

REVISED PROPOSED AMENDMENT: TERRORISM

Overview: *On October 26, 2001, the President signed into law 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. Among other things, the Act created a number of new terrorism, money laundering, and currency offenses, and increased the statutory maximum penalties for certain pre-existing offenses. In light of this legislation, the Commission is assessing the guidelines' treatment of terrorism offenses, and certain money laundering and currency offenses as they may be related to terrorism.*

This amendment cycle, the Commission is interested in considering amending the guidelines as they pertain to these newly created offenses and those offenses modified by the Act, as well as the Chapter Three adjustment for terrorism, §3A1.4. In addition, the proposed amendment contains a number of modifications to existing guidelines and the Statutory Index.

Synopsis of Proposed Amendment: *This is a multi-part amendment proposed in response to the USA PATRIOT Act of 2001 (the Act) and the Commission's assessment of the guidelines' treatment of offenses involving terrorism. Parts (A) through (D) address offenses that involve, or potentially involve, terrorism. Providing guideline treatment for these offenses in Chapter Two (Offense Conduct) is important, in part, to ensure applicability of the Chapter Three adjustment for terrorism, §3A1.4. Specifically, Parts (A) through (D) of this amendment address the following: (A) new predicate offenses to federal crimes of terrorism; (B) other predicate offenses to federal crimes of terrorism that are not currently referenced in the Statutory Index; (C) penalties for terrorism conspiracies and attempts; and (D) issues related to the terrorism adjustment in §3A1.4.*

Part (E) of this amendment addresses money laundering provisions of the Act. Part (F) addresses miscellaneous issues.

Part (A): New Predicate Offenses to Federal Crimes of Terrorism

Synopsis of Proposed Amendment: *This amendment addresses section 801 (Terrorist Attacks and Other Acts of Violence Against Mass Transportation Systems) of the Act, which added section 1993 of title 18, United States Code. Section 1993(a)(1) prohibits willfully wrecking, derailing, setting fire to, or disabling a mass transportation vehicle or ferry. Section 1993(a)(2) prohibits willfully placing or causing to be placed any biological agent or toxin for use as a weapon, destructive substance, or destructive device in, upon, or near a mass transportation vehicle or ferry without previously obtaining the permission of the mass transportation provider, and with intent to endanger the safety of any passenger or employee of the mass transportation provider, or with a reckless disregard for the safety of human life. Section 1993(a)(3) prohibits willfully setting fire to, or placing any biological agent or toxin for use as a weapon, destructive substance, or destructive device in, upon, or near any garage, terminal, structure, supply, or facility used in the operation of, or in support of the operation of, a mass transportation vehicle or ferry, without previously obtaining the permission of the mass transportation provider, and knowing or having reason to know such activity would likely derail, disable, or wreck a mass transportation vehicle or ferry used,*

operated, or employed by the mass transportation provider. Section 1993(a)(4) prohibits willfully removing appurtenances from, damaging, or otherwise impairing the operation of a mass transportation signal system, including a train control system, centralized dispatching system, or rail guard crossing signal without authorization from the mass transportation provider. Section 1993(a)(5) prohibits willfully interfering with, disabling, or incapacitating any dispatcher, driver, captain, or person while they are employed in dispatching, operating, or maintaining a mass transportation vehicle or ferry, with intent to endanger the safety of any passenger or employee of the mass transportation provider, or with a reckless disregard for the safety of human life. Section 1993(a)(6) prohibits willfully committing an act, including the use of a dangerous weapon, with the intent to cause death or serious bodily injury to an employee or passenger of a mass transportation provider or any other person while the foregoing are on the property of a mass transportation provider. Section 1993(a)(7) prohibits willfully conveying or causing to be conveyed false information, knowing that information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by this section. Section 1993(a)(8) prohibits willfully attempting, threatening, or conspiring to do any of the above acts. The maximum term of imprisonment is 20 years, or under 1993(b) life imprisonment if the mass transportation vehicle or ferry was carrying a passenger; or death resulted.

This amendment also addresses 49 U.S.C. § 46507 (False information and threats). That offense prohibits (i) willfully and maliciously or with reckless disregard for the safety of human life, giving or causing to be given false information, knowing that information to be false, concerning an attempt or alleged attempt being made or to be made to do any act which would violate sections 46502(a), 46504, 46505, or 46506 of title 49; or (ii) threatening to violate or causing a threat to violate such sections with the apparent determination and will to carry out the threat. The maximum term of imprisonment is five years. Currently, section 46507 offenses are not listed in the Statutory Index.

This amendment also addresses the new offense at 49 U.S.C. § 46503 (Interference with Security Screening Personnel). That offense, created by section 114 of the Aviation and Transportation Security Act, prohibits an individual in an area within a commercial service airport in the United States from assaulting a Federal, airport, or air carrier employee who has security duties within the airport, thereby interfering with the performance of the employee's duties or lessening the ability of that employee from performing those duties. The maximum term of imprisonment is 10 years, or, if the individual used a dangerous weapon in committing the assault or interference, any term of years or life.

This amendment amends Chapter Two, Part A, Subpart 5 (Air Transportation) to make a number of changes to §2A5.2 (Interference with Flight Crew Member or Flight Attendant), and Chapter Two, Part A, Subpart 2 (Assault). First, this amendment references to the Statutory Provisions violations of 18 U.S.C. § 1993(a)(4), (a)(5), (a)(6), (b) and 49 U.S.C. § 46503, with conforming changes to the Statutory Index. This is proposed because of similarities to other included statutory provisions and because the guideline's alternative prongs capture reckless or intentional endangerment. Subsection 1993(a)(4) is similar to 49 U.S.C. § 46308 with respect to intent to commit the offense and resulting harm. Subsection 1993(a)(5) is similar to 49 U.S.C. §

46504 with respect to offense conduct, individuals targeted, and potential harm. Section 46503 is similar to section 46504 with respect to offense conduct, individuals targeted, and potential harm and to section 1993(a)(5). In addition to referencing section 1993(a)(6) to §2A5.2 because the conduct fits sufficiently within interference with mass transportation vehicles, a reference to §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) and §2A2.2 (Aggravated Assault) is also provided.

Second, in response to the Issue for Comment regarding whether §2A5.2 should provide an enhancement for assaulting airport security personnel in order to take into account aggravating conduct under 49 U.S.C. § 46503, the amendment adds a specific offense characteristic for use of a weapon, borrowing language from the Aggravated Assault guideline (§2A2.2).

Third, a cross reference to the appropriate homicide guideline is provided in response to the Issue for Comment regarding whether §2A5.2 should be amended to provide an enhancement or cross reference to the homicide guidelines if death results. Such a cross reference recognizes the “intent to cause death or serious bodily injury” element contained in section 1993(a)(6) and the death results element contained in section 1993(b)(2).

Fourth, it should be noted that no enhancement is provided in response to the Issue for Comment regarding whether there should be a more general enhancement in §2A5.2 for jeopardizing the security of an airport facility, mass transportation vehicle or ferry. This is because the addition of the mass transportation facility language in the guideline in conjunction with the alternative base offense levels adequately captures conduct associated with jeopardizing security. The amendment proposes to add a graduated enhancement, and a minimum offense level of level 24, for the involvement of a dangerous weapon in the offense. This proposed change addresses the concern of the Department of Justice that the current base offense level of 18 (in §2A5.2(a)(2)) for reckless endangerment may be inadequate in situations involving a dangerous weapon and reckless disregard for the safety of human life.

Fifth, in response to the Issue for Comment regarding whether §2A5.2 should be amended to provide a specific offense characteristic if the offense endangered or harmed multiple victims, it is suggested that such an enhancement may not be necessary. For the most part, the offenses recommended for reference to this guideline are similar to offenses currently referenced to this guideline (e.g., 49 U.S.C. §§ 46308 and 46504) but pertain to air transportation rather than mass transportation. As such, the base offense levels most likely were established to encompass the potential for harm or endangerment to multiple victims.

This amendment also amends Chapter Two, Part A, Subpart 6 (Threatening or Harassing Communications, Stalking, and Domestic Violence) to include offenses against mass transportation systems under 18 U.S.C. § 1993 and 49 U.S.C. § 46507 within the scope of that Subpart and provides references in the Statutory Index. Specifically, the amendment amends the Statutory Index to reference subsections 1993(a)(7) and (a)(8) and Section 46507 to §2A6.1 because these three provisions require the same type of threatening conduct or conveyance of false information as 18 U.S.C. §§ 35(b) and 32(c), except that conduct is in relation to aircrafts, railroads, and shipping,

rather than mass transportation systems. Although sections 35(b) and 32(c) are listed in the Statutory Index, they are not currently listed in the Statutory Provisions of this guideline. Therefore, the amendment includes them in the Statutory Provisions.

Additionally, a specific offense characteristic is proposed if the offense resulted in a substantial disruption of public, governmental, or business functions or services, or a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense. According to the Department of Justice, a terrorist threat will usually be directed at a large number of individuals, governmental buildings or operations, or infrastructure. Unless a terrorist threat is immediately dismissed as not credible, the conduct may also result in significant disruption and response costs. The specific offense characteristic proposed is the same as that contained in §2M6.1(b)(3) (Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Materials, Weapons, or Facilities, Biological Agents, Toxins, or Delivery Systems, Chemical Weapons, or Other Weapons of Mass Destruction; Attempts or Conspiracy).

An invited upward departure provision is proposed for situations in which the offense involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, or if the offense involved multiple victims. Many of the statutory provisions already referenced to §2A6.1 are less likely to involve multiple victims than violations of section 1993. These statutory provisions involve threats against the president, vice-president, foreign officials, harassing telephone calls or the mailing of threatening communications.

This amendment amends the Statutory Index and a number of Chapter Two guidelines to incorporate offenses against mass transportation systems under 18 U.S.C. § 1993. Specifically, the proposal amends §2K1.4 (Arson; Property Damage by Use of Explosives) and §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) to cover violations of Subsections 1993(a)(1) and (b). Subsection 1993(a)(1) is similar to another offense referenced to these guidelines (18 U.S.C. § 32(a)(1)) with respect to the intent standard required to commit the offense, offense conduct, and resulting harm. The amendment references subsection 1993(a)(2), (a)(3), and (b) to §2K1.4 and §2M6.1. These offenses encompass a wide range of conduct. For example, a violation of subsection 1993(a)(3) may occur because the defendant sets fire to a garage or because the defendant places a biological agent or toxin for use as a destructive substance near an aircraft and this likely endangered the safety of such aircraft. Therefore, because these offenses are similar in conduct and implicate similar harm issues as other offenses currently referenced to §2K1.4, such as 18 U.S.C. §§ 32 and 33, the proposed amendment references this offense to §2K1.4 as well as to §2M6.1 to account for use of biological agents or toxins.

The amendment expands the guideline covering nuclear, biological, and chemical weapons, §2M6.1, to cover new offenses created by section 817 of the Act involving possession of biological agents, toxins, and delivery systems. Specifically, section 817 added a new offense at 18 U.S.C.

§ 175(b), which prohibits a person from knowingly possessing any biological agent, toxin, or delivery system of a type or in a quantity that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose. The maximum term of imprisonment is 10 years. Section 817 also added a new offense at 18 U.S.C. § 175b, which prohibits certain classes of individuals from shipping or transporting in interstate or foreign commerce, or possessing in or affecting commerce, any biological agent or toxin, or receiving any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a select agent in applicable federal regulations. The maximum term of imprisonment is 10 years.

Section 2M6.1 is the appropriate guideline for these offenses because they involve the knowing possession of certain biological substances. A base offense level of level 20 is provided for 18 U.S.C. § 175(b) offenses, the same base offense level as is currently provided for threat cases under that guideline. Arguably possession under 18 U.S.C. § 175(b) is more serious than a threat where no dangerous material is possessed. Indeed, such possession is particularly hazardous, and the conduct could engender a public health crisis, and require a significant response from hazmat teams, FBI, and, like the anthrax in the Hart Building, could cause the evacuation of a building and require extensive decontamination programs. However, Congress saw fit to sanction these possession cases at 10 years, whereas threats to use nuclear, biological, and chemical agents and weapons have a life statutory maximum. It may be that a base offense level of 20 for mere possession is sufficient and then the current 2-level increase for particularly dangerous biological agents would be available for the most serious substances (the same as a threat).

A base offense level of level 22 is provided for offenses under 18 U.S.C. § 175b, which applies to restricted persons (defined in the statute), and forbids such persons to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any biological agent or toxin, or receive any biological agent or toxin that has been shipped or transported in interstate or foreign commerce, if the biological agent or toxin is listed as a select agent. Thus, this offense already takes into account the serious nature of a select agent. Thus, the amendment treats these offenses separately from offenses under 18 U.S.C. § 175(b), with a higher base offense level and an instruction that the enhancement for select biological agents does not apply. The substances at issue are extremely dangerous (e.g., ebola, anthrax), and all of the consequences listed above would be invoked due to the deadly nature of these substances.

The amendment also proposes to amend the Statutory Index to reference 18 U.S.C. § 2339 to §§2X2.1 (Aiding and Abetting) and 2X3.1 (Accessory After the Fact). This offense 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 statutory term of imprisonment is 10 years.

Proposed Amendment (Part (A)):

§2A2.1. Assault with Intent to Commit Murder; Attempted Murder

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Commentary

Statutory Provisions: 18 U.S.C. §§ 113(a)(1), 351(c), 1113, 1116(a), 1751(c), 1993(a)(6). For additional statutory provision(s), see Appendix A (Statutory Index).

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§2A2.2. Aggravated Assault

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Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)(1), 351(e), 1751(e) 1993(a)(6). For additional statutory provision(s), see Appendix A (Statutory Index).

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5. AIR PIRACY, OFFENSES AGAINST MASS TRANSPORTATION SYSTEMS

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§2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of Mass Transportation Vehicle or Ferry

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

- (1) **30**, if the offense involved intentionally endangering the safety of: (A) ~~the an airport or an aircraft and passengers~~; or (B) a mass transportation facility, a mass transportation vehicle, or a ferry; ~~or~~
- (2) **18**, if the offense involved recklessly endangering the safety of: (A) ~~the an airport or an aircraft and passengers~~; or (B) a mass transportation facility, a mass transportation vehicle, or a ferry; ~~or~~
- (3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1-2A2.4; or
- (4) **9**.

(b) **Specific Offense Characteristic**

- (1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by **5** levels; (ii) a dangerous weapon was otherwise used, increase by **4** levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by **3** levels. If the resulting offense level is less than level **24**, increase to level **24**.

(c) **Cross References**

- (1) If death resulted, apply the most analogous guideline from Chapter Two,

Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

- (2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear by-product material; (B) a chemical weapon, (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §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), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 1993(a)(4), (5), (6), (b); 49 U.S.C. §§ 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Definitions.—For purposes of this guideline:

"Brandished", "dangerous weapon", "firearm", and "otherwise used" have the meaning given those terms in Application Note 1 of §1B1.1 (Application Instructions).

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

~~*Background:* An adjustment is provided where the defendant intentionally or recklessly endangered the safety of the aircraft and passengers. The offense of carrying a weapon aboard an aircraft, which is proscribed by 49 U.S.C. § 46505, is covered in §2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft).~~

§2A6.1. Threatening or Harassing Communications

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- (b) Specific Offense Characteristics
 - (1) If the offense involved any conduct evidencing an intent to carry out such threat, increase by **6** levels.
 - (2) If the offense involved more than two threats, increase by **2** levels.
 - (3) If the offense involved the violation of a court protection order, increase by **2** levels.
 - (4) 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.

- (45) If (A) subsection (a)(2) and subdivisions (1), (2), ~~and (3)~~, and (4) do not apply, and (B) the offense involved a single instance evidencing little or no deliberation, decrease by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1993(a)(7), (8); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. § 46507. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

~~1. The Commission recognizes that this offense includes a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).~~

2. **Scope of Conduct to Be Considered.**—In determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole. For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those prior acts of threatening the victim that have a substantial and direct connection to the offense.

~~For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.~~

~~If the conduct involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, an upward departure may be warranted.~~

3. **Grouping.**—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.

4. **Departure Provisions.**—

(A) **In General.**—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).

- (B) Multiple Threats or Victims.—If the offense involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, or if the offense involved multiple victims, an upward departure may be warranted.

Background: These statutes cover a wide range of conduct, the seriousness of which depends upon the defendant's intent and the likelihood that the defendant would carry out the threat. The specific offense characteristics are intended to distinguish such cases.

§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

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Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1341-1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a). For additional statutory provision(s), see Appendix A (Statutory Index).

§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**;
 - (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**; or (C) endangered (i) a dwelling, or (ii) a structure other than a dwelling, or (iii) **an aircraft, a mass transportation vehicle, or a ferry**; or
 - (3) **2** plus the offense level from §2B1.1 (Theft, Property Destruction, and Fraud).
- (b) Specific Offense Characteristics

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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. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

~~1. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).~~

1. Definitions.—For purposes of this guideline:

"Explosives" includes any explosive, explosive material, or destructive device.

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

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

2. Risk of Death or Serious Bodily Injury.—Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.

~~3. "Explosives," as used in the title of this guideline, includes any explosive, explosive material, or destructive device.~~

~~4. "National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.~~

3. Upward Departure Provision.—If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

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§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) ~~and~~, (a)(3), (a)(4), and (a)(5) do not apply; or

- (3) **22**, if the defendant is convicted under 18 U.S.C. § 175b;
- (4) **20**, if the defendant is convicted under 18 U.S.C. § 175(b); or
- (35) **20**, if the offense (A) involved a threat to use a nuclear weapon, nuclear material, or nuclear by-product 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.

(b) Specific Offense Characteristics

- (1) If (A) subsection (a)(2) ~~or (a)(3)~~, (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) 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) ~~or~~, (a)(3), (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

Statutory Provisions: 18 U.S.C. §§ 175, **175b**, 229, 831, 842(p)(2), **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).

Application Notes:

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

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

"Restricted person" has the meaning given that term in 18 U.S.C. § 175b(b)(2).

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§2X2.1. Aiding and Abetting

Commentary

Statutory Provisions: 18 U.S.C. §§ 2, 2339.

3. ACCESSORY AFTER THE FACT

§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. ~~Provided, that where~~ **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.

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072, 2339.

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. 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).*
2. **Application of Mitigating Role Adjustment.**—*The adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level.*

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 175 2M6.1
18 U.S.C. § 175b 2M6.1

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18 U.S.C. § 1992 2A1.1, 2B1.1, 2K1.4,
 2X1.1
18 U.S.C. § 1993(a)(1) 2B1.1, 2K1.4
18 U.S.C. § 1993(a)(2) 2K1.4, 2M6.1
18 U.S.C. § 1993(a)(3) 2K1.4, 2M6.1
18 U.S.C. § 1993(a)(4) 2A5.2, 2B1.1

18 U.S.C. § 1993(a)(5)	2A5.2
18 U.S.C. § 1993(a)(6)	2A2.1, 2A2.2, 2A5.2
18 U.S.C. § 1993(a)(7)	2A6.1
18 U.S.C. § 1993(a)(8)	2A6.1
18 U.S.C. § 1993(b)	2A5.2, 2K1.4, 2M6.1

* * *

18 U.S.C. § 2332a	2K1.4, 2M6.1
18 U.S.C. § 2339	2X2.1, 2X3.1

* * *

49 U.S.C. § 46502(a), (b)	2A5.1, 2X1.1
49 U.S.C. § 46503	§2A5.2
49 U.S.C. § 46507	§2A6.1

* * *

Part (B): Pre-existing Predicate Offenses to Federal Crimes of Terrorism Not Covered by the Guidelines

Synopsis of Proposed Amendment: *A number of offenses that currently are enumerated in 18 U.S.C. § 2332b(g)(5) as federal crimes of terrorism are not listed in the Statutory Index (Appendix A). This means that the court needs to look for an analogous Chapter Two guideline for these offenses. The amendment proposes a number of Statutory Index references, as well as modifications to various Chapter Two guidelines, for these offenses.*

Specifically, 18 U.S.C. § 2332b(a)(1), prohibits, as part of conduct transcending national boundaries and in certain enumerated circumstances, killing, maiming, committing an aggravated assault, or creating a substantial risk of serious bodily injury by destroying or damaging real or personal property. The maximum statutory penalty for such offenses is life imprisonment. The amendment proposes to reference these offenses to §§2A1.1, 2A1.2, 2A1.3, 2A1.4, and 2A2.2, as 18 U.S.C. § 2332b offenses are by definition offenses against the person and therefore are analogous to offenses currently referenced to those guidelines.

The amendment also provides a Statutory Index reference to §2A6.1 (Threatening Communications) for cases under 18 U.S.C. § 2332b(a)(2), which prohibits threats to commit an offense under 18 U.S.C. § 2332b(a)(1). Those offenses prohibit, as part of conduct transcending national boundaries and in certain enumerated circumstances, killing, maiming, committing an aggravated assault, or creating a substantial risk of serious bodily injury by destroying or damaging real or personal property. The maximum term of imprisonment for threats to commit an offense under 18 U.S.C. § 2332b(a)(1) is ten years.

This amendment also creates a new guideline, at 2M5.3 (Providing Material Support to Terrorists and Foreign Terrorist Organizations), for offenses under 18 U.S.C. § 2339B, which prohibits the provision of material support or resources to a foreign terrorist organization. The maximum term of imprisonment is 15 years, or life if death resulted. The amendment references offenses under 18 U.S.C. § 2339A to §§2X2.1 and 2X3.1. These offenses prohibit 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.

The amendment proposes to treat 18 U.S.C. §§ 2339A and § 2339B offenses separately for the following reason. Section 2339A offenses concern providing material support to terrorists that the defendant knows or intends will be used in preparation for, or in carrying out, certain specified predicate offenses. Thus, the essence of 18 U.S.C. § 2339A offenses are akin to aiding and abetting offenses, or accessory after the fact offenses, which warrant reference to §2X2.1 and §2X3.1. In contrast, 18 U.S.C. § 2339B offenses are referenced to a new guideline, §2M5.3, primarily because they are not statutorily linked to the commission of any specified predicate offenses. To account for the variety of ways that such offenses may be committed, the proposed new guideline provides two possible specific offense characteristics that enhance the sentence where the material support

involved dangerous weapons, and another where the material support involved nuclear, biological, or chemical weapons.

The amendment also proposes to reference torture offenses under 18 U.S.C. § 2340A to §§2A1.1 (First Degree Murder), 2A1.2 (Second Degree Murder), 2A2.2 (Aggravated Assault), and 2A4.1 (Kidnapping, Abduction, Unlawful Restraint). The statutory maximum penalty for this offense is 20 years imprisonment, or life imprisonment if death results. "Torture" is defined in 18 U.S.C. § 2340A(1) as "an act committed by a person under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control". Although currently this offense is not listed in the Statutory Index, reference in the Statutory Index is recommended at this time because the offense is now a predicate offense that may qualify as a "federal crime of terrorism".

The amendment also proposes to reference 49 U.S.C. § 60123(b)(damaging or destroying an interstate gas or hazardous liquid pipeline facility) to §§2B1.1 (Theft, Property Destruction, and Fraud), 2K1.4 (Arson; Property Damage by Use of Explosives), 2M2.1 Destruction of, or Production of Defective, War Material, Premises, or Utilities), and 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities). The maximum penalty is 20 years, or life imprisonment if the offense resulted in the death of any person. Although currently this offense is not listed in the Statutory Index, reference in the Statutory Index is recommended at this time because the offense is now a predicate offense that may qualify as a "federal crime of terrorism".

Proposed Amendment (Part B):

§2A1.1. First Degree Murder

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 2113(e), 2118(c)(2), **2332b(a)(1)**, **2340A**; 21 U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A1.2. Second Degree Murder

- (a) Base Offense Level: **33**

Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, **2332b(a)(1)**, **2340A**. For additional statutory provision(s), see Appendix A (Statutory Index).

§2A1.3. Voluntary Manslaughter

(a) Base Offense Level: 25

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A1.4. Involuntary Manslaughter

* * *

Commentary

Statutory Provision: 18 U.S.C. §§ 1112, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

§2A2.2. Aggravated Assault

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)(1), 351(e), 1751(e) 1993(a)(6), 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A4.1. Kidnapping, Abduction, Unlawful Restraint

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 115(b)(2), 351(b), (d), 1201, 1203, 1751(b), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2A6.1. Threatening or Harassing Communications

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1993(a)(7), (8), 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. § 46507. For additional statutory provision(s), see Appendix A

(Statutory Index).

* * *

§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

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1341-1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

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

* * *

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; 49 U.S.C. § 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2M2.1. Destruction of, or Production of Defective, War Material, Premises, or Utilities

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 2153, 2154; 42 U.S.C. § 2284; 49 U.S.C. § 60123(b).

* * *

§2M2.3. Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 2155, 2156; 42 U.S.C. § 2284; 49 U.S.C. § 60123(b).

5. PROHIBITED FINANCIAL TRANSACTIONS AND EXPORTS, PROVIDING MATERIAL SUPPORT TO DESIGNATED FOREIGN TERRORIST ORGANIZATIONS

* * * * *

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

- (a) Base Offense Level: **26**
- (b) Specific Offense Characteristics (Apply the greater):
 - (1) If the offense involved the provision of (A) dangerous weapons, (B) firearms, (C) explosive materials, (D) destructive devices, or (E) funds with knowledge or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (D), 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 by-product material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §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), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 2339B.

Application Notes:

1. *In the case of a violation during time of war or armed conflict, an upward departure may be warranted.*
2. *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. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).*

3. Definitions—*For purposes of this guideline:*

"Dangerous weapon", "firearm", "explosive material(s)", and "destructive device" have the meaning given those terms in the Commentary to §1B1.1.

"Foreign terrorist organization" has the meaning given that term 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).

"Nuclear material or nuclear byproduct material", and "weapon of mass destruction" have the meaning given those terms in the Commentary to §2M6.1.

* * * * *

2. AIDING AND ABETTING

§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, 2339A.

Application Note:

1. *"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, "underlying offense" means the offense the defendant is convicted of having materially supported prior to or during its commission.*

Background: A defendant convicted of aiding and abetting is punishable as a principal. 18 U.S.C. § 2. This section provides that aiding and abetting the commission of an offense has the same offense level as the underlying offense. An adjustment for a mitigating role (§3B1.2) may be applicable.

* * * * *

3. ACCESSORY AFTER THE FACT

§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**. *Provided*, that where the conduct is limited to harboring a fugitive, the offense level shall not be more than level **20**.

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072, 2339A.

Application Notes:

1. "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 or an escape from that offense). 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).
2. The adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level.

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* * *

18 U.S.C. § 2332a	2K1.4, 2M6.1
18 U.S.C. § 2332b(a)(1)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A4.1, 2B1.1
18 U.S.C. § 2332b(a)(2)	2A6.1
18 U.S.C. § 2339A	2X2.1, 2X3.1
18 U.S.C. § 2339B	2M5.3
18 U.S.C. § 2340A	2A1.1, 2A1.2, 2A2.1, 2A2.2, 2A4.1
18 U.S.C. § 2342(a)	2E4.1
	* * *
49 U.S.C. 46506	2A5.3
49 U.S.C. 60123(b)	2B1.1, 2K1.4, 2M2.1, 2M2.3

* * *

Part (C): Penalties for Terrorist Conspiracies and Attempts

Synopsis of Proposed Amendment: *Section 811 of the Act amended the following offenses to ensure that attempts and conspiracies to commit any of those offenses shall subject the offender to the same penalties prescribed for the offense, commission of which was attempted or was the object of the conspiracy: (1) arson under 18 U.S.C. § 81; (2) killings in federal facilities under 18 U.S.C. § 930(c); (3) willful or malicious injury to or destruction of communications lines, stations, or systems under 18 U.S.C. § 1362; (4) destruction of buildings or property within the maritime of territorial jurisdiction of the United States under 18 U.S.C. § 1363; (5) wrecking trains under 18 U.S.C. § 1992; (6) providing material support to terrorists under 18 U.S.C. § 2339A; (7) torture under 18 U.S.C. § 2340A; (8) sabotage of nuclear facilities or fuel under 42 U.S.C. § 2284; (9) interference with flight crew members and attendants under 49 U.S.C. § 46504; (10) willfully or recklessly carrying a weapon or explosive on an aircraft under 49 U.S.C. § 46505; and (11) damaging or destroying an interstate gas or hazardous liquid pipeline facility under 49 U.S.C. § 60123(b).*

The proposed amendment provides a special instruction in §2X1.1 (Attempt, Solicitation, or Conspiracy) to provide that the three level reduction in §2X1.1(b) does not apply to these offenses.

Proposed Amendment:

§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

* * *

(d) Special Instruction

- (1) Subsection (b) shall not apply to any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined at 18 U.S.C. § 2332b(g)(5):**

18 U.S.C. § 81 (arson),
18 U.S.C. § 930(c) (killings in federal facilities),
18 U.S.C. § 1362 (malicious injury to or destruction of communications lines, stations, or systems),
18 U.S.C. § 1363 (destruction of buildings or property within the maritime or territorial jurisdiction of the United States),
18 U.S.C. § 1992 (wrecking trains),
18 U.S.C. § 2339A (material support to terrorists),
18 U.S.C. § 2340A (torture);
49 U.S.C. § 46504 (interference with flight crew),
49 U.S.C. § 46505 (carrying weapon or explosive on aircraft),
49 U.S.C. § 60123(b) (damaging or destroying pipeline).

* * * * *

Part (D): Terrorism Adjustment in §3A1.4

Synopsis of Proposed Amendment: *The proposed amendment adds an invited structured upward departure in §3A1.4 (Terrorism) for offenses that involve terrorism but do not otherwise qualify as offenses that involved or were intended to promote "federal crimes of terrorism" for purposes of the terrorism adjustment in §3A1.4.*

The proposed application note regarding harboring and concealing offenses was added to clarify that §3A1.4 applies in cases where the offense was intended to conceal a federal crime of terrorism or to obstruct an investigation into such crime. (This proposal was added in response to the Issue for Comment regarding whether the Commission should amend §3A1.4 to clarify that the adjustment may apply in the case of offenses that occurred after the commission of the federal crime of terrorism (e.g., a case in which the defendant, in violation of 18 U.S.C. § 2339A, concealed an individual who had committed a federal crime of terrorism)).

The proposed amendment provides an upward departure because of the infrequency of terrorism offenses and to provide the court with a viable tool to account for the harm involved during the commission of these offenses on a case-by-case basis. In addition, the upward departure provision makes it possible to impose up to the same sentence as would be imposed if the adjustment actually applied.

Proposed Amendment:

§3A1.4. Terrorism

- (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by **12** levels; but if the resulting offense level is less than level **32**, increase to level **32**.
- (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes:

- ~~1. Subsection (a) increases the offense level if the offense involved, or was intended to promote, a federal crime of terrorism. "Federal crime of terrorism" is defined at 18 U.S.C. § 2332b(g).~~
- 1. Federal Crime of Terrorism Defined.—For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5).
- 2. Harboring, Concealing, and Obstruction Offenses.—For purposes of this guideline, an offense that involved (A) harboring or concealing a terrorist who committed a federal crime

of terrorism (such as an offense under 18 U.S.C. § 2339 or § 2339A); or (B) obstructing an investigation of a federal crime of terrorism, shall be considered to have involved, or to have been intended to promote, that federal crime of terrorism.

- 23. Computation of Criminal History Category.—Under subsection (b), if the defendant’s criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.*
- 4. Upward Departure Provision.—By the terms of the directive to the Commission in section 730 of Pub. L. 104–132, the adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. § 2332b(g)(5)(B) but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied.*

Part (E): Money Laundering Offenses

Synopsis of Proposed Amendment: *This amendment amends §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) to incorporate the following new money laundering provisions created by the Act. The amendment proposes to reference these provisions to the structuring guideline and proposes a number of changes to that guideline in order to more fully incorporate the new offenses. Specifically:*

- (1) *31 U.S.C. § 5318A(b), created by section 311 of the Act, authorizes the Secretary of the Treasury to (i) require domestic financial institutions to maintain records, file reports, or both, concerning transactions with financial institutions or jurisdictions outside the United States if the Secretary finds that such transactions are of "primary money laundering concern"; (ii) require domestic financial institutions to provide identifying information about payable-through accounts on such transactions that are of "primary money laundering concern"; and (iii) prohibit domestic financial institutions from opening or maintaining a payable-through account for or on behalf of a foreign banking institution, if any such transactions could be conducted. The applicable penalty provision, 31 U.S.C. §5322, provides for a maximum term of imprisonment of 5 years, or ten years if the defendant engaged in a pattern of unlawful activity.*
- (2) *31 U.S.C. § 5318(i), added by section 312 of the Act, requires financial institutions that establish or maintain a private banking account or correspondent account in the United States for a non-United States person, to establish due diligence policies, procedures, and controls that are reasonably designed to detect and report money laundering through those accounts.*
- (3) *Section 313 of the Act added 31 U.S.C. § 5318(j), which prohibits financial institutions from establishing or maintaining a correspondent account for a foreign bank that does not have a physical presence in any country. The applicable penalty provision, 31 U.S.C. §5322, provides for a maximum term of imprisonment of 5 years, or ten years if the defendant engaged in a pattern of unlawful activity.*

The amendment provides an alternative base offense level of level 8 in §2S1.3(a) in order to incorporate these offenses into the guideline.

The amendment also adds an enhancement for certain banking-related offenses if the defendant committed the offense as part of a pattern of unlawful activity. This enhancement takes into account the enhanced penalty provisions (imprisonment of not more than ten years) under 31 U.S.C. § 5322(b) for such conduct if the pattern of unlawful activity involved more than \$100,000 in a 12-month period.

- (3) *31 U.S.C. § 5331, added by section 365 of the Act, requires nonfinancial trades or businesses to report the receipt of more than \$10,000 in coins and currency in one transaction or two or more related transactions. The maximum term of imprisonment is five years, or ten years if the defendant engaged in a pattern of unlawful activity.*
- (4) *31 U.S.C. § 5332, added by section 371 of the Act, prohibits concealing on one's person or any conveyance more than \$10,000 in currency or other monetary instruments in order to evade currency reporting requirements (i.e., bulk cash smuggling). The maximum term of imprisonment is not more than five years.*

Proposed Amendment (Part (E)):

§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.
- (23)** If **(A) subsection (a)(2) applies and** subsections **(b)(1) does 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**.

* * *

Commentary

Statutory Provisions: 18 U.S.C. § 1960; 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, 5318, 5318A(b), 5322, 5324, 5326, 5331, 5332. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definition of "Value of the Funds".—For purposes of this guideline, "value of the funds" means the amount of the funds involved in the structuring or reporting conduct. The relevant statutes require monetary reporting without regard to whether the funds were lawfully or unlawfully obtained.
2. Bulk Cash Smuggling.—For purposes of subsection (b)(1)(B), "bulk cash smuggling" means (A) knowingly concealing, with the intent to evade a currency reporting requirement under 31 U.S.C. § 5316, more than \$10,000 in currency or other monetary instruments; and (B) transporting or transferring (or attempting to transport or transfer) such currency or monetary instruments into or outside of the United States. "United States" has the meaning given that term in Application Note 1 of §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).
3. Enhancement for Pattern of Unlawful Activity.—For purposes of subsection (b)(2), a pattern of unlawful activity means at least two separate occasions of unlawful activity involving a total amount of more than \$100,000 in a 12-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion.

Background: ~~The~~*Some of the* offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. These reports include Currency Transaction Reports, Currency and Monetary Instrument Reports, Reports of Foreign Bank and Financial Accounts, and Reports of Cash Payments Over \$10,000 Received in a Trade or Business.

Other offenses covered by this guideline, under 31 U.S.C. §§ 5318 and 5318A, relate to records, reporting and identification requirements, and prohibited accounts involving certain foreign jurisdictions, foreign institutions, foreign banks, and other types of transactions and types of accounts.

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31 U.S.C. § 5316	2S1.3
31 U.S.C. § 5318	2S1.3
31 U.S.C. § 5318A(b)	2S1.3
31 U.S.C. § 5322	2S1.3
31 U.S.C. § 5326	2S1.3, 2T2.2
31 U.S.C. § 5331	2S1.3
31 U.S.C. § 5332	2S1.3
33 U.S.C. § 403	2Q1.3

* * *

Part (F): Miscellaneous Amendments

Synopsis of Proposed Amendment: *This part of the amendment proposes to address eight miscellaneous issues related to terrorism:*

