

PROPOSED AMENDMENT: TERRORISM

Synopsis of Proposed Amendment: This proposed amendment is a continuation of the Commission's work over the past two years to ensure that the guidelines provide appropriate guideline penalties for offenses involving terrorism. Specifically, this proposed amendment (1) further responds to the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub.L. 107-56*; (2) responds to the *Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub.L. 107-188*; (3) responds to the *Terrorist Bombings Convention Implementation Act of 2002, Pub.L. 107-197*.

I. REMAINING USA PATRIOT ACT AMENDMENTS

The following amendments further respond to the USA PATRIOT Act.

A. Terrorism Enhancement in Money Laundering Guideline

This amendment provides two options for treatment of the current 6-level terrorism enhancement in the money laundering guideline, §2S1.1. Option One eliminates the terrorism enhancement. Elimination of the enhancement is appropriate because it prevents "double-counting" with the terrorism adjustment in §3A1.4 (Terrorism). Specifically, the money laundering terrorism enhancement applies if the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote, an offense involving terrorism. The terrorism adjustment at §3A1.4 applies if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5). Therefore, if the money laundering terrorism enhancement applied, the terrorism adjustment at §3A1.4 would apply based on the same conduct.

In the event the Commission determines that the money laundering terrorism adjustment should not be eliminated, Option Two provides a definition of terrorism in the money laundering guideline that mirrors the definition in §3A1.4.

Proposed Amendment:

§2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

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(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed

that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, [Option One: ~~terrorism,~~] or the sexual exploitation of a minor, increase by **6** levels.

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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"Sexual exploitation of a minor" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse, sexual abuse, or abusive sexual contact involving a minor. "Minor" means an individual under the age of 18 years.

[Option Two:

"Terrorism" means a federal crime of terrorism as defined in 18 U.S.C. §2332b(g)(5).]

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B. Reference of 18 U.S.C. § 1960 to Money Laundering Guideline

This amendment provides two options for the treatment of certain offenses under 18 U.S.C. § 1960. These offenses prohibit knowingly conducting, controlling, managing, supervising, directing, or owning all or part of an unlicensed money transmitting business, as defined in 18 U.S.C. § 1960(b)(1)(C). That provision defines an unlicensed money transmitting business as "a money transmitting business which affects interstate or foreign commerce in any manner or degree and otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity." The statutory maximum term of imprisonment is 5 years.

Option One changes the Statutory Index reference for these offenses from §2S1.3

(Structuring Transactions to Evade Reporting Requirements) to the main money laundering guideline, §2S1.1. This change is appropriate for this offense because its essence is money laundering rather than structuring to evade reporting requirements.

In contrast, other offenses under 18 U.S.C. § 1960 would remain in the structuring guideline under Option One because they are essentially structuring offenses. Specifically, they prohibit knowingly conducting, controlling, managing, supervising, directing, or owning all or part of an unlicensed money transmitting business, as defined in 18 U.S.C. § 1960(b)(1)(A) and (B). Those provisions define an unlicensed money transmitting business as “a money transmitting business which affects interstate or foreign commerce in any manner or degree and (A) is operated without an appropriate money transmitting license....; or (B) fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section.”.

Option Two maintains the initial Statutory Index reference for 18 U.S.C. § 1960(b)(1)(C) offenses in the structuring guideline but provides a cross reference to the main money laundering guideline for conduct that falls under 18 U.S.C. § 1960(b)(1)(C).

An issue for comment requests comment regarding whether the proposed cross reference should be broadened so that any structuring offense that involves the intent to promote unlawful activity, knowledge or belief that the funds were the proceeds of unlawful activity, or reckless disregard of the illicit source of the funds would be cross referenced to main money laundering guideline, leaving the structuring guideline to cover purely regulatory offenses.

Proposed Amendment:

[Option One:

§2S1.1. Laundrying of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

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Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957, 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(C)). For additional statutory provision(s), see Appendix A (Statutory Index).

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§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report

Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports

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Commentary

Statutory Provisions: 18 U.S.C. § 1960 (but only with respect to unlicensed money transmitting businesses as defined in 18 U.S.C. § 1960(b)(1)(A) and (B)); 26 U.S.C. § 7203 (if a violation based upon 26 U.S.C. § 6050I), § 7206 (if a violation based upon 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313, 5314, 5316, 5324, 5326. For additional statutory provision(s), see Appendix A (Statutory Index).

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APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 1960 **2S1.1, 2S1.3**

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[Option Two:

§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports; Bulk Cash Smuggling; Establishing or Maintaining Prohibited Accounts

(a) Base Offense Level:

- (1) **8**, if the defendant was convicted under 31 U.S.C. § 5318 or § 5318A; or
- (2) **6** plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds, if subsection (a)(1) does not apply.

(b) Specific Offense Characteristics

- (1) If (A) the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity; or (B) the offense involved bulk cash smuggling, increase by **2** levels.
- (2) If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense

as part of a pattern of unlawful activity involving more than \$100,000 in a 12-month period, increase by 2 levels.

- (3) If (A) subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level 6.

(c) Cross References

- (1) If the offense was committed for the purposes of violating the Internal Revenue laws, apply the most appropriate guideline from Chapter Two, Part T (Offenses Involving Taxation) if the resulting offense level is greater than that determined above.
- (2) If the offense involved (A) a money transmitting business; and (B) the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity, apply §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity).

Commentary

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4. Cross Reference in Subsection (c)(2).—For purposes of subsection (c)(2), “money transmitting business” means a money transmitting business that affects interstate or foreign commerce. “Money transmitting” includes transferring funds on behalf of the public by any means, including transfers within the United States or to foreign locations by wire, check, draft, facsimile, or courier.

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Issue for Comment: *The proposed amendment provides two options for the treatment of offenses under 18 U.S.C. § 1960(b)(1)(C). Option One provides for a Statutory Index reference for these offenses to the main money laundering guideline, §2S1.1, rather than the structuring guideline, §2S1.3, because such an offense is essentially a money laundering offense. Option Two references this offense to §2S1.3 in the first instance but provides a cross reference for this offense from §2S1.3 to §2S1.1.*

The Commission requests comment regarding whether the proposed cross reference to §2S1.1 in Option Two should be expanded to cover any offense initially referenced to §2S1.3 in the Statutory Index that involved the intent to promote unlawful activity, knowledge or belief

that the funds were the proceeds of unlawful activity, or reckless disregard of the illicit source of the funds. Such an approach would effectively limit the application of §2S1.3 to regulatory offenses (such as the failure to file transaction reports or structuring transactions to evade reporting requirements) unaccompanied by aggravated, real offense money laundering conduct. To effectuate such cross reference, §2S1.3 would likely need to be amended as follows: First, the base offense level of 8 in subsection (a)(1) would be maintained for offenses under 31 U.S.C. §§ 5318 and 5318A, but the alternative base offense level in subsection (a)(2) would be amended to level 6 without any increase from the loss table in §2B1.1. An alternative base offense level of level 6 for a regulatory offense unaccompanied by aggravated conduct is proportionate to other regulatory offenses under the guidelines. Second, the aggravated conduct described in §2S1.3(b)(1) and the aggravated conduct the absence of which is described in §2S1.3(b)(3) would form the basis for the new cross reference. Accordingly, the cross reference to the main money laundering guideline would apply if: (1) the defendant knew or believed that the funds were the proceeds of unlawful activity or were intended to promote unlawful activity; [(2) the offense involved bulk cash smuggling;] or (3) the defendant acted with reckless disregard for the illegal source of the funds. The major possible effects of cross referencing offenses involving real offense money laundering conduct to the money laundering guideline are application of the six-level enhancement in §2S1.1(b)(1) if the defendant knew or believed that the funds were the proceeds of or were intended to promote certain specified crimes, and application of the enhancement in §2S1.1(b)(3) for sophisticated laundering.

C. Enhancement in Accessory After the Fact Guideline for Harboring Terrorists

Currently in §2X3.1 (Accessory After the Fact) there exists an offense level “cap” of level 20 for offenses in which the conduct is limited to harboring a fugitive (and an offense level “cap” of level 30 for all other offenses sentenced under the accessory guideline). This proposed amendment makes the lower offense level “cap” of level 20 inapplicable to offenses involving the harboring of terrorists because of the relative seriousness of those offenses.

Last year, the Commission promulgated an amendment that referenced 18 U.S.C. §§ 2339 and 2339A to §§2X2.1 (Aiding and Abetting) and 2X3.1 (Accessory After the Fact). The offense at 18 U.S.C. § 2339 prohibits harboring or concealing any person who the defendant knows, or has reasonable grounds to believe, has committed or is about to commit one of several enumerated offenses. The maximum term of imprisonment is 10 years. The offense at 18 U.S.C. § 2339A prohibits the provision of material support or resources to terrorists, knowing or intending that they will be used in the preparation for, or in carrying out, specified crimes (i.e., those designated as predicate offenses for "federal crimes of terrorism") or in preparation for, or in carrying out, the concealment or an escape from the commission of any such violation. The maximum term of imprisonment is 15 years. In contrast, a violation of the general harboring statute, 18 U.S.C. § 1071, has a maximum term of imprisonment of 5 years.

For consistency and proportionality, the proposed amendment not only makes the “cap” of level 20 inapplicable to harboring a person who is convicted under 18 U.S.C. § 2339 or § 2339A but also to the conduct of harboring an individual who commits a terrorism offense, i.e., one of the offenses listed in 18 U.S.C. § 2339 or § 2339A or an offense involving or intending to promote federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5).

Proposed Amendment:

§2X3.1. Accessory After the Fact

~~(a) Base Offense Level: 6 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 30. However, in a case in which the conduct is limited to harboring a fugitive, the base offense level under this subsection shall not be more than level 20.~~

(a) **Base Offense Level:**

(1) **6 levels lower than the offense level for the underlying offense, except as provided in subdivisions (2) and (3).**

(2) **The base offense level under this guideline shall not be less than level 4.**

(3) (A) **The base offense level under this guideline shall be not more than level 30, except as provided in subdivision (B).**

(B) **In any case in which the conduct is limited to harboring a fugitive, other than a case described in subdivision (C), the base offense level under this guideline shall not be more than level 20.**

(C) **The limitation in subdivision (B) shall not apply in any case in which (i) the defendant is convicted under 18 U.S.C. § 2339 or § 2339A; or (ii) the conduct involved (I) harboring a person who committed any offense listed in 18 U.S.C. § 2339 or § 2339A or who committed any offense involving or intending to promote a federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5); or (II) obstructing the investigation of, or committing perjury with respect to, any offense described in subdivision (I). In such a case, the base offense level under this guideline shall be not more than level 30, as provided in subdivision (A).**

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II. AMENDMENTS REQUIRED BY THE PUBLIC HEALTH SECURITY AND BIOTERRORISM PREPAREDNESS AND RESPONSE ACT OF 2002

The following amendments to the guidelines are proposed in response to the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107–188.

