

**Section 2G2.1** is amended in subsection **(b)(3)** by striking "If the offense involved distribution" and inserting "If the defendant **knowingly engaged in distribution**"; and in subsection **(b)(4)** by inserting "(A)" before "**sadistic or masochistic**", and by inserting after "violence" the following: "; or (B) **an infant or toddler**".

### Commentary

The Commentary to §2G2.1 captioned "Application Notes" is amended by redesignating Notes 3, 4, 5, and 6 as Notes 5, 6, 7, and 8, respectively, and by inserting after Note 2 the following new Notes 3 and 4:

- 3: Application of Subsection (b)(3).- **For purposes of subsection (b)(3), 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.**
- 4: Interaction of Subsection (b)(4)(B) & Vulnerable Victim (§3A1.1(b)).  
If subsection (b)(4)(B) applies, do not apply §3A1.1 (b)..

**Section 2G2.2** is amended in subsection **(b)(3)** by striking "If the offense involved";

in subparagraphs (A), (C), (D), and (E) by striking "Distribution" and inserting "**If the offense involved distribution**";

in subparagraph (B) by striking "Distribution for the receipt, or expectation of receipt, of a thing of value," and inserting "If the defendant distributed in exchange for any **valuable consideration**,";

and in subparagraph (F) by striking "Distribution" and inserting "If the defendant **knowingly engaged in distribution**,";

and in subsection (b)(4) by inserting "(A)" before "**sadistic or masochistic**", and by inserting after "violence" the following: "; or (B) sexual abuse or exploitation of an **infant or toddler**".

### Commentary

The Commentary to §2G2.2 captioned "Application Notes" is amended in Note 1 by striking the fourth undesignated paragraph as follows:

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration. For example, in a case

involving the bartering of child pornographic material, the 'thing of value' is the child pornographic material received in exchange for other child pornographic

material bartered in consideration for the material received.",

and inserting the following:

"'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.**";

by redesignating Notes 2 through 7 as Notes 3, 5, 6, 7, 8, and 9,

respectively; by inserting after Note 1 the following new Note 2:

"2. Application of Subsection (b)(3)(F).-For purposes of subsection (b)(3)(F), 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.";

in Note 3 (as so redesignated) by inserting "(A)" after "(b)(4)" both places such term appears;

and by inserting after Note 3 (as so redesignated) the following new Note 4:

Interaction of Subsection (b)(4)(B) & Vulnerable Victim §3A1.1(b)-  
If subsection (b)(4)(B) applies, do not apply §3A1.1(b).".

**Section 2G3.1** [Obscenity] is amended in subsection (b)(1) by striking "If the offense involved";

in subparagraphs (A), (C), (D), and (E) by striking "Distribution" and inserting "If the offense involved distribution";

in subparagraph (B) by striking "Distribution for the receipt, or expectation of receipt, of a thing of value," and inserting "If the defendant distributed in exchange for any valuable consideration,";

and in subparagraph (F) by striking "Distribution" and inserting "If the defendant knowingly engaged in distribution,".

The Commentary to §2G3.1 captioned "Application Notes" is amended in Note I by striking the fourth undesignated paragraph as follows:

"'Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain' means any transaction, including bartering or other in-kind transaction that is conducted for a thing of value, but not for profit. 'Thing of value' means anything of valuable consideration.",

And inserting the following:

"'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.";

by redesignating Notes 2 and 3 as Notes 3 and 4,

respectively; and by inserting after Note 1 the following

new Note 2:

"2. Application of Subsection (b)(1)(F).-For purposes of subsection (b)(1)(F), 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."

### **Reasons for Amendment**

Reason for Amendment: This amendment addresses circuit conflicts and application issues related to the child pornography guidelines. One issue generally arises under both the child pornography production guideline and the child pornography distribution guideline when the offense involves victims who are unusually young and vulnerable.

The other two issues frequently arise when the offense involves a peer-to-peer file-sharing program or network. These issues were noted by the Commission in its 2012 report to Congress on child pornography offenses. See United States Sentencing Commission, "Report to the Congress: Federal Child Pornography Offenses," at 33-35 (2012).

