

appraise or control conduct was substantially impaired by drugs or alcohol.

3. Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a victim less than 18 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 enhancement, 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.

(B) Inapplicability of Enhancement.—If the enhancement in subsection (b)(5) applies, do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(6) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act or prohibited sexual conduct. Subsection (b)(6) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in a commercial sex act or prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

5. Use of a Computer or an Interactive Computer Service.—Subsection (b)(7) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(7) would not apply to the use of a computer or an interactive computer service to obtain

airline tickets for the minor from an airline's Internet site.

6. Cross Reference.—The cross reference in subsection (c)(1) is to be construed broadly to include all instances in which the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a person less than 18 years of age to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. For purposes of subsection (c)(1), 'sexually explicit conduct' has the meaning given that term in 18 U.S.C. § 2256.

7. Special Instruction for Cases Involving Multiple Victims at Subsection (d)(1).—

(A) In General.—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, a commercial sex act 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 travel or transportation to engage in a commercial sex act or prohibited sexual conduct in respect to more than one victim, whether specifically cited in the count of conviction, each such victim shall be treated as if contained in a separate count of conviction.

(B) Definition of Victim.—For purposes of subsection (d)(1), a victim includes (A) an individual who had not attained the age of 18 years; or (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; and (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

8. Aggravating Role.—For the purposes of § 3B1.1 (Aggravating Role), a minor, as defined in this guideline, is considered a participant only if that minor assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another minor.

9. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than ten victims.

Background: This guideline covers offenses under Chapter 117 of title 18, United States Code, involving

transportation of a minor for illegal sexual activity through a variety of means.”.

Chapter Two, Part G, Subpart 1 is amended by striking § 2G1.1 and accompanying commentary in its entirety and inserting the following new guideline:

§ 2G1.1. Promoting a Commercial Sex Act or Prohibited Sexual Conduct With an Individual Other Than a Minor

(a) Base Offense Level: 14

(b) Specific Offense Characteristic

(1) If the offense involved the use of physical force, fraud, or coercion, increase by 4 levels.

(c) Cross Reference

(1) 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).

(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 a commercial sex act 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 (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense); 18 U.S.C. 1591 (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense), 2421 (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense), 2422(a) (only if the offense involved a victim who had attained the age of 18 years at the time of the commission of the offense).

Application Notes:

1. Definitions.—For purposes of this guideline:

‘Commercial sex act’ has the meaning given that term in 18 U.S.C. 1591(c)(1).

‘Prohibited sexual conduct’ has the meaning given that term in Application Note 1 of § 2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

‘Promoting a commercial sex act’ means persuading, inducing, enticing, or coercing a person to engage in a commercial sex act, or to travel to engage in, a commercial sex act.

‘Victim’ means a person transported, persuaded, induced, enticed, or coerced