- (1) *It provides a definition of terrorism for purposes of the prior conviction enhancement in the illegal reentry guideline, §2L1.2. For consistency, the definition is the same as the current Chapter Three terrorism adjustment.*
- (2) *It amends the obstruction of justice guideline, §3C1.1, in response to section 319(d) of the Act. Section 319(d) amends the Controlled Substances Act at 21 U.S.C. § 853(e) to require a defendant to repatriate any property that may be seized and forfeited and to deposit that property in the registry of the Court or with the U.S. Marshal. That section also states that the failure to comply with a protective order and an order to repatriate property "may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines."*
- (3) *It amends the guideline on terms of supervised release, §5D1.2, in response to section 812 of the Act, which authorizes a term of supervised release of any term of years or life for a defendant convicted of a federal crime of terrorism the commission of which resulted in, or created a substantial risk of, death or serious bodily injury to another person.*
- (4) *It amends the theft, property destruction and fraud guideline, §2B1.1, to delete the special instruction pertaining to the imposition of not less than six months imprisonment for a defendant convicted under section 1030 of title 18, United States Code. Section 814(f) of the Act directed the Commission to amend the guidelines "to ensure that any individual convicted of a violation of section 1030 of title 18, United States Code, can be subjected to appropriate penalties, without regard to any mandatory minimum term of imprisonment."*
- (5) *It adds a reference in the Statutory Index to the bribery guideline, §2C1.1, for the new offense created by section 329 of the Act. Section 329 prohibits a Federal official or employee, in connection with administration of the money laundering provisions of the Act, to corruptly demand, seek, receive, accept, or agree to receive or accept anything of value in return for being influenced in the performance of an official act, being influenced to commit or aid in committing any fraud on the United States, or being induced to do or omit to do any act in violation of official duties. The term of imprisonment is not more than 15 years.*
- (6) *It amends §2M5.1 (Evasion of Export Controls) to incorporate 18 U.S.C. § 2332d, which prohibits a person, knowing or having reasonable cause to know that a*

country is designated under the Export Administration Act as a country supporting international terrorism, to engage in a financial transaction with the government of that country. The amendment also proposes to make the base offense level of level 26 applicable to 18 U.S.C. § 2332d offenses.

- (7) It amends §2B2.3 (Trespass) to incorporate an offense under 18 U.S.C. § 1036. That offense, added by section 2 of the Enhanced Federal Security Act of 2000, Pub. L. 106–547, prohibits, by fraud or pretense, the entering or attempting to enter any real property, vessel, or aircraft of the United States, or secure area of an airport. The maximum penalty is five years imprisonment if the offense was committed with the intent to commit another felony. The amendment proposes to amend the existing two level enhancement in §2B2.3(b)(1) to provide an additional ground for application of the enhancement if the trespass involved any real property, vessel, or aircraft of the United States, or secure area of an airport. It also adds a cross reference to §2X1.1 (Attempt, Solicitation, or Conspiracy) if the offense involved the intent to commit another felony.

Proposed Amendment (Part (F)):

§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

* * *

(d) — Special Instruction

- (1) — If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months² imprisonment.

Commentary

* * *

Background:

* * *

~~Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104-132.~~

* * *

§2B2.3. Trespass

- (a) Base Offense Level: 4
- (b) Specific Offense Characteristics

- (1) If the trespass occurred at (A) a secured government facility, (B) a nuclear energy facility, (C) a vessel or aircraft of the United States, or (D) a secured area of an airport, or a residence, increase by 2 levels.

* * *

(c) Cross Reference

- (1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(3), 1036; 42 U.S.C. § 7270b. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

"Airport" has the meaning given that term in section 47102 of title 49, United States Code.

"Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).

"Felony offense" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.

"Protected computer" means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).

* * *

§2L1.2. Unlawfully Entering or Remaining in the United States

* * *

(b) Specific Offense Characteristic

- (1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

- (A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense committed for profit, increase by 16 levels;

* * *

Commentary

* * *

Application Notes:

1. Application of Subsection (b)(1).—

* * *

(B) Definitions.—For purposes of subsection (b)(1):

* * *

(iv) "Terrorism offense" means any offense involving, or intending to promote, a federal crime of terrorism (as defined in 18 U.S.C. §2332b(g)(5)).

* * *

§2M5.1. Evasion of Export Controls; Financial Transactions with Countries Supporting International Terrorism

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

- (1) 26, if (A) national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons were evaded; or (B) the offense involved a financial transaction with a country supporting international terrorism; or
- (2) 14, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. § 2332d; 50 U.S.C. App. §§ 2401-2420.

Application Notes:

* * *

4. For purposes of subsection (a)(1)(B), "a country supporting international terrorism" means a country designated under section 6(j) of the Export Administration Act (50 U.S.C. App. 2405).

* * *

§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

Application Notes:

* * *

4. *The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:*

* * *

- (i) *other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511);*
- (j) *failing to comply with a restraining order or injunction issued pursuant to 21 U.S.C. § 853(e) or with an order to repatriate property issued pursuant to 21 U.S.C. § 853(p).*

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

* * *

§5D1.2. Term of Supervised Release

- (a) Subject to subsection (b), if a term of supervised release is ordered, the length of the term shall be:
 - (1) at least three years but not more than five years for a defendant convicted of a Class A or B felony;
 - (2) at least two years but not more than three years for a defendant convicted of a Class C or D felony;
 - (3) one year for a defendant convicted of a Class E felony or a Class A misdemeanor.

Notwithstanding subdivisions (1) through (3), the length of the term of supervised release, for any offense listed in 18 U.S.C. § 2332b(g)(5)(B), the commission of which resulted in, or created a foreseeable risk of, death or serious bodily injury to another person (A) shall be not less than the minimum term of years specified for that class of offense under subdivisions (1) through (3); and (B) may be up to life.

* * *

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 2332a	2K1.4, 2A6.1
18 U.S.C. § 2332d	2M5.1

* * *

50 U.S.C. App. § 2410 2M5.1
Section 329 of the USA 2C1.1
PATRIOT Act of 2001,
(31 U.S.C. §5311 note)