A. *BIOLOGICAL AGENTS AND TOXINS*

First, the proposed amendment amends the Statutory Index to refer new offenses involving biological agents and toxins to the guideline covering nuclear, biological, and chemical weapons and materials, §2M6.1. Specifically, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 amends 18 U.S.C. §175b to redesignate the existing offense and create new offenses as follows:

(1) The existing offense, redesignated at 18 U.S.C. § 175b(a)(1), prohibits any restricted person (as defined in subsection (b)) from transporting, receiving, or possessing any biological agent or toxin that the Secretary of Health and Human Services has listed under regulations as a "select agent". The maximum term of imprisonment is 10 years. During the last amendment cycle, the Commission referred this offense to §2M6.1 and provided an alternative base offense level of level 22.

(2) Two new offenses, at 18 U.S.C. § 175b(b)(1) and (2), prohibit a person from transferring a select agent listed in regulations by the Secretary of Health and Human Services, or a biological agent or toxin listed in regulations by the Secretary of Agriculture as posing a severe threat to animal or plant health or products, to any person the transferor knows or has reason to believe is not registered to receive or possess such agent or toxin, as required under regulations prescribed by the pertinent Secretary. The maximum term of imprisonment is 5 years.

(3) Two new offenses, at 18 U.S.C. § 175b(c)(1) and (2), prohibit any person from knowingly possessing a select agent listed in regulations by the Secretary of Health and Human Services, or a biological agent or toxin listed in regulations by the Secretary of Agriculture as posing a severe threat to animal or plant health or products, if that person has not registered to receive or possess such agent or toxin, as required under regulations prescribed by the pertinent Secretary. The maximum term of imprisonment is 5 years.

Like the existing offense at 18 U.S.C. § 175b(a)(1), reference of the new offenses to §2M6.1 is appropriate. (An amendment to the statutory index is not necessary because there already exists a reference to §2M6.1 for § 175b offenses.)

Second, the proposed amendment provides for a base offense level of level 22 for the new offenses involving transfer to, or possession of select biological agents by unregistered persons. This proposed base offense level is the same as the existing base offense level for offenses

involving transfer to, or possession of select biological agents by restricted persons. The proposed amendment exempts these offenses from application of §2M6.1(b)(1), which provides a two level enhancement for offenses involving select agents, because that factor is incorporated into the proposed base offense levels.

Third, in response to Act, the proposed amendment makes two modifications to the definition of “select biological agent” in §2M6.1. That definition exists in the guideline for purposes of the two level enhancement in §2M6.1(b)(1) for offenses that involved such an agent.) First, in response to section 212 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, the amendment proposes to expand the definition of “select biological agent” to include biological agents and toxins the Secretary of Agriculture has determined pose a severe threat to animal and plant health and products. Second, section 201 of the Act codified a number of provisions of the Antiterrorism and Effective Death Penalty Act of 1996 in the Public Health Service Act. This codification necessitates a conforming amendment to the definition of “select agent” in application note 1 of §2M6.1.

Proposed Amendment:

§2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

- (a) Base Offense Level (Apply the Greatest):
- (1) **42**, if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization;
 - (2) **28**, if subsections (a)(1), (a)(3), **and (a)(4), and ~~(a)(5)~~** do not apply;
 - (3) **22**, if the defendant is convicted under 18 U.S.C. § 175b; **or**
 - (4) **20**, if **(A)** the defendant is convicted under 18 U.S.C. § 175(b); or **(B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat.**
 - ~~(5) **20**, if the offense (A) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (B) did not involve any conduct evidencing an intent or ability to carry out the~~

threat.

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(b) Specific Offense Characteristics

- (1) If (A) subsection (a)(2); **or** (a)(4); ~~or (a)(5)~~ applies; and (B) the offense involved a threat to use, or otherwise involved (i) a select biological agent; (ii) a listed precursor or a listed toxic chemical; (iii) nuclear material or nuclear byproduct material; or (iv) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (i), (ii), or (iii), increase by **2** levels.
- (2) If (A) subsection (a)(2), (a)(3), or (a)(4)(A) applies; and (B)(i) any victim died or sustained permanent or life-threatening bodily injury, increase by **4** levels; (ii) any victim sustained serious bodily injury, increase by **2** levels; or (iii) the degree of injury is between that specified in subdivisions (i) and (ii), increase by **3** levels.
- (3) If (A) subsection (a)(2), (a)(3), **or** (a)(4); ~~or (a)(5)~~ applies; and (B) the offense resulted in (i) substantial disruption of public, governmental, or business functions or services; or (ii) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.

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Commentary

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Application Notes:

1. Definitions.—For purposes of this guideline:

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*"Select biological agent" means a biological agent or toxin identified (A) by the Secretary of Health and Human Services on the select agent list established **and maintained** pursuant to section 511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104-132. ~~See 42 C.F.R. part 72.351A of the Public Health Service Act (42 U.S.C. 262a), or (B) by the Secretary of Agriculture on the list established and maintained pursuant to section 212 of the Agricultural Bioterrorism Protection Act of 2002 (7 U.S.C. § 8401).~~*

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2. Threat Cases.—Subsection ~~(a)(3)~~(a)(4)(B) applies in cases that involved a threat to use a weapon, agent, or material covered by this guideline but that did not involve any conduct

evidencing an intent or ability to carry out the threat. For example, subsection ~~(a)(3)~~(a)(4)(B) would apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that appeared to be anthrax but that the defendant knew to be harmless talcum powder. In such a case, the dispersal of talcum powder does not evidence an intent on the defendant's part to carry out the threat. In contrast, subsection ~~(a)(3)~~(a)(4)(B) would not apply in a case in which the defendant threatened to contaminate an area with anthrax and also dispersed into the area a substance that the defendant believed to be anthrax but that in fact was harmless talcum powder. In such a case, the dispersal of talcum powder was conduct evidencing an intent to carry out the threat because of the defendant's belief that the talcum powder was anthrax.

Subsection ~~(a)(3)~~(a)(4)(B) shall not apply in any case involving both a threat to use any weapon, agent, or material covered by this guideline and the possession of that weapon, agent, or material. In such a case, possession of the weapon, agent, or material is conduct evidencing an intent to use that weapon, agent, or material.

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B. SAFE DRINKING WATER PROVISIONS

This proposed amendment responds to amendments to the Safe Drinking Water Act made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response of 2002. Section 1432(a) of the Safe Drinking Water Act (42 U.S.C. § 300i-1(a)) prohibits any person from tampering with a public water system. The statutory maximum penalty was increased from 5 years' imprisonment to 20 years' imprisonment. This offense is the only offense referenced to §2Q1.4 (Tampering or Attempted Tampering with Public Water System). Section 1432(b) of such Act (42 U.S.C. § 300i-1(b)) prohibits anyone from attempting or threatening to tamper with a public water system. The statutory maximum penalty was increased from 3 years' imprisonment to 10 years' imprisonment. This offense is the only offense referenced to §2Q1.5 (Threatened Tampering with Public Water System). (For purposes of both offenses, "tamper" means "to introduce a contaminant into a public water system with the intention of harming persons" or "to otherwise interfere with the operation of a public water system with the intention of harming persons".)

First, the amendment proposes to consolidate the guidelines covering tampering with consumer products, §2N1.1, and tampering with a public water system, §2Q1.4, and to consolidate the guidelines covering threatened tampering with consumer products, §2N1.2, and threatened tampering with a public water system, §2Q1.5. Consolidation is proposed because of the infrequency of occurrence of these offenses and because these guidelines cover very similar conduct; accordingly, the treatment of these offenses under the same guideline would promote proportionality in punishment. The substantive changes resulting from the proposed consolidation would include (1) increased base offense levels for public water system offenses, as

discussed in the following paragraph, (2) application to consumer product cases of an existing enhancement in the public water system guidelines if the offense involved substantial disruption of governmental functions or substantial expenditure of funds to respond to the offense, (3) elimination of the existing enhancement in the public water system guideline for ongoing, continuous, or repetitive release of a contaminant into the water supply (elimination is proposed because of definitional difficulties); (4) replacement of the existing enhancement in the public water system guideline if the purpose of the offense was to influence government action or to extort money with an application note inviting an upward departure if a terrorist motive was present and a cross reference to the extortion guideline if the offense involved extortion; and (5) application to the public water system offenses of an existing cross reference in the consumer products guideline to the murder guidelines if death resulted. Conforming changes are made to the Statutory Index.

An issue for comment follows regarding whether the proposed consolidations should also effectuate a consolidation of the tampering guidelines with the threatened tampering guidelines, similar to the manner in which offenses involving threats to use nuclear, biological, or chemical weapons are subsumed within the nuclear, biological and chemical guideline, §2M6.1.

Second, the amendment proposes to increase the base offense level for offenses involving tampering and threatened tampering with a public water system. Under the proposed consolidation, the base offense level for tampering with a public water system would increase from level 18 to level 25, and the six level enhancement for the risk of death or serious bodily injury would be eliminated and replaced with a graduated enhancement for actual bodily injury. Likewise, the base offense level for threatening to tamper with a public water system is proposed to increase from level 10 to level 16. For point of comparison, the existing base offense level for threatening communications under §2A6.1 is level 12 and for threatened use of nuclear, biological, and chemical weapons under §2M6.1 is level 20. These substantial increases in the base offense levels are proposed to ensure proportionality with similar offenses and to respond to the increased statutory maximum penalties made by section 403 of the Public Health Security and Bioterrorism Preparedness and Response of 2002.

Third, the amendment proposes to provide an application note in the consolidated guideline that an upward departure (as provided in application note 4 of the terrorism adjustment in §3A1.4 (Terrorism)) may be warranted if the tampering or threatened tampering was accompanied by a terrorist motive. The amendments to the Safe Drinking Water Act made by the Public Health Security and Bioterrorism Preparedness and Response of 2002 contemplated that terrorism may be the motive behind tampering with the public water supply. Section 1431 of the Safe Drinking Water Act (42 U.S.C. 300i-1) was amended to expand the authority of the Administrator of the Environmental Protection Agency to take emergency action to protect the public health if the Administrator determines that "there is a threatened or potential terrorist attack or other intentional act designed to disrupt the provision of safe

drinking water or to impact adversely the safety of drinking water supplied to communities and individuals, which may present an imminent and substantial endangerment" to the public health. Terrorist motives similarly may be present in offenses involving tampering with consumer products.

One other criminal provision was added by the Act, but it may be appropriate not to list this provision in the Statutory Index at this time. Section 401 of the Public Health Security and Bioterrorism Preparedness and Response of 2002 added section 1433 to the Safe Drinking Water Act. This provision requires local communities to conduct assessments of the vulnerability of their public water systems to terrorist and other intentional acts. Section 1433(a)(6) of the Safe Drinking Water Act (42 U.S.C. § 300i-2(a)(6)) provides that any person who acquires information from this assessment and knowingly or recklessly reveals such information to a person other than to specified persons authorized to receive such information shall be imprisoned for not more than one year and/or fined in accordance with the fines applicable to Class A misdemeanors. This provision does not provide a neat fit within the guidelines. Most of the environmental regulatory guidelines cover the failure to report information or the falsification of information, rather than the reckless disclosure of information. Rather than provide a Statutory Index reference at this point, it may be best to assess over the next few years the frequency of prosecution of this offense and what conduct typically occurs in connection with the offense.

Proposed Amendment:

**PART N - OFFENSES INVOLVING PUBLIC WATER SYSTEMS, FOOD, DRUGS,
AGRICULTURAL PRODUCTS, AND ODOMETER LAWS**

1. TAMPERING WITH CONSUMER PRODUCTS OR PUBLIC WATER SYSTEMS

§2N1.1. Tampering With Consumer Products or Attempting to Tamper With Consumer Products Involving Risk of Death or Bodily Injury; Tampering or Attempting to Tamper With a Public Water System

- (a) Base Offense Level: **25**
- (b) Specific Offense Characteristics
 - (1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if any victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.

- (2) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

(c) Cross References

- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.
- (3) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provisions: 18 U.S.C. § 1365(a), (e); 42 U.S.C. § 300i-1.

Application Notes:

- ~~1. — The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. Where the offense posed a substantial risk of death or serious bodily injury to numerous victims, or caused extreme psychological injury or substantial property damage or monetary loss, an upward departure may be warranted. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.~~
- ~~2. — The special instruction in subsection (d)(1) applies whether the offense level is determined under subsection (b)(1) or by use of a cross reference in subsection (c).~~

1. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under this guideline or under another guideline in Chapter Two (Offense Conduct) by use of a cross reference under subsection (c).

2. Departure Provisions.—

A. Downward Departure Provision.—The base offense level reflects that offenses covered by this guideline typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury. In the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

B. Upward Departure Provisions.—If the offense posed a substantial risk of death or serious bodily injury to numerous victims, caused extreme psychological injury, or caused substantial property damage or monetary loss, an upward departure may be warranted.

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure may be warranted. See Application Note 4 of §3A1.4 (Terrorism).

§2N1.2. Providing False Information or Threatening to Tamper with Consumer Products; Threatening to Tamper With a Public Water System

(a) Base Offense Level: **16**

(b) Specific Offense Characteristic

(1) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.

~~(b)~~(c) Cross Reference

(1) If the offense involved extortion, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Commentary

Statutory Provisions: 18 U.S.C. § 1365(c), (d); 42 U.S.C. § 300i-1.

Application Note:

1. Upward Departure Provisions.—If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

If the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, an upward departure may be warranted. See Application Note 4 of §3A1.4 (Terrorism).

~~§2Q1.4. Tampering or Attempted Tampering with Public Water System~~

- ~~(a) Base Offense Level: 18~~
- ~~(b) Specific Offense Characteristics~~
 - ~~(1) If a risk of death or serious bodily injury was created, increase by 6 levels.~~
 - ~~(2) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.~~
 - ~~(3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.~~
 - ~~(4) If the purpose of the offense was to influence government action or to extort money, increase by 6 levels.~~

~~Commentary~~

~~Statutory Provision: 42 U.S.C. § 300i-1.~~

~~Application Note:~~

- ~~1. "Serious bodily injury" is defined in the Commentary to §1B1.1 (Application Instructions).~~

~~§2Q1.5. Threatened Tampering with Public Water System~~

- ~~_____ (a) Base Offense Level: 10~~
- ~~_____ (b) Specific Offense Characteristic~~
 - ~~_____ (1) If the threat or attempt resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, increase by 4 levels.~~
- ~~_____ (c) Cross Reference~~
 - ~~_____ (1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).~~

