

Creating a new guideline for these cases is intended to address more appropriately the issues specific to these offenses. In addition, the removal of these cases from § 2A3.2 will permit the Commission more appropriately to tailor the guideline to statutory rape cases.

Currently, § 2A3.2 provides alternative base offense levels of (1) level 24 for a Chapter 117 violation with a sexual act, (2) level 21 for a Chapter 117 violation with no sexual act (e.g., a sting case), or (3) level 18 for statutory rape with no travel. The PROTECT Act created a five year mandatory minimum term of imprisonment for 18 U.S.C. 2422 and 2423(a) and increased the statutory maximum term of imprisonment for these offenses from 15 to 30 years. However, the PROTECT Act did not increase the penalties for offenses under 18 U.S.C. 2243 (sexual abuse of a minor), which prohibits statutory rape.

The proposed guideline provides a base offense level of level [22][24][25][26] to account for the new mandatory minimum terms of imprisonment as required by the PROTECT Act. The guideline proposes a number of enhancements, including enhancements for offenses involving victims under the age of 12 years, commission of a sexual act, use of force, use of a computer, misrepresentation of identity, and custody issues. The proposed amendment also provides two options for a specific offense characteristic to address the conduct from 18 U.S.C. 2423(d), a new offense created by the PROTECT Act. Offenses under 18 U.S.C. 2423(d) prohibit a person, for the purpose of commercial advantage or private financial gain, from arranging, inducing, procuring, or facilitating the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in an illicit sexual act. The maximum term of imprisonment for an offense under 18 U.S.C. 2423(d) is 30 years.

The proposed amendment also makes conforming changes to § 2G1.1 (Promoting A Commercial Sex Act or Prohibited Sexual Conduct).

In addition, an issue for comment regarding which guideline is the most appropriate for violations of 18 U.S.C. 2425, use of interstate facilities to transport information about a minor, follows the proposed amendments.

### III. Misleading Domain Names

Section 521 of the PROTECT Act creates a new offense at 18 U.S.C. 2252B (misleading domain names on the Internet). Section 2252B of title 18, United States Code, prohibits the

knowing use of a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity, and offenses under this statute are punishable by a maximum term of imprisonment of two years, or if the misleading domain name was intended to deceive a minor into viewing material that is harmful to minors, a maximum term of imprisonment of four years. The proposed amendment refers the new offense to § 2G3.1 (Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor), modifies the title of the guideline to include "Misleading Domain Names", and provides a two-level enhancement if "the offense involved the use of a misleading domain name on the Internet with the intent to deceive a [minor][person] into viewing material on the Internet that is harmful to minors." In addition, the proposed amendment also provides enhancements for the following: (1) Distribution to a minor that was intended to persuade, induce, entice, or coerce a minor to engage in any illegal activity; (2) use of a computer or interactive computer service; and (3) material that was advertised or described to include minors engaged in sexually explicit conduct. Finally, the proposed amendment adds § 2G3.1 to the list of guidelines at subsection (d) of § 3D1.2 (Groups of Closely Related Counts). Grouping multiple counts of these offenses pursuant to § 3D1.2(d) is appropriate because typically these offenses, as well as other pornography distribution offenses, are continuous and ongoing in nature. The proposal makes other minor technical changes to the Commentary to make this guideline consistent with other Chapter Two, Part G guidelines.

### IV. Conditions of Supervised Release

In response to a circuit conflict, this amendment proposes amending §§ 5B1.3 (Conditions of Probation) and 5D1.3 (Conditions of Supervised Release) to add a condition "limiting [or prohibiting] the use of a computer or an interactive computer service" in cases in which the [defendant used][the offense involved the use of] such items. The circuit courts have disagreed over imposition of restrictive computer use and Internet-access conditions. Some circuit courts have refused to allow complete restrictions on computer use and Internet access (see *United States v. Sofsky*, 287 F.3d 122 (2nd Cir. 2002) (invalidating restrictions on computer use and Internet use); *United States v. Freeman*, 316 F.3d 386 (3d Cir. 2003) (same)), but some circuit courts have

upheld restrictions on computer use and Internet access with probation officer permission (see *United States v. Fields*, 324 F.3d 1025 (8th Cir. 2003) (upholding condition prohibiting defendant from having Internet service in his home and allowing possessing of a computer only if granted permission by his probation officer); *United States v. Walser*, 275 F.3d 981 (10th Cir. 2001) (prohibiting Internet use but allowing Internet use with probation officer's permission); *United States v. Zinn*, 321 F.3d 1084 (11th Cir. 2003) (same)). Other courts have permitted a complete ban on a convicted sex offender's Internet use while on supervised release. (See *United States v. Paul*, 274 F.3d 155 (5th Cir. 2001) (upholding complete ban of Internet use)).

In addition, this proposed amendment amends § 5D1.2 (Term of Supervised Release) to make the guideline consistent with changes provided in the PROTECT Act to the applicable terms of supervised release under 18 U.S.C. 3583 for sex offenders.

### V. Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) Amendments

Section 401(i)(2) of the PROTECT Act directs the Commission to "amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses" under sections 2243(b) (sexual abuse of a ward), 2244(a)(4) (sexual contact), and 2244(b) (sexual contact with a person without that person's permission) of title 18, United States Code. This amendment proposes several amendments to the guidelines in Chapter Two, Part A (Criminal Sexual Abuse) to address the directive and to account for proportionality issues created by the increases in the Chapter Two, Part G guidelines. In addition, the amendment makes changes to the Commentary to make the definitions in these guidelines consistent with the definitions in the pornography guidelines.

An issue for comment regarding proportionality issues and implementation of the directive follows the proposed amendments.

#### Proposed Amendment:

### I. Child Pornography Offenses

#### A. Trafficking Offenses Under § 2G2.2

Proposed Amendment: Section 2G2.2 is amended in the heading by inserting "Soliciting," after "Shipping,".

##### [Option 1:

Section 2G2.2(a) is amended by striking "17" and inserting "[22][24][25][26]".]

##### [Option 2: