

REVISED PROPOSED AMENDMENT: NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS

(Proposed Amendment 19 of User Friendly, Volume Two)

Synopsis of Proposed Amendment: *This is a two-part amendment.*

First, the proposed amendment increases by four levels the base offense levels in §§2M5.1 (the guideline covering the evasion of export controls) and 2M5.2 (the guideline covering the exportation of arms, munitions, and military equipment without a license), in response to the sense of Congress contained in section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997 that guideline penalties are inadequate for certain offenses involving the importation, attempted importation, exportation, and attempted exportation of nuclear, chemical, and biological weapons, materials, or technologies. A four-level increase is proposed for those offenses in subsection (a)(1) of both §§2M5.1 and 2M5.2 to make the penalty structure for those offenses proportional to other national security guidelines in Chapter Two, Part M. In addition, the Statutory Index is proposed to be amended to refer one of the offenses, 50 U.S.C. § 1701 (which currently is not referenced in the Statutory Index), to both §§2M5.1 and 2M5.2.

Second, the proposed amendment substantially revises §2M6.1 (the guideline covering the unlawful acquisition, alteration, use, transfer, or possession of nuclear material, weapons, or facilities) in order to incorporate into that guideline two relatively new offenses, 18 U.S.C. § 175, relating to biological weapons, and 18 U.S.C. § 229, relating to chemical weapons. Specifically, the amendment proposes to modify §2M6.1 in the following ways:

- (1) It provides three alternative base offense levels. The first base offense level of level 42 applies if the offense was committed with the intent to injure the United States or to aid a foreign government or foreign terrorist organization. This incorporates into the base offense level the 12-level enhancement currently found in the guideline for such intent and does not change the overall offense level for these offenses. "Foreign terrorist organizations" are added because Congress has found that such groups are investing in the acquisition of unconventional weapons such as nuclear, biological, and chemical agents. It is anticipated that this base offense level will apply to cases as apparently originally contemplated by the guideline (*i.e.*, the acquisition of nuclear material from defense, or even civilian, nuclear facilities in order to assist foreign governments, thereby creating a threat to the national security) as well as to cases that implicate the national security but involve biological and chemical weapons and other weapons of mass destruction.*

The proposed amendment provides that, if the base offense level of level 42 applies, none of the adjustments in subsection (b) shall apply. This is intended to cap the very high offense level attendant to this base offense level and also to preclude the possibility of a downward adjustment if the offense involved only a threat. However, if death results, the cross reference allows for the possibility of a higher offense level through application of the first degree murder guideline.

It is anticipated that the second alternative base offense level, of level 28, will apply in most

cases, specifically those cases that do not threaten the national security of the United States.

The third alternative base offense level, of level 22, is intended to apply in cases which involve only a threat to use a nuclear, biological, or chemical weapon or material, or other weapon of mass destruction, unaccompanied by the use, or intended use, of any such weapon or material.

After review of the cases and meeting with representatives of the Department of Justice and the Federal Bureau of Investigations, it became apparent that the least culpable offenders, and the least serious of these offenses, are those that involve only threats.

- (3) It provides a two-level enhancement in subsection (b)(2) if the offense involved particularly dangerous types of nuclear, chemical, and biological weapons and materials. Those weapons and materials are defined in the guideline commentary by reference to the applicable statutory and regulatory provisions. This enhancement acknowledges the distinctions already made in international treaties, provisions of title 18, United States Code, the relevant regulatory schemes, and by representatives of the Department of Justice and the Federal Bureau of Investigations, that certain types of weapons and materials are inherently more lethal and pose a greater threat to the public safety.*
- (4) It provides an enhancement in subsection (b)(3) if any victim sustained serious bodily injury or death. This enhancement is modeled after the enhancement found in §2N1.1, the guideline covering tampering with consumer products.*
- (5) It provides a four-level enhancement for cases involving a substantial disruption of public, governmental, or business functions or services, or the substantial expenditure of funds for clean up and decontamination efforts.*
- (6) It provides two cross references, if the resulting offense level is greater, if either death resulted (in which case the first or second degree murder guideline would apply) or if the offense was tantamount to attempted murder (in which case the attempted murder guideline would apply). These cross references are also modeled after cross references found in §2N1.1, the guideline for tampering with consumer products.*
- (7) It provides a special instruction that if the defendant is convicted of one count involving the death of, serious bodily injury to, or attempted murder of, more than one victim, the grouping rules will be applied as if the defendant had been convicted of separate counts for each such victim.*
- (8) It amends the Statutory Index to refer 18 U.S.C. §§ 175 and 229 to §2M6.1 and to delete a number of guideline references for 18 U.S.C. § 2332a and instead provide a reference for that offense to §§2K1.4 (in the case of weapons of mass destruction that are explosive devices and 2M6.1 (in the case of other weapons of mass destruction).*

Proposed Amendment:

§2M5.1. Evasion of Export Controls

(a) Base Offense Level (Apply the greater):

- (1) ~~2226~~, if national security controls or ~~nuclear proliferation~~ controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or
- (2) **14**, otherwise.

