

2019 ANALYSIS AND RECOMMENDATIONS

VIRGINIA

FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

Legal Components:

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*
- 1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*
- 1.3 *Prostitution statutes refer to the sex trafficking statute to acknowledge the intersection of prostitution with trafficking victimization.*
- 1.4 *The state racketeering or gang crimes statute includes sex trafficking or commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute child sex trafficking crimes.*

Legal Analysis¹:

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*

Va. Code Ann. § 18.2-357.1² (Commercial sex trafficking; penalties) specifically criminalizes domestic minor sex trafficking without requiring proof of force, fraud or coercion when the victim is a minor. Pursuant to Va. Code Ann. § 18.2-357.1,

A. Any person who, with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse in violation of subsection A of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], solicits, invites, recruits, encourages, or otherwise causes or attempts to cause a person to violate subsection A of § 18.2-346 is guilty of a class 5 felony.

B. Any person who violates subsection A through the use of force, intimidation, or deception is guilty of a Class 4 felony.

¹ This report includes legislation enacted as of August 1, 2019.

² The text Va. Code Ann. § 18.2-357.1 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2586 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

C. Any adult who violates subsection A with a person under 18 years of age is guilty of a Class 3 felony.

D. Each violation of this section constitutes a separate and distinct felony.

A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).³ A Class 4 felony is punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(d). A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e).⁴

1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*

The following laws make CSEC a distinct crime in Virginia:

1. Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) criminalizes:

[a]bduction (i) of any person with the intent to extort money or pecuniary benefit, (ii) of any person with intent to defile such person, (iii) of any child under sixteen years of age for the purpose of

³ Va. Code Ann. § 18.2-10(g) provides that “[e]xcept as specifically authorized in subdivision (e) [Class 5 felonies] or (f) [Class 6 felonies], or in Class 1 felonies for which a sentence of death is imposed, the court shall impose either a sentence of imprisonment together with a fine, or imprisonment only. However, if the defendant is not a natural person, the court shall impose only a fine.”

⁴ In addition to any fines imposed under state law, Va. Code Ann. § 16.1-69.48:6 (Fees for offenses related to sex trafficking) and § 17.1-275.13 (Additional fee for offenses related to sex trafficking) require convicted offenders to pay a designated fee, which is to be deposited into the Virginia Prevention of Sex Trafficking Fund “for the purpose of promoting awareness of and preventative training and education related to sex trafficking.” Va. Code Ann. §§ 9.1-116.4, 16.1-69.48:6, 17.1-275.13.

Pursuant to Va. Code Ann. § 16.1-69.48:6, “The court shall order any person convicted of a misdemeanor violation of subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties] or of § 18.2-348 [Aiding prostitution or illicit sexual intercourse, etc.; penalty] or 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse; penalty] to pay a \$100 fee, which shall be deposited into the Virginia Prevention of Sex Trafficking Fund to be used in accordance with § 9.1-116.4” Similarly, Va. Code Ann. § 17.1-275.13 states,

In addition to the fees provided for by §§ 17.1-275.1, 17.1-275.2, 17.1-275.7, 17.1-275.10, and 17.1-275.12, any person convicted of a misdemeanor violation of subsection B of § 18.2-346 or of § 18.2-348 or 18.2-349 shall be ordered to pay a \$100 fee, and any person convicted of a violation of clause (ii), (iii), or (iv) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], or of § 18.2-368 [Placing or leaving wife for prostitution; penalty], or any felony violation of the laws pertaining to commercial sex trafficking or prostitution offenses pursuant to Article 3 (§ 18.2-344 et seq.) of Chapter 8 [Commercial Sex Trafficking, Prostitution, Etc.], with the exception of § 18.2-361 [Crimes against nature; penalty], shall be ordered to pay a \$500 fee. All fees collected pursuant to this section shall be deposited into the Virginia Prevention of Sex Trafficking Fund to be used in accordance with § 9.1-116.4.

The text Va. Code Ann. § 16.1-69.48:6 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2651 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019). The text Va. Code Ann. § 17.1-275.13 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2651 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019). The text Va. Code Ann. § 9.1-116.4 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2651 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

concubinage or prostitution, (iv) of any person for the purpose of prostitution, or (v) of any minor for the purpose of manufacturing child pornography

Under Va. Code Ann. § 18.2-47 (Abduction and kidnapping defined; punishment),

A. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of “abduction.”

B. Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to subject him to forced labor or services shall be deemed guilty of “abduction.” For purposes of this subsection, the term “intimidation” shall include destroying, concealing, confiscating, withholding, or threatening to withhold a passport, immigration document, or other governmental identification or threatening to report another as being illegally present in the United States.

Va. Code Ann. § 18.2-48 is punishable as a Class 2 felony, which carries a minimum sentence of 20 years to life and a possible fine of up to \$100,000. Va. Code Ann. § 18.2-10 (b), (g). Va. Code Ann. § 18.2-48 also specially directs:

If the sentence imposed for a violation of (ii), (iii), (iv), or (v) includes a term of confinement less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life subject to revocation by the court.

2. Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) criminalizes soliciting sex with minors, stating that “any person who solicits prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.” Va. Code Ann. § 18.2-346(B). A Class 6 felony is punishable by “imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(f). A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e).
3. Va. Code Ann. § 18.2-355(4) (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking) provides that any person who “for purposes of prostitution, takes any minor into, or persuades, encourages, or causes any minor to enter, a bawdy place, or takes or causes such person to be taken to any place for such purposes; is guilty of pandering A violation of subdivision (4) is punishable as a Class 3 felony.” A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

4. Va. Code Ann. § 18.2-370(B) (Taking indecent liberties with children) states,

Any person 18 years of age or over who, with lascivious intent, knowingly and intentionally receives money, property, or any other remuneration for allowing, encouraging, or enticing any person under the age of 18 years to perform in or be a subject of sexually explicit visual material as defined in § 18.2-374.1⁵ or who knowingly encourages such person to perform in or be a subject of sexually explicit material; is guilty of a Class 5 felony.

⁵ Va. Code Ann. § 18.2-374.1(A) defines “sexually explicit visual material” as “a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer’s temporary Internet cache when three or

A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e). This penalty is enhanced to a Class 4 felony for second or subsequent convictions, “provided that (i) the offenses were not part of a common act, transaction or scheme; (ii) the accused was at liberty as defined in § 53.1-151 between each conviction; and (iii) it is admitted, or found by the jury or judge before whom the person is tried, that the accused was previously convicted of a violation of this section.” Va. Code Ann. § 18.2-370(C). A Class 4 felony is punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 may be assessed.⁶ Va. Code Ann. § 18.2-10(d).

5. Va. Code Ann. § 18.2-356 (Receiving money for procuring person) states,

Any person who receives any money or other valuable thing for or on account of (i) procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act in violation of § 18.2-361 or (ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography is guilty of a Class 4 felony. Any person who violates clause (i) or (ii) with a person under the age of 18 is guilty of a Class 3 felony.

A Class 4 felony is punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(d). A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

6. Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties) states,

Any person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering, punishable as a Class 4 felony. Any person who violates this section by receiving money or other valuable thing from a person under the age of 18 is guilty of a Class 3 felony.

A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

7. Va. Code Ann. § 18.2-348⁷ (Aiding prostitution or illicit sexual intercourse) states,

It is unlawful for any person or any officer, employee or agent of any firm, association or corporation with knowledge of, or good reason to believe, the immoral purpose of such visit, to take or transport or assist in taking or transporting, or offer to take or transport on foot or in any way, any person to a place, whether within or outside any building or structure, used or to be used for the purpose of lewdness, assignation or prostitution within the Commonwealth or to procure or assist in procuring for the purpose of illicit sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act violative of § 18.2-361 [Crimes against nature; penalty], or to give

more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.”

⁶ See *supra* note 3.

⁷ The text Va. Code Ann. § 18.2-348 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2586 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

any information or direction to any person with intent to enable such person to commit an act of prostitution. A violation of this section is a Class 1 misdemeanor. However, any adult who violates this section with a person under the age of 18 is guilty of a Class 6 felony.

A Class 1 misdemeanor is punishable by up to 12 months in jail, a fine up to \$2,500, or both, while a Class 6 felony is punishable by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. §§ 18.2-11(a), 18.2-10(f).

8. Va. Code Ann. § 18.2-349⁸ (Using vehicles to promote prostitution or unlawful sexual intercourse; penalty) states,

It is unlawful for any owner or chauffeur of any vehicle, with knowledge or reason to believe the same is to be used for such purpose, to use the same or to allow the same to be used for the purpose of prostitution or unlawful sexual intercourse or to aid or promote such prostitution or unlawful sexual intercourse by the use of any such vehicle. A violation of this section is a Class 1 misdemeanor. However, any adult who violates this section by using a vehicle or allowing a vehicle to be used for or to aid or promote prostitution or unlawful sexual intercourse with a person under the age of 18 is guilty of a Class 6 felony.

A Class 1 misdemeanor is punishable by up to 12 months in jail, a fine up to \$2,500, or both, while a Class 6 felony is punishable by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. §§ 18.2-11(a), 18.2-10(f).

Also, though not specific to commercial sex offenses, the following offenses may also apply to commercial sexual exploitation of children cases:

1. Va. Code Ann. § 18.2-370(A) (Taking indecent liberties with children; penalties) makes the following a Class 5 felony:

Any person 18 years of age or over, who, with lascivious intent, knowingly and intentionally commits any of the following acts with any child under the age of 15 years . . . :

- (1) Expose his or her sexual or genital parts to any child to whom such person is not legally married or propose that any such child expose his or her sexual or genital parts to such person; or
- (2) [Repealed.]
- (3) Propose that any such child feel or fondle his own sexual or genital parts or the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child; or
- (4) Propose to such child the performance of an act of sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
- (5) Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any of the purposes set forth in the preceding subdivisions of this section.

A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(e).

⁸ The text Va. Code Ann. § 18.2-349 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2586 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

2. Va. Code Ann. § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.) makes it a Class 1 misdemeanor for “[a]ny person 18 years of age or older, including the parent of any child” to “willfully contribute[] to, encourage[], or cause[] any act, omission, or condition that renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228” or to “engage[] in consensual sexual intercourse or anal intercourse with or performs cunnilingus, fellatio, or anilingus upon or by a child 15 or older not his spouse, child, or grandchild.” Va. Code Ann. § 18.2-371. A Class 1 misdemeanor is punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. § 18.2-11(a) (Punishment for conviction of misdemeanor).
3. Va. Code Ann. § 18.2-61 (Rape), among other things, classifies sex with a child under 13 as rape. Va. Code Ann. § 18.2-61(A)(iii). A mandatory minimum sentence of 25 years is required for rape of a child under 13 where the offender is “more than three years older than the victim” and “if done in the commission of, or as part of the same course of conduct as, or as part of a common scheme or plan as a violation of (i) subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment] or § 18.2-48 [Abduction with intent to extort money or for immoral purpose], (ii) § 18.2-89 [Burglary; how punished], 18.2-90 [Entering dwelling house, etc., with intent to commit murder, rape, robbery or arson; penalty], or 18.2-91 [Entering dwelling house, etc., with intent to commit larceny, assault and battery or other felony], or (iii) § 18.2-51.2 [Aggravated malicious wounding; penalty].” Where it is alleged that the offender was 18 or older at the time of the offense, “the punishment shall include a mandatory minimum term of confinement for life.” Va. Code Ann. § 18.2-61(B). “If the term of confinement imposed for any violation of clause (iii) of subsection A, where the offender is more than three years older than the victim, is for a term less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life, subject to revocation by the court.” Va. Code Ann. § 18.2-61(B).
4. Va. Code Ann. § 18.2-63(A) (Carnal knowledge of child between thirteen and fifteen years of age) makes it a Class 4 felony punishable by imprisonment for 2–10 years and a possible fine of up to \$100,000 for a person to “carnally know[], without the use of force, a child thirteen years of age or older but under fifteen years of age.”⁹ Va. Code Ann. § 18.2-10(d), (g).¹⁰ Va. Code Ann. § 18.2-63(B) also makes it a Class 6 felony for a person to “carnally know[], without the use of force, a child thirteen years of age or older but under fifteen years of age who consents to sexual intercourse and the accused is a minor and such consenting child is three years or more the accused’s junior.” A Class 6 felony is punishable by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(f). This crime is reduced to a Class 4 misdemeanor when the “consenting child is less than three years the accused’s junior” punishable by a fine up to \$250. Va. Code Ann. §§ 18.2-63(B), 18.2-11(d). The provision notes that “a child under the age of thirteen years shall not be considered a consenting child.” Va. Code Ann. § 18.2-63(C).
5. Va. Code Ann. § 18.2-67.4:2 (Sexual abuse of a child under 15 years of age; penalty) states, “Any adult who, with lascivious intent, commits an act of sexual abuse, as defined in § 18.2-67.10 [General definitions], with any child 13 years of age or older but under 15 years of age is guilty of a Class 1 misdemeanor.”¹¹ A Class 1 misdemeanor is punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. § 18.2-11(a).

⁹ Va. Code Ann. § 18.2-63(C)(ii) defines “carnal knowledge” as including “acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and animate and inanimate object sexual penetration.”

¹⁰ See *supra* note 3.

¹¹ Va. Code Ann. § 18.2-67.10(6) (General definitions) states,

“Sexual abuse” means an act committed with the intent to sexually molest, arouse, or gratify any person, where:

6. Va. Code Ann. § 18.2-379 (Employing or permitting minor to assist in offense under article) states, “It shall be unlawful for any person knowingly to hire, employ, use or permit any minor to do or assist in doing any act or thing constituting an offense under this article [Article 5—Obscenity and related offenses].” A first conviction is a Class 1 misdemeanor punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-380, 18.2-11(a). Subsequent convictions are punishable as Class 6 felonies by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. § 18.2-10(f). “However, if the person, firm, association or corporation convicted of such subsequent offense is the owner of the business establishment where each of the offenses occurred, a fine of not more than \$10,000 shall be imposed in addition to the penalties otherwise prescribed by this section.” Va. Code Ann. § 18.2-381.
7. Va. Code Ann. § 18.2-374.4 (Display of child pornography or grooming video or materials to a child unlawful) states,

Any person 18 years of age or older who displays child pornography or a grooming video or materials to a child under 13 years of age with the intent to entice, solicit, or encourage the child to engage in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration is guilty of a Class 6 felony.

A Class 6 felony is punishable by “a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(f). Va. Code Ann. § 18.2-374.4(B) defines “Grooming video or materials” as “a cartoon, animation, image, or series of images depicting a child engaged in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, masturbation, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration.”

1.3 Prostitution statutes refer to the sex trafficking statute to acknowledge the intersection of prostitution with trafficking victimization.

Virginia’s prostitution statute, Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties), does not refer to the sex trafficking statute, Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) to acknowledge the intersection of prostitution with trafficking victimization.

- 1.3.1 Recommendation: Amend Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) to refer to Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) to acknowledge the intersection of prostitution with trafficking victimization.

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- a. The accused intentionally touches the complaining witness’s intimate parts or material directly covering such intimate parts;
 - b. The accused forces the complaining witness to touch the accused’s, the witness’s own, or another person’s intimate parts or material directly covering such intimate parts;
 - c. If the complaining witness is under the age of 13, the accused causes or assists the complaining witness to touch the accused’s, the witness’s own, or another person’s intimate parts or material directly covering such intimate parts; or
 - d. The accused forces another person to touch the complaining witness’s intimate parts or material directly covering such intimate parts.

1.4 *The state racketeering or gang crimes statute includes sex trafficking or commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute child sex trafficking crimes.*

Va. Code Ann. § 18.2-514 (Racketeering offenses) states,

A. It shall be unlawful for an enterprise,¹² or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to receive any proceeds known to have been derived directly from racketeering activity and to use or invest an aggregate of \$10,000 or more of such proceeds in the acquisition of any title to, or any right, interest, or equity in, real property, or in the establishment or operation of any enterprise.

B. It shall be unlawful for any enterprise, or for any person who occupies a position of organizer, supervisor, or manager of an enterprise, to directly acquire or maintain any interest in or control of any enterprise or real property through racketeering activity.

C. It shall be unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through racketeering activity.

D. It shall be unlawful for any person to conspire to violate any of the provisions of subsection A, B, or C.

Va. Code Ann. § 18.2-513¹³ (Definitions) defines “racketeering activity” to mean:

[to] commit, attempt to commit, or conspire to commit or to solicit, coerce, or intimidate another person to commit two or more of the following offenses: . . . § 18.2-48 [Abduction with intent to extort money or for immoral purpose], . . . § 18.2-49 [Threatening, attempting or assisting in such abduction], . . . 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], 18.2-348 [Aiding prostitution or illicit sexual intercourse, etc.; penalty], 18.2-348.1 [Promoting travel for prostitution; penalty], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse; penalty], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute; penalties], 18.2-357.1 [Commercial sex trafficking; penalties], . . . 18.2-374.1 [Possession, reproduction, distribution, solicitation, and facilitation of child pornography; penalty] . . . ; or any substantially similar offenses under the laws of any other state, the District of Columbia, the United States or its territories.

Based on this definition of racketeering, certain acts of commercial sexual exploitation of children constitute predicate crimes to the racketeering law, making it available for combatting criminal enterprises that engage in domestic minor sex trafficking.

Penalties for violation of Va. Code Ann. § 18.2-514 (Racketeering offenses) are described in Va. Code Ann. § 18.2-515 (Criminal penalties; forfeiture)

A. Any person or enterprise convicted of engaging in activity in violation of the provisions of § 18.2-514 is guilty of a felony punishable by imprisonment for not less than five years nor more than 40 years and a fine of not more than \$1 million. A second or subsequent offense shall be punishable as a Class 2 felony and a fine of not more than \$2 million.

¹² Va. Code Ann. § 18.2-513 (Definitions) defines “enterprise” to mean “any of the following: sole proprietorship, partnership, corporation, business trust, criminal street gang or other group of three or more individuals associated for the purpose of criminal activity.”

¹³ The text Va. Code Ann. § 18.2-513 cited here and elsewhere in this report includes amendments made by the enactment of House Bills 1817 and 2586 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

The court may order any such person or enterprise to be divested of any interest in any enterprise or real property identified in § 18.2-514; order the dissolution or reorganization of such enterprise; and order the suspension or revocation of any license, permit, or prior approval granted to such enterprise or person by any agency of the Commonwealth or political subdivision thereof.

B. All property, real or personal, including money, together with any interest or profits derived from the investment of such money, used in substantial connection with, intended for use in the course of, or traceable to, conduct in violation of any provision of § 18.2-514 is subject to civil forfeiture to the Commonwealth.

Finally, where the alleged enterprise is a criminal street gang, additional charges may apply. Under Va. Code Ann. § 18.2-46.2(A),

Any person who actively participates in or is a member of a criminal street gang and who knowingly and willfully participates in any predicate criminal act¹⁴ committed for the benefit of, at the direction of, or in association with any criminal street gang shall be guilty of a Class 5 felony. However, if such participant in or member of a criminal street gang is age eighteen years or older and knows or has reason to know that such criminal street gang also includes a juvenile member or participant, he shall be guilty of a Class 4 felony.

Va. Code Ann. § 18.2-46.1 (Definitions) defines “criminal street gang” as “any ongoing organization, association, or group of three or more persons, whether formal or informal, (i) which has as one of its primary objectives or activities the commission of one or more criminal activities; (ii) which has an identifiable name or identifying sign or symbol; and (iii) whose members individually or collectively have engaged in the commission of, attempt to commit, conspiracy to commit, or solicitation of two or more predicate criminal acts, at least one of which is an act of violence, provided such acts were not part of a common act or transaction.”

Where CSEC and sex trafficking offenses involve gang recruitment or intimidation, gang members may face prosecution under Va. Code Ann. § 18.2-46.3 (Recruitment of persons for criminal street gang; penalty), which states,

A. Any person who solicits, invites, recruits, encourages or otherwise causes or attempts to cause another to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a Class 1 misdemeanor. Any person age 18 years or older who solicits, invites, recruits, encourages or otherwise causes or attempts to cause a juvenile to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a Class 6 felony.

¹⁴ Va. Code Ann. § 18.2-46.1 defines “predicate criminal act” to include “(i) an act of violence; (ii) any violation of § 18.2-42, 18.2-46.3 [Recruitment of persons for criminal street gang; penalty], . . . 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute], or 18.2-357.1 [Commercial sex trafficking; penalties]; (iii) a felony violation of § . . . 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], 18.2-348 [Aiding prostitution or illicit sexual intercourse, etc.; penalty], or 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse; penalty]; . . . or (v) any substantially similar offense under the laws of another state or territory of the United States, the District of Columbia, or the United States.” “Act of violence” is defined as “those felony offenses described in subsection A of § 19.2-297.1.” Va. Code Ann. § 18.2-46.1. Pursuant to Va. Code Ann. § 19.2-297.1(A)(i), the term includes “c. Any kidnapping or abduction felony under Article 3 (§ 18.2-47 et seq.)” and “f. Except as otherwise provided in § 18.2-67.5:2 or § 18.2-67.5:3, criminal sexual assault punishable as a felony under Article 7 (§ 18.2-61 et seq.)” It also includes “(ii) conspiracy to commit any of the violations enumerated in clause (i) of this section; and (iii) violations as a principal in the second degree or accessory before the fact of the provisions enumerated in clause (i) of this section.”

The text Va. Code Ann. § 18.2-46.1 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2586 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

B. Any person who, in order to encourage an individual (a) to join a criminal street gang, (b) to remain as a participant in or a member of a criminal street gang, or (c) to submit to a demand made by a criminal street gang to commit a felony violation of this title, (i) uses force against the individual or a member of his family or household or (ii) threatens force against the individual or a member of his family or household, which threat would place any person in reasonable apprehension of death or bodily injury, is guilty of a Class 6 felony. The definition of “family or household member” “set forth in § 16.1-228 applies to this section.”

Va. Code Ann. § 18.2-46.3:2 provides for civil forfeiture in the case of criminal street gang activities, stating in part,

All property, both personal and real, of any kind or character used in substantial connection with, intended for use in the course of, derived from, traceable to, or realized through, including any profit or interest derived from, any conduct in violation of any provision of this article¹⁵ is subject to civil forfeiture to the Commonwealth. Further, all property, both personal and real, of any kind or character used or intended to be used in substantial connection with, during the course of, derived from, traceable to, or realized through, including any profit or interest derived from, criminal street gang member recruitment as prohibited under Va. Code § 18.2-46.3 is subject to civil forfeiture to the Commonwealth.

¹⁵ Title 18.2, Chapter 4, Article 2.1 (Crimes by gangs), Va. Code Ann. § 18.2-46.1 *et seq.*, includes offenses under § 18.2-46.2 (Prohibited criminal street gang participation; penalty) and § 18.2-46.3 (Recruitment of persons for criminal street gang; penalty).

Legal Components:

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a minor.*
 - 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
 - 2.3 *Solicitation laws differentiate between soliciting sex acts with an adult and soliciting sex acts with a minor under 18.*
 - 2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*
 - 2.5 *Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*
 - 2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*
 - 2.7 *Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*
 - 2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*
 - 2.9 *Buying and possessing child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*
 - 2.10 *Convicted buyers of commercial sex acts with minors are required to register as sex offenders.*
-

Legal Analysis:

- 2.1 *The state sex trafficking law can be applied to buyers of commercial sex acts with a minor.*

Since Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking, penalties) is limited in application to offenders who act “with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse in violation of subsection A of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties],” the sex trafficking law does not apply to the conduct of buyers of sex acts with a minor.

- 2.1.1 Recommendation: Amend Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking, penalties) to make the statute applicable to the actions of buyers of sex with minors.

- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*

Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) criminalizes soliciting sex from minors, stating that “any person who solicits prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.” Va. Code Ann. § 18.2-346(B).

In addition, Va. Code Ann. § 18.2-355(4) (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking) may apply to buyers through the term “causes.” Pursuant to Va. Code Ann. § 18.2-355(4), any person who “for purposes of prostitution, takes any minor into, or persuades, encourages, or causes any minor to enter, a bawdy place, or takes or causes such person to be taken to any place for such purposes; is guilty of pandering A violation of subdivision (4) is punishable as a Class 3 felony.”

2.3 *Solicitation laws differentiate between soliciting sex acts with an adult and soliciting sex acts with a minor under 18.*

Virginia law differentiates between soliciting sex acts with an adult and soliciting sex acts with a minor. Specifically, Va. Code Ann. § 18.2-346(B) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) provides,

Any person who offers money or its equivalent to another for the purpose of engaging in sexual acts . . . is guilty of solicitation of prostitution and which is punishable as a Class 1 misdemeanor. However, any person who solicits prostitution from a minor (i) 16 years of age or older is guilty of a Class 6 felony or (ii) younger than 16 years of age is guilty of a Class 5 felony.

2.4 *Penalties for buyers of commercial sex acts with minors are as high as federal penalties.*

Soliciting sex with a minor of 16 years of age or older is a Class 6 felony. Va. Code Ann. § 18.2-346(B) (Prostitution; commercial sexual conduct; commercial exploitation of a minor). Soliciting sex with a minor younger than 16 years of age is a Class 5 felony. A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both imprisonment and a fine.¹⁶ A Class 6 felony is punishable by a term of imprisonment of 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both imprisonment and a fine.¹⁷

Pandering involving a minor is a Class 3 felony. Va. Code Ann. § 18.2-355(4) (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking). A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)¹⁸ for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17 a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense¹⁹ against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,²⁰ a conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.²¹

¹⁶ Va. Code Ann § 18.2-10(e) (General punishment for conviction of felony; penalty).

¹⁷ *Id.* § 18.2-10(f).

¹⁸ Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

¹⁹ Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as an offense under section 1591 [18 USCS § 1591] (relating to sex trafficking of children), 2241 [18 USCS § 2241] (relating to aggravated sexual abuse), 2242 [18 USCS § 2242] (relating to sexual abuse), 2244(a)(1) [18 USCS § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 USCS § 2245] (relating to sexual abuse resulting in death), 2251 [18 USCS § 2251] (relating to sexual exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

²⁰ 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

²¹ 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(b) (stating that a

2.5 *Using the Internet or electronic communications to lure, entice, or purchase, or attempt to lure, entice, or purchase commercial sex acts with a minor is a separate crime or results in an enhanced penalty for buyers.*

Va. Code Ann. § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) makes it a crime to use the Internet, or other communication systems, to engage in certain types of sexual interactions with a minor. It states in part,

....

B. It is unlawful for any person to use a communications system,²² including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 [Taking indecent liberties with children; penalties] or 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]. A violation of this subsection is a Class 6 felony.

C. It is unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child younger than 15 years of age to knowingly and intentionally:

1. Expose his sexual or genital parts to any child to whom he is not legally married or propose that any such child expose his sexual or genital parts to such person;
2. Propose that any such child feel or fondle his own sexual or genital parts or the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child;
3. Propose to such child the performance of an act of sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus, or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
4. Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any purposes set forth in the preceding subdivisions.

Any person who violates this subsection is guilty of a Class 5 felony. However, if the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age, the person shall be punished by a term of imprisonment of not less than five years nor more than 30 years in a state correctional facility, five years of which shall be mandatory minimum term of imprisonment. Any person who commits a second or subsequent violation of this subsection when the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age shall be punished by a term of imprisonment of not less than 10 years nor more than 40 years, 10 years of which shall be a mandatory minimum term of imprisonment.

D. Any person who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any child he knows or has reason to believe is at least 15 years of age but younger than 18 years of age to knowingly and intentionally commit any of the activities listed in subsection C if the person is at least seven years older than the child is guilty of a Class 5 felony. Any person who commits a second or subsequent violation of this subsection shall be punished by a term of imprisonment of not less than one nor more than 20 years, one year of which shall be a mandatory minimum term of imprisonment.

conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

²² Va. Code Ann. § 18.2-374.3(A) defines “use a communications system” as “making personal contact or direct contact through any agent or agency, any print medium, the United States mail, any common carrier or communication common carrier, any electronic communications system, the Internet, or any telecommunications, wire, computer network, or radio communications system.”

E. Any person 18 years of age or older who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child younger than 18 years of age for (i) any activity in violation of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking] or 18.2-361 [Crimes against nature; penalty], (ii) any activity in violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], or (iii) a violation of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty] is guilty of a Class 5 felony.

Va. Code Ann. § 18.2-376.1 (Enhanced penalties for using a computer in certain violations) states, “Any person who uses a computer in connection with a violation of §§ 18.2-374 [Production, publication, sale, possession, etc., of obscene items], 18.2-375 [Obscene exhibitions and performances], or § 18.2-376 [Advertising, etc., obscene items, exhibitions or performances] is guilty of a separate and distinct Class 1 misdemeanor, and for a second or subsequent such offense within 10 years of a prior such offense is guilty of a Class 6 felony, the penalties to be imposed in addition to any other punishment otherwise prescribed for a violation of any of those sections.”

2.6 *No age mistake defense is permitted for a buyer of commercial sex acts with any minor under 18.*

Virginia law is silent regarding the availability of a mistake of age defense in prosecutions for buying commercial sex acts with a minor.

2.6.1 Recommendation: Amend Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking) and Virginia’s CSEC laws to prohibit a mistake of age defense.

2.7 *Base penalties for buying sex acts with a minor under 18 are sufficiently high and not reduced for older minors.*

Virginia’s buyer-applicable CSEC law, Va. Code Ann. § 18.2-346(B) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties), staggers penalties based on a minor’s age; penalties are not sufficiently high when the victim is an older minor. A conviction under Va. Code Ann. § 18.2-346(B) is a Class 5 felony when the victim is a minor under 16 years of age or a Class 6 felony when the victim is 16 years of age or older. Va. Code Ann. § 18.2-346(B). A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months” Va. Code Ann. § 18.2-10(e). A Class 6 felony is punishable by a term of imprisonment 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months” Va. Code Ann. § 18.2-10(f).

2.7.1 Recommendation: Amend Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) to provide a sufficiently high base penalty for commercial sexual exploitation offenses against any minor under 18.

2.8 *Financial penalties for buyers of commercial sex acts with minors are sufficiently high to make it difficult for buyers to hide the crime.*

Buyers convicted under Va. Code Ann. § 18.2-346(B) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) face fines not to exceed \$2,500 while those convicted under Va. Code Ann. § 18.2-355(4) (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking) face fines not to exceed \$100,000. Va. Code Ann. § 18.2-10(c).

A buyer convicted of possessing child sexual abuse material (CSAM) may be subject to a fine of not more than \$2,500. Va. Code Ann. §§ 18.2-10(f), 18.2-374.1:1. A person possessing CSAM may also face asset forfeiture

pursuant to Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children), which states in part,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (Section 19.2-386.1 et seq.). The Commonwealth shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1 (Section 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture. Upon his conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.

Should a buyer be convicted under Va. Code Ann. § 18.2-374.1:1 (Possession, reproduction, distribution, and facilitation of child pornography; penalty) or § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) will also be required to pay mandatory restitution to the victim. Under Va. Code Ann. § 19.2-305.1(H) (Restitution for property damage or loss; community service),

A defendant convicted of an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, “victim” means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3. The Commonwealth shall make reasonable efforts to notify victims of offenses under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.

Also, under Va. Code Ann. § 19.2-386.35²³ (Seizure of property used in connection with certain offenses), property used in connection with certain offenses is subject to forfeiture. Va. Code Ann. § 19.2-386.35 provides,

All money, equipment, motor vehicles, and other personal and real property of any kind or character together with any interest or profits derived from the investment of such proceeds or other property that (i) was used in connection with the commission of, or in an attempt to commit, a violation of . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], . . . 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto] . . . ; (ii) is traceable to the proceeds of some form of activity that violates . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], . . . 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-357 [Receiving money from earnings of male or female prostitute; penalties], 18.2-357.1 [Commercial sex trafficking, penalties] . . . ; or (iii) was used to or intended to be used to promote some form of activity that violates . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], . . . 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto] . . . is subject to lawful seizure by a law-enforcement officer and subject to forfeiture to

²³ The text Va. Code Ann. § 19.2-386.35 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1817 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). Any forfeiture action under this section shall be stayed until conviction, and property eligible for forfeiture pursuant to this section shall be forfeited only upon the entry of a final judgment of conviction for an offense listed in this section; if no such judgment is entered, all property seized pursuant to this section shall be released from seizure.

Finally, buyers convicted under Va. Code Ann. § 18.2-374.1:1 (Possession, reproduction, distribution, and facilitation of child pornography; penalty) or § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) are subject to mandatory asset forfeiture. Under Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children),

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, solicitation, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). The Commonwealth shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1 (§ 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture.

Asset forfeiture under Va. Code Ann. § 19.2-386.31 may be pursued through criminal or civil procedures. “Upon [the defendant’s] conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court’s discretion.” Va. Code Ann. § 19.2-386.31.

Under Va. Code Ann. § 19.2-386.12 (Sale of forfeited property), forfeited property is sold and the money obtained from the sale is “paid over to the state treasury into a special fund of the Department of Criminal Justice Services” The Department of Criminal Justice Services then distributes the money to “federal, state and local agencies to promote law enforcement” Va. Code Ann. § 19.2-386.14(A1) (Sharing of forfeited assets).

A buyer arrested for a second or subsequent offense of Va. Code Ann. 18.2-346 (Prostitution; commercial exploitation of a minor) may be subject to vehicle seizure and forfeiture. Va. Code Ann. § 19.2-386.16(A)²⁴ (Forfeiture of motor vehicles used in commission of certain crimes) states in part,

Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a second or subsequent offense of Section 18.2-346 [Prostitution; commercial exploitation of a minor], 18.2-347 [Keeping, residing in or frequenting a bawdy place; “bawdy place” defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-348.1 [Promoting travel for prostitution; penalty], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person] or § 18.2-357 [Receiving money from earnings of male or female prostitute] or of a similar ordinance of any county, city or town or knowingly used for the transportation of any stolen goods, chattels or other property, when the value of such stolen goods, chattels or other property is \$500 or more, or any stolen property obtained as a result of a robbery, without regard to the value of the property, shall be forfeited to the

²⁴ The text Va. Code Ann. § 19.2-386.16 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1817 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

Commonwealth. The vehicle shall be seized by any law-enforcement officer arresting the operator of such vehicle for the criminal offense, and delivered to the sheriff of the county or city in which the offense occurred

2.9 *Buying and possessing child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*

Va. Code Ann. § 18.2-374.1:1(A) (Possession, reproduction, distribution, and facilitation of child pornography; penalty) makes it a Class 6 felony to “knowingly possess[] child pornography,”²⁵ which is punishable by a possible term of imprisonment of 1–5 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.” Va. Code Ann. § 18.2-10(f). Subsequent offenses are Class 5 felonies, punishable by a possible imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.” Va. Code Ann. §§ 18.2-10(e), 18.2-374.1:1(B). In addition, Va. Code Ann. § 18.2-374.1:1(C) provides,

Any person who knowingly (i) reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography or (ii) commands, entreats, or otherwise attempts to persuade another person to send, submit, transfer or provide to him any child pornography in order to gain entry into a group, association, or assembly of persons engaged in trading or sharing child pornography shall be punished by not less than five years nor more than 20 years in a state correctional facility.

A subsequent violation of subsection C is punishable by imprisonment for 5–20 years with a mandatory minimum of 5 years. Va. Code Ann. § 18.2-374.1:1(C).

In comparison, a federal conviction for possession of child sexual abuse material (CSAM)²⁶ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.²⁷ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.²⁸

²⁵ Va. Code Ann. § 18.2-374.1:1(F) states, “For purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.”

²⁶ 18 U.S.C. §§ 2252(a)(2), (a)(4)(A) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

²⁷ 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

²⁸ 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (b)(1), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (b)(1), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

- 2.9.1 Recommendation: Amend Va. Code Ann. § 18.2-374.1:1(A) (Possession, reproduction, distribution, and facilitation of child pornography; penalty) to impose more substantial penalties to reflect the seriousness of the offense.

2.10 Convicted buyers of commercial sex acts with minors are required to register as sex offenders.

Under Va. Code Ann. § 9.1-902(A) (Offenses requiring registration), “offense for which registration is required” is defined to include the following:

1. Any offense listed in subsection B;
-
4. A sexually violent offense;
5. Any offense similar to those listed in subdivisions 1 through 4 under the laws of any foreign country or any political subdivision thereof, the United States or any political subdivision thereof; and
6. Any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted.

Under subsection (B),²⁹

The offenses included under this subsection include any violation of, attempted violation of, or conspiracy to violate:

1. § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age] unless registration is required pursuant to subdivision E 1; § 18.2-64.1 [Carnal knowledge of certain minors]; . . . any felony violation of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties]; any violation of subdivision (4) of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking]; any violation of subsection C of § 18.2-357.1 [Commercial sex trafficking; penalties]; subsection B or C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]; . . . subsection B, C, or D of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children]; or a third or subsequent conviction of (i) § 18.2-67.4 [Sexual battery], (ii) § 18.2-67.4:2 [Sexual abuse of a child under 15 years of age; penalty], (iii) subsection C of § 18.2-67.5 [Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery], or (iv) § 18.2-386.1 [Unlawful filming, videotaping or photographing of another; penalty].

If the offense was committed on or after July 1, 2006, § 18.2-91 [Entering a dwelling, etc.] with the intent to commit any felony offense listed in this section; subsection A of § 18.2-374.1:1 [Possession, reproduction, distribution, solicitation, and facilitation of child pornography; penalty]; or a felony under § 18.2-67.5:1.

2. Where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10 [General definitions], subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], clause (i) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], § 18.2-67.4, subsection C of § 18.2-67.5, § 18.2-361 [Crimes against nature; penalty], § 18.2-366 [Incest], or a felony violation of former § 18.1-191 or a felony violation of former § 18.1-191.

3. § 18.2-370.6 [Penetration of mouth of child with lascivious intent; penalty].

....

5. If the offense was committed on or after July 1, 2016, any violation of § 18.2-356 [Receiving money for procuring persons] punishable as a Class 3 felony or any violation of § 18.2-357

²⁹ The text Va. Code Ann. § 9.1-902 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2586 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

[Receiving money from earnings of male or female prostitute; penalties] punishable as a Class 3 felony.

6. If the offense was committed on or after July 1, 2019, any felony violation of § 18.2-348 [Aiding prostitution or illicit sexual intercourse, etc.; penalty] or 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse; penalty].

A “sexually violent offense” is defined in subsection (E) as the following:

[A] violation of, attempted violation of, or conspiracy to violate:

1. Clause (ii) and (iii) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], former § 18.1-38 with the intent to defile or, for the purpose of concubinage or prostitution, a felony violation of subdivision (2) or (3) of former § 18.1-39 that involves assisting or aiding in such an abduction, § 18.2-61 [Rape], former § 18.1-44 when such act is accomplished against the complaining witness's will, by force, or through the use of the complaining witness's mental incapacity or physical helplessness, or if the victim is under 13 years of age, subsection A of § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age] where the perpetrator is more than five years older than the victim, § 18.2-67.1 [Forcible Sodomy], § 18.2-67.2 [Aggravated sexual battery; penalty], § 18.2-67.3 [Aggravated sexual battery], former § 18.1-215 when the complaining witness is under 13 years of age, § 18.2-67.4 [Sexual battery] where the perpetrator is 18 years of age or older and the victim is under the age of six, subsections A and B of § 18.2-67.5, § 18.2-370 [Taking indecent liberties with children; penalties], subdivisions (1), (2), or (4) of former § 18.1-213, former § 18.1-214, § 18.2-370.1, or § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]; or
2. § 18.2-63, § 18.2-64.1 [Carnal knowledge of certain minors], former § 18.2-67.2:1, § 18.2-90 with the intent to commit rape or, where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10 [General definitions], subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-67.4, subsection C of § 18.2-67.5, clause (i) of § 18.2-48, § 18.2-361 [Crimes against nature; penalty], § 18.2-366 [Incest], or subsection C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]. An offense listed under this subdivision shall be deemed a sexually violent offense only if the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that person had been at liberty between such convictions or adjudications; . . .
. . . .
4. Chapter 117 (18 U.S.C. § 2421 et seq.) of Title 18 of the United States Code or sex trafficking (as described in § 1591 of Title 18, U.S.C.).

Legal Components:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*
- 3.2 *Creating and distributing child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*
- 3.3 *Using the Internet or electronic communications to lure, entice, recruit, or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*
- 3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*
- 3.5 *Convicted traffickers are required to register as sex offenders.*
- 3.6 *Laws relating to parental custody and termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for sole custody or termination in order to prevent traffickers from exploiting their parental rights as a form of control.*

Legal Analysis:

- 3.1 *Penalties for trafficking a child for sexual exploitation are as high as federal penalties.*

A violation of Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) with a person under 18 years of age is punishable as a Class 3 felony by 5–20 years imprisonment and a possible fine of up to \$100,000. Va. Code Ann. § 18.2-10(c).

A violation of Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) is punishable as a Class 2 felony, which carries a minimum sentence of 20 years and a maximum sentence of life imprisonment. Va. Code Ann. § 18.2-10(b). Va. Code Ann. § 18.2-48 also specially directs that “[i]f the sentence imposed for a violation of (ii), (iii), (iv), or (v) includes a term of confinement less than life imprisonment, the judge shall impose, in addition to any active sentence, a suspended sentence of no less than 40 years. This suspended sentence shall be suspended for the remainder of the defendant’s life subject to revocation by the court.” Va. Code Ann. § 18.2-48.

Traffickers also face Class 3 felonies for violating Va. Code Ann. § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), Va. Code § 18.2-356 (Receiving money for procuring person) and Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute) when these offenses involve a minor victim and a Class 5 felony for violating Va. Code Ann. § 18.2-370(B) (Taking indecent liberties with children). A Class 3 felony is punishable by 5–20 years imprisonment and a possible fine of up to \$100,000. Va. Code Ann. § 18.2-10(c). A Class 5 felony is punishable by a term of imprisonment of 1–10 years, “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-10(e).

Other crimes which might apply to the act of trafficking a minor for sexual exploitation do not carry as severe penalties. Va. Code Ann. § 18.2-371 (Causing or encouraging acts rendering children delinquent, abused, etc.) is a Class 1 misdemeanor punished by “confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both.” Va. Code Ann. §§ 18.2-11(a), 18.2-371. Also, Va. Code Ann. § 18.2-375 (Obscene³⁰ exhibitions and performances) is a Class 1 misdemeanor, stating in part, “It shall be unlawful for any person knowingly to: (1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any

³⁰ Va. Code Ann. § 18.2-372 defines “obscene” as “that which, considered as a whole, has as its dominant theme or purpose an appeal to the prurient interest in sex, that is, a shameful or morbid interest in nudity, sexual conduct, sexual excitement, excretory functions or products thereof or sadomasochistic abuse, and which goes substantially beyond customary limits of candor in description or representation of such matters and which, taken as a whole, does not have serious literary, artistic, political or scientific value.”

obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene” Va. Code Ann. §§ 18.2-375, 18.2-380. An offender is subject to a sentence of up to 12 months in jail, a fine of up to \$2,500, or both. Va. Code Ann. § 18.2-11(a) (Punishment for conviction of misdemeanor). A second or subsequent violation is punishable as a Class 6 felony by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine not to exceed \$2,500, or both imprisonment and a fine. Va. Code Ann. §§ 18.2-10(f), 18.2-381.³¹

Va. Code Ann. § 18.2-374.4 (Display of child pornography or grooming video or materials to a child unlawful) states,

Any person 18 years of age or older who displays child pornography or a grooming video or materials³² to a child under 13 years of age with the intent to entice, solicit, or encourage the child to engage in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration is guilty of a Class 6 felony.

A Class 6 felony is punishable by “a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(f).

The age-neutral prostitution offense under Va. Code Ann. § 18.2-347³³ (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined) may also be used to prosecute a trafficker. Va. Code Ann. § 18.2-347 provides, “It is unlawful for any person to keep any bawdy place, or to reside in or at or visit for immoral purposes, any such bawdy place As used in this Code, ‘bawdy place’ means any place within or outside any building or structure that is used or is to be used for lewdness, assignation or prostitution.” A conviction under Va. Code Ann. § 18.2-347 is a Class 1 misdemeanor punishable by up to 12 months in jail, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-347, 18.2-11(a).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act³⁴ for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense³⁵ against a minor. 18 U.S.C. § 3559(e)(1).

