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UNITED STATES  
SENTENCING COMMISSION

AMENDMENTS TO THE  
SENTENCING GUIDELINES

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INTERIM PUBLICATION

**Incorporating guideline amendments effective November 1, 1996.  
To be used in conjunction with the 1995 Guidelines Manual until  
publication of the 1996 manual.**

**AMENDED GUIDELINES**

[Sections 2G1.1 and 2G1.2 are deleted in their entirety and replaced with the following guideline]

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

- (a) Base Offense Level: **14**
- (b) Specific Offense Characteristics
  - (1) If the offense involved 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 **9** levels; (B) attained the age of twelve years but not attained the age of sixteen years, increase by **7** 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.
- (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).
  - (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).
- (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(a).

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.

"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.

"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.

2. The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).
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 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.
8. 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. In such case, the guideline for the underlying prohibited sexual conduct is to be used; e.g., §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.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 157 and 158); November 1, 1990 (see Appendix C, amendment 322); November 1, 1996 (see Appendix C, amendment 538).

**§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 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.
- (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.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2251(a), (b), (c)(1)(B), 2258(a), (b).

Application Notes:

1. *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.*
2. *Subsection (b)(2) is intended to have broad application and includes offenses involving a minor 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 child and not simply to the legal status of the defendant-child relationship.*
3. *If the adjustment in subsection (b)(2) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 161); November 1, 1990 (see Appendix C, amendment 324); November 1, 1991 (see Appendix C, amendment 400); November 1, 1996 (see Appendix C, amendment 537).

**§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**

- (a) Base Offense Level: **17**
- (b) Specific Offense Characteristics
  - (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.
  - (2) If the offense involved distribution, 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.
  - (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by **4** levels.
  - (4) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by **5** levels.
  - (5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by **2** levels.
- (c) Cross Reference
  - (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor 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) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2251(c)(1)(A), 2252(a)(1)-(3), 2258(a), (b).

Application Notes:

1. For purposes of this guideline—

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

*"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, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. "Sexual abuse or*

*exploitation" does not include trafficking in material relating to the sexual abuse or exploitation of a minor.*

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

2. *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)(4) 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)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.*

*Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

3. *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 minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.*

[Delete Notes 4 and 5]

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 31); November 1, 1990 (see Appendix C, amendment 325); November 1, 1991 (see Appendix C, amendment 372); November 27, 1991 (see Appendix C, amendment 435); November 1, 1996 (see Appendix C, amendment 537).

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

- (a) Base Offense Level: **15**
- (b) Specific Offense Characteristics
  - (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by **2** levels.
  - (2) If the offense involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor, increase by **2** levels.
  - (3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by **2** levels.
- (c) Cross References
  - (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor 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 trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §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

Statutory Provision: 18 U.S.C. § 2252(a)(4).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 372). Amended effective November 27, 1991 (see Appendix C, amendment 436); November 1, 1996 (see Appendix C, amendment 537).

#### **§3A1.4. Terrorism**

- (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by **12** levels; but if the resulting offense level is less than level **32**, increase to level **32**.

- (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes:

1. Subsection (a) increases the offense level if the offense involved, or was intended to promote, a federal crime of terrorism. "Federal crime of terrorism" is defined at 18 U.S.C. § 2332b(g).
2. Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

Historical Note: Effective November 1, 1995 (see Appendix C, amendment 526). Amended effective November 1, 1996 (see Appendix C, amendment 539).

**REASONS FOR AMENDMENTS**

537. Section 2G2.1(a) is amended by deleting "25" and inserting in lieu thereof "27".

Section 2G2.1(b) is amended by deleting:

- "(1) If the offense involved a minor under the age of twelve years, increase by 4 levels; otherwise, if the offense involved a minor under the age of sixteen years, increase by 2 levels."

and inserting in lieu thereof:

- "(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."

Section 2G2.1(b) is amended by inserting the following additional subdivision:

- "(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."

The Commentary to §2G2.1 captioned "Statutory Provisions" is amended by deleting "§ 2251(a), (b), (c)(1)(B)" and inserting in lieu thereof "§§ 2251(a), (b), (c)(1)(B), 2258(a), (b)".

Section 2G2.2(a) is amended by deleting "15" and inserting in lieu thereof "17".

Section 2G2.2(b) is amended by inserting the following additional subdivision:

- "(5) If a computer was used for the transmission of the material or a notice or advertisement of the material, increase by 2 levels."

