

APPENDIX E
SOURCE OF CURRENT §2G2.2 BASE OFFENSE LEVELS
AND SPECIFIC OFFENSE CHARACTERISTICS

Guideline Provision	Source	Effective Date
Base Offense Level for Trafficking and Receipt; §2G2.2(a)(2)	<u>Trafficking and Receipt Offenses</u> (Level 22) — Commission initiative ¹ (Prior base offense level 17 pursuant to specific congressional directive ²)	2004 ⁵
Base Offense Level for Possession; §2G2.2(a)(1)	<u>Possession Offenses</u> (Level 18) — Commission initiative ³ (Prior base offense level 15 pursuant to specific congressional directive ⁴)	2004 ⁶
Simple Receipt, 2-level decrease; §2G2.2(b)(1)	<u>Trafficking and Receipt Offenses</u> — Commission initiative ⁷	2004 ⁸
Prepubescent Minor or Minor Under 12 years; 2-level increase; §2G2.2(b)(2)	<u>Trafficking, Receipt and Possession Offenses</u> — Commission initiative ⁹	1988 ¹⁰
Distribution; §2G2.2(b)(3)	<u>Trafficking and Receipt Offenses</u> — Commission initiative at guideline promulgation ¹¹	1987
	Amended by congressional directive ¹² (graduated offense levels — Commission initiative ¹³)	2000 ¹⁴
S&M, 4-levels; §2G2.2(b)(4)	<u>Trafficking and Receipt Offenses</u> — originally Commission initiative ¹⁵	1990 ¹⁷
	<u>Possession Offenses</u> — direct congressional amendment ¹⁶	2003 ¹⁸
Pattern of Activity; §2G2.2(b)(5)	<u>Trafficking and Receipt Offenses</u> — specific congressional directive ¹⁹ [the definition of “pattern of activity” in application note requiring two or more separate instances of abuse or exploitation — Commission initiative ²⁰]	1991 ²³
	Definition of “pattern of activity” amended on Commission initiative ²¹	1996 ²⁴
	<u>Possession Offenses</u> — Commission initiative ²²	2004 ²⁵
Use of a Computer; §2G2.2(b)(6)	<u>Trafficking and Receipt Offenses</u> — specific congressional directive ²⁶	1996 ²⁹
	<u>Possession Offenses</u> — specific congressional directive (applicability of the enhancement — Commission initiative) ²⁷	1996 ³⁰
	Expansion of enhancement — Commission initiative ²⁸	2004 ³¹
Number of Images; §2G2.2(b)(7)	<u>Trafficking and Receipt Offenses</u> — direct congressional amendment ³² (definition of “images” in application note — Commission initiative ³³)	2003 ³⁶
	<u>Possession Offenses</u> — direct congressional amendment ³⁴ (definition of “images” in application note — Commission initiative ³⁵)	2003 ³⁷