Commentary

Statutory Provision: ~~42 U.S.C. § 300i-1.~~

* * *

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* * *

42 U.S.C. § 300i-1 ~~2Q1.4, 2Q1.5~~ **2N1.1, 2N1.2**

* * *

Issue for Comment: *For the reasons stated in the foregoing synopsis, this amendment proposes to consolidate the guidelines covering tampering with consumer products, §2N1.1, and tampering with a public water system, §2Q1.4, and to consolidate the guidelines covering threatened tampering with consumer products, §2N1.2, and threatened tampering with a public water system, §2Q1.5. The Commission requests comment regarding whether the Commission should effectuate the consolidation of these four guidelines into one guideline covering both tampering and threatened tampering cases. Such an approach would be consistent with the guideline covering nuclear, biological, and chemical weapons and materials, §2M61, which covers both offenses involving such weapons and materials as well as offenses involving the threatened use of such weapons and materials.*

C. ANIMAL ENTERPRISE TERRORISM

This proposed amendment adds an invited upward departure provision in the fraud, theft, and property destruction guideline, §2B1.1, to account for aggravating conduct that may occur in connection with an animal enterprise offense under 18 U.S.C. § 43.

Specifically, section 336 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 increased the penalty provisions of 18 U.S.C. § 43, which makes it an offense to travel in interstate or foreign commerce, or to use or cause to be used the mail or any facility in interstate or foreign commerce for the purpose of causing physical disruption to the functioning of an animal enterprise, and to intentionally damage or cause the loss of any property (including animals and records) used by the animal enterprise, or to conspire to do so.

Before amendment by the Act, the penalty structure was (1) not more than one year imprisonment for causing economic damage exceeding \$10,000, (2) not more than 10 years' imprisonment for causing serious bodily injury in the course of such an offense, and (3) life or any term of years of imprisonment if death resulted. As a result of the Act, the penalty structure now is (1) not more than 6 months imprisonment for causing economic damage not exceeding \$10,000 (18 U.S.C. § 43(b)(1)); (2) not more than 3 years' imprisonment for causing economic damage exceeding \$10,000 (18 U.S.C. § 43(b)(2)); (3) not more than 20 years' imprisonment for causing serious bodily injury in the course of such an offense (18 U.S.C. § 43(b)(3)); and (4) life or any term of years of imprisonment if death resulted (18 U.S.C. § 43(b)(4)).

This offense currently is referenced only to §2B1.1. While reference only to that guideline generally continues to be appropriate for violations under 18 U.S.C. § 43, that guideline fails to account for aggravated situations in which serious bodily injury or death results. Although the property damage guideline contains an enhancement for the risk of serious bodily injury or death, there is no enhancement or cross reference in that guideline that would provide a higher offense level if actual serious bodily injury or death resulted. Given the highly unusual occurrence of death or serious bodily injury in property damage cases generally and the infrequency of these specific offenses, the proposed amendment adds an invited upward departure provision in Application Note 15(A)(ii) of §2B1.1 if death or serious bodily injury occurs in an offense under 18 U.S.C. § 43, or if substantial or significant scientific information or research is lost as part of such an offense.

Proposed Amendment:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

Commentary

* * *

Application Notes:

* * *

15. Departure Considerations.—

(A) Upward Departure Considerations.—*There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*

- (i) *A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.*
- (ii) *The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.*

* * *

III. AMENDMENTS REQUIRED BY THE TERRORIST BOMBINGS CONVENTION IMPLEMENTATION ACT OF 2002

The proposed amendment amends the Statutory Index (and the Statutory Provisions of the pertinent Chapter Two guidelines) to add three new offenses created by the Terrorist Bombings Convention Implementation Act of 2002, Pub. L. 107–197 and provides conforming amendments within a number of Chapter Two guidelines to more fully incorporate the new offenses into the offense guidelines.

First, section 102 of the Act created a new offense at 18 U.S.C. § 2332f, which provides in subsection (a) that "whoever unlawfully delivers, places, discharges, or detonates an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility (A) with the intent to cause death or

serious bodily injury, or (B) with the intent to cause extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss" and in subsection (b) that "whoever attempts or conspires to commit [such] an offense" shall be punished as provided under 18 U.S.C. § 2332a(a). Section 2332a offenses currently are referenced to §§2K1.4 (the arson and property damage by use of explosives guideline) and 2M6.1 (the guideline covering nuclear, biological, and chemical weapons). The proposed amendment refers this new offense to those guidelines as well. In addition, the proposed amendment amends the alternative base offense levels in the arson guideline §2K1.4(a)(1) so that the base offense level of level 24 applies to targets of 18 U.S.C. §2332f offenses, namely, state or government facilities, infrastructure facilities, public transportation systems and "places of public use".

Second, section 202 of the Act created a new offense at 18 U.S.C. § 2339C, which provides in subsection (a)(1) that "whoever, in a circumstance described in subsection (c) (i.e., in the United States or outside of the United States by a national of the United States or an entity organized under the laws of the United States), by any means directly or indirectly, unlawfully and willfully provides or collects funds, with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out (A) an act which constitutes an offense, within the scope of [certain international treaties], as implemented by the United States, or (B) any other act intended to cause death or serious bodily injury to a civilian, or to any person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing an act", and in subsection (b) that whoever attempts or conspires to commit such an offense, shall be punished for a maximum term of imprisonment of 20 years.