#### Offenses Involving Infants and Toddlers

First, the amendment addresses differences among the circuits when cases involve infant and toddler victims. The production guideline at §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) provides a 4-level enhancement if the offense involved a minor who had not attained the age of 12 years and a 2-level enhancement if the minor had not attained the age of 16 years. See §2G2.1(b)(1)(A)-(B). The non-production guideline at §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) provides a 2-level enhancement if the material involved a prepubescent minor or a minor who had not attained the age of 12 years. See §2G2.2(b)(2).

A circuit conflict has arisen as to whether a defendant who receives an age

enhancement under §§2G2.1 and 2G2.2 may also receive a vulnerable victim adjustment at §3A1.1 (Hate Crime Motivation or Vulnerable Victim) when the victim is extremely young and vulnerable, such as an infant or toddler. Section 3A 1.1(b)(I) provides for a 2-level increase if the defendant knew or should have known that a victim was a "vulnerable victim," which is defined

in the accompanying commentary as a victim "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." See §3A 1.1, comment. (n.2). The commentary also provides that the vulnerable victim adjustment does not apply if the factor that makes the victim a "vulnerable victim," such as age, is incorporated in the offense guidelines, "unless the victim was unusually vulnerable for reasons unrelated to age." *Id.*

The Fifth and Ninth Circuits have held that it is permissible to apply both enhancements in cases involving infant or toddler victims because their level of vulnerability is not fully incorporated in the offense guidelines. See United States v. Jenkins, 712 F.3d 209, 214 (5th Cir. 2013); United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004). These circuits have reasoned that although the victim's small physical size and extreme vulnerability tend to correlate with age, such characteristics are not the same as compared to most children under 12 years. Jenkins, 712 F.3d at 214; Wright, 373 F.3d at 942-43. The Fourth Circuit, by contrast, has held that the age enhancement and vulnerable victim adjustment may not be simultaneously applied because the child pornography guidelines fully address age-related factors. See United States v. Dowell, 771 F.3d 162, 175 (4th Cir. 2014). The Fourth Circuit reasoned that cognitive development or psychological susceptibility necessarily is related to age. *Id.*

The amendment resolves the circuit conflict by explicitly accounting for infant and toddler victims in the child pornography guidelines. Specifically, the amendment revises §§2G2.1 and 2G2.2 by adding a new basis for application of the "sadistic or masochistic" enhancement when the offense involves infants or toddlers. The amendment amends §2G2.1 (b)(4) to provide for a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) an infant or toddler," and amends §2G2.2(b)(4) to provide a 4-level increase "if the offense involved material that portrays (A) sadistic or masochistic conduct or other depictions of violence; or (B) sexual abuse or exploitation of an infant or toddler." The accompanying application note to each guideline provides that if subsection (b)(4)(B) applies, do not apply the vulnerable victim adjustment in Chapter Three.

The amendment reflects the Commission's view, based on testimony and public comment, that child pornography offenses involving infants and toddlers warrant an enhancement. Because application of the vulnerable victim adjustment necessarily relies on a fact-specific inquiry, the Commission determined that expanding the "sadistic or masochistic" enhancement (§§2G2.1(b)(4) and 2G2.2(b)(4)) to include infant and toddler victims would promote more consistent application of the child pornography guidelines and reduce unwarranted sentencing disparities. In making its determination, the Commission was informed by case law indicating that

most circuits have found depictions of the sexual abuse or exploitation of infants or toddlers involving penetration or pain portray sadistic conduct. See, e.g., United States v. Hoey, 508 F.3d 687, 691 (1<sup>st</sup> Cir. 2007) ("We agree with the many circuits which have found that images depicting the sexual penetration of young and prepubescent children by adult males represent conduct sufficiently likely to involve pain such as to support a finding that it is inherently 'sadistic' or similarly 'violent' . . . ."); United States v.

