victim" means (A) an individual who, except as provided in subdivision (B), had not attained the age of 16 years; or (B) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.

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).~~

32. Custody, Care, and Supervisory Control Enhancement.—Subsection (b)(1)(A) 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.

43. Abuse of Position of Trust.—If the enhancement in subsection (b)(1)(A) or (B) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

54. Misrepresentation of Identity.—

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65. Use of Computer or Internet-Access Device.—

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76. Cross Reference.—

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87. Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(A) ~~If the~~The defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense,~~an upward departure may be warranted.~~

(B) 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.

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

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(b) Specific Offense Characteristics

(3) If the victim was in the custody, care, or supervisory control of the defendant, increase by 2 levels. If the offense involved incest, increase by an additional 2 levels.

(6) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline—

"Incest" means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (e.g., parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.

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

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

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APPENDIX A - STATUTORY INDEX

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| 18 U.S.C. § 2421 | 2G1.1, 2A3.2 |
| 18 U.S.C. § 2422 | 2G1.1, 2A3.2 |
| 18 U.S.C. § 2423(a) | 2G1.1, 2A3.2 |
| 18 U.S.C. § 2423(b) | 2A3.1, 2A3.2, 2A3.3 |
| 18 U.S.C. § 2425 | 2G1.1, 2A3.2 |

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§2G2.1. **Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production**

- (a) Base Offense Level: 27
- (b) Specific Offense Characteristics
 - (1) 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.
 - (2) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
 - (3) If, for the purpose of producing sexually explicit material, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an Internet-access device to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by 2 levels.
 - (4) If (A) the offense involved the production of sexually explicit material that portrays sadistic or masochistic conduct or other depictions of violence; or (B) the victim sustained serious bodily injury, increase by [2][4] levels.
 - (5) If the offense involved any distribution of the sexually explicit material, increase by [2] levels.
- (c) Special Instruction
 - (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

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Commentary

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Application Notes:

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

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

"Distribution" has the meaning given that term in Application Note 1 of §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or

Issue for Comments:

1. *The Commission invites comment on whether and, if so, to what extent, the guidelines covering sexual abuse, §§2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), should be amended to provide an enhancement if the offense involved the transportation, persuasion, inducement, enticement, or coercion of a child to engage in prohibited sexual conduct. Do enhancements added to these guidelines (that became effective November 1, 2000) for use of a computer and/or misrepresentation of a criminal participant's identity, or for "undue influence" sufficiently provide an appropriate enhancement, or is an additional enhancement in these guidelines for other aggravating conduct needed?*
2. *The Commission invites comment on whether and, if so, to what extent, the guidelines covering sexual abuse, §§2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), should be amended to provide an enhancement in order to maintain proportionality between these guidelines and the guidelines covering pornography offenses, particularly, 2G2.2 (Trafficking In Material Involving the Sexual Exploitation of a Minor).*