ENDNOTES

1. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003). The Act contained a new 5 year mandatory minimum for trafficking and receipt offenses, and a general directive to the Commission to “review and, as appropriate, amend [the guidelines]. . . . to ensure that the guidelines are adequate to deter and punish conduct” including trafficking and receipt offenses. The Reason for Amendment accompanying Amendment 664 states that the Commission determined a base offense level 22 was appropriate because it would be combined with several specific offense characteristics which were expected to apply in almost every case (*e.g.*, use of a computer, material involving children under the age of 12 years, and the number of images). USSG, App C, amendment 664 (Nov. 1, 2004).
2. Sex Crimes Against Children Prevention Act, Pub. L. No. 104–71, 109 Stat. 774 (1995). The Act contained a directive to the Commission to “amend the sentencing guidelines to . . . increase the base offense level for [child pornography offenses] by at least 2 levels” when the base offense level was 15 for trafficking and receipt offenses. The base offense level 15 was set pursuant to a prior directive in the Treasury, Postal Services and General Government Appropriations Act of 1992, Pub. L. No. 102–141, 105 Stat. 834 (1991), which stated “[p]ursuant to its authority under section 994 of title 28, United States Code, the Sentencing Commission shall promulgate guidelines, or amend existing or proposed guidelines as follows: (A) Guideline 2G2.2 to provide a base offense level of not less than 15.”
3. PROTECT Act, Pub. L. No. 108–21, 117 Stat. 650 (2003). The Act contained a general directive to the Commission to “review and, as appropriate, amend [the guidelines]. . . . to ensure that the guidelines are adequate to deter and punish conduct.” The Reason for Amendment accompanying Amendment 664 states that “the Commission increased the base offense level for possession offenses from level 15 to level 18 because of the increase in the statutory maximum term of imprisonment from 5 to 10 years, and to maintain proportionality with receipt and trafficking offenses.” USSG, App C, amendment 664 (Nov. 1, 2004).
4. Sex Crimes Against Children Prevention Act, Pub. L. No. 104–71, 109 Stat. 774 (1995). The Act contained a directive to the Commission to “amend the sentencing guidelines to . . . increase the base offense level for [child pornography offenses] by at least 2 levels” when the base offense level was 13 for possession offenses. The base offense level 13 was set pursuant to a prior directive in the Treasury, Postal Services and General Government Appropriations Act of 1992, Pub. L. No. 102–141, 105 Stat. 834 (1991), which stated the Commission “shall promulgate guidelines, or amend existing or proposed guidelines as follows . . . (C) Guideline 2G2.4 to provide a base offense level of not less than 13 . . .”
5. USSG, App C, amendment 664 (Nov. 1, 2004).
6. *Id.*
7. This specific offense characteristic only applies to trafficking and receipt offenses. In the Reason for Amendment accompanying Amendment 664, the Commission stated its “review of these cases indicated the conduct involved in such ‘simple receipt’ cases in most instances was indistinguishable from ‘simple possession’” cases. USSG App. C, amendment 664 (Nov. 1, 2004).
8. USSG App. C, amendment 664 (Nov. 1, 2004).
9. When first promulgated in 1987, §2G2.2 contained a specific offense characteristic for a 2-level increase if the image depicted a child under 12 years of age. Pursuant to testimony received at a public hearing in 1988, the Commission expanded the offense characteristic to refer to a prepubescent minor or a minor under 12 years as a way to “provide an alternative measure to be used in determining whether the material involved an extremely young minor for cases in which the actual age of the minor is unknown.” See Notice of Submission of Regular Amendments to the Sentencing Guidelines and Commentary to the Congress for Review, 53 Fed. Reg. 15,530 (Apr. 29, 1988); USSG App. C, amendment 31 (June 15, 2008). When the Commission promulgated §2G2.4 in 1991, it included the same specific offense characteristic for a prepubescent minor or a minor under 12 years. USSG, App. C, amendment 372 (May 1, 1991).

10. USSG, App. C, amendment 31 (June 15, 1988).

11. The original specific offense characteristic stated “if the offense involved distribution, increase by the number of levels . . . corresponding to the retail value of the material, but in no event less than 5 levels.” The Commission defined “distribution” to be “any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.” USSG §2G2.2 (1987).

12. The Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105–314, 112 Stat. 2974, §506 (1998) included a directive to the Commission to “(1) review the . . . guidelines relating to the distribution of pornography . . . and (2) upon completion of the review . . . promulgate such amendments to the Federal Sentencing Guidelines as are necessary to clarify that the term ‘distribution of pornography’ applies to the distribution of pornography – (A) for monetary remuneration; or (B) for a nonpecuniary interest.”

13. The Reason for Amendment accompanying Amendment 592 states:

the amendment modifies the enhancement in §2G2.2 . . . relating to the distribution of child pornographic material, . . . and (1) modifies the definition of “distribution” to mean any act, including production, transportation, and possession with intent to distribute, related to the transfer of the material, regardless of whether it was for pecuniary gain; and (2) provides for varying levels of enhancement depending upon the purpose and audience of the distribution. These varying levels are intended to respond to increased congressional concerns, as indicated in the legislative history of the Act, that pedophiles, including those who use the Internet, are using child pornographic and obscene material to desensitize children to sexual activity, to convince children that sexual activity involving children is normal, and to entice children to engage in sexual activity. USSG, App. C, amendment 592 (Nov. 1, 2000).

Further, in 2004, the Commission added a new subsection to the specific offense characteristic for distribution on its own initiative. USSG, App. C, amendment 664 (Nov. 1, 2004).

14. USSG, App. C, amendment 592 (Nov. 1, 2000).

15. The Commission’s 1990 Staff working group report included information that the distribution of adult obscenity guideline at §2G3.1 included a specific offense characteristic for sadistic and masochistic conduct, and the proposed SOC was considered in order to accord consistent treatment under both guidelines. See 55 Fed. Reg. 5, 718, at 5,729-30 (Feb. 16, 1990). When Congress directly amended the then-possession guideline at §2G2.4(b)(4) in the PROTECT Act to include a specific offense characteristic for sadistic and masochistic conduct, however, the enhancement for sadistic and masochistic conduct for the trafficking and receipt guideline became codified.

16. PROTECT Act, Pub. L. No. 108–21, 401(i), 117 Stat. 650 (2003). The Act amended then §2G2.4(b)(4) to state “If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.” It further directed that with respect to this enhancement at §2G2.4, the Commission “shall not promulgate any amendments that, with respect to such cases, would result in sentencing ranges that are lower than those that would have applied” based on the directive. PROTECT Act, Pub. L. No. 108–21, 401(j), 117 Stat. 650 (2003).