³¹ Va. Code Ann. § 18.2-381 states in full, “Any person, firm, association or corporation convicted of a second or other subsequent offense under § 18.2-374, 18.2-375, 18.2-376, 18.2-377, 18.2-378, or 18.2-379 is guilty of a Class 6 felony. However, if the person, firm, association or corporation convicted of such subsequent offense is the owner of the business establishment where each of the offenses occurred, a fine of not more than \$10,000 shall be imposed in addition to the penalties otherwise prescribed by this section.”

³² Va. Code Ann. § 18.2-374.4(B) defines “Grooming video or materials” as “a cartoon, animation, image, or series of images depicting a child engaged in the fondling of the sexual or genital parts of another or the fondling of his sexual or genital parts by another, masturbation, sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, or object sexual penetration.”

³³ The text Va. Code Ann. § 18.2-347 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2586 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

³⁴ See *supra* note 18.

³⁵ See *supra* note 19 for the definition of “federal sex offense.”

3.2 *Creating and distributing child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*

Va. Code Ann. § 18.2-374.1(B) (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability)³⁶ states,

A person shall be guilty of production of child pornography who:

1. Accosts, entices or solicits a person less than 18 years of age with intent to induce or force such person to perform in or be a subject of child pornography; or
2. Produces or makes or attempts or prepares to produce or make child pornography; or
3. Who knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means; or
4. Knowingly finances or attempts or prepares to finance child pornography.

Va. Code Ann. § 18.2-374.1(D) makes clear that “[f]or the purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.

A violation of Va. Code Ann. § 18.2-374.1(B) is punishable by imprisonment for 5–30 years when the subject of child sexual abuse material (CSAM) is under 15, with a mandatory minimum of 5 years if the offender is at least 7 years older than the subject. A subsequent violation, where the offender is at least 7 years older than the child, is punishable by imprisonment for 15–40 years, “15 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C1). When the subject of CSAM is at least 15 but less than 18, the sentence is 1–20 years, except if the offender is at least 7 years older than the child then the sentence is 3–30 years, with a 3-year “mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2). A subsequent violation by an offender at least 7 years older than the subject is punishable by imprisonment for 10–30 years, “10 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2).

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense³⁷ against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for

³⁶ Va. Code Ann. § 18.2-374.1(A) defines “child pornography” for “this article and Article 4 (§ 18.2-362 et seq.) . . . [as] sexually explicit visual material which utilizes or has as a subject an identifiable minor. An identifiable minor is a person who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting or modifying the visual depiction; and who is recognizable as an actual person by the person’s face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and shall not be construed to require proof of the actual identity of the identifiable minor.” Also, the term “sexually explicit visual material” is defined in the same provision as “a picture, photograph, drawing, sculpture, motion picture film, digital image, including such material stored in a computer’s temporary Internet cache when three or more images or streaming videos are present, or similar visual representation which depicts sexual bestiality, a lewd exhibition of nudity, as nudity is defined in § 18.2-390, or sexual excitement, sexual conduct or sadomasochistic abuse, as also defined in § 18.2-390, or a book, magazine or pamphlet which contains such a visual representation. An undeveloped photograph or similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.”

³⁷ See *supra* note 19 for the definition of “federal sex offense.”

distribution of CSAM³⁸ is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.³⁹ Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.⁴⁰

3.3 *Using the Internet or electronic communications to lure, entice, recruit, or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*

Va. Code Ann. § 18.2-374.3 (Use of communications systems to facilitate certain offenses involving children) makes it a crime to use the Internet, or other communication systems, to engage in certain types of sexual interactions with a minor.⁴¹ It states in part,

....

B. It shall be unlawful for any person to use a communications system,⁴² including but not limited to computers or computer networks or bulletin boards, or any other electronic means for the purposes of procuring or promoting the use of a minor for any activity in violation of § 18.2-370 [Taking indecent liberties with children; penalties] or § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]. A violation of this subsection is a Class 6 felony.

C. It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child younger than 15 years of age to knowingly and intentionally:

1. Expose his sexual or genital parts to any child to whom he is not legally married or propose that any such child expose his sexual or genital parts to such person;
2. Propose that any such child feel or fondle his own sexual or genital parts or the sexual or genital parts of such person or propose that such person feel or fondle the sexual or genital parts of any such child;
3. Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361 [Crimes against nature; penalty]; or
4. Entice, allure, persuade, or invite any such child to enter any vehicle, room, house, or other place, for any purposes set forth in the preceding subdivisions.

³⁸ 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

³⁹ 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

⁴⁰ 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

⁴¹ *Podracky v. Commonwealth*, 662 S.E.2d 81, 87 (Va. Ct. App. 2008) (stating that language of § 18.2-374.3(B) “does not require the solicitation of an actual minor, only the use of a communications system ‘for the purposes of soliciting any person he knows or has reason to believe is a minor’ for specified criminal offenses.”); *see also Grafmuller v. Commonwealth*, 698 S.E.2d 276, 279 (Va. Ct. App. 2010) (citing *Podracky*, explaining “the defendant’s solicitation of sexual behavior from a person that he believes is a child constitutes the behavior that the legislature intended to prohibit.”)

⁴² *See supra* note 22 for the definition of “use a communications system.”

Any person who violates this subsection is guilty of a Class 5 felony. However, if the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age, the person shall be punished by a term of imprisonment of not less than five years nor more than 30 years in a state correctional facility, five years of which shall be mandatory minimum term of imprisonment. Any person who commits a second or subsequent violation of this subsection when the person is at least seven years older than the child he knows or has reason to believe is less than 15 years of age shall be punished by a term of imprisonment of not less than 10 years nor more than 40 years, 10 years of which shall be a mandatory minimum term of imprisonment.

D. Any person who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any child he knows or has reason to believe is at least 15 years of age but younger than 18 years of age to knowingly and intentionally commit any of the activities listed in subsection C if the person is at least seven years older than the child is guilty of a Class 5 felony. Any person who commits a second or subsequent violation of this subsection shall be punished by a term of imprisonment of not less than one nor more than 20 years, one year of which shall be a mandatory minimum term of imprisonment.

E. Any person 18 years of age or older who uses a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting any person he knows or has reason to believe is a child younger than 18 years of age for (i) any activity in violation of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking] or 18.2-361 [Crimes against nature; penalty], (ii) any activity in violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], or (iii) a violation of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty] is guilty of a Class 5 felony.

Va. Code Ann. § 18.2-376.1 (Enhanced penalties for using a computer in certain violations) states, “Any person who uses a computer in connection with a violation of §§ 18.2-374 [Production, publication, sale, possession, etc., of obscene items], 18.2-375 [Obscene exhibitions and performances], or § 18.2-376 [Advertising, etc., obscene items, exhibitions or performances] is guilty of a separate and distinct Class 1 misdemeanor, and for a second or subsequent such offense within 10 years of a prior such offense is guilty of a Class 6 felony, the penalties to be imposed in addition to any other punishment otherwise prescribed for a violation of any of those sections.”

3.4 *Financial penalties for traffickers, including asset forfeiture, are sufficiently high.*

A trafficker convicted under Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties), § 18.2-48 (Abduction with intent to extort money or for immoral purpose), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), § 18.2-356 (Receiving money for procuring person; penalties), or § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties) could be fined of up to \$100,000. Va. Code Ann. § 18.2-10(b), (c).

Pursuant to Va. Code Ann. § 19.2-386.32 (Seizure and forfeiture of property used in connection with the abduction of children), a trafficker could be subject to non-mandatory asset forfeiture in the course of their criminal proceedings. Va. Code Ann. § 19.2-386.32 states,

All moneys and other property, real and personal, owned by a person and used to further the abduction of a child in violation of § 18.2-47, 18.2-48, or 18.2-48.1 are subject to lawful seizure by a law-enforcement officer and are subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) by order of the court in which a conviction under § 18.2-47, 18.2-48, or 18.2-48.1 is obtained.

Also, under Va. Code Ann. § 19.2-386.35⁴³ (Seizure of property used in connection with certain offenses), property used in connection with certain offenses is subject to forfeiture. Va. Code Ann. § 19.2-386.35 provides,

All money, equipment, motor vehicles, and other personal and real property of any kind or character together with any interest or profits derived from the investment of such proceeds or other property that (i) was used in connection with the commission of, or in an attempt to commit, a violation of subsection B of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-48 [Abduction with intent to extort money or for immoral purpose] or . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], or § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-348.1 [Promoting travel for prostitution; penalty], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute], 18.2-357.1 [Commercial sex trafficking; penalties] . . . ; (ii) is traceable to the proceeds of some form of activity that violates subsection B of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-48 [Abduction with intent to extort money or for immoral purpose] . . . ; subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], or § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute] . . . ; or (iii) was used to or intended to be used to promote some form of activity that violates subsection B of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-48 [Abduction with intent to extort money or for immoral purpose] or . . . subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties], or § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto], 18.2-356 [Receiving money for procuring person], 18.2-357 [Receiving money from earnings of male or female prostitute] . . . is subject to lawful seizure by a law-enforcement officer and subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). Any forfeiture action under this section shall be stayed until conviction, and property eligible for forfeiture pursuant to this section shall be forfeited only upon the entry of a final judgment of conviction for an offense listed in this section; if no such judgment is entered, all property seized pursuant to this section shall be released from seizure.

A trafficker arrested under Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose) or § 18.2-357 (Receiving money from earnings of male or female prostitute) may be subject to vehicle seizure and forfeiture. Va. Code Ann. § 19.2-386.16⁴⁴ (Forfeiture of motor vehicles used in commission of certain crimes) states in part,

A. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a second or subsequent offense of Section 18.2-346 [Prostitution; commercial exploitation of a minor], 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-

⁴³ See *supra* note 23.

⁴⁴ See *supra* note 24.

348.1 [Promoting travel for prostitution; penalty], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person] or § 18.2-357 [Receiving money from earnings of male or female prostitute] or of a similar ordinance of any county, city or town or knowingly used for the transportation of any stolen goods, chattels or other property, when the value of such stolen goods, chattels or other property is \$500 or more, or any stolen property obtained as a result of a robbery, without regard to the value of the property, shall be forfeited to the Commonwealth. The vehicle shall be seized by any law-enforcement officer arresting the operator of such vehicle for the criminal offense, and delivered to the sheriff of the county or city in which the offense occurred

B. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a misdemeanor violation of subsection D of Section 18.2-47 [Abduction and kidnapping defined; punishment] or a felony violation of (i) Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2 or (ii) § 18.2-357 [Receiving money from earnings of male or female prostitute] where the prostitute is a minor, shall be forfeited to the Commonwealth

. . . .

A trafficker convicted for an offense involving child sexual abuse material (CSAM) is subject to mandatory asset forfeiture. Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children) states,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (Section 19.2-386.1 et seq.). The Commonwealth shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1 (Section 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture. Upon his conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.

Under Va. Code Ann. § 19.2-386.12 (Sale of forfeited property), forfeited property is sold and the money obtained from the sale is “paid over to the state treasury into a special fund of the Department of Criminal Justice Services . . .” The Department of Criminal Justice Services then distributes the money to “federal, state and local agencies to promote law enforcement” Va. Code Ann. § 19.2-386.14(A1) (Sharing of forfeited assets).

Traffickers convicted of certain offenses also have to pay mandatory restitution under Va. Code Ann. § 19.2-305.1(H) (Restitution for property damage or loss; community service), which states,

A defendant convicted of an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, “victim” means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3. The Commonwealth shall make reasonable efforts to notify victims of offenses under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.

3.5 Convicted traffickers are required to register as sex offenders.

Under Va. Code Ann. § 9.1-902(A) (Offenses requiring registration), “offense for which registration is required” is defined to include the following:

1. Any offense listed in subsection B;
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4. A sexually violent offense;
5. Any offense similar to those listed in subdivisions 1 through 4 under the laws of any foreign country or any political subdivision thereof, the United States or any political subdivision thereof; and
6. Any offense for which registration in a sex offender and crimes against minors registry is required under the laws of the jurisdiction where the offender was convicted.

Under subsection (B),⁴⁵

The offenses included under this subsection include any violation of, attempted violation of, or conspiracy to violate:

1. § 18.2-63 [Carnal knowledge of child between thirteen and fifteen years of age]; unless registration is required pursuant to subdivision E 1; § 18.2-64.1 [Carnal knowledge of certain minors]; . . . any felony violation of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties]; any violation of subdivision (4) of § 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking]; any violation of subsection C of § 18.2-357.1 [Commercial sex trafficking; penalties]; subsection B or C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]; . . . subsection B, C, or D of § 18.2-374.3; or a third or subsequent conviction of (i) § 18.2-67.4 [Sexual battery], (ii) § 18.2-67.4:2 [Sexual abuse of a child under 15 years of age; penalty], (iii) subsection C of § 18.2-67.5 [Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery] or (iv) § 18.2-386.1 [Unlawful filming, videotaping or photographing of another; penalty].
If the offense was committed on or after July 1, 2006, § 18.2-91 with the intent to commit any felony offense listed in this section; subsection A of § 18.2-374.1:1; or a felony under § 18.2-67.5:1.
2. Where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10 [General definitions], subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], clause (i) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], § 18.2-67.4, subsection C of § 18.2-67.5, § 18.2-361 [Crimes against nature; penalty], § 18.2-366, or a felony violation of former § 18.1-191.
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5. If the offense was committed on or after July 1, 2016, any violation of § 18.2-356 [Receiving money for procuring persons] punishable as a Class 3 felony or any violation of § 18.2-357 [Receiving money from earnings of male or female prostitute; penalties] punishable as a Class 3 felony.
6. If the offense was committed on or after July 1, 2019, any felony violation of § 18.2-348 [Aiding prostitution or illicit sexual intercourse, etc.; penalty] or 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse; penalty].

A “sexually violent offense” is defined in subsection (E) as the following:

[A] violation of, attempted violation of, or conspiracy to violate:

⁴⁵ See *supra* note 29.