The Commentary to §2G2.2 captioned "Statutory Provisions" is amended by inserting ", 2258(a), (b)" immediately before the period at the end.

The Commentary to §2G2.2 captioned "Application Notes" is amended by deleting:

1. 'Distribution,' as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.
2. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256."

and inserting in lieu thereof:

1. For purposes of this guideline—
  - 'Distribution' includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.
  - '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, abusive sexual contact of a minor, any similar offense under state law, or an attempt or conspiracy to commit any of the above offenses. 'Sexual abuse or exploitation' does not include trafficking in material relating to the sexual abuse or exploitation of a minor.
  - 'Sexually explicit conduct' has the meaning set forth in 18 U.S.C. § 2256.
2. 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)(4) 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)(4) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.



Prior convictions taken into account under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).".

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 3 by deleting "(c)(1)" and inserting in lieu thereof "subsection (c)(1)".

The Commentary to §2G2.2 captioned "Application Notes" is amended by deleting:

- "4. `Pattern of activity involving the sexual abuse or exploitation of a minor,' for the purposes of 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.
5. If the defendant sexually exploited or abused a minor at any time, whether or not such sexual abuse occurred during the course of the offense, an upward departure may be warranted. In determining the extent of such a departure, the court should take into consideration the offense levels provided in §§2A3.1, 2A3.2, and 2A3.4 most commensurate with the defendant's conduct, as well as whether the defendant has received an enhancement under subsection (b)(4) on account of such conduct."

Section 2G2.4(a) is amended by deleting "13" and inserting in lieu thereof "15".

Section 2G2.4(b) is amended by inserting the following additional subdivision:

- "(3) If the defendant's possession of the material resulted from the defendant's use of a computer, increase by 2 levels."

This is a four-part amendment. First, the amendment implements the congressional directives in section 2 of the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71, 109 Stat. 774, by providing a two-level enhancement above the currently prescribed offense level for offenses involving the sexual exploitation of minors. The two-level enhancement is provided in the base offense levels under §§2G2.1, 2G2.2, and 2G2.4.

Second, the amendment implements the congressional directive in section 3 of the above-noted Act by providing a two-level enhancement for offenses involving the sexual exploitation of a minor if a computer was used to transmit certain notices or advertisements of material involving minors engaged in sexually explicit conduct or to transport or ship that material. The enhancement in §2G2.2(b)(5) applies to the transmission of the material or of the notice or advertisement of the material. The enhancement in §2G2.4(b)(3) applies only if the defendant's possession of the material resulted from the defendant's use of a computer. In addition to these congressionally directed enhancements, the amendment adds a two-level enhancement under §2G2.1(b)(3) if a computer was used to solicit participation in sexually explicit conduct by or with a minor for the purpose of producing sexually explicit material.

Third, the amendment revises the Commentary to §2G2.2 to consolidate the definitions applicable to this guideline in the first application note and address several additional issues. The amendment revises the definition of "pattern of activity involving the sexual abuse or exploitation of a minor" to clarify that "sexual abuse or exploitation," for purposes of §2G2.2(b)(4), 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, No. 95-5002, 1996 WL 141628 (3d Cir. Mar. 29, 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). In addition, the amendment provides that an upward departure may be warranted if the defendant (1) did not engage in a "pattern of activity" but nevertheless abused a minor at any time, or (2) engaged in a "pattern of activity" but the enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation. In addition, the amendment clarifies that prior convictions counted as part of the "pattern of activity" also may be counted as part of the defendant's criminal history under Chapter Four, if those convictions meet the criteria set forth in the relevant guidelines of that chapter.

Fourth, the amendment makes the "Statutory Provisions" in the Commentary to §§2G2.1 and 2G2.2 more comprehensive by adding 18 U.S.C. § 2258(a) and (b) to the list of statutory provisions covered by those guidelines. **The effective date of this amendment is November 1, 1996.**

538. Sections 2G1.1 and 2G1.2 are deleted in their entirety as follows:

- "§2G1.1.        Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct
- (a)        Base Offense Level: 14
  - (b)        Specific Offense Characteristic
    - (1)        If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.
  - (c)        Special Instruction
    - (1)        If the offense involved the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422.

Application Notes:

1.        The base offense level assumes that the offense was committed for profit. In the infrequent case where the defendant did not commit the offense for profit and the offense did not involve physical force or coercion, the Commission recommends a downward departure of 8 levels.
2.        The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).
3.        `Coercion,' as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of transportation involving an adult, rather than a minor, this characteristic generally will not apply where the alcohol or drug was voluntarily taken.
4.        For the purposes of §3B1.1 (Aggravating Role), the persons transported are considered participants only if they assisted in the unlawful transportation of others.
5.        For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate victim. Consequently, multiple counts involving the transportation of different persons 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 person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction.

