

Furthermore, this amendment addresses a number of issues in response to comments from the Department of Justice's Child Exploitation and Obscenity Section ("CEOS"), calls to the Commission's Helpline, and issues identified through case law regarding the sexual abuse and pornography guidelines. This proposed amendment makes changes to Chapter Two, Part A (Criminal Sexual Abuse), Chapter Two, Part G (Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity), §§ 3D1.2 (Groups of Closely Related Counts), 5B1.3 (Conditions of Probation), 5D1.2 (Term of Supervised Release), 5D1.3 (Conditions of Supervised Release), and Appendix A (Statutory Index). Several issues for comment regarding these guidelines and § 4B1.5 (Repeat and Dangerous Sex Offender Against Minors) follow the proposed amendments.

I. Child Pornography Offenses

This part of the proposed amendment covers offenses sentenced under §§ 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), 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), and 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). Issues for comment regarding the scope of specific enhancements in these guidelines and the application of the "image tables" and "sado-masochistic" enhancements at §§ 2G2.2 and 2G2.4 follow the proposed amendments.

A. Trafficking Offenses Under § 2G2.2

Section 103 of the PROTECT Act creates five year mandatory minimum terms of imprisonment for offenses related to trafficking of child pornography under 18 U.S.C. 2252(a)(1)–(3) and 2252A(a)(1), (2), (3), (4) and (6). This section also increases the statutory maximum terms of imprisonment for these offenses from 15 years to 20 years. As a result, this proposed amendment provides two options for increasing the base offense level in § 2G2.2 to reflect the new five year mandatory minimum term of imprisonment. Option 1 increases the base offense level for all offenses covered by this guideline from level 17

to level [22][24][25][26]. Option 2 provides alternative base offense levels of level [20][22][24] if the conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor and level [22][24][25][26] for all other offenses.

Section 503 of the PROTECT Act creates two new offenses in 18 U.S.C. 2252A. The new offense at 18 U.S.C. 2252A(a)(3)(B) prohibits advertising, promoting, presenting, distributing, or soliciting any material or purported material that the defendant believes, or intends to cause another to believe, contains actual or obscene child pornography. No actual materials need to exist in order to be convicted under this provision, thus even fraudulent offers to buy or sell such materials are covered under this provision. The new offense at 18 U.S.C. 2252A(a)(6) prohibits using any type of real or apparent child pornography to induce a child to commit a crime. Section 513(c) of the PROTECT Act directs the Commission to review and, as appropriate, amend the guidelines to ensure that penalties are adequate to deter and punish conduct that involves a violation of these new offenses. In addition, the Commission is directed to "consider the relative culpability of promoting, presenting, describing, or distributing material" in violation of 18 U.S.C. § 2252A(a)(3)(B) as compared to soliciting such material.

In response to this directive, several options are proposed. First, the amendment refers both of these new offenses to the trafficking guideline, § 2G2.2. Currently, § 2G2.2(b)(2) provides, for offenses involving distribution of child pornography, a two-to seven-level enhancement, depending on the type of distribution. Section 2G2.2(b)(2)(C) provides a five-level enhancement for offenses involving distribution to a minor, and § 2G2.2(b)(2)(D) provides a seven-level enhancement for "distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct." In response to the new offense at 18 U.S.C. 2252(A)(a)(b), the proposed amendment adds a six-level enhancement at § 2G2.2(b)(2) if the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity.

This proposal addresses in two ways the directive to compare the relative culpability of a defendant who promotes, presents, describes, or distributes child pornographic material to the culpability of a defendant who

merely solicits such material. First, the amendment provides an alternative base offense level "if (A) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (B) the defendant did not intend to traffic in, or distribute, such material." Second, the proposal amends § 2G2.2(b)(2) and the commentary of that guideline to make clear that the enhancement only applies to defendants whose conduct involves some form of distribution. In addition, this proposal adds commentary to the definition of "distribution" that makes clear that distribution does not include merely soliciting child pornography. Therefore, defendants who merely solicit child pornography will not be subject to the distribution enhancement at § 2G2.2(b)(2) unless their conduct involves some other act related to the transfer of material involving the sexual exploitation of a minor. Third, the amendment contains an option in the distribution enhancement at § 2G2.2(b)(2) to change the enhancement from "if the offense involved" to "if the defendant's conduct involved", which would limit the defendant's exposure under the enhancement to that of the defendant's own conduct.

Section 504 of the PROTECT Act creates a new offense at 18 U.S.C. 1466A that prohibits producing, distributing, receiving, possessing, or possessing with intent to distribute visual depictions (including drawings, cartoons, sculptures or paintings) that depict (1) a minor engaging in sexually explicit conduct and is obscene; or (2) an image that is, or appears to be, a minor engaging in sexually explicit conduct and lacks serious literary, artistic, political, or scientific value. Trafficking in such materials is covered under subsection (a) and carries a mandatory minimum term of imprisonment of five years and a maximum term of imprisonment of 20 years. Simple possession of such materials is covered under 18 U.S.C. 1466A(b) and punishable by a term of imprisonment of not more than ten years. Although 18 U.S.C. 1466A covers offenses of trafficking in, possession with intent to traffic in, and simple possession of, obscene material, section 504 of the PROTECT Act directs the Commission to punish these offenses consistent with child pornography trafficking offenses sentenced under § 2G2.2. By strictly complying with the language of this directive, however, the Commission would create an anomaly with regard to simple possession cases. For example, a defendant convicted of