1. Clause (ii) and (iii) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], former § 18.1-38 with the intent to defile or, for the purpose of concubinage or prostitution, a felony violation of subdivision (2) or (3) of former § 18.1-39 that involves assisting or aiding in such an abduction, § 18.2-61, former § 18.1-44 when such act is accomplished against the complaining witness's will, by force, or through the use of the complaining witness's mental incapacity or physical helplessness, or if the victim is under 13 years of age, subsection A of § 18.2-63 where the perpetrator is more than five years older than the victim, § 18.2-67.1, § 18.2-67.2, § 18.2-67.3, former § 18.1-215 when the complaining witness is under 13 years of age, § 18.2-67.4 where the perpetrator is 18 years of age or older and the victim is under the age of six, subsections A and B of § 18.2-67.5, § 18.2-370 [Taking indecent liberties with children; penalties], subdivisions (1), (2), or (4) of former § 18.1-213, former § 18.1-214, § 18.2-370.1, or § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability]; or
2. § 18.2-63, § 18.2-64.1 [Carnal knowledge of certain minors], former § 18.2-67.2:1, § 18.2-90 with the intent to commit rape or, where the victim is a minor or is physically helpless or mentally incapacitated as defined in § 18.2-67.10 [General definitions], subsection A of § 18.2-47 [Abduction and kidnapping defined; punishment], § 18.2-67.4, subsection C of § 18.2-67.5, clause (i) of § 18.2-48, § 18.2-361 [Crimes against nature; penalty], § 18.2-366 or subsection C of § 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty]. An offense listed under this subdivision shall be deemed a sexually violent offense only if the person has been convicted or adjudicated delinquent of any two or more such offenses, provided that person had been at liberty between such convictions or adjudications; . . .
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4. Chapter 117 (18 U.S.C. § 2421 et seq.) of Title 18 of the United States Code or sex trafficking (as described in § 1591 of Title 18, U.S.C.).

3.6 *Laws relating to parental custody and termination of parental rights include sex trafficking or commercial sexual exploitation of children (CSEC) offenses as grounds for sole custody or termination in order to prevent traffickers from exploiting their parental rights as a form of control.*

Va. Code Ann. § 16.1-283 (Termination of residual parental rights) does not specifically include violations of Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) or Virginia's CSEC laws as grounds for terminating parental rights.

Pursuant to Va. Code Ann. § 16.1-283, "residual parental rights" may be terminated for a number of reasons. Under subsection (B), residual parental rights of a parent of a neglected or abused child placed in foster care "as a result of (i) court commitment; (ii) an entrustment agreement entered into by the parent or parents; or (iii) other voluntary relinquishment by the parent or parents may be terminated if the court finds, based upon clear and convincing evidence, that it is in the best interests of the child."

However, the court must also find:

1. The neglect or abuse suffered by such child presented a serious and substantial threat to his life, health or development; and
2. It is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child's safe return to his parent or parents within a reasonable period of time

Proof of severe mental or emotional illness or intellectual disability, debilitating habitual abuse or addiction to drugs or alcohol without attempts to complete treatment to improve parenting ability, or failure "without good cause, [to] respond[] to or follow[] through with appropriate, available and reasonable rehabilitative efforts on the part of social, medical, mental health or other rehabilitative agencies designed to reduce, eliminate or prevent the neglect or abuse of the child" is prima facie evidence of the conditions in Va. Code Ann.

§ 16.1-283(B)(2).

Under subsection (E), the residual parental rights of a parent whose child “is in the custody of a local board or licensed child-placing agency” may be terminated if, by clear and convincing evidence, the court finds it is in the best interests of the child and that, among other things, “(iii) the parent has been convicted of . . . felony sexual assault, if the victim of the offense was a child of the parent or a child with whom the parent resided at the time of such offense; or (iv) the parent has subjected any child to aggravated circumstances.”

Va. Code Ann. § 16.1-283(E) defines “aggravated circumstances” as

torture, chronic or severe abuse, or chronic or severe sexual abuse, if the victim of such conduct was a child of the parent or a child with whom the parent resided at the time such conduct occurred, including the failure to protect such a child from such conduct, which conduct or failure to protect: (i) evinces a wanton or depraved indifference to human life, or (ii) has resulted in the death of such a child or in serious bodily injury to such a child.

Furthermore, “chronic sexual abuse” is defined as “recurring acts of physical abuse which place the child’s health, safety and well-being at risk” whereas “‘severe sexual abuse’ may include an act or omission that occurred only once, but otherwise meets the definition of ‘aggravated circumstances.’”

- 3.6.1 Recommendation: Amend Va. Code Ann. § 16.1-283 (Termination of residual parental rights) to include violations of Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) and Virginia’s CSEC laws as grounds for termination of parental rights.

Legal Components:

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*
 - 4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*
 - 4.3 *Promoting and selling child sex tourism is illegal.*
 - 4.4 *Promoting and selling child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*
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Legal Analysis:

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*

Va. Code Ann. § 18.2-357.1(A) (Commercial sex trafficking; penalties) does not specifically criminalize assisting, enabling, or financially benefitting from child sex trafficking unless the facilitator engages in the primary conduct prohibited under the trafficking law. In order to be held liable for sex trafficking, a facilitator must “solicit[], invite[], recruit[], encourage[], or otherwise cause[] or attempt[] to cause a person to violate subsection A of § 18.2-346 [Prostitution]” while acting “with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse.” Therefore, the conduct of assisting, enabling or financially benefitting from child sex trafficking is not specifically criminalized under this offense.

Facilitators may face prosecution under Virginia’s CSEC laws. Va. Code Ann. § 18.2-355(4) (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking) provides that any person who “for purposes of prostitution, takes any minor into, or persuades, encourages, or causes any minor to enter, a bawdy place, or takes or causes such person to be taken to any place for such purposes; is guilty of pandering. . . . A violation of subdivision (4) is punishable as a Class 3 felony.” Va. Code Ann. § 18.2-356 (Receiving money for procuring person) criminalizes the conduct of, “[a]ny person who receives any money or other valuable thing for or on account of (i) procuring for or placing in a house of prostitution or elsewhere any person for the purpose of causing such person to engage in unlawful sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act in violation of § 18.2-361 or (ii) causing any person to engage in forced labor or services, concubinage, prostitution, or the manufacture of any obscene material or child pornography Any person who violates clause (i) or (ii) with a person under the age of 18 is guilty of a Class 3 felony.” Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties) states, “Any person who shall knowingly receive any money or other valuable thing from the earnings of any male or female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering . . . [and] who violates this section by receiving money or other valuable thing from a person under the age of 18 is guilty of a Class 3 felony.” A Class 3 felony is punishable by imprisonment for 5–20 years and a possible fine of up to \$100,000 may be assessed. Va. Code Ann. § 18.2-10(c).

Va. Code Ann. § 18.2-49 (Threatening, attempting or assisting in such abduction) states, “Any person who (1) threatens, or attempts, to abduct any other person with intent to extort money, or pecuniary benefit, or (2) assists or aids in the abduction of, or threatens to abduct, any person with the intent to defile such person, or (3) assists or aids in the abduction of, or threatens to abduct, any female under sixteen years of age for the purpose of concubinage or prostitution, shall be guilty of a Class 5 felony.” This crime is punishable by imprisonment for 1–10 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$ 2,500, either or both.” Va. Code Ann. § 18.2-10(e).

Facilitators of prostitution with minors or adults may also be found guilty of Va. Code Ann. § 18.2-348⁴⁶ (Aiding prostitution or illicit sexual intercourse), which states,

It is unlawful for any person or any officer, employee or agent of any firm, association or corporation with knowledge of, or good reason to believe, the immoral purpose of such visit, to take or transport or assist in taking or transporting, or offer to take or transport on foot or in any way, any person to a place, whether within or outside any building or structure, used or to be used for the purpose of lewdness, assignation or prostitution within the Commonwealth or to procure or assist in procuring for the purpose of illicit sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or any act violative of § 18.2-361 [Crimes against nature; penalty], or to give any information or direction to any person with intent to enable such person to commit an act of prostitution. A violation of this section is a Class 1 misdemeanor. However, any adult who violates this section with a person under the age of 18 is guilty of a Class 6 felony.

A Class 1 misdemeanor is punishable by up to 12 months in jail, a fine up to \$2,500, or both, while a Class 6 felony is punishable by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. §§ 18.2-11(a), 18.2-10(f).

Also, Va. Code Ann. § 18.2-347⁴⁷ (Keeping, residing in or frequenting a bawdy place; “bawdy place” defined) prohibits the maintenance of a place, indoors or outdoors, in which prostitution occurs, stating,

It is unlawful for any person to keep any bawdy place, or to reside in or at or visit for immoral purposes, any such bawdy place. Each day such bawdy place is kept, resided in or visited shall constitute a separate offense. In a prosecution under this section the general reputation of the bawdy place may be proved As used in this Code, “bawdy place” means any place within or outside any building or structure that is used or is to be used for lewdness, assignation or prostitution.

A conviction under Va. Code Ann. § 18.2-347 is a Class 1 misdemeanor punishable by up to 12 months in jail, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-347, 18.2-11(a).

Va. Code Ann. § 18.2-349⁴⁸ (Using vehicles to promote prostitution or unlawful sexual intercourse) states,

It is unlawful for any owner or chauffeur of any vehicle, with knowledge or reason to believe the same is to be used for such purpose, to use the same or to allow the same to be used for the purpose of prostitution or unlawful sexual intercourse or to aid or promote such prostitution or unlawful sexual intercourse by the use of any such vehicle. A violation of this section is a Class 1 misdemeanor. However, any adult who violates this section by using a vehicle or allowing a vehicle to be used for or to aid or promote prostitution or unlawful sexual intercourse with a person under the age of 18 is guilty of a Class 6 felony.

A Class 1 misdemeanor is punishable by up to 12 months in jail, a fine up to \$2,500, or both, while a Class 6 felony is punishable by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months,” a fine up to \$2,500, or both imprisonment and a fine. Va. Code Ann. §§ 18.2-11(a), 18.2-10(f).

⁴⁶ See *supra* note 7.

⁴⁷ See *supra* note 33.

⁴⁸ See *supra* note 8.

Facilitators are prosecuted for transporting minors for the purpose of sex trafficking according to the procedures in Va. Code Ann. § 18.2-359 (Venue for criminal sexual assault or where any person transported for criminal sexual assault, attempted criminal sexual assault, or purposes of unlawful sexual intercourse, crimes against nature, and indecent liberties with children; venue for such crimes when coupled with a violent felony). Va. Code Ann. § 18.2-359(A) states,

Any person transporting or attempting to transport through or across the Commonwealth, any person for the purposes of unlawful sexual intercourse, anal intercourse, cunnilingus, fellatio, or anilingus or prostitution, or for the purpose of committing any crime specified in § 18.2-361[Crimes against nature; penalty] or 18.2-370 [Taking indecent liberties with children; penalties], or for the purposes of committing or attempting to commit criminal sexual assault under Article 7 (§ 18.2-61 et seq.) of Chapter 4, may be presented, indicted, tried, and convicted in any county or city in which any part of such transportation occurred.

Va. Code Ann. § 18.2-374.1 (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability) could apply to facilitators who produce child sexual abuse material (CSAM) and who, among other things, “knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means” or “[k]nowingly finances or attempts or prepares to finance child pornography.” Va. Code Ann. § 18.2-374.1(B)(3), (4). A violation of this statute, when the child is under 15, is punishable by imprisonment for 5–30 years with a 5-year mandatory sentence if the offender is 7 years older than the child victim. Va. Code Ann. § 18.2-374.1(C1). A second or subsequent violation by a person seven years older than the child and involving a child under 15 is punishable by imprisonment for 15–40 years with a 15-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C1). The punishment is reduced to 1–20 years, however, if the child is between 15 and less than 18. Va. Code Ann. § 18.2-374.1(C2). However, if the offender is seven years older than the child, a violation is punishable by imprisonment for 3–30 years with a 3-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C2). A second or subsequent violation from a person at least seven years older than the child and involving a child between 15 and less than 18 is punishable by imprisonment for 10–30 years with a 10-year mandatory sentence. Va. Code Ann. § 18.2-374.1(C2).

Further, facilitating CSAM is prohibited under Va. Code Ann. § 18.2-375 (Obscene exhibitions and performances). The first conviction under Va. Code Ann. § 18.2-375 is punishable as a Class 1 misdemeanor by imprisonment in jail up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. §§ 18.2-11(a), 18.2-380. A second or subsequent conviction under Va. Code Ann. § 18.2-375 is punishable as a Class 6 felony by imprisonment for 1–5 years “or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than 12 months and a fine of not more than \$2,500, either or both.” Va. Code Ann. §§ 18.2-10(f), 18.2-381. Va. Code Ann. § 18.2-375 states,

It shall be unlawful for any person knowingly to:

- (1) Produce, promote, prepare, present, manage, direct, carry on or participate in, any obscene exhibitions or performances, including the exhibition or performance of any obscene motion picture, play, drama, show, entertainment, exposition, tableau or scene; provided, that no employee of any person or legal entity operating a theatre, garden, building, structure, room or place which presents such obscene exhibition or performance shall be subject to prosecution under this section if the employee is not the manager of the theatre or an officer of such entity, and has no financial interest in such theatre other than receiving salary and wages; or
- (2) Own, lease or manage any theatre, garden, building, structure, room or place and lease, let, lend or permit such theatre, garden, building, structure, room or place to be used for the purpose of presenting such obscene exhibition or performance or to fail to post prominently therein the name and address of a person resident in the locality who is the manager of such theatre, garden, building, structure, room or place.

- 4.1.1 Recommendation: Amend Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) to include the crime of assisting, enabling or financially benefitting from child sex trafficking.

4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*

Convicted facilitators face a fine of up to \$100,000 under Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), § 18.2-356 (Receiving money for procuring persons; penalties), and § 18.2-357 (Receiving money from earnings of male or female prostitutes; penalties). Va. Code Ann. §§ 18.2-10(e), 18.2-11(a), 18.2-380, 18.2-10(f), 18.2-381. Facilitators also face a fine of up to \$2,500 under Va. Code Ann. § 18.2-49 (Threatening, attempting or assisting in such abduction). Va. Code Ann. § 18.2-10(e).

A facilitator convicted of Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), § 18.2-356 (Receiving money for procuring persons; penalties), or § 18.2-357 (Receiving money from earnings of male or female prostitutes; penalties) faces mandatory criminal asset forfeiture pursuant to Va. Code Ann. § 19.2-386.35⁴⁹ (Seizure of property used in connection with certain offenses). Va. Code Ann. § 19.2-386.35 provides,

All money, equipment, motor vehicles, and other personal and real property of any kind or character together with any interest or profits derived from the investment of such proceeds or other property that (i) was used in connection with the commission of, or in an attempt to commit, a violation of . . . § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-348.1 [Promoting travel for prostitution; penalty], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse] . . . 18.2-357.1 [Commercial sex trafficking; penalties] . . . ; (ii) is traceable to the proceeds of some form of activity that violates § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse] . . . ; or (iii) was used to or intended to be used to promote some form of activity that violates § 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse] . . . is subject to lawful seizure by a law-enforcement officer and subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.). Any forfeiture action under this section shall be stayed until conviction, and property eligible for forfeiture pursuant to this section shall be forfeited only upon the entry of a final judgment of conviction for an offense listed in this section; if no such judgment is entered, all property seized pursuant to this section shall be released from seizure.

Additionally, a facilitator of domestic minor sex trafficking arrested under Va. Code Ann. § 18.2-49 (Threatening, attempting or assisting in such abduction) may be subject to vehicle seizure and, upon conviction, forfeiture and mandatory restitution. Va. Code Ann. § 19.2-386.16⁵⁰ (Forfeiture of motor vehicles used in commission of certain crimes) states in part,

A. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a second or subsequent offense of Section 18.2-346 [Prostitution; commercially exploited children], 18.2-347 [Keeping, residing in or frequenting a bawdy place; "bawdy place" defined], 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-

⁴⁹ See *supra* note 23.

