

of the specific offense characteristics in §§ 2G2.2 and 2G2.4 (effective April 30, 2003) for material portraying sadistic or masochistic conduct or other depictions of violence. Currently, the circuit courts are split on this issue, with three circuits finding that application of the enhancement requires proof that the defendant intended to possess or traffic material portraying sadistic or masochistic conduct, or other depictions of violence (see *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995); *United States v. Burnette*, 234 F.3d 1270 (6th Cir. 2000)(unpub.); *United States v. Tucker*, 136 F.3d 763 (11th Cir. 1998)), while the Seventh Circuit requires a strict liability standard (see *United States v. Richardson*, 238 F.3d 837 (7th Cir. 2001)). The Commission requests comment on whether it should resolve this circuit conflict. If so, how should the Commission handle this issue?

Further, the Commission seeks comment regarding whether it should provide a definition of sadistic or masochistic conduct or other depictions of violence for purposes of application of the specific offense characteristic. Circuit courts have struggled with whether material portraying sexual penetration of prepubescent minors is per se sadistic or violent; whether the enhancement requires that depictions contain material portraying bondage or restraints; whether sadistic or masochistic conduct requires purposefully degrading or humiliating conduct that causes mental, psychological, or emotional injury; or whether the conduct depicted must be painful, coercive, degrading, and abusive. See *United States v. Delmarle*, 99 F.3d 80 (2d Cir. 1996); *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995); *United States v. Turchen*, 187 F.3d 735 (7th Cir. 1999); *United States v. Parker*, 267 F.3d 839 (8th Cir. 2001); *United States v. Hall*, 312 F.3d 1250 (11th Cir. 2002). If the Commission provides a definition of these terms, what should that definition be?

Finally, some argue that material that depicts bestiality or excretory functions is just as harmful as material that depicts sadistic or masochistic conduct or other depictions of violence and should be treated accordingly. The Commission seeks comment regarding whether the enhancement for material portraying sadistic or masochistic conduct or other depictions of violence in §§ 2G2.2, 2G2.4, and 2G3.1 (as well as the proposed enhancement in § 2G2.1) should be expanded to include material portraying bestiality or excretory functions.

4. The Commission seeks comment regarding which guideline is the most appropriate for violations of 18 U.S.C. 2425, relating to use of interstate facilities to transport information about a minor. Section 2425 prohibits the use of interstate facilities to transmit the name, address, telephone number, social security number, or e-mail address of a minor, with the intent to encourage, entice, offer, or solicit any person to engage in prohibited sexual conduct with that minor. Violations of this section carry a statutory maximum term of imprisonment of five years and are currently covered by § 2G1.1 (proposed § 2G1.3). Other offenses covered by § 2G1.1 carry a five year mandatory minimum term of imprisonment and substantially higher statutory maximums. Some practitioners claim that section 2425 offenses might be more like harassment or threatening communications offenses covered by § 2A6.1 (Threatening or Harassing Communications). Is § 2G1.1 (proposed § 2G1.3) or § 2A6.1 the more appropriate guideline for section 2425 offenses? If § 2G1.1 (proposed § 2G1.3) is not the most appropriate guideline, what guideline should be used to sentence violators of section 2425? Is there conduct specific to section 2425 offenses that necessitates the addition of any specific offense characteristic (e.g., age, intent to encourage, entice, offer, or solicit any person to engage in prohibited sexual conduct with a minor)?

5. The Commission seeks comment regarding whether the offense levels in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse), specifically, §§ 2A3.1, 2A3.2, and 2A3.3, 2A3.4, should be increased to maintain proportionality with increases proposed for the Chapter Two, Part G guidelines, in response to statutory penalty changes provided by the PROTECT Act. If so increased, what should be the appropriate offense levels? Are there additional specific offense characteristics, cross references, or departure considerations that should be added to these guidelines? Additionally, how should the Commission address the interaction between the pattern of activity enhancement at § 4B1.5 (Repeat and Dangerous Sex Offender Against Minor) and offenses sentenced under § 2A3.2. The PROTECT Act changed the definition of pattern of activity so that, instead of requiring the abuse of two minors on two separate occasions, a pattern of activity now requires two separate occasions of prohibited sexual conduct with only one minor. Therefore, under the new definition,

repeat acts against one minor will lead to a five-level increase under § 4B1.5. Preliminary data suggest this enhancement will apply to the majority of defendants sentenced at § 2A3.2. Thus, should the Commission consider this enhancement when deciding whether to increase the base offense level at § 2A3.2?

6. The Commission requests comment regarding whether the guidelines in Chapter Two, Part A, Subpart 3 (Criminal Sexual Abuse) and Chapter Two, Part G (Offenses Involving Commercial Sexual Acts, Sexual Exploitation of Minors, and Obscenity) should provide an enhancement if the offense involved incest. Some commentators have argued that offenses involving incest result in a violation of trust, making these offenses more egregious than offenses in which a defendant has care, custody, or control of the victim but is not a family member. If the Commission added this enhancement to the Chapter Two, Part A, Subpart 3 offenses, should the enhancement apply as an alternative or as an additional enhancement to the current two-level enhancement that applies "if the victim was in the custody, care, or supervisory control of the defendant"? Furthermore, if the Commission added this enhancement, what relationships should be covered under the definition of incest?

Proposed Amendment 2: Effective Compliance Programs in Chapter Eight

Synopsis of Proposed Amendment: The proposed amendment is intended to provide greater guidance to organizations and courts regarding the criteria for an effective program to prevent and detect violations of the law ("compliance programs"). The proposed amendment adds to Chapter Eight, Part B, a new guideline, § 8B2.1 (Effective Program to Prevent and Detect Violations of Law), that identifies the purposes of an effective compliance program, sets forth seven minimum steps for such a program, and provides guidance for their implementation. This proposed amendment was developed by the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines empaneled by the Commission for the purpose of reviewing the general effectiveness of the guidelines for organizations, with particular emphasis on examining the criteria for an effective compliance program. The Advisory Group's review and analysis can be found in its report of October 7, 2003, to the Commission at www.ussc.gov.

Under subsection (g) of § 8C2.5 (Culpability Score), the existence of an effective compliance program is a