- §2G1.2.        Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct
- (a)        Base Offense Level: 16
  - (b)        Specific Offense Characteristics
    - (1)        If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.
    - (2)        If the offense involved the transportation of a minor under the age of twelve years, increase by 4 levels.
    - (3)        If the offense involved the transportation of a minor at least twelve years of age but under the age of sixteen years, increase by 2 levels.
    - (4)        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.

(c) Cross References

- (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor 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 to Commit Criminal Sexual Abuse).
- (3) If neither subsection (c)(1) nor (c)(2) is applicable, and the offense did not involve transportation for the purpose of prostitution, 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 the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction.

Commentary

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

Application Notes:

1. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Special instruction (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction.
2. The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).
3. 'Coercion,' as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol.
4. 'Sexually explicit conduct,' as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.
5. Subsection (b)(4) is intended to have broad application and includes offenses involving a minor 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 child and not simply to the legal status of the defendant-child relationship.
6. If the adjustment in subsection (b)(4) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
7. 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

minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct."

A replacement guideline with accompanying commentary is inserted as §2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct).

Chapter 1, Part A, Subpart 4(b) is amended in the fourth paragraph by deleting the third sentence as follows:

"For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved."

Section 3D1.2(d) is amended in the third paragraph by deleting "2G1.2,".

This is a three-part amendment. First, this amendment consolidates §§2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) and 2G1.2 (Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct) in furtherance of the Commission's goal to simplify the operation of the guidelines. The enhancement pertaining to the age of the victim in subsection (b)(2) is increased by two levels to reflect the two-level higher base offense level of former §2G1.2. The consolidated offense guideline incorporates the cross references of §2G1.2, provides a definition of the term "victim," and clarifies that the guideline covers offenses under 18 U.S.C. § 2423(a), but not 18 U.S.C. § 2423(b) (a statutory provision referenced in Appendix A to §§2A3.1, 2A3.2, and 2A3.3).

Second, this amendment implements the congressional directive in section 4 of the Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71, 109 Stat. 774, by providing a three-level increase in the enhancement for offenses involving the transportation of minors with intent to engage in prostitution or other prohibited sexual conduct. This three-level increase is provided in the specific offense characteristic pertaining to the age of the victim in subsection (b)(2) and is in addition to the two-level increase in this enhancement described in the first part of this amendment.

Third, this amendment addresses 18 U.S.C. § 2422(b), a new offense created by section 508 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. That offense makes it unlawful, in interstate or foreign commerce, including through the mail, or within the special maritime or territorial jurisdiction of the United States, to knowingly persuade, induce, entice, or coerce an individual under the age of 18 years to engage in prostitution or other prohibited sexual conduct. The amendment brings this new offense within the scope of the consolidated guideline. As revised, the guideline is broadly applicable to offenses that involve "promoting prostitution or prohibited sexual conduct." That term is defined to encompass conduct covered by the new Telecommunications Act offense as well as conduct previously covered by the guideline; i.e., transporting a person, or inducing a person to travel, for the purpose of prostitution or other prohibited sexual conduct. The effective date of this amendment is November 1, 1996.

539. Section 3A1.4 is amended in the title by deleting "International".

Section 3A1.4(a) is amended by deleting "international" and inserting in lieu thereof "a federal crime of".

The Commentary to §3A1.4 captioned "Application Notes" is amended in Note 1 in the first sentence by deleting "international" and inserting in lieu thereof "a federal crime of"; and in the second sentence by deleting "International" and inserting in lieu thereof "Federal crime of", and by deleting "2331" and inserting in lieu thereof "2332b(g)".

