

Footnotes to Chart G1

1. If the offense involved conduct described in 18 U.S.C. §2241(a) or (b) or 18 U.S.C. §2242, apply **§2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse)**.
2. If bodily injury results, an upward departure may be warranted. “Coercion” includes any form of conduct that negates the voluntariness of the victim. This enhancement would apply, for example, in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol. This characteristic generally will not apply if the drug or alcohol was voluntarily taken.
3. If the offense involved more than ten victims, an upward departure may be warranted.
4. “Victim” may include an undercover law enforcement officer.
5. For the purposes of **§3B1.1 (Aggravating Role)**, a victim, as defined in this guideline, is considered a participant only if that victim assisted in the promoting of a commercial sex act or prohibited sexual conduct in respect to another victim.
6. If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply **§2G2.1**, if the resulting offense level is greater than that determined above.
7. If a minor was killed under circumstances that would constitute murder under 18 U.S.C. §1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply **§2A1.1 (First Degree Murder)**, if the resulting offense level is greater than that determined above.
8. If the offense involved conduct described in 18 U.S.C. §2241 or §2242, apply **§2A3.1**, if the resulting offense level is greater than that determined above. If the offense involved interstate travel with intent to engage in a sexual act with a minor who had not attained the age of 12 years, or knowingly engaging in a sexual act with a minor who had not attained the age of 12 years, **§2A3.1** shall apply, regardless of the “consent” of the minor.
9. “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; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.
10. 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 minor and not simply to the legal status of the defendant-minor relationship.
11. Do not apply **§3B1.3 (Abuse of a Position of Confidence or of a Special Skill)**.
12. 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 would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor. misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor. The misrepresentation 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 prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement. In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption that such participant unduly influenced the minor to engage in prohibited sexual conduct.
13. To apply only to use of a computer or interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of a minor. The enhancement would not apply to use of a computer or interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.

Footnotes to Chart G2

1. If the offense involved more than ten victims, an upward departure may be warranted.
2. If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. §2252A(a)(7)), the term “material involving the sexual exploitation of a minor” includes such material.
3. If a minor was killed under circumstances that would constitute murder under 18 U.S.C. §1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply **§2A1.1 (First Degree Murder)**, if the resulting offense level is greater than that determined above.
4. “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; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.
5. 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 minor and not simply to the legal status of the defendant-minor relationship.
6. Do not apply **§3B1.3 (Abuse of a Position of Confidence or Use of a Special Skill)**.
7. 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 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 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 sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.
8. To apply only to use of a computer or interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of a minor. The enhancement would not apply to use of a computer or interactive computer service to obtain airline tickets for the minor from an airline’s Internet site.
9. If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, or for the purpose of transmitting a live visual depiction of such conduct, apply **§2G2.1** if the resulting offense level is greater than that determined above.
10. “Pattern of activity involving the sexual abuse or exploitation of a minor” means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct. Also, a conviction taken into account under this subsection is not excluded from consideration of whether that conviction receives criminal history points pursuant to **Chapter Four, Part A (Criminal History)**.
11. Applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials. If the Offense involved material that portrays an infant or toddler, do not apply **§3A1.1(b)** [enhancement for vulnerable victim].

Footnotes to Chart G2

12. Each photograph, picture, computer or computer generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially under represents the number of minors depicted, an upward departure may be warranted. (ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.
13. “Sexual abuse or exploitation” does not include possession, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.
14. If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and this subsection does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under this subsection but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.
15. “Distribution” includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant. The defendant “knowingly engaged in distribution” if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.
16. If the offense reflected an effort to conceal a substantive offense that involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply **§2G2.1**. If the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply **§2G2.2**.
17. “Distribution to a minor” means the knowing distribution to an individual who is a minor at the time of the offense.
18. A conviction taken into account under this subsection is not excluded from consideration of whether that conviction receives criminal history points pursuant to **Chapter Four, Part A (Criminal History)**.
19. If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. §2252A(a)(7)), the term “material involving the sexual exploitation of a minor” includes such material.
20. Upward Departure Provision – If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and if the subsection for engaging in a pattern of activity involving the sexual abuse or exploitation of a minor with an increase by 5 levels, does NOT apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under the latter subsection but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.
21. If the Offense involved material that portrays an infant or toddler, do not apply **§3A1.1(b)** [enhancement for **Vulnerable Victim**].
22. “The defendant distributed in exchange for any valuable consideration” means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other child pornographic material, preferential access to child pornographic material, or access to a child.
- 23 The defendant “knowingly engaged in distribution” if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.
24. “Distribution” means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

Part G – Offenses Involving Commercial Sex Acts, Sexual Exploitation of Minors, and Obscenity

Part G3 – Obscenity

3. OBSCENITY

2G3.1 Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names

Base Offense Level: 10

(Apply the Greatest)

(A) If the offense involved distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (**Theft, Property Destruction, and Fraud**) (see page 271) corresponding to the retail value of the material, but by not less than 5 levels.

(B) If the defendant distributed in exchange for any valuable consideration, but not for pecuniary gain, increase by:

Note: “The defendant distributed in exchange for any valuable consideration” means the defendant agreed to an exchange with another person under which the defendant knowingly distributed to that other person for the specific purpose of obtaining something of valuable consideration from that other person, such as other obscene material, preferential access to obscene material, or access to a child.

(C) If the offense involved distribution to a minor, increase by:

(D) If the offense involved distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E) below, increase by:

(E) If the offense involved 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, increase by:

(F) If the defendant knowingly engaged in distribution, other than distribution described in subdivisions (A) – (E) above, increase by:

Note: The defendant “knowingly engaged in distribution” if the defendant (A) knowingly committed the distribution, (B) aided, abetted, counseled, commanded, induced, procured, or willfully caused the distribution, or (C) conspired to distribute.

If, with the intent to deceive a minor into viewing material that is harmful to minors, the offense involved the use of (A) a misleading domain name on the Internet; or (B) embedded words or digital images in the source code of a website, increase by:

If the offense involved the use of a computer or an interactive computer service, increase by:

Note: If the defendant is convicted of 18 U.S.C. §2252B or §2252C, this enhancement shall not apply.

If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by:

Note: This enhancement applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, receive, or distribute such materials.

If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply **§2G2.2**.

Note: “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; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

2G3.2 Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material

Base Offense Level: 12

If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by:

4

If 6 plus the offense level from the table in **§2B1.1 (Theft, Property Destruction, and Fraud)** (see page 271) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.