The proposed amendment refers the new offense at 18 U.S.C. § 2339C(1)(A) to §2X2.1 (Aiding and Abetting). The new offense involves providing or collecting funds knowing or intending that the funds would be used to carry out any of a number of specified offenses. Accordingly, the proposed amendment treats these offenses in the same manner as 18 U.S.C. § 2339A offenses, which aid and abet a predicate offense listed in the statute. An amendment is proposed to be made in §2X2.1 to conform the definition of the "underlying offense" that is aided and abetted.

The proposed amendment refers the new offense at 18 U.S.C. § 2339C(a)(1)(B) to §2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorist Organizations). Reference to §2M5.3 is appropriate because this offense involves generally providing or collecting funds knowing or intending that the funds would be used to carry out not a specified offense but rather an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). Therefore, the essence of the offense is the

provision of material support to terrorists, which is appropriately referenced to §2M5.3. The proposed amendment expands §2M5.3 to include not only designated foreign terrorist organizations but other terrorists as well.

Third, 18 U.S.C. § 2339C(c)(2) makes it unlawful in the United States, or outside the United States by a national of the United States or an entity organized under the laws of the United States, to knowingly conceal or disguise the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that (A) they were provided in violation of 18 U.S.C. §2339B, or (B) they were provided or collected in violation of 18 U.S.C. §2339C(a)(1) or (2). The maximum term of imprisonment for a violation of subsection 18 U.S.C. § 2339C(c) is 10 years.

The proposed amendment references offenses under 18 U.S.C. § 2339C(c)(2)(A) to §2X3.1 (Accessory After the Fact), since the essence of such an offense is the concealment of resources that were known or intended to have been provided in violation of another substantive offense, namely, 18 U.S.C. § 2339B. An amendment is proposed to be made in §2X3.1 to conform the definition of the “underlying offense” to which the defendant is an accessory.

The proposed amendment references offenses under 18 U.S.C. § 2339C(c)(2)(B) to §§2M5.3 and 2X3.1. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were provided or collected in violation of 18 U.S.C. §2339C(a)(1), the offense should be sentenced under §2X3.1. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out an act which constitutes any number of specified offenses. To the extent the offense involved knowingly concealing or disguising the nature, location, source, ownership, or control of any material support, resources, or funds knowing or intending that they were provided or collected in violation of 18 U.S.C. §2339C(a)(2), the offense should be sentenced under §2M5.3. This is because the concealment occurs with respect to material support the defendant knows is to be used, in full or in part, in order to carry out not a specified offense but rather an act which by its nature is a terrorist act (because it is meant to intimidate a civilian population or to compel a government or international organization to do something or to refrain from doing something). A conforming amendment is proposed to be added to the Statutory Provisions of §§2M5.3 and 2X3.1.

Proposed Amendment:

§2K1.4. Arson; Property Damage by Use of Explosives

- (a) Base Offense Level (Apply the Greatest):

- (1) **24**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling, an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~or~~ a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use;
- (2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~or~~ a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C) endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, ~~or~~ a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 1992, 1993(a)(1), (a)(2), (a)(3), (b), 2275, 2332a, **2332f**; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

- 1. Definitions.—For purposes of this guideline:

* * *

"Mass transportation" has the meaning given that term in 18 U.S.C. § 1993(c)(5).

"State or government facility", "infrastructure facility", "place of public use", and "public transportation system" have the meaning given those terms in 18 U.S.C. § 2332f(e)(3), (5), (6), and (7), respectively.

* * *

§2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or For A Terrorist Purpose

- (a) Base Offense Level: **26**

- (b) Specific Offense Characteristic
- (1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; or (D) funds with knowledge or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C), increase by 2 levels.
- (c) Cross References
- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.
- (3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 2339B, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. § 2339C(a)(1)(B)).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Biological agent", "chemical weapon", "nuclear byproduct material", "nuclear material", "toxin", and "weapon of mass destruction" have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).

"Dangerous weapon", "firearm", and "destructive device" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"Explosives" has the meaning given that term in Application Note 1 of the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).

"Foreign terrorist organization" has the meaning given the term "terrorist organization" in 18 U.S.C. § 2339B(g)(6).

"Material support or resources" has the meaning given that term in 18 U.S.C. § 2339B(g)(4).

2. Departure Provisions.—

- (A) In General.—In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of the material support or resources involved, the extent of planning or sophistication, and whether there were multiple occurrences. In a case in which such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).
- (B) War or Armed Conflict.—In the case of a violation during time of war or armed conflict, an upward departure may be warranted.

* * *

§2X2.1. Aiding and Abetting

The offense level is the same level as that for the underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2, 2339, 2339A, 2339C(a)(1)(A).

Application Note:

1. Definition.—For purposes of this guideline, "underlying offense" means the offense the defendant is convicted of aiding or abetting, or in the case of a violation of 18 U.S.C. § 2339A or 2339C(a)(1)(A), "underlying offense" means the offense the defendant is convicted of having materially supported or provided or collected funds for prior to or during its commission.

* * *

§2X3.1. Accessory After the Fact

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072, 2339, 2339A, 2339C(c)(2)(A), (c)(2)(B)(but only with respect to funds known or intended to have been provided or collected in

violation of 18 U.S.C. § 2339C(a)(1)(A)).