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§2M5.2. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

(a) Base Offense Level:

- (1) ~~2226~~, except as provided in subdivision (2) below;
- (2) **14**, if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten.

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**PART M - OFFENSES INVOLVING NATIONAL DEFENSE
AND WEAPONS OF MASS DESTRUCTION**

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6. ~~ATOMIC ENERGY~~ NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS AND MATERIALS AND OTHER WEAPONS OF MASS DESTRUCTION

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

(a) Base Offense Level (Apply the greatest): ~~30~~

- (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; ~~or~~
- (2) **28**, if subsections (a)(1) and (a)(3) do not apply; or
- (3) **22**, if the offense (A) involved a threat to use a nuclear, biological, or chemical weapon, agent, or material, or a weapon of mass destruction; but (B) did not involve any conduct evidencing an intent or ability to carry

out the threat.

(b) Specific Offense Characteristics

(1) ~~If the offense was committed with intent to injure the United States or to aid a foreign nation, increase by 12 levels.~~

(1) If (A) subsection (a)(2) or (a)(3) 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) applies, and (B)(i) any victim 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) or (a)(3) applies; and (B) the offense resulted in (i) significant disruption of public, governmental, or business functions or services; or (ii) a significant 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, 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.

(d) Special Instruction

(1) If the defendant is convicted of a single count involving (A) conduct that resulted in 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 such conduct in respect to each victim had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 229, 831, 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)); 42 U.S.C. §§ 2077(b), 2122, 2131. Also, 18 U.S.C. § 831 (only where the conduct is similar to that proscribed by the aforementioned statutory provision(s)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

I. Definitions.—For purposes of this guideline:

"Biological agent" has the meaning given that term in 18 U.S.C. § 178(1).

"Chemical weapon" has the meaning given that term in 18 U.S.C. § 229F(1).

"Foreign terrorist organization" (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § 1219). "National of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

"Listed precursor or listed toxic chemical" means a precursor or toxic chemical, respectively, listed in Schedule I of the Annex on Chemicals to the Chemical Weapons Convention. See 18 U.S.C. § 229F(6)(B), (8)(B). "Precursor" has the meaning given that term in 18 U.S.C. § 229F(6)(A). "Toxic chemical" has the meaning given that term in 18 U.S.C. § 229F(8)(A).

"Nuclear byproduct material" has the meaning given that term in 18 U.S.C. § 831(f)(2).

"Nuclear material" has the meaning given that term in 18 U.S.C. § 831(f)(1).

"Select biological agent" means a biological agent or toxin identified by the Secretary of Health and Human Services on the select agent list established pursuant to section 511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. See 42 C.F.R. part 62. "Toxin" has the meaning given that term in 18 U.S.C. § 178(2).

"Weapon of mass destruction" (A) has the meaning given that term in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D); and (B) includes any radiological dispersal device, regardless of whether the radioactive material contained in that radiological dispersal device was nuclear material, nuclear byproduct material, or other radioactive material (such as low-grade medical, industrial, or research radioactive waste). "Radiological dispersal device" means any device, including any weapon or equipment, other than a nuclear explosion, specifically designed to disseminate radioactive material in order to cause property destruction, damage, or bodily injury by means of the radiation produced by the decay of the radioactive material.

2. *Inapplicability of Subsection (b) in Subsection (a)(1) Cases.*—If subsection (a)(1) applies, do not apply subsection (b).

3. *Threat Cases.*—Subsection (a)(3) 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) 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) 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) 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.

4. *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 subsection (a), subsections (a) and (b), or subsection (c).

5. *Inapplicability of §3A1.4 in Certain Cases.*—If subsection (a)(1) applies because the offense was committed with the intent to aid an international foreign terrorist organization, do not apply §3A1.4 (Terrorism).

6. *Departure Provisions.*—

(A) *Upward Departure Provisions.*—There may be cases in which the offense level determined above substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of circumstances in which an upward departure may be warranted:

(i) The offense posed a substantial risk of death or serious bodily injury to numerous victims (*e.g.*, chlorine gas was released in a crowded movie theater).

(ii) The offense caused extreme psychological injury. *See* §5K2.3 (Extreme Psychological Injury).

(iii) The offense caused substantial property damage or monetary loss. *See*

§5K2.5 (Property Damage or Loss).

- (B) *Downward Departure Provision.*—There may be cases in which the offense level determined above substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. For example, 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.

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 155	2F1.1	
18 U.S.C. § 175	2M6.1	
18 U.S.C. § 201(b)(1)	2C1.1	
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18 U.S.C. § 228	2J1.1	
18 U.S.C. § 229	2M6.1	
18 U.S.C. § 241	2H1.1, 2H2.1	
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18 U.S.C. § 2332a	2A1.1, 2A1.2, 2A1.3,	
	2A1.4, 2A1.5, 2A2.1,	
	2A2.2, 2B1.3, 2K1.4, 2M6.1	
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50 U.S.C. App. § 462	2M4.1	
50 U.S.C. App. § 1701	2M5.1, 2M5.2	
50 U.S.C. App. § 2410	2M5.1	