

(g) *Effective date.* This section is applicable with respect to qualified offers made in administrative or court proceedings described in section 7430 after December 24, 2003.

§ 301.7430–7T [Removed]

■ **Par. 3.** Section 301.7430–7T is removed.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: December 19, 2003.

Pamela F. Olson,

Assistant Secretary of the Treasury.

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DEPARTMENT OF JUSTICE

28 CFR Part 28

[OAG 101; AG Order No. 2699–2003]

RIN 1105–AA78

Regulations Under the DNA Analysis Backlog Elimination Act of 2000

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: The Department of Justice is publishing this final rule to implement section 3 and related provisions of the DNA Analysis Backlog Elimination Act of 2000, as amended by the USA PATRIOT Act. The rule specifies the Federal offenses that will be treated as qualifying offenses for purposes of collecting DNA samples from Federal offenders, sets forth the responsibilities of the Federal Bureau of Prisons for collecting DNA samples from individuals in its custody, and sets forth related responsibilities of the Federal Bureau of Investigation for analyzing and indexing DNA samples.

DATES: *Effective date:* This rule is effective January 28, 2004.

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SUPPLEMENTARY INFORMATION: All 50 states authorize the collection and analysis of DNA samples from convicted State offenders, and entry of resulting information into the Combined DNA Index System (“CODIS”), which the Federal Bureau of Investigation (“FBI”) has established pursuant to 42 U.S.C. 14132. The DNA Analysis Backlog Elimination Act of 2000 (the “Act”), Public Law 106–546, similarly authorized the collection, analysis, and indexing of DNA samples from

convicted Federal, military, and District of Columbia offenders.

Section 3 of the Act addresses the offenses that are to be treated as qualifying Federal offenses for purposes of DNA sample collection, which determines the categories of Federal offenders from whom DNA samples are collected. Section 3 also addresses the responsibility of the Federal Bureau of Prisons (“BOP”) and federal probation offices to collect DNA samples from offenders in their custody or supervision, and the responsibility of the FBI to analyze and index DNA samples. On June 28, 2001, the Department of Justice published an interim rule in the **Federal Register**, pursuant to subsection (e) of section 3, which provides that, with the exception of the activities of the probation offices, the section shall be carried out under regulations prescribed by the Attorney General. See 66 FR 34363 (June 28, 2001). The interim rule also addressed certain responsibilities of BOP and the FBI under other sections of the Act that are closely related to the matters addressed in section 3.

Subsequent to the publication of the interim rule, Congress enacted Public Law 107–56, the USA PATRIOT Act. Section 503 of the USA PATRIOT Act provided that three additional categories of offenses shall be treated for purposes of DNA sample collection as qualifying federal offenses, as determined by the Attorney General: (1) Any offense listed in section 2332b(g)(5)(B) of title 18, United States Code; (2) any crime of violence (as defined in section 16 of title 18, United States Code); and (3) any attempt or conspiracy to commit any of the above offenses. See 42 U.S.C. 14135a(d)(2). The Department of Justice published a proposed rule in the **Federal Register** on March 11, 2003, to implement this expanded sample collection authority. See 68 FR 11481 (March 11, 2003).

The Department received comments from two individuals concerning the interim rule published on June 28, 2001. No comments were received concerning the proposed rule published on March 11, 2003. One commenter on the interim rule claimed that the rule violated numerous provisions of the Constitution. The other commenter asked about the relationship of the interim rule to statute of limitations provisions and its consistency with the Constitution’s prohibition of ex post facto laws. The Department of Justice has considered the constitutional question and is confident that the interim rule, the proposed rule, this final rule, and the statutory provisions that they implement, are consistent with

the Constitution. See, e.g., *United States v. Kimler*, 335 F.3d 1132 (10th Cir. 2003); *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998); *Rise v. Oregon*, 59 F.3d 1556 (9th Cir. 1995); *Gilbert v. Peters*, 55 F.3d 237 (7th Cir. 1995); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992). But see *United States v. Kincade*, 345 F.3d 1095 (9th Cir. 2003). These rules have no effect on the statutory limitation periods for commencing the prosecution of crimes.

The interim rule published on June 28, 2001, added a new part 28 to title 28 CFR relating to the DNA identification system. The proposed rule published on March 11, 2003, involved a modification of § 28.2 in the new part 28, to reflect the expanded range of qualifying federal offenses authorized by section 503 of the USA PATRIOT Act. This final rule integrates the proposed rule’s revision of § 28.2 with the other regulatory provisions adopted by the interim rule. The list of offenses in the final version of § 28.2 is generally the same as in the proposed rule, but includes two additional offenses (18 U.S.C. 2332f and 2339C) that appear in the listing of 18 U.S.C. 2332b(g)(5)(B), as discussed below. In addition, some citations have been updated or added for conformity to the current versions of the cited statutes, or to ensure consistent coverage of attempts and conspiracies to commit offenses that are otherwise covered. The changes affect specifically the citations relating to provisions of 18 U.S.C. 43, 1512, 1513, and 1594, and also involve substituting citations relating to 40 U.S.C. 5104 and 5109 for former citations relating to 40 U.S.C. 193f and 193h.

Like the interim rule published on June 28, 2001, this final rule sets forth a part 28 of title 28 CFR relating to the DNA identification system. Part 28 contains subparts A and B, which relate respectively to the federal offenses for which DNA samples will be collected, and the responsibilities of BOP and the FBI in collecting, analyzing, and indexing DNA samples:

Subpart A—Qualifying Federal Offenses for Purposes of DNA Sample Collection

Subpart A of the rule specifies qualifying federal offenses for purposes of DNA sample collection. Section 3 of the Act, in part, requires BOP and probation offices to collect DNA samples from individuals in their custody or supervision who are, or have been, convicted of a “qualifying Federal offense.” Subsection (d)(1) of section 3 of the Act states that qualifying Federal offenses include those in a specified list, as determined by the Attorney General.