

The offense list in subsection (d)(1) was included in the Act as originally enacted and is, for the most part, explicit about which code sections are covered. Subsection (d)(2) of section 3 of the Act identifies additional categories of offenses that are qualifying Federal offenses, as determined by the Attorney General, reflecting the expansion of the range of covered offenses by section 503 of the USA PATRIOT Act.

Section 28.2 in this final rule provides a comprehensive listing of qualifying Federal offenses, reflecting both subsection (d)(1) and subsection (d)(2) of section 3 of the Act. The offenses listed in § 28.2 as revised are generally grouped by title of the United States Code for convenience in readability and application. The derivation of the listing is as follows:

Offenses in the Original Act and Rule

Section 3(d)(1) of the Act (42 U.S.C. 14135a(d)(1)) identifies the qualifying offenses authorized by the original version of the Act. These offenses were specified in the original version of 28 CFR § 28.2 that was adopted by the interim rule published on June 28, 2001. The rationale for the specification of these offenses in the original § 28.2 is explained in the preamble to the interim rule. See 66 FR 34363, 34363–64 (June 28, 2001).

These offenses from the earlier rule are all carried forward in the final version of § 28.2. In some instances, however, offenses in the earlier rule are subsumed in broader references in the final rule that reflect the new categories added by section 503 of the USA PATRIOT Act. See 42 U.S.C. 14135a(d)(2). In particular, under the original § 28.2 listing, only voluntary manslaughter under 18 U.S.C. 1112 was covered, reflecting a limitation in the original statute. See 42 U.S.C. 14135a(d)(1)(A). In accordance with section 503 of the USA PATRIOT Act, however, the expanded offense categories now include crimes of violence as defined in 18 U.S.C. 16. See 42 U.S.C. 14135a(d)(2)(B). The revised listing in the final version of § 28.2 includes 18 U.S.C. 1112 without qualification, reflecting the Attorney General's determination that involuntary manslaughter constitutes such an offense.

Likewise, the original listing in § 28.2 included a narrower set of offenses under 18 U.S.C. 1153, an Indian country jurisdictional provision, based on limited statutory language. See 42 U.S.C. 14135a(d)(1)(F). Specifically, of the offenses identified in 18 U.S.C. 1153, the original listing did not include

“assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years,” or “a felony under section 661 of this title.” 18 U.S.C. 1153. However, the previously excluded assaultive crimes are crimes of violence as defined in 18 U.S.C. 16. The revised listing encompasses a broader range of offenses under 18 U.S.C. 1153, excluding only felonies under section 661 of title 18, which defines nonviolent larceny offenses.

Offenses Listed in 18 U.S.C. 2332b(g)(5)(B)

Section 503 of the USA PATRIOT Act added offenses listed in 18 U.S.C. 2332b(g)(5)(B)—a statutory list of crimes that are often committed by terrorists—as qualifying offenses for purposes of DNA sample collection. The final version of 28 CFR 28.2 incorporates all of these offenses.

In some instances, offenses listed explicitly in 18 U.S.C. 2332b(g)(5)(B) are subsumed in broader references in the final version of 28 CFR 28.2. For example, 18 U.S.C. 2332b(g)(5)(B) includes offenses under section “844(f)(2) or (3)” of title 18. Since the offense defined by section 844(f)(1) of title 18 is a crime of violence—and hence includable on the basis of 42 U.S.C. 14135a(d)(2)(B)—the listing in the final version of § 28.2 includes all offenses under 18 U.S.C. 844(f) without qualification.

The offenses listed in the final version of § 28.2 on the basis of 18 U.S.C. 2332b(g)(5)(B) are the same as those listed in the version of § 28.2 in the proposed rule published on March 11, 2003, with two additions: Legislation enacted to implement international counterterrorism conventions created two new offenses in the terrorism chapter of the criminal code, 18 U.S.C. 2332f and 2339C, and added these new offenses to the offense list in 18 U.S.C. 2332b(g)(5)(B). See Public Law 107–197, 116 Stat. 721 (June 25, 2002). The final version of § 28.2 accordingly includes these offenses.

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 that satisfy this definition and are not otherwise included in the offense categories in the DNA sample collection statute. The final version 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 listing in the final version of § 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 the final version of § 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 the final version of § 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