Delmarle, 99 F.3d 80, 83 (2d Cir. 1996) ("[S]ubjection of a young child to a sexual act that would have to be painful is excessively cruel and hence is sadistic . . . ."); United States v. Maurer, 639 F.3d 72, 79 (3d Cir. 2011) ("[W]e join other circuits in holding that the application of §2G2.2(b)(4) is appropriate where an image depicts sexual activity involving a prepubescent minor that would have caused pain to the minor."); United States v. Burgess, 684 F.3d 445, 454 (4th Cir. 2012) (image depicting vaginal penetration of five-year-old girl by adult male, which would "necessarily cause physical pain to the victim," qualified for sentencing enhancement under §2G2.2(b)); United States v. Lyckman, 235 F.3d 234, 238-39 (5th Cir. 2000) (agreeing with the Second, Seventh, and Eleventh Circuits that application of subsection (b)(4) is warranted when the image depicts "the physical penetration of a young child by an adult male."); United States v. Groenendal, 557 F.3d 419, 424-26 (6th Cir. 2009) (penetration of a prepubescent child by an adult male constitutes inherently sadistic conduct that justifies application of §2G2.2(b)(4)); United States v. Meyers, 355 F.3d 1040, 1043 (7th Cir. 2004) (finding vaginal intercourse between a prepubescent girl and an adult male sadistic); United States v. Belflower, 390 F.3d 560, 562 (8th Cir. 2004) (images involving the anal penetration of minor boy or girl adult male are per se sadistic or violent within the meaning of subsection (b)(4)); United States v. Henderson, 649 F.3d 995 (9th Cir. 2010) (vaginal penetration of prepubescent minor qualifies for (b)(4) enhancement); United States v. Kimler, 335 F.3d 1132, 1143 (10th Cir. 2003) (finding no expert testimony necessary for a sentence enhancement [(b)(4)] when the images depicted penetration of prepubescent children by adults); United States v. Bender, 290 F.3d 1279, 1286 (11th Cir. 2002) (photograph was sadistic within the meaning of subsection (b)(4) when it depicts the "subjugation of a young child to a sexual act that would have to be painful"). **The Commission intends the new enhancement to apply to any sexual images of an infant or toddler.**

#### The Two and Five Level Distribution Enhancements

Next, the amendment addresses differences among the circuits involving application of the tiered distribution enhancements in §2G2.2. Section 2G2.2(b)(3) provides for an increase for distribution of child pornographic material ranging from 2 to 7 levels depending on certain factors. See §2G2.2(b)(3)(A)-(F). The circuits have reached different conclusions regarding the mental state required for application of the 2-level enhancement for "generic" distribution as compared to the 5-level enhancement for distribution not for pecuniary gain. The circuit conflicts involving these two enhancements have arisen frequently, although not exclusively, in cases involving the use of peer-to-peer file-sharing programs or networks.

## Peer-to-Peer File-Sharing Programs

The Commission's 2012 report to Congress discussed the use of file-sharing programs, such as Peer-to-Peer ("P2P"), in the context of cases involving distribution of child pornography. See 2012 Report at 33-35, 48-62. Specifically, P2P is a software application that enables computer users to share files easily over the Internet. These applications do not require a central server or use of email. Rather, the file-sharing application allows two or more users to essentially have access each other's computers and to directly swap files from their computers. Some file-sharing programs require a user to designate files to be shared during the installation process, meaning that at the time of installation the user can "opt in" to share files, and the software will automatically scan the user's computer and then compile a list of files to share. Other programs employ a default file-sharing setting, meaning the user can "opt out" of automatically sharing files by changing the default setting to limit which, if any, files are available for sharing. Once the user has downloaded and set up the file-sharing software, the user can begin searching for files shared on the connected network using search keywords in the same way one regularly uses a search engine such as Google. Users may choose to "opt in" for a variety of reasons, including, for example, to obtain faster download speeds, to have access to a greater range of material, or because the particular site mandates sharing.