Application Notes:

1. Definition.—For purposes of this guideline, "underlying offense" means the offense as to which the defendant is convicted of being an accessory, or in the case of a violation of 18 U.S.C. § 2339A, "underlying offense" means the offense the defendant is convicted of having materially supported after its commission (*i.e.*, in connection with the concealment of or an escape from that offense), or in the case of a violation of 18 U.S.C. § 2339C(c)(2)(A), "underlying offense" means the violation of 18 U.S.C. § 2339B with respect to which the material support, resources, or funds were concealed or disguised. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; *see* Application Note 10 of the Commentary to §1B1.3 (Relevant Conduct).

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18 U.S.C. § 2332d	2M5.1
18 U.S.C. § 2332f	2K1.4, 2M6.1
18 U.S.C. § 2339	2X2.1, 2X3.1
18 U.S.C. § 2339A	2X2.1, 2X3.1
18 U.S.C. § 2339B	2M5.3
18 U.S.C. § 2339C(a)(1)(A)	2X2.1
18 U.S.C. § 2339C(a)(1)(B)	2M5.3
18 U.S.C. § 2339C(c)(2)(A)	2X3.1
18 U.S.C. § 2339C(c)(2)(B)	2M5.3, 2X3.1
18 U.S.C. § 2340A	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A4.1

* * *

IV. MISCELLANEOUS AMENDMENTS

The proposed amendment amends §2K1.3 to add an additional base offense level of 18 for certain offenses committed under 18 U.S.C. § 842(p)(2). Section 842(p)(2) criminalizes knowingly or intentionally facilitating Federal crimes of violence by teaching or demonstrating the making or use of an explosive, destructive device, or weapon of mass destruction. It also criminalizes the distribution "by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive, device, or weapon of mass destruction" with the intent or knowing that the teaching, demonstration, or information will be used for or in furtherance of, an activity that constitutes a Federal crime of violence. The statutory maximum

term of imprisonment is 20 years.

The statute is referenced in the Statutory Index to §§2K1.3 (prohibited transactions involving explosive materials) and 2M6.1 (weapons of mass destruction). The applicable offense levels at §2M6.1 are 42 and 28. The applicable offense level at §2K1.3 currently is base offense level 12. Guideline 2K1.3 has alternative base offense levels predicated upon recidivism. An alternative base offense level of 24 applies to a defendant with two prior felony convictions of a crime of violence or a controlled substance offense, and an alternative base offense level of 20 applies to a defendant with one prior felony conviction of a crime of violence or a controlled substance offense. The base offense level of 12 appears to be disproportionately low compared with other 20 year offenses, and compared with the treatment of 18 U.S.C. § 842(p)(2) offenses under the 2M6.1 guideline. This is especially true in light of the definition of destructive device, defined at 18 U.S.C. § 921(a)(4) to include “(A) any explosive, incendiary, or poison gas (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses”

The proposed amendment would also makes the enhancement at §2K1.3(b)(3) and the cross reference at §2K1.3(c)(1) applicable to 18 U.S.C. § 842(p)(2) offenses. Currently, in cases in which the defendant used or possessed any explosive material in connection with another felony offense or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, subsection (b)(3) provides a four level enhancement and a minimum offense level of level 18, and, if the resulting offense level is greater, the cross reference at subsection (c)(1) references such cases either to §2X1.1 (Attempt, Solicitation, or Conspiracy), or to the most analogous homicide guideline if death resulted. Application of both subsection (b)(3) and subsection (c)(1) to 18 U.S.C. § 842(p)(2) offenses is appropriate because of the defendant’s knowledge and/or intent that the defendant’s teaching would be used to carry out another felony.

Finally, the proposed amendment makes minor technical changes to the Statutory Provisions of §2M6.1.

Proposed Amendment:

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

- (a) Base Offense Level (Apply the Greatest):
 - (1) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

- (2) **20**, if the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (3) **18**, if the defendant was convicted under 18 U.S.C. § 842(p)(2);
- ~~(3)~~(4) **16**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or
- ~~(4)~~(5) **12**, otherwise.

* * *

(b) Specific Offense Characteristics

* * *

- (3) If the defendant (A) was convicted under 18 U.S.C. § 842(p)(2); or (B) used or possessed any explosive material in connection with another felony offense; or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(c) Cross Reference

- (1) If the defendant (A) was convicted under 18 U.S.C. § 842(p)(2); or (B) used or possessed any explosive material in connection with the commission or attempted commission of another offense, or possessed or transferred any explosive material with knowledge or intent that it would be used or possessed in connection with another offense, apply --
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above; or
 - (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)-(e), (h), (i), (l)-(o), (p)(2), 844(d), (g), 1716; 26 U.S.C.

§ 5685.

Application Notes:

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3. For purposes of subsection (a)(~~3~~)(4), "prohibited person" means any person described in 18 U.S.C. § 842(i).

* * *

9. For purposes of applying subsection (a)(1) or (2), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. (n.3).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), or (a)(~~3~~)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

§2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempt or Conspiracy

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 175b, 229, 831, 842(p)(2) (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), but including any biological agent, toxin, or vector), 1993(a)(2), (3), (b), 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), but including any biological agent, toxin, or vector); 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), see Appendix A (Statutory Index).