

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in the final rule includes two sections defining offenses involving rape or sexual abuse of children that have been repealed, 18 U.S.C. 2031 and 2032.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 Act provides that any attempt or conspiracy to commit a qualifying Federal offense is a qualifying Federal offense for the purpose 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 § 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 § 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.

In addition to enlarging the offense listing in § 28.2 to reflect the USA PATRIOT Act amendment, the final rule makes a conforming change in § 28.1. Section 28.1 of the original rule stated in part that section 3(d) of the Act “states that the offenses that shall be treated as qualifying Federal offenses are offenses under title 18, United States Code, contained in a list of descriptive terms and code sections, as determined by the Attorney General.” This statement is no longer accurate in light of the USA PATRIOT Act’s addition of a second offense list in section 3(d)(2) of the Act (42 U.S.C. 14135a(d)(2)) that

covers many offenses outside of title 18. The final rule accordingly revises this sentence in § 28.1.

#### Subpart B—DNA Sample Collection, Analysis, and Indexing

Section 28.11 in the rule provides definitions for “DNA sample” and “DNA analysis” that are taken verbatim from section 3(c) of the Act.

Section 28.12, in paragraph (a), directs BOP to collect a DNA sample from each individual in its custody who is, or has been, convicted of a qualifying Federal offense, a qualifying military offense, or a qualifying District of Columbia offense. The requirement that BOP collect DNA samples from individuals convicted of qualifying Federal offenses and qualifying military offenses appears in section 3(a)(1) of the Act. The requirement to collect samples from individuals convicted of qualifying District of Columbia offenses appears in section 4, rather than section 3, of the Act (specifically, section 4(a)(1)). It is included in this regulation for logical completeness in describing BOP’s DNA sample collection responsibilities under the Act.

Section 28.12, in paragraph (b), qualifies paragraph (a)’s requirement by affording BOP discretion about taking a DNA sample from an individual who is already in CODIS, or from whom a DNA sample has been collected pursuant to the provisions for collection of DNA samples from military offenders by the Department of Defense. This discretionary authority, which BOP could utilize to avoid duplicative sample collection, tracks sections 3(a)(3) and 4(a)(3) of the Act.

Section 28.12, in paragraph (c), provides in part that individuals described in paragraph (a) shall cooperate in the collection of DNA samples by BOP. This obligation on inmates is correlative to BOP’s legal duty to collect DNA samples from them, and arises directly from sections 3(a)(5) and 4(a)(5) of the Act, which prescribe criminal penalties for individuals who fail to cooperate in DNA sample collection authorized by the Act.

Section 28.12, in paragraph (c), further provides that BOP may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual described in paragraph (a) who refuses to cooperate in the collection of the sample. This is taken directly from sections 3(a)(4) and 4(a)(4) of the Act. While inmates will normally cooperate voluntarily in DNA sample collection, or be persuaded to do so by the prospect of disciplinary action if

they refuse to cooperate, taking a sample involuntarily from a recalcitrant individual may occasionally be necessary. The involuntary taking of a blood sample may in some instances be required under existing procedures for other purposes, such as medical evaluation, *see* 28 CFR 549.13, or compliance with a court order to take such a sample for evidentiary purposes. Existing regulations regarding the use of force where necessary to enforce institutional regulations or for other purposes will continue to apply in relation to inmates who refuse to cooperate in the collection of a DNA sample. *See* 28 CFR part 552, Subpart C.

Section 28.12, in paragraph (d)—tracking sections 3(a)(4)(B) and 4(a)(4)(B) of the Act—states that BOP may enter into agreements with units of State or local government or with private entities to provide for the collection of DNA samples. This provision makes it clear, for example, that BOP can arrange to have DNA samples collected from inmates in contract facilities by contract facility personnel.

Section 28.12, in paragraph (e), directs BOP to furnish each DNA sample to the FBI (for purposes of analysis and indexing in CODIS). This is explicitly required by sections 3(b) and 4(b) of the Act.

Section 28.13 directs the FBI to carry out a DNA analysis on each DNA sample furnished to it pursuant to section 3(b) or 4(b) of the Act, and to include the results in CODIS. The cited statutory provisions explicitly require the FBI to carry out these functions. Section 28.13 further provides that the FBI must include in CODIS the results of analyses furnished by the Department of Defense, which is required by 10 U.S.C. 1565(b)(2). The FBI is not required to analyze the samples collected by the Department of Defense, because the Department of Defense is responsible for carrying out that function, as provided in 10 U.S.C. 1565(b)(1).

#### 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 reasons: The regulation concerns the collection, analysis, and indexing by Federal agencies of DNA samples from certain offenders.