### The 2-Level Distribution Enhancement

The circuits have reached different conclusions regarding whether application of the 2-level distribution enhancement at §2G2.2(b)(3)(F) requires a mental state (mens rea), particularly in cases involving use of a file-sharing program or network. The Fifth, Tenth, and Eleventh Circuits have held that the 2-level distribution enhancement applies if the defendant used a file-sharing program, regardless of whether the defendant did so purposefully, knowingly, or negligently. See, e.g., United States v. Baker, 742 F.3d 618, 621 (5th Cir. 2014); United States v. Ray, 704 F.3d 1307, 1312 (10th Cir. 2013); United States v. Creel, 783 F.3d 1357, 1360 (11th Cir. 2015). The Second, Fourth, and Seventh Circuits have held that the 2-level distribution enhancement requires a showing that the defendant knew of the file-sharing properties of the program. See, e.g., United States v. Baldwin, 743 F.3d 357, 361 (2d Cir. 2015) (requiring knowledge); United States v. Robinson, 714 F.3d 466, 468 (7th Cir. 2013) (knowledge); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009) (knowledge or reckless disregard). The Eighth Circuit has held that knowledge is required, but knowledge may be inferred from the fact that a file-sharing program was used, absent "concrete evidence" of ignorance. See United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010). The Sixth Circuit has held that there is a "presumption" that "users of file-sharing software understand others can access their files." United States v. Conner, 521 Fed. App'x 493, 499 (6th Cir. 2013); see also United States v. Abbring, 788 F.3d 565, 567 (6th Cir. 2015) ("the whole point of a file-sharing program is to share, sharing creates a transfer, and transferring equals distribution").

The amendment generally adopts the approach of the Second, Fourth, and Seventh Circuits. It amends §2G2.2(b)(3)(F) to provide that the 2-level distribution enhancement applies if "the defendant knowingly engaged in distribution." Based on testimony, public comment, and data analysis, the Commission determined that **the 2-level distribution enhancement is appropriate only in cases in which the**

**defendant knowingly engaged in distribution.** An accompanying application note clarifies that: "For purposes of subsection (b)(3)(F), 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."

Similar changes are made to the 2-level distribution enhancement at §2G2.1(b)(3) and the obscenity guideline, §2G3.1(Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor; Misleading Domain Names), which contains a similarly tiered distribution enhancement.

### The 5-Level Distribution Enhancement

Finally, the amendment responds to differences among the circuits in applying the 5-level enhancement for distribution not for pecuniary gain at §2G2.2(b)(3)(B). While courts generally agree that mere use of a file-sharing program or network, without more, is insufficient for application of the 5-level distribution enhancement, the circuits have taken distinct approaches with respect to the circumstances under which the 5-level rather than the 2-level enhancement is appropriate in such circumstances. The Fourth Circuit has held that the 5-level distribution enhancement applies when the defendant (1) "knowingly made child pornography in his possession available to others by some means"; and (2) did so "for the specific purpose of obtaining something of valuable consideration, such as more pornography." United States v. McManus, 734 F.3d 315, 319 (4th Cir. 2013). In contrast, while holding that the 5-level enhancement applies when the defendant knew he was distributing child pornographic material in exchange for a thing of value, the Fifth Circuit has indicated that when the defendant knowingly uses file-sharing software, the requirements for the 5-level enhancement are generally satisfied. See United States v. Groce, 784 F.3d 291, 294 (5th Cir. 2015).

The amendment revises §2G2.2(b)(3)(B) and commentary to clarify that **the 5-level enhancement applies "if the defendant distributed in exchange for any valuable consideration."** The amendment further explains in the accompanying application note that this 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." The amendment makes parallel changes to the obscenity guideline at §2G3.1, which has a similar tiered distribution enhancement.

As with the 2-level distribution enhancement, the amendment resolves differences among the circuits in applying the 5-level distribution enhancement by clarifying the mental state required for distribution of child pornographic material for non-pecuniary gain, particularly when the case involves a file-sharing program or network. The Commission determined that the amendment is an appropriate way to account for the higher level of culpability when the defendant had the specific purpose of distributing child pornographic material to another person in exchange for valuable consideration.