

intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

3. Use of a Computer or an Interactive Computer Service.—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) 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.”

Section 2A3.4(a) is amended by striking subdivisions (1) and (2) in their entirety and inserting the following:

“(1) 16, if the offense involved conduct described in 18 U.S.C. 2241(a) or (b);

(2) 12, if the offense involved conduct described in 18 U.S.C. 2242;”.

Section 2A3.4(b) is amended by striking subdivisions (4) through (6) in their entirety and inserting the following:

“(4) If the offense involved the knowing misrepresentation of a participant’s identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.

(5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.”.

The Commentary to § 2A3.4 captioned “Application Notes” is amended in Note 1 by striking “For purposes of this guideline”—and all that follows through “18 years.” and inserting the following: “Definitions.—For purposes of this guideline:

‘Minor’ means (A) an individual who had not attained the age of 18 years; (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.”.

The Commentary to § 2A3.4 captioned “Application Notes” is amended in Note 2 by striking “The means set forth” and inserting “Application of Subsection (a)(1).—‘Conduct described’; by striking “are” and inserting “is”; and by striking “by” each place it appears.

The Commentary to § 2A3.4 captioned “Application Notes” is amended in Note 3 by striking “The means set forth” and inserting “Application of Subsection (a)(2).—‘Conduct described’; by striking “are” and inserting “is”; and by striking “by” each place it appears.

The Commentary to § 2A3.4 captioned “Application Notes” is amended in Note 4 by inserting before “Subsection (b)(3)” the following:

“Custody, Care, or Supervisory Control.—

(A) In General.—”;

and by adding at the end the following new paragraph:

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

The Commentary to § 2A3.4 captioned “Application Notes” is amended by striking Note 5 in its entirety; and by redesignating Notes 6 and 7 as Notes 5 and 6, respectively.

The Commentary to § 2A3.4 captioned “Application Notes” is amended in Note 5, as redesignated by this amendment, by inserting “Misrepresentation of a Participant’s Identity.—” before “The enhancement in subsection (b)(4) applies”; by striking “(A)” each place it appears; and by striking “; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct” each place it appears.

The Commentary to § 2A3.4 captioned “Application Notes” is amended in Note 6, as redesignated by this amendment, by striking the text and inserting the following:

“Use of a Computer or an Interactive Computer Service.—Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) 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.”.

The Commentary to § 2A3.4 captioned “Background” is amended by striking “For cases involving” and all that follows through “level 6.”.

#### Issues for Comment:

1. The PROTECT Act contains substantial increases in penalties for defendants sentenced under a number of the sexual abuse and pornography guidelines, including new mandatory minimum penalties. Do the increased penalties provided in the PROTECT Act

necessitate amending the base offense levels and specific offense characteristics in these guidelines to target more accurately the specific conduct of the defendant, thereby reserving the most severe penalties for the most serious offenders? Guidelines 2G2.1, 2G2.2, and 2G2.4 contain numerous specific offense characteristics addressing a wide variety of conduct involved in the production of, trafficking in, or possession of, child pornography. Currently, the application of these specific offense characteristics is based on either (A) the actions of only the defendant (*e.g.*, § 2G2.4(b)(3) provides a two-level increase “if the defendant’s possession of the material resulted from the defendant’s use of a computer”), or (B) all the conduct within the scope of relevant conduct (*e.g.*, § 2G2.1(b)(3) provides, in part, a two-level increase if the “offense involved” the use of a computer or Internet-access device). Specifically, the Commission requests comment on whether the specific offense characteristics in these guidelines should be based on all conduct within the scope of relevant conduct, or based on only the actions of the defendant; *i.e.*, should the enhancement apply if the defendant used or directed the use of a computer, rather than if others within the defendant’s jointly undertaken criminal activity used a computer?

2. Sections 401(i)(1)(B) and (C) of the PROTECT Act added new subsections in §§ 2G2.2 and 2G2.4 which provide a two- to five-level enhancement based on the number of child pornography “images” involved in the offense. See §§ 2G2.2(b)(6) and 2G2.4(b)(5). The PROTECT Act did not, however, define what constitutes an “image” for purposes of applying these new “image tables.” The Commission seeks comment regarding whether a definition of “image,” or instructions for counting images, for purposes of applying these subsections, is necessary. If the Commission provides instructions, how should the Commission decide how to count images? For example, is a photograph of two minors engaged in sexually explicit conduct to be considered one image, or two images? How should videos, films, or AVI files be considered? For example, if a video includes numerous scenes, each of which portrays the same minor engaging in sexually explicit conduct with a different adult, is each scene with a different adult to be considered a separate image?

3. The Commission seeks comment regarding whether it should address a circuit conflict involving the application