⁵⁰ See *supra* note 24.

348.1 [Promoting travel for prostitution; penalty], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person] or § 18.2-357 [Receiving money from earnings of male or female prostitute] or of a similar ordinance of any county, city or town or knowingly used for the transportation of any stolen goods, chattels or other property, when the value of such stolen goods, chattels or other property is \$500 or more, or any stolen property obtained as a result of a robbery, without regard to the value of the property, shall be forfeited to the Commonwealth. The vehicle shall be seized by any law-enforcement officer arresting the operator of such vehicle for the criminal offense, and delivered to the sheriff of the county or city in which the offense occurred. The officer shall take a receipt therefor.

B. Any vehicle knowingly used by the owner thereof or used by another with his knowledge of and during the commission of, or in an attempt to commit, a misdemeanor violation of subsection D of 18.2-47 [Abduction and kidnapping defined; punishment] or a felony violation of (i) Article 3 (§ 18.2-47 et seq.) of Chapter 4 of Title 18.2 or (ii) § 18.2-357 [Receiving money from earnings of male or female prostitute] where the prostitute is a minor, shall be forfeited to the Commonwealth

. . . .

A facilitator convicted for publicizing or selling child sexual abuse material (CSAM) is also subject to mandatory asset forfeiture. Va. Code Ann. § 19.2-386.31 (Seizure and forfeiture of property used in connection with the exploitation and solicitation of children) states,

All audio and visual equipment, electronic equipment, devices and other personal property used in connection with the possession, production, distribution, publication, sale, possession with intent to distribute or making of child pornography that constitutes a violation of § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability] or 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or in connection with the solicitation of a person less than 18 years of age that constitutes a violation of § 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be subject to lawful seizure by a law-enforcement officer and shall be subject to forfeiture to the Commonwealth pursuant to Chapter 22.1 (Section 19.2-386.1 et seq.). The Commonwealth shall file an information and notice of seizure in accordance with the procedures in Chapter 22.1 (Section 19.2-386.1 et seq.); however, any forfeiture action shall be stayed until conviction of the person whose property is subject to forfeiture. Upon his conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.

Asset forfeiture under Va. Code Ann. § 19.2-386.31 may be pursued through criminal or civil procedures. “Upon [the defendant’s] conviction, the court may dispose of the issue of forfeiture or may continue the civil case allowing the defendant time to answer, at the court's discretion.” Va. Code Ann. § 19.2-386.31.

Under Va. Code Ann. § 19.2-386.12 (Sale of forfeited property), forfeited property is sold and the money obtained from the sale is “paid over to the state treasury into a special fund of the Department of Criminal Justice Services” The Department of Criminal Justice Services then distributes the money to “federal, state and local agencies to promote law enforcement” Va. Code Ann. § 19.2-386.14(A1) (Sharing of forfeited assets).

Facilitators convicted of certain offenses also have to pay mandatory restitution under Va. Code Ann. § 19.2-305.1(H) (Restitution for property damage or loss; community service), which states,

A defendant convicted of an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be ordered to pay mandatory restitution to

the victim of the offense in an amount as determined by the court. For purposes of this subsection, “victim” means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3. The Commonwealth shall make reasonable efforts to notify victims of offenses under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.

Under Va. Code Ann. § 40.1-11.3, facilitators may also be subject to financial penalties for failure to post notice of the Human Trafficking Hotline number. This provision applies to topless entertainment businesses as well as truck stops.

4.3 *Promoting and selling child sex tourism is illegal.*

Promoting child sex tourism is criminalized under Va. Code Ann. § 18.2-348.1⁵¹ (Promoting travel for prostitution; penalty), which states,

It is unlawful for any travel agent to knowingly promote travel services, as defined in § 59.1-445 [Definitions], for the purposes of prostitution or any act in violation of an offense set forth in subsection E 1 of § 9.1-902 [Offenses requiring registration], made punishable within the Commonwealth, whether committed within or without. Violation of this section shall constitute a separate and distinct offense, and any person violating this section is guilty of a Class 1 misdemeanor. Punishment for a violation of this section shall be separate and apart from any punishment received from any other offense

A Class 1 misdemeanor is punishable by imprisonment up to 12 months, a fine up to \$2,500, or both. Va. Code Ann. § 18.2-11(a) (Punishment for conviction of misdemeanor).

4.4 *Promoting and selling child sexual abuse material (CSAM) carries penalties as high as similar federal offenses.*

Va. Code Ann. § 18.2-374.1 (Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability)⁵² states in subsection B,

A person shall be guilty of production of child pornography who: . . . 2. Produces or makes or attempts or prepares to produce or make child pornography; or 3. Who knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means; or 4. Knowingly finances or attempts or prepares to finance child pornography.

Va. Code Ann. § 18.2-374.1(D) makes clear that “[f]or the purposes of this section it may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age.”

A violation of Va. Code Ann. § 18.2-374.1(B) is punishable by imprisonment for 5–30 years when the subject of child sexual abuse material (CSAM) is under 15, with a mandatory minimum of 5 years if the person is at least seven years older than the subject. Va. Code Ann. § 18.2-374.1(C1). A subsequent violation where the offender is at least 7 years older than the child is punishable by imprisonment for 15–40 years, “15 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C1). When the subject of CSAM is at least 15 but less than 18, the sentence is 1–20 years, except if the offender is at least 7 years older than the child then the sentence is 3–30 years, with a 3 year mandatory minimum term of imprisonment. Va. Code Ann. § 18.2-374.1(C2). Subsequent violations by an offender at least 7 years older than the subject carry a sentence of 10-30 years, “10 years of which shall be a mandatory minimum term of imprisonment.” Va. Code Ann. § 18.2-374.1(C2).

⁵¹ The text Va. Code Ann. § 18.2-348.1 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1817 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

⁵² See *supra* note 36 for definition of “child pornography.”

Also, importantly for facilitator liability, Va. Code Ann. § 18.2-374.1:1(D) (Possession, reproduction, distribution, and facilitation of child pornography; penalty) states, “Any person who intentionally operates an Internet website for the purpose of facilitating the payment for access to child pornography is guilty of a Class 4 felony.” This offense is punishable by imprisonment for 2–10 years and a potential fine of up to \$100,000. Va. Code Ann. § 18.2-10(d), (g). If the offender is a not a natural person, only a fine will be assessed for this felony. Va. Code Ann. § 18.2-10(g). Under Va. Code Ann. § 18.2-374.1:1(C), “Any person who knowingly (i) reproduces by any means, including by computer, sells, gives away, distributes, electronically transmits, displays, purchases, or possesses with intent to sell, give away, distribute, transmit, or display child pornography or (ii) commands, entreats, or otherwise attempts to persuade another person to send, submit, transfer or provide to him any child pornography in order to gain entry into a group, association, or assembly of persons engaged in trading or sharing child pornography shall be punished by not less than five years nor more than 20 years in a state correctional facility.” Subsequent violations are punishable by imprisonment for 5–20 years with a mandatory 5 year minimum.

Legal Components:

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor to engage in the commercial sex act.*
- 5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*
- 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
- 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

Legal Analysis:

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*⁵³

Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties), Virginia’s human trafficking offense, does not include all commercial sexual exploitation of minors. Although Va. Code Ann. § 18.2-357.1 does not require proof of force, fraud, or coercion when the victim is a minor,⁵⁴ the act of buying commercial sex with a minor does not constitute human trafficking; rather, an offender must act “with the intent to receive money or other valuable thing or to assist another in receiving money or other valuable thing from the earnings of a person from prostitution or unlawful sexual intercourse” Va. Code Ann. § 18.2-357.1.⁵⁵ Therefore, the offense of human trafficking requires a trafficker or controlling third party be identified. Consequently, not all commercially sexually exploited children are identifiable as victims under Va. Code Ann. § 18.2-357.1.

- 5.1.1 **Recommendation:** Amend the definition of Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) so that all commercially sexually exploited children are identifiable as victims and eligible for protections pursuant to their victim status.

⁵³ See generally **SHARED HOPE INTERNATIONAL**, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

⁵⁴ See *supra* discussion in Component 1.1.

⁵⁵ See *supra* discussion of buyer applicability in Component 2.1.

5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor to engage in the commercial sex act.*

Virginia’s sex trafficking statute, Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties), does not prohibit a defendant from asserting a defense based on the minor’s willingness to engage in the commercial sex act, meaning that a defendant charged under Va. Code Ann. § 18.2-357.1 may seek to assert such a defense.

5.2.1 Recommendation: Amend Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties) and Virginia’s CSEC laws to specifically prohibit a defense based on the willingness of the minor to engage in the sex act.⁵⁶

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*⁵⁷

Va. Code Ann. § 18.2-346(A) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) does not prohibit the criminalization of minors for prostitution offenses. It states, “Any person who, for money or its equivalent, (i) commits adultery, fornication, or any act in violation of § 18.2-361, performs cunnilingus, fellatio, or anilingus upon or by another person, or engages in anal intercourse or (ii) offers to commit adultery, fornication, or any act in violation of § 18.2-361, perform cunnilingus, fellatio, or anilingus upon or by another person, or engage in anal intercourse and thereafter does any substantial act in furtherance thereof is guilty of prostitution, which is punishable as a Class 1 misdemeanor.”

5.3.1 Recommendation: Amend Va. Code Ann. § 18.2-346(A) (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) to ensure that all minors are protected from criminalization for prostitution offenses.⁵⁸

5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*

System response to child engaged in commercial sex act

Virginia law provides juvenile sex trafficking victims with a statutory avenue to specialized services. However, because state law does not prevent minors from being adjudicated delinquent for prostitution offenses, some commercially sexually exploited youth may face barriers in accessing services designed to address their trafficking victimization.

Pursuant to Va. Code Ann. § 63.2-1506.1⁵⁹ (Sex trafficking assessments by local departments),

A. If a report or complaint is based upon information and allegations that a child is a victim of sex trafficking or severe forms of trafficking as defined in the federal Trafficking Victims Protection Act of 2000 (22 U.S.C. § 7102 et seq.) and in the federal Justice for Victims of Trafficking Act of 2015 (P.L. 114-22), the local department shall conduct a sex trafficking assessment, unless at any time during the

⁵⁶ The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁵⁷ For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

⁵⁸ See generally SHARED HOPE INTERNATIONAL, “Seeking Justice: Legal approaches to eliminate criminal liability for child sex trafficking victims” (2018), https://sharedhope.org/wp-content/uploads/2018/08/ANALYSIS-OF-STATUTORY-APPROACHES_ver7.pdf (discussing need to eliminate a minor’s criminal liability for prostitution and other offenses committed pursuant to trafficking victimization and to establish a statutory avenue to specialized services).

⁵⁹ The text Va. Code Ann. § 63.2-1506.1 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2597 and Senate Bill 1661 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

sex trafficking assessment the local department determines that an investigation or family assessment is required pursuant to § 63.2-1505 [Investigations by local departments] or 63.2-1506 [Family assessments by local departments].

B. A sex trafficking assessment requires the collection of information necessary to determine:

1. The immediate safety needs of the child;
2. The protective and rehabilitative services needs of the child and the child's family that will deter abuse and neglect; and
3. Risk of future harm to the child.

C. When a local department responds to the report or complaint by conducting a sex trafficking assessment, the local department may:

1. Consult with the family to arrange for necessary protective and rehabilitative services to be provided to the child and the child's family;
2. Petition the court for services deemed necessary; or
3. Commence an immediate investigation or family assessment, if at any time during the sex trafficking assessment the local department determines that an investigation or family assessment is required pursuant to § 63.2-1505 or 63.2-1506.

....

F. The local department or departments shall notify the Child Protective Services Unit within the Department in writing whenever such a sex trafficking assessment is conducted.

Regarding protective custody, Va. Code Ann. § 63.2-1517(C)⁶⁰ (Authority to take child into custody) states,

A child-protective services worker of a local department responding to a complaint or report of abuse and neglect for purposes of sex trafficking or severe forms of trafficking may take a child into custody and the local department may maintain custody of the child for up to 72 hours without prior approval of a parent or guardian, provided that the alleged victim child or children have been identified as a victim or victims of sex trafficking or a victim or victims of severe forms of trafficking as defined in the federal Trafficking Victims Protection Act of 2000, (22 U.S.C. § 7101 et. seq.) and in the federal Justice for Victims of Trafficking Act of 2015 (P.L. 114-22). After taking the child into custody, the local department shall notify the parent or guardian of such child as soon as practicable. Every effort shall be made to provide such notice in person. The local department shall also notify the Child-Protective Services Unit within the Department whenever a child is taken into custody.⁶¹

⁶⁰ The text Va. Code Ann. § 63.2-1517 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2597 and Senate Bill 1661 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

⁶¹ Pursuant to Va. Code Ann. § 63.2-1517(D),

When a child is taken into custody by a child-protective services worker of a local department pursuant to subsection C, that child shall be returned as soon as practicable to the custody of his parent or guardian. However, the local department shall not be required to return the child to his parent or guardian if the circumstances are such that continuing in his place of residence or in the care or custody of such parent or guardian, or custodian or other person responsible for the child's care, presents an imminent danger to the child's life or health to the extent that severe or irremediable injury would be likely to result or if the evidence of abuse is perishable or subject to deterioration before a hearing can be held. If the local department cannot return the child to the custody of his parents or guardians within 72 hours, the local department shall obtain an emergency removal order pursuant to § 16.1-251 [Emergency removal order].

Further, state law requires the Sex Trafficking Response Coordinator to develop a plan for responding to juvenile sex trafficking victims. Va. Code Ann. § 9.1-116.5(A)⁶² (Sex Trafficking Response Coordinator; duties; report) requires the coordinator to:

1. Create a statewide plan for local and state agencies to identify and respond to victims of sex trafficking;
2. Coordinate the development of standards and guidelines for treatment programs for victims of sex trafficking;
3. Maintain a list of programs that provide treatment or specialized services to victims of sex trafficking and make such list available to law-enforcement agencies, attorneys for the Commonwealth, crime victim and witness assistance programs, the Department of Juvenile Justice, the Department of Social Services, the Department of Education, and school divisions;
4. Oversee the development of a curriculum to be completed by persons convicted of solicitation of prostitution under subsection B of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties]; and
5. Promote strategies for the education, training, and awareness of sex trafficking and for the reduction of demand for commercial sex.

