

U.S.C. 14135a(d)(2)(B)—the listing in the proposed revision of § 28.2 includes all offenses under 18 U.S.C. 844(f) without qualification.

Crimes of Violence

Section 503 of the USA PATRIOT ACT also added offenses that are crimes of violence under the definition of 18 U.S.C. 16. According to that provision, a crime of violence is “(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

Some offenses that satisfy this definition are independently covered by the original offense categories in 42 U.S.C. 14135a(d)(1) or the listing of offenses in 18 U.S.C. 2332b(g)(5)(B). However, there are a large number of federal crimes which satisfy this definition and are not otherwise included in the offense categories in the DNA sample collection statute. The proposed revision of § 28.2 includes an extensive listing of such provisions.

Many crimes of violence are defined or referenced in discrete sections, subsections, or paragraphs of the United States Code. The listing in proposed § 28.2 identifies such offenses by referring to the appropriate sections, subsections, or paragraphs.

In some instances, however, sections of the United States Code effectively define a number of offenses—some violent and some nonviolent under the definition of 18 U.S.C. 16—without structural subdivisions that can readily be referenced in identifying the violent offenses. For such provisions, the proposed listing in revised § 28.2 identifies the covered crimes of violence by including appropriate phrases that specify the relevant limitations.

For example, 18 U.S.C. 241 generally prohibits conspiracies to violate federally protected rights. The basic offense under the section is punishable by imprisonment for up to 10 years. The section also includes aggravated offenses, punishable by imprisonment for any term of years or for life, for cases in which “death results” or that involve “kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.” The aggravated offenses under 18 U.S.C. 241 are crimes of violence under the definition of 18 U.S.C. 16. Consequently, the listing in proposed § 28.2 refers to offenses under section 241 “involving an offense

punishable by imprisonment for any term of years or for life.” Similarly, the subsequent section of the code, 18 U.S.C. 242, generally prohibits willful deprivations of federally protected rights under color of law, and the basic offense it defines is graded as a misdemeanor. The section also includes aggravated offenses, punishable at the felony level, that constitute crimes of violence. The listing in proposed § 28.2 accordingly covers offenses under section 242 “if a felony.”

Other types of qualifying phrases are also used, as appropriate, in relation to sections that set forth alternative grounds of liability that effectively define both violent and nonviolent offenses under 18 U.S.C. 16. For example, 18 U.S.C. 874 prohibits securing kickbacks from public works employees “by force [or] intimidation,” or alternatively by “threat of procuring dismissal from employment, or by any other manner whatsoever.” The listing in proposed § 28.2 accordingly refers to offenses under section 874 “involving force or intimidation.”

In addition to crimes of violence that are currently included in the United States Code, the listing in the proposed rule includes two sections defining offenses involving rape or sexual abuse of children that have been repealed, 18 U.S.C. 2031 and 2032. Notwithstanding the repeal of these provisions, offenders who were convicted under them may currently be in custody or under supervision. The inclusion of these sections in the rule ensures that DNA samples will be collected from these offenders.

Attempts and Conspiracies

The amendment in section 503 of the USA PATRIOT ACT also provides that any attempt or conspiracy to commit a qualifying federal offense is a qualifying federal offense for purposes of DNA sample collection. See 42 U.S.C. 14135a(d)(1)(G) and (2)(C). In part, this is implemented through the inclusion in proposed § 28.2(a)–(h) of various specific provisions that encompass liability for attempts or conspiracies. However, there are also cross-cutting attempt and conspiracy provisions in the United States Code, including 18 U.S.C. 371 and 844(n) and 21 U.S.C. 846, which apply to categories of offenses that include both offenses that are qualifying federal offenses for DNA sample collection purposes and offenses that are not. Paragraph (i) in proposed § 28.2 makes it clear that any attempt or conspiracy under these provisions is a qualifying federal offense, if the object of the attempt or conspiracy includes an

offense that is a qualifying federal offense.

Regulatory Procedures

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities for the following reason: The regulation concerns the collection by federal agencies of DNA samples from certain offenders.

Executive Order 12866

This regulation has been drafted and reviewed in accordance with Executive Order 12866, “Regulatory Planning and Review,” section 1(b), Principles of Regulation. The Department of Justice has determined that this rule is a “significant regulatory action” under Executive Order 12866, section 3(f), and accordingly this rule has been reviewed by the Office of Management and Budget.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect