

PROPOSED AMENDMENT: NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS

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

First, 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 offenses¹ involving the importation, attempted importation, exportation, and attempted exportation of nuclear, chemical, and biological weapons, materials, or technologies, the 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). 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.² Specifically, the amendment proposes to modify §2M6.1 in the following ways:

- (1) It provides two 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 based on representations made by the Department of Justice that such groups are sometimes involved. It is anticipated that this base offense level will apply to cases as apparently originally contemplated by the guideline, *i.e.*, the*

¹Those offenses are found in section 11 of the Export Administration Act of 1979 (50 U.S.C. § 2410, sections 38 and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778 and 2780), and the International Emergency Economic Powers Act (50 U.S.C. § 1701 *et seq.*)

²The offense at 18 U.S.C. § 175 makes it unlawful to knowingly develop, produce, stockpile, transfer, acquire, retain or possess (or to attempt, threaten, or conspire to do so) any biological agent, toxin, or delivery system for use as a weapon. The statutory maximum term of imprisonment is life or any term of years. The offense at 18 U.S.C. § 229 makes it unlawful to develop, produce, otherwise acquire, transfer, receive, stockpile, retain, own, possess, or use, or threaten to use (or to attempt or conspire to do so) any chemical weapon. The statutory maximum term of imprisonment is any term of years or the death penalty will apply if another person dies as a result of the offense.

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.

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 base offense level, of level [28][30], will apply in most cases, specifically those cases that do not threaten the national security of the United States.

- (2) *It provides a six-level decrease, in subsection (b)(1), if the offense involved only a threat to use a nuclear, biological, or chemical weapon or material, and there was no conduct evidencing an intent to carry out the threat. 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 non-credible threats. The extent of the adjustment (i.e., six levels) mirrors in reverse the six-level increase in the threatening communications guideline, §2A6.1, if the conduct involved an actual intent to carry out the threat.*
- (3) *It provides, in brackets, 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. Like that guideline, the amendment provides commentary (in the background) stating that the base offense level reflects that the offense typically will involve a risk of serious bodily injury or death or will cause or intend to cause bodily injury.*

- (5) *It provides two options 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. Option One provides for a four-level enhancement in such cases. Option Two provides for an upward departure provision.*
- (6) *It provides two cross references, if the resulting offense level is greater, if 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.*

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**.

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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:

(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][30], otherwise.

(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.~~

If subsection (a)(2) applies, and:

(1) If the offense (A) involved a threat to use a nuclear weapon, nuclear material, nuclear byproduct material, biological agent, chemical weapon, or other weapon of mass destruction; and (B) did not involve any conduct evidencing an intent or ability to carry out the threat, decrease by [6] levels.

[2] If the offense involved (A) a select biological agent; (B) a listed precursor or a listed toxic chemical; (C) nuclear material or nuclear byproduct material; or (D) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (A), (B), or (C), increase by [2] levels.]

(3) If (A) any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) any victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

[Option One on disruption of governmental services:

(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.]

(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.

(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. §§ 175, 229, 831; 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 provisions).~~
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); 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) to Subsection (a)(1) Cases.—If subsection (a)(1) applies, do not apply subsection (b).*
3. *Applicability of Subsections (b)(2) and (b)(4) in Threat Cases.—The application of subsection (b)(1) in a case involving a threat shall not preclude the application of either subsection (b)(2) or subsection (b)(4) in such a case.*
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).*

[Option Two on disruption of governmental services:

(iv) *The offense resulted in substantial disruption of public, governmental, or business functions or services, or the response to the offense required a substantial expenditure (e.g., to provide environmental decontamination of the affected area). See, e.g., §5K2.7 (Disruption of Governmental Function).]*

(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.*

Background: *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.*

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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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	

Issues for Comment: *The Commission invites comment on whether the above proposal appropriately addresses the offenses in 18 U.S.C. § 175, relating to biological weapons, and in 18 U.S.C. § 229, relating to chemical weapons. Specifically, are these offenses more appropriately addressed through a guideline that incorporates into the base offense level any or all of the aggravating factors that may be associated with these offenses (e.g., the inherent psychological harm, the risk of bodily harm, and the economic harm associated with cleanup and decontamination efforts), or is it preferable to address these harms as specific offense characteristics?*