The Department of Social Services (DSS) has also been directed to develop a plan to provide services to human trafficking victims through House Bill 2190,⁶³ which Governor McDonnell approved on March 18, 2011. 2011 Va. Acts 258. The law states,

Such plan shall include provisions for (i) identifying victims of human trafficking in the Commonwealth; (ii) assisting victims of human trafficking with applying for federal and state benefits and services to which they may be entitled; (iii) coordinating the delivery of health, mental health, housing, education, job training, victims' compensation, legal, and other services for victims of human trafficking; (iv) preparing and disseminating educational and training programs and materials to increase awareness of human trafficking and services available to victims of human trafficking among local departments of social services, public and private agencies and service providers, and the public; (v) developing and maintaining community-based services for victims of human trafficking; and (vi) assisting victims of human trafficking with family reunification or return to their place of origin if the person so desires. In developing its plan, the Department shall work together with such other state and federal agencies, public and private entities, and other stakeholders as the Department shall deem appropriate.

Finally, Virginia law requires the Child Protective Services Unit to establish specialized training. Specifically, Va. Code Ann. § 63.2-1502 (Establishment of Child-Protective Services Unit; duties) mandates the Child Protective Services Unit to:

establish minimum training requirements for workers and supervisors on identifying, assessing, and providing comprehensive services for children who are victims of sex trafficking or severe forms trafficking as defined in the Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102 et seq., and in the Justice for Victims of Trafficking Act of 2015, 42 U.S.C. § 5101 et seq., including efforts to coordinate with law-enforcement, juvenile justice, and social service agencies such as runaway and homeless youth shelters to serve this population.

⁶² The text Va. Code Ann. § 9.1-116.5 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2576 and Senate Bill 1669 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

⁶³ House Bill 2190 is appended to Va. Code Ann. § 63.2-200 (Department of Social Services created), as published by Lexis.

Summary

Juvenile sex trafficking victims may be adjudicated delinquent for the crime of prostitution. However, for minor victims identified as “abused and neglected,” Virginia law directs the Statewide Trafficking Response Coordinator and DSS to develop plans for responding to juvenile sex trafficking victims, including through the provision of a special assessment for connecting juvenile sex trafficking victims to specialized services.

5.4.1 Recommendation: Amend Virginia’s response to direct child sex trafficking victims away from the juvenile justice system and to specialized services available through child welfare.⁶⁴

5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*⁶⁵

Sex trafficking is identified as a type of abuse and neglect within Virginia’s child protection statutes. Under Va. Code Ann. § 63.2-100 (Definitions), the definition of “abused or neglected child,” which applies to Title 63.2 (Welfare (Social Services)), includes a child “who has been identified as a victim of sex trafficking or severe forms of trafficking as defined in the Trafficking Victims Protection Act of 2000, 22 U.S.C § 7102 et seq., and in the Justice for Victims of Trafficking Act of 2015, 42 U.S.C. § 5101 et seq.,” regardless of the offender’s relationship to the child.

Additionally, the definition of “abused or neglected child” includes any child under the age of 18 “[w]hose parents or other person responsible for his care commits or allows to be committed any act of sexual exploitation or any sexual act upon a child in violation of the law” and a child under the age of 18 “[w]hose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child alone in the same dwelling, including an apartment . . . , with a person to whom the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902 [Offenses requiring registration].” Va. Code Ann. § 63.2-100.

Pursuant to Va. Code Ann. § 16.1-228 (Definitions), the definition of “abused or neglected child” for purposes of Chapter 11 (Juvenile and Domestic Relations District Courts) is substantially similar to the definition in Va. Code Ann. § 63.2-100.

5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*

Va. Code Ann. § 16.1-228 (Definitions) and § 63.2-100 (Welfare (Social Services)—Definitions) require fault by “parents or other person responsible for his care” of the child in the definition for “abused or neglected child” except when a child “has been identified as a victim of sex trafficking or severe forms of trafficking as defined in the Trafficking Victims Protection Act of 2000, 22. U.S.C. § 7102 et seq., and in the Justice for Victims of Trafficking Act of 2015, 42. U.S.C. § 5101 et seq.” As such, the definition of abuse and neglect in is broad enough to include victims of non-familial trafficking.

Further, Va. Code Ann. § 63.2-1508(B)⁶⁶ (Valid report or complaint) states,

⁶⁴ The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁶⁵ For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

⁶⁶ The text Va. Code Ann. § 63.2-1508 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2597 and Senate Bill 1661 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

A valid report or complaint regarding a child who has been identified as a victim of sex trafficking or severe forms of trafficking as defined in the federal Trafficking Victims Protection Act of 2000 (22 U.S.C. § 7102 et seq.) and in the federal Justice for Victims of Trafficking Act of 2015 (P.L. 114-22) may be established if the alleged abuser is the alleged victim child's parent, other caretaker, or any other person suspected to have caused such abuse or neglect.

5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*

The Virginia Workers' Compensation program contains ineligibility criteria that could negatively affect domestic minor sex trafficking victims' ability to receive compensation.⁶⁷ Va. Code Ann. § 19.2-368.4 (Persons eligible for awards) states in subsection (B) that “[a] person who is criminally responsible for the crime upon which a claim is based, or an accomplice or accessory of such person, shall not be eligible to receive an award with respect to such claim.” Va. Code Ann. § 19.2-368.6 (Assignment of claims; investigation; hearing; confidentiality of records; decisions) provides in subsection (D) that “[t]here shall be a rebuttable presumption that the claimant did not contribute to and was not responsible for the infliction of his injury,” reducing the risk that a minor victim of prostitution may be found to have contributed to the injuries sustained through her activities in prostitution. Also, a child victim of sex trafficking, who may be afraid or angry with law enforcement, may have an award denied, reduced or withdrawn if “[t]he Commission . . . find[s] that any claimant or award recipient has not fully cooperated with all law-enforcement agencies.” Va. Code Ann. § 19.2-368.10.

Va. Code Ann. § 19.2-368.10 (When awards to be made; reporting crime and cooperation with law enforcement) also restricts an award to a victim where the crime was reported to the authorities later than “120 hours after the occurrence of such crime, unless the Commission, for good cause shown, finds the delay to have been justified.” An exception is outlined in Va. Code Ann. § 19.2-368.10, which states, “The provisions of this subdivision shall not apply to claims of sexual abuse that occurred while the victim was a minor.” However, “sexual abuse” is defined in Va. Code Ann. § 19.2-368.2 as “sexual abuse as defined in subdivision 6 of § 18.2-67.10 [General definitions]⁶⁸ and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2.”

Va. Code Ann. § 19.2-368.5(B) gives deadlines for when a claim may be filed by a victim by stating, “A claim shall be filed by the claimant not later than one year after the occurrence of the crime upon which such claim is based, or not later than one year after the death of the victim. However, (i) in cases involving claims made on behalf of a minor or a person who is incapacitated, the provisions of subsection A of § 8.01-229 shall apply to toll the one-year period; (ii) in cases involving claims made by a victim against profits of crime held in escrow pursuant to Chapter 21.2 (§ 19.2-368.19 et seq.) of this title, the claim shall be filed within five years of the date of the special order of escrow; and (iii) in cases involving claims of sexual abuse of a minor, the claim shall be filed within 10 years after the minor's eighteenth birthday. For good cause shown, the Commission may extend the time for filing.” Va. Code Ann. § 19.2-368.8(A) also provides for reconsideration of claims of sexual abuse by stating, “The Commission, on its own motion, or upon request of the claimant, may reinvestigate or reopen a decision making or denying an award. Except for claims of sexual abuse that occurred while the victim was a minor, the Commission shall not reopen or reinvestigate a case after the expiration of two years from the date of submission of the original claim. Any claim involving the sexual abuse of a minor that has been denied before July 1, 2001, because it was not timely filed may, upon application filed with the Commission, be reconsidered provided the application for reconsideration is filed within ten years after the minor's eighteenth birthday.”

⁶⁷ The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁶⁸ See *supra* note 11 for the definition of “sexual abuse.”

Va. Code Ann. § 19.2-368.11:1 (Amount of award) sets forth the limits for the amount of the award, allowing for claims including but not limited to unreimbursed medical costs, loss of earnings, and funeral expenses, after being reduced by any amounts received or to be received from another source or an emergency award, with a total cap not to exceed \$35,000. Va. Code Ann. § 19.2-368.11:1.⁶⁹

- 5.7.1 Recommendation: Amend Va. Code Ann. § 19.2-368.4 (Persons eligible for awards) and § 19.2-368.10 (When awards to be made; reporting crime and cooperation with law enforcement) to stipulate an exception to listed ineligibility factors for minor victims of commercial sexual exploitation.

5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*

Virginia law provides some victim-friendly procedures and protections for minors. First, Va. Code Ann. § 2.2-515.2(A), (B) (Address confidentiality program established; victims of domestic violence, stalking, sexual violence, or human trafficking; application; disclosure of records) allows child trafficking victims to use designated addresses under the Address Confidentiality Program, which was designed to protect victims from further acts of violence, intimidation, and retribution by abusers and traffickers.

Next, Va. Code Ann. § 18.2-67.9⁷⁰ provides a method for the court to order the use of two-way closed circuit television testimony for certain victims of child sex trafficking, prostitution offenses, abduction under Va. Code Ann. § 18.2-47 et seq., and other listed crimes upon application by the defendant or prosecutor. Va. Code Ann. § 63.2-1521(A) (Testimony by child using two-way closed-circuit television) also provides for the use of two-way closed circuit television testimony “[i]n any civil proceeding involving alleged abuse or neglect of a child” under certain specified provisions. Both laws apply to “[a]n alleged victim who was 14 years of age or under on the date of the alleged offense and is 16 or under at the time of the trial” and “[a]ny child witness who is 14 years of age or under at the time of the trial.” Va. Code Ann. §§ 63.2-1521(B), 18.2-67.9(A). The statutes explain that the court has discretion to order the testimony via closed-circuit television if it finds that the child is “unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons: 1. The child’s persistent refusal to testify despite judicial requests to do so; 2. The child’s substantial inability to communicate about the offense; or 3. The substantial likelihood, based upon expert opinion testimony, that the child will suffer severe emotional trauma from so testifying.” Va. Code Ann. §§ 18.2-67.9(B), 63.2-1521(C).

Further, Va. Code Ann. § 63.2-1522(A), (B)⁷¹ (Admission of evidence of sexual acts with children) allows for out-of-court statements, in certain abuse and neglect civil proceedings, “describing any act of a sexual nature performed with or on the child by another” not otherwise admissible made “by a child 14 years of age or younger at the time the statement is offered into evidence” under the following conditions:

1. The child testifies at the proceeding, or testifies by means of a videotaped deposition or closed-circuit television, and at the time of such testimony is subject to cross-examination concerning the out-of-court statement or the child is found by the court to be unavailable to testify on any of these grounds:
 - a. The child’s death;

⁶⁹ The text Va. Code Ann. § 19.2-368.11:1 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2773 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

⁷⁰ The text Va. Code Ann. § 18.2-67.9 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2464 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

⁷¹ The text Va. Code Ann. § 63.2-1522 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1622 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

- b. The child’s absence from the jurisdiction, provided such absence is not for the purpose of preventing the availability of the child to testify;
 - c. The child’s total failure of memory;
 - d. The child’s physical or mental disability;
 - e. The existence of a privilege involving the child;
 - f. The child’s incompetency, including the child’s inability to communicate about the offense because of fear or a similar reason; and
 - g. The substantial likelihood, based upon expert opinion testimony, that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television.
2. The child’s out-of-court statement is shown to possess particularized guarantees of trustworthiness and reliability

Va. Code Ann. § 18.2-67.7 (Admission of evidence) provides protection to the testifying victim of a sexual offense (commonly called “rape shield law”), but this protection does not extend to victims of sex trafficking or most CSEC offenses. Va. Code Ann. § 18.2-67.7(A) states,

In prosecutions under this article [Criminal sexual assault], or under clause (iii) or (iv) [involving minors] of § 18.2-48 [Abduction with intent to extort money or for immoral purpose], 18.2-370 [Taking indecent liberties with children; penalties], 18.2-370.01 [Indecent liberties by children; penalty], or 18.2-370.1 [Taking indecent liberties with child by person in custodial or supervisory relationship; penalties], general reputation or opinion evidence of the complaining witness’s unchaste character or prior sexual conduct shall not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct shall be admitted only if it is relevant and is:

- 1. Evidence offered to provide an alternative explanation for physical evidence of the offense charged which is introduced by the prosecution, limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury to the complaining witness’s intimate parts; or
- 2. Evidence of sexual conduct between the complaining witness and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation or through the use of the complaining witness’s mental incapacity or physical helplessness, provided that the sexual conduct occurred within a period of time reasonably proximate to the offense charged under the circumstances of this case; or
- 3. Evidence offered to rebut evidence of the complaining witness’s prior sexual conduct introduced by the prosecution.

Subsection (B) of Va. Code Ann. § 18.2-67.7 emphasizes that nothing “shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused.” A “written notice generally describing the evidence” must be given “prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs” in order for the accused to present evidence of “past sexual conduct of the complaining witness with a person other than the accused.” Va. Code Ann. § 18.2-67.7(B). Subsection (C) mandates that the evidence may not be admitted or referred to “until the court first determines the admissibility of that evidence at an evidentiary hearing to be held before the evidence is introduced.” Additionally, pursuant to subsection (C), “If the court initially determines that the evidence is inadmissible, but new information is discovered during the course of the preliminary hearing or trial which may make such evidence admissible, the court shall determine in an evidentiary hearing whether such evidence is admissible.”

Also, under Va. Code Ann. § 18.2-67.6 (Proof of physical resistance not required), “The Commonwealth need not demonstrate that the complaining witness cried out or physically resisted the accused in order to convict the

accused of an offense under this article [Criminal sexual assault], but the absence of such resistance may be considered when relevant to show that the act alleged was not against the will of the complaining witness.”

5.9 *Child sex trafficking victims may vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.*

Virginia law does not provide a mechanism for minors to vacate delinquency adjudications related to trafficking victimization; however, juvenile records will be expunged automatically, but only after a waiting period. Specifically, Va. Code Ann. § 16.1-306(A) (Expungement of court records) directs the automatic annual destruction of records by the clerk of the Juvenile and Domestic Relations Court for any juvenile who has reached 19, if five years have passed from the date of the last hearing. However, the records are kept if the juvenile was found guilty of an offense that would have been a felony if committed by an adult. Va. Code Ann. § 16.1-306(A).⁷²

- 5.9.1 Recommendation: Enact a law that allows child sex trafficking victims to vacate delinquency adjudications and expunge related records for prostitution and other offenses arising from trafficking victimization, without a waiting period.⁷³

5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*

Virginia law mandates restitution and provides for civil causes of action for minor victims of sex trafficking⁷⁴ or commercial sexual exploitation. Specifically, Va. Code Ann. § 8.01-42.4⁷⁵ (Civil action for trafficking in persons) states,

A. Any person injured by reason of

- (i) a violation of clause (iii), (iv), or (v) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose];
- (ii) a violation of § 18.2-348 [Aiding prostitution or illicit sexual intercourse], 18.2-348.1 [Promoting travel for prostitution; penalty], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring person; penalties], 18.2-357 [Receiving money from earnings of male or female prostitute; penalties], 18.2-357.1 [Commercial sex trafficking; penalties] . . . or
- (iii) a felony conviction of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties] may sue thereof and recover compensatory damages, punitive damages, and reasonable attorney fees and costs.