This amendment implements section 730 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1303. That section requires the Commission to amend the sentencing guidelines so that the adjustment in §3A1.4 (relating to international terrorism) applies more broadly to Federal crimes of terrorism, as defined in 18 U.S.C. § 2332b(g), and provides that the Commission shall have the authority to promulgate this amendment as an emergency amendment under procedures set forth in section 21(a) of the Sentencing Act of 1987. **The effective date of this amendment is November 1, 1996.**

540. Appendix A (Statutory Index) is amended by inserting at the appropriate place by title and section:

"8 U.S.C. § 1255a(c)(6)	2L2.1, 2L2.2",
"16 U.S.C. § 1372	2Q2.1",
"16 U.S.C. § 1387	2Q2.1",
"18 U.S.C. § 474A	2B5.1, 2F1.1",
"18 U.S.C. § 842(l)-(o)	2K1.3",
"18 U.S.C. § 844(b)	2K1.1",
"18 U.S.C. § 844(g)	2K1.3",
"18 U.S.C. § 844(n)	2X1.1",

"18 U.S.C. § 844(o)	2K2.4",
"18 U.S.C. § 956	2A1.5, 2X1.1",
"18 U.S.C. § 1073	2J1.5, 2J1.6",
"18 U.S.C. § 2319A	2B5.3",
"21 U.S.C. § 843(a)(4)(A)	2D1.13",
"26 U.S.C. § 7212(b)	2B1.1, 2B2.1, 2B3.1",
"41 U.S.C. § 423(e)	2C1.1, 2C1.7, 2F1.1",
"49 U.S.C. § 11902	2B4.1",
"49 U.S.C. § 11903	2F1.1",
"49 U.S.C. § 14103(b)	2B1.1",
"49 U.S.C. § 14904	2B4.1",
"49 U.S.C. § 14905(b)	2B1.1",
"49 U.S.C. § 14909	2J1.1",
"49 U.S.C. § 14912	2F1.1",
"49 U.S.C. § 16102	2F1.1",
"49 U.S.C. § 16104	2J1.1".

Appendix A (Statutory Index) is amended in the line referenced to 8 U.S.C. § 1328, by deleting "2G1.2";

in the line referenced to 18 U.S.C. § 32(a),(b) by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 37 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 115(a) by inserting ", 2X1.1" immediately following "2A6.1";

in the line referenced to 18 U.S.C. § 115(b)(2) by inserting ", 2X1.1" immediately following "2A4.1";

in the line referenced to 18 U.S.C. § 115 (b)(3) by inserting ", 2X1.1" immediately following "2A2.1";

in the line referenced to 18 U.S.C. § 491 by inserting "2B5.1," immediately before "2F1.1";

in the line referenced to 18 U.S.C. § 752 by inserting ", 2X3.1" immediately following "2P1.1";

in the line referenced to 18 U.S.C. § 1203 by inserting ", 2X1.1" immediately following "2A4.1";

in the line referenced to 18 U.S.C. § 2280 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 2281 by inserting ", 2X1.1" immediately following "2K1.4";

in the line referenced to 18 U.S.C. § 2421, by deleting ", 2G1.2";

in the line referenced to 18 U.S.C. § 2422, by deleting ", 2G1.2";

in the line referenced to 18 U.S.C. § 2423(a), by deleting "2G1.2" and inserting in lieu thereof "2G1.1";

by deleting:

"42 U.S.C. § 7413	2Q1.2, 2Q1.3",
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and inserting in lieu thereof:

"42 U.S.C. § 7413(c)(1)-(4)	2Q1.2, 2Q1.3
42 U.S.C. § 7413(c)(5)	2Q1.1";

in the line referenced to 49 U.S.C. § 11904 by deleting "2B4.1" and inserting in lieu thereof "2F1.1 (2B4.1 for offenses committed prior to January 1, 1996)";

in the line referenced to 49 U.S.C. § 11907(a) by inserting "(for offenses committed prior to January 1, 1996)" immediately following "2B4.1";

in the line referenced to 49 U.S.C. § 11907(b) inserting "(for offenses committed prior to January 1, 1996)" immediately following "2B4.1"; and

in the line referenced to 49 U.S.C. § 46502(a),(b) by inserting ", 2X1.1" immediately following "2A5.1".

The Commentary to §3B1.4 captioned "Application Notes" is amended in Note 1 by deleting "processing" and inserting in lieu thereof "procuring".

The Commentary to §5C1.2 captioned "Application Notes" is amended in Note 6 in the second sentence by deleting "a `organizer," and inserting in lieu thereof "an `organizer,".

This amendment makes Appendix A (Statutory Index) more comprehensive. References are added for additional offenses, including offenses enacted by the Marine Mammal Protection Act Amendments of 1994, Pub. L. 103-238, 108 Stat. 532; the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803; the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186; and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214. In addition, this amendment revises Appendix A to conform to the revision of existing statutes and reflect the consolidation of §§2G1.1 and 2G1.2. Finally, this amendment corrects clerical errors in §§3B1.4 and 5C1.2. **The effective date of this amendment is November 1, 1996.**