17. USSG, App. C, amendment 325 (Nov. 1, 1990).

18. USSG, App. C, amendment 649 (April 30, 2003).

19. The Treasury, Postal Services and General Government Appropriations Act of 1992, Pub. L. No. 102–141, 105 Stat. 834 (1991), directed that the Commission “shall promulgate guidelines, or amend existing . . . guidelines . . . to provide at least a 5 level increase for offenders who have engaged in a pattern of activity involving the sexual abuse or exploitation of a minor.”

20. The directive did not define “pattern of activity,” but on its own initiative, the Commission added Application Note 4 stating a “pattern of activity involving the sexual abuse or exploitation of a minor,” for purposes of [then] subsection (b)(4) means any combination of two or more separate instances of the sexual abuse or the sexual exploitation of a minor, whether involving the same or different victims.” USSG §2G2.2(b)(4) (1991).

21. The Reason for Amendment accompanying Amendment 537 states that the Commission revised the definition to clarify that:

“sexual abuse or exploitation,” requires that the defendant personally had participated in such conduct. The amendment defines “sexual abuse or exploitation” to mean conduct constituting criminal sexual abuse, sexual exploitation, or abusive sexual contact and to exclude trafficking in child pornography. These revisions are consistent with *United States v. Chapman*, 60 F.3d 894 (1st Cir. 1995) and *United States v. Ketcham*, 80 F.3d 789 (3d Cir. 1996), both of which held that the defendant’s transportation or distribution of child pornography is not sexual exploitation within the meaning of the “pattern of activity” enhancement in §2G2.2(b)(4). In addition, the amendment clarifies that the “pattern of activity” may include acts of sexual abuse or exploitation that were not committed during the course of the offense or that did not result in a conviction. This revision responds in part to the holding in *Chapman*, 60 F.3d at 901, that the “pattern of activity” enhancement is inapplicable to past sexual abuse or exploitation unrelated to the offense of conviction. The amended language expressly provides that such conduct may be considered. Accordingly, the conduct considered for purposes of the “pattern of activity” enhancement is broader than the scope of relevant conduct typically considered under §1B1.3 (Relevant Conduct).

22. When the Commission consolidated §§2G2.2 and 2G2.4 in 2004, the Commission made the specific offense characteristic for pattern of activity applicable to possession offenses. USSG App. C, amendment 664 (Nov. 1, 2004).

23. USSG, App. C, amendment 435 (Nov. 1, 1991).

24. USSC, App. C, amendment 527 (Nov. 1, 1996).

25. USSG, App. C, amendment 664 (Nov. 1, 2004).

26. In the Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104–71, 109 Stat. 774 (1995), Congress directed the Commission to “increase the base offense level by at least 2 levels . . . if a computer was used to transmit the notice or advertisement to the intended recipient or to transport or ship the visual depiction.” The Commission determined that the enhancement in §2G2.2 would apply to the transmission of the material or of the notice or advertisement of the material. USSG, App. C, amendment 537 (Nov. 1, 1996).

27. The Commission determined that the enhancement in 2G2.4 would apply only if the defendant’s possession of the material resulted from the defendant’s use of a computer. USSG, App. C, amendment 537 (Nov. 1, 1996).

28. The Commission expanded the specific offense characteristic to include the use of an interactive computer service, as defined in the Communications Act of 1934 (47 U.S.C. § 230(f)(2)). USSG, App. C, amendment 664 (Nov. 1, 2004).

29. USSG, App. C, amendment 537 (Nov. 1, 1996).

30. *Id.*

31. USSG, App. C, amendment 664 (Nov. 1, 2004).

32. In the PROTECT Act, Congress directly amended §2G2.2(b)(6) to provide the current image table. Pub. L. No. 108–21, 117 Stat. 650 (2003).

33. The Reason for Amendment accompanying Amendment 664 states “the [PROTECT Act] did not provide a definition of “image,” which raised questions regarding how to apply the specific offense characteristic. This amendment defines the term “image” and provides an instruction regarding how to apply the specific offense characteristic to videotapes. Application Note 4 states that an “image” means any visual depiction described in 18 U.S.C. § 2256(5) and (8) and instructs that each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered one image. Furthermore, the application note provides that each video, video-clip, movie, or similar recording shall be considered to have 75 images for purposes of the specific offense characteristic.” USSG, App. C, amendment 664 (Nov. 1, 2004).

34. PROTECT Act, Pub. L. No. 108–21, 117 Stat. 650 (2003).

35. USSG, App. C, amendment 664 (Nov. 1, 2004).

36. USSG, App. C, amendment 649 (April 30, 2003).

37. *Id.*