B. No action shall be commenced under this section more than seven years after the later of the date on which such person

- (i) was no longer subject to the conduct prohibited by clause (iii), (iv), or (v) of § 18.2-48 or § 18.2-348, 18.2-348.1, 18.2-349, 18.2-355, 18.2-356, 18.2-357, 18.2-357.1 . . . or under a felony violation of § 18.2-346 or

⁷² Additionally, “if the juvenile was found guilty of an offense for which the clerk is required by § 46.2-383 to furnish an abstract to the Department of Motor Vehicles, the records shall be destroyed when the juvenile has attained the age of 29.” Va. Code Ann. § 16.1-306(A).

⁷³ The recommendation in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁷⁴ The analysis in the component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁷⁵ The text Va. Code Ann. § 8.01-42.4 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1817 during the 2019 Regular Session of the Virginia General Assembly (effective July 1, 2019).

(ii) attained 18 years of age.

Restitution is also made available for CSEC victims under Va. Code Ann. § 19.2-305.1(B) (Restitution for property damage or loss; community service),

[A]ny person who, on or after July 1, 1995, commits, and is convicted of, a crime in violation of any provision in Title 18.2 shall make at least partial restitution for any property damage or loss caused by the crime or for any medical expenses or expenses directly related to funeral or burial incurred by the victim or his estate as a result of the crime, may be compelled to perform community services and, if the court so orders, shall submit a plan for doing that which appears to be feasible to the court under the circumstances.

Further, Va. Code Ann. § 19.2-305.1(H) provides for mandatory restitution to victims depicted in child sexual abuse material (CSAM), stating,

A defendant convicted of an offense under § 18.2-374.1 [Production, publication, sale, financing, etc., of child pornography; presumption as to age; severability], 18.2-374.1:1 [Possession, reproduction, distribution, and facilitation of child pornography; penalty], or 18.2-374.3 [Use of communications systems to facilitate certain offenses involving children] shall be ordered to pay mandatory restitution to the victim of the offense in an amount as determined by the court. For purposes of this subsection, “victim” means a person who is depicted in a still or videographic image involved in an offense under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3. The Commonwealth shall make reasonable efforts to notify victims of offenses under § 18.2-374.1, 18.2-374.1:1, or 18.2-374.3.

5.11 Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.

Va. Code Ann. § 8.01-42.4 (Civil action for trafficking in persons) provides a lengthened statute of limitations of seven years for civil causes of action by victims of sex trafficking⁷⁶ and certain CSEC offenses. Va. Code Ann. § 8.01-42.4(B)⁷⁷ states,

No action shall be commenced under this section more than seven years after the later of the date on which such person (i) was no longer subject to the conduct prohibited by clause (iii), (iv), or (v) of § 18.2-48 [Abduction with intent to extort money or for immoral purpose] or § 18.2-348 [Aiding prostitution or illicit sexual intercourse, etc.], 18.2-348.1 [Promoting travel for prostitution; penalty], 18.2-349 [Using vehicles to promote prostitution or unlawful sexual intercourse], 18.2-355 [Taking, detaining, etc., a person for prostitution, etc., or consenting thereto; human trafficking], 18.2-356 [Receiving money for procuring persons; penalties], 18.2-357 [Receiving money from earnings of male or female prostitute; penalties], 18.2-357.1 [Commercial sex trafficking; penalties] . . . or under a felony violation of § 18.2-346 [Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties] or (ii) attained 18 years of age.

For personal injury, Va. Code Ann. § 8.01-243(A) provides a statute of limitations of two years, unless otherwise provided. Under subsection (B), “Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues.” Va. Code Ann. § 8.01-243(B). Va. Code Ann. § 8.01-243(D) provides, “Every action for

⁷⁶ The analysis in this component is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

⁷⁷ See *supra* note 75.

injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person as set forth in subdivision 6 of § 8.01-249 shall be brought within 20 years after the cause of action accrues.” Generally, under Va. Code Ann. § 8.01-230, the limitation period begins when the right of action accrues, which is “the date the injury is sustained in the case of injury to the person . . . and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under . . . §§ 8.01-249, 8.01-250 or other statute.” Va. Code Ann. § 8.01-249(6) provides some statutory relief for victims of sexual abuse, stating,

In actions for injury to the person, whatever the theory of recovery, resulting from sexual abuse occurring during the infancy or incapacity of the person, upon removal of the disability of infancy or incapacity as provided in § 8.01-229 or, if the fact of the injury and its causal connection to the sexual abuse is not then known, when the fact of the injury and its causal connection to the sexual abuse is first communicated to the person by a licensed physician, psychologist, or clinical psychologist. As used in this subdivision, “sexual abuse” means sexual abuse as defined in subdivision 6 of § 18.2-67.10 [General definitions]⁷⁸ and acts constituting rape, sodomy, object sexual penetration or sexual battery as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2;

With regard to criminal actions against traffickers, there is no general statute of limitations for felonies indicated in the Virginia Code.⁷⁹ Va. Code Ann. § 19.2-8 (Limitation of prosecutions) states, “A prosecution for a misdemeanor, or any pecuniary fine, forfeiture, penalty or amercement, shall be commenced within one year next after there was cause therefor” However, “A prosecution of a misdemeanor under § . . . 18.2-67.4 [Sexual battery], 18.2-67.4:1 [Infected sexual battery], 18.2-67.4:2 [Sexual abuse of a child under 15 years of age; penalty], 18.2-67.5 [Attempted rape, forcible sodomy, object sexual penetration, aggravated sexual battery, and sexual battery], or 18.2-370.6 [Penetration of mouth of child with lascivious intent; penalty] where the victim is a minor at the time of the offense shall be commenced no later than one year after the victim reaches majority.” Va. Code Ann. § 19.2-8.

⁷⁸ See *supra* note 11 for definition of “sexual abuse.”

⁷⁹ *Statute of Limitations Fact Sheet*, NATIONAL CENTER FOR VICTIMS OF CRIME, http://corsal.org/06SOLNCVC%20Statute_of_Limitations_Fact_Sheet32%5B1%5D.pdf (last visited June 30, 2011).

Legal Components:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*
- 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
- 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking and commercial sexual exploitation of children (CSEC).*
- 6.4 *Using a law enforcement decoy to investigate buying or selling commercial sex is not a defense to soliciting, purchasing, or selling sex with a minor.*
- 6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
- 6.6 *State law requires reporting of missing children and located missing children.*

Legal Analysis:

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*

Training on human trafficking is statutorily authorized for law enforcement under Va. Code Ann. § 9.1-102 (Powers and duties of the Board and the Department). Pursuant to Va. Code Ann. § 9.1-102(37)(i), the Department of Criminal Justice Services, under the direction of the Criminal Justice Services Board and in conjunction with the Office of the Attorney General, has “the power and duty” to “[e]stablish training standards and publish and periodically update model policies for law-enforcement personnel . . . [on] sensitivity to and awareness of human trafficking offenses and the identification of victims and human trafficking offenses for personnel involved in criminal investigations or assigned to vehicle or street patrol duties” Further, the Board has “the power and duty” to “advise law-enforcement agencies and attorneys for the Commonwealth regarding the identification, investigation, and prosecution of human trafficking offenses using the common law and existing criminal statutes in the Code of Virginia.” Va. Code Ann. § 9.1-102(48).

Additionally, under subsection (37), the department has the power to “[e]stablish training standards and publish a model policy for law-enforcement personnel . . . [on] . . . the handling of family abuse, domestic violence, sexual assault and stalking cases, including standards for determining the predominant physical aggressor in accordance with Section 19.2-81.3.” Further, “The Department shall provide technical support and assistance to law-enforcement agencies in carrying out the requirements set forth in subsection A of § 9.1-1301 [Sexual assault policies for law-enforcement agencies in the Commonwealth].” Va. Code Ann. § 9.1-102(37).

Under Va. Code Ann. § 9.1-1301(A),

The Virginia Department of State Police and the police and sheriff’s departments of every political subdivision in the Commonwealth and every campus police department shall establish written policies and procedures regarding a law-enforcement officer’s response to an alleged criminal sexual assault in violation of Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2. Such policies shall, at a minimum, provide guidance as to the department’s policy on (i) training; (ii) compliance with §§ 19.2-9.1 and 19.2-165.1; (iii) transportation of alleged sexual assault victims; and (iv) the provision of information on legal and community resources available to alleged victims of sexual assault.

While the Virginia Office of the Attorney General (OAG), in cooperation with the Virginia Department of Criminal Justice Services (DCJS) provides a regional multidisciplinary training to law enforcement officers, prosecutors and victim-witness coordinators in Virginia, this training is not mandatory for law enforcement.⁸⁰

6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*

Va. Code Ann. § 19.2-62(B)(2) (Interception, disclosure, etc., of wire, electronic or oral communications unlawful; penalties; exceptions) authorizes interception of a wire, electronic, or oral communication if one party gives consent. That section states, “It shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.”

6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking and commercial sexual exploitation of children (CSEC).*

Va. Code Ann. § 19.2-66(A) (When Attorney General or Chief Deputy Attorney General may apply for order authorizing interception of communications) states in part, “The Attorney General or Chief Deputy Attorney General, if the Attorney General so designates in writing, in any case where the Attorney General is authorized by law to prosecute or pursuant to a request in his official capacity of an attorney for the Commonwealth in any city or county, may apply to a judge of competent jurisdiction for an order authorizing the interception of wire, electronic or oral communications by the Department of State Police, when such interception may reasonably be expected to provide evidence” of certain felony offenses. The relevant felony offenses listed include “any felonies that are not Class 6 felonies in Article 7 (§ 18.2-61 et seq. [Criminal sexual assault]) of Chapter 4 of Title 18.2.” As a result, wiretapping could be authorized in sex trafficking and CSEC investigations involving suspected violations of Va. Code Ann. § 18.2-48 (Abduction with intent to extort money or for immoral purpose), § 18.2-370(B) (Taking indecent liberties with children), § 18.2-355 (Taking, detaining, etc., person for prostitution, etc., or consenting thereto; human trafficking), Va. Code Ann. § 18.2-356 (Receiving money for procuring person; penalties), Va. Code Ann. § 18.2-357 (Receiving money from earnings of male or female prostitute; penalties), and Va. Code Ann. § 18.2-357.1 (Commercial sex trafficking; penalties).

Va. Code § 19.2-68(G) (Application for and issuance of order authorizing interception; contents of order; recording and retention of intercepted communications, applications and orders; notice to parties; introduction in evidence of information obtained) outlines the admissibility into evidence of intercepted communications. That section requires at least 10 days’ notice, which may be judicially waived in some circumstances. Subsection H sets forth the grounds for moving to suppress such evidence.

6.4 *Using a law enforcement decoy to investigate buying or selling commercial sex is not a defense to soliciting, purchasing, or selling sex with a minor.*

No sex trafficking or CSEC law prohibits a defense to prosecution based on the use of a law enforcement decoy posing as a minor, but Va. Code Ann. § 18.2-374.3(C)–(E) (Use of communications systems to facilitate certain offenses involving children) uses the phrase “child he knows or has reason to believe is younger than 15 years of age,” when referring to the offender, indicating that decoys can be used.

However, a defendant may still be able to assert a defense based on a law enforcement decoy posing as a minor to investigate other buyer-applicable offenses through reverse sting operations, which are the most likely situations in which a defendant would try to use such a defense. Va. Code Ann. § 18.2-346 (Prostitution; commercial sexual conduct; commercial exploitation of a minor; penalties) is a buyer applicable CSEC offense that does not prohibit this defense, meaning that buyers charged for attempting to solicit or purchases sex with a

⁸⁰ See <http://www.dcjs.virginia.gov/trainingevents/cple/HTtraining/> (last visited June 19, 2015).

minor under Va. Code Ann. § 18.2-346 would not be prohibited from raising a defense based on the fact that an actual minor was not involved.

- 6.4.1 Recommendation: Enact a law expressly prohibiting a defense to prosecution based on the use of a law enforcement decoy posing as a minor to investigate domestic minor sex trafficking related crimes.⁸¹

6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*

Va. Code Ann. § 18.2-374.3(E) (Use of communications systems to facilitate certain offenses involving children) uses the phrase “person he knows or has reason to believe is younger than 15 years of age,” when referring to the offender, indicating that law enforcement can use the Internet to pose as minors to investigate the crime.

6.6 *State law requires reporting of missing children and located missing children.*

Va. Code Ann. § 52-31 establishes the “Missing Children Information Clearinghouse.”⁸² Also, Va. Code Ann. § 15.2-1718 (Receipt of missing child reports) requires law enforcement to promptly enter missing child information into the state and national systems in addition to this, stating,

No police or sheriff’s department shall establish or maintain any policy which requires the observance of any waiting period before accepting a missing child report as defined in § 52-32. Upon receipt of a missing child report by any police or sheriff’s department, the department shall immediately, but in all cases within two hours of receiving the report, enter identifying and descriptive data about the child into the Virginia Criminal Information Network and the National Crime Information Center Systems, forward the report to the Missing Children Information Clearinghouse within the Department of State Police, notify all other law-enforcement agencies in the area, and initiate an investigation of the case.

In addition, Va. Code Ann. § 52-31.1 instructs the Superintendent of State Police to “establish a network to implement reports of the disappearance of children by local law-enforcement agencies to local school division superintendents and the State Registrar of Vital Records.” Va. Code Ann. § 22.1-288.1(B) states, “Upon notification by a local law-enforcement agency of a child’s disappearance, the principal of any school in which the child was enrolled at the time of the disappearance shall indicate, by mark, in the child’s cumulative record that the child has been reported as missing. Upon notification by law enforcement that the child is located, the principal shall remove the mark from the record.” Va. Code Ann. § 32.1-275.2 instructs the State Registrar to indicate on birth records that a child is missing when notified of the disappearance.

Va. Code Ann. § 52-34 (Notification required when missing child located) states that “[a]ny law-enforcement officer who has reported a missing child to the Clearinghouse shall notify the Clearinghouse immediately upon determining the location of the child.”

Additionally, Va. Code Ann. § 9.1-102(37)(j) (Powers and duties of the Board and the Department) provides that the Department “shall have the power and duty to . . . [e]stablish training standards and publish and

⁸¹ The recommendation in this component is predicated upon the recommendation in 2.1 being simultaneously or previously enacted.

⁸² Va. Code Ann. § 52-32 defines “missing child” as “any person who is under the age of 21 years, whose temporary or permanent residence is in Virginia, or is believed to be in Virginia, whose whereabouts are unknown to any parent, guardian, legal custodian or other person standing in loco parentis of the child, and who has been reported as missing to a law-enforcement agency within the Commonwealth.”

periodically update model policies for law-enforcement personnel . . . [on] missing children . . . and rescue protocol”

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