

2017  
National  
Seminar

## Selected Sex Offense Statutes and Guidelines: Production of Child Pornography, Failure to Register as Sex Offender, & §4B1.5

This primer provides an overview of the federal offenses of Production of Child Pornography and Failure to Register as a Sex Offender. The primer will discuss the statutes and relevant guidelines, and provides guideline application pointers.

### *Production of Child Pornography*

- **Main statute:** 18 U.S.C. § 2251
- **Statutory Penalties:** 15 Year Mandatory Minimum with 30 Year Statutory Maximum
- **Recidivist Enhancement:** 25 Year Mandatory Minimum with 50 Year Statutory Maximum
- **Guideline:** §2G2.1
- **Guideline Application Pointers:** There are Four Commonly Applied Specific Offense Characteristics:
  - (b)(1) age of the victim
  - (b)(2) defendant engaged in a sex act or contact
  - (b)(4) S/M or other depictions of violence
  - (b)(5) victim in the custody or care of the defendant

The guideline contains a special instruction (§2G2.1(d)) if the offense involves more than one minor victim. The instruction provides that if the offense involved the exploitation of more than one minor, the court shall apply multiple counts as if the exploitation of each minor had been contained in a separate count of conviction.

### *Failure to Register as Sex Offender*

- **Statute:** 18 U.S.C. § 2250(a)
- **Statutory Penalties:** 10 Year Statutory Maximum
- **Guideline:** §2A3.5
- **Base Offense Level (BOL):** Determined by Classification of Sex Offender
  - BOL 16: Tier III (Aggravated sex abuse, abusive sex contact against minor under 13, kidnapping not by parent;)
  - BOL 14: Tier II (Sex trafficking, coercion and enticement, transportation for sexual activity, abusive sexual contact, solicitation of minor for prostitution, distribution or production of child pornography)
  - BOL 12: Tier I (Other than Tier II or Tier III offender)
- (b)(1) if while in failure to register status, the defendant committed a sex offense against a minor increase by 6 levels if an adult, or 8 levels if committed against a minor
- (b)(2) if defendant voluntary corrected failure to register or attempted to register, decrease by 3 levels
- **Guideline Application Pointers:** To determine which Tier applies, courts typically must use the categorical approach. (See *United States v. Morales*, 800 F.3d 1 (1st Cir. 2015), *United States v. Berry*, 814 F.3d 192 (4th Cir. 2016), *United States v. Rogers*, 804 F.3d 1233 (7th Cir. 2015), and *United States v. White*, 782 F.3d 1118 (10th Cir. 2015))



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## *Repeat and Dangerous Sex Offender against a Minor*

- **Guideline:** §4B1.5

(A) If defendant's offense of conviction is a covered sex offense and defendant committed instant offense subsequent to sustaining at least one sex offense conviction, the offense level determined under Chapter Two and Three or according to a table at §4B1.5(b) based on the statutory and the defendant's criminal history must be at least CHC.

(B) If the defendant's instant offense of conviction is a covered sex crime and the defendant engaged in a pattern of activity involving prohibited sexual conduct, add five levels to the offense level calculated under Chapters 2 and 3.

- **Guideline Application Pointers:**

- If defendant qualifies under subsection (A), do not apply subsection (B). The court also may not use the greater of (A) or (B).
- Court should apply the categorical approach to determine whether defendant's prior conviction is a sex offense conviction under §4B1.5(a) (*See U.S. v. Dahl*, 833 F.3d 345 (3d Cir. 2016)).
- Under §4B1.5(a):
  - There is no time limit on a prior sex offense conviction. (*See U.S. v. Babcock*, 753 F.3d 587 (6th Cir. 2014)).
  - Prior sex offense conviction must be against a minor and not against an adult (*See U.S. v. Viren*, 828 F.3d 535 (7th Cir. 2016)).
- Under §4B1.5(b):
  - An occasion of "prohibited sexual conduct" may be considered without regard to whether the occasion occurred during of the instant offense (*See U.S. v. Evans*, 782 F.3d 1115 (10th Cir. 2015 and *U.S. v. Gibson*, 840 F.3d 512 (8th Cir. 2016)).
  - An occasion of prohibited sexual conduct" may be considered without regard to whether there was a conviction for that conduct.
  - Attempted production of child pornography is prohibited sexual conduct (*See U.S. v. Morgan*, 842 F.3d 1370 (8th Cir. 2016)), and attempted attempts to meet up with a minor can be prohibited sexual conduct (*See U.S. v. Syed*, 616 F. App'x 973 (11th Cir. 2015)).

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.