

consecutive penalty *e.g.*, 18 U.S.C. 844(h) or 18 U.S.C. 929(a)). The Commission requests comment regarding whether such a rule should be provided in § 4B1.4.

For example, should the Commission add § 4B1.4 to the list of guidelines to which the special exception in § 2K2.4 applies? Should the Commission also provide an upward departure note to § 4B1.4 for the few cases in which the application of the exception may result in a guideline range that, when combined with the mandatory consecutive sentence under 18 U.S.C. 844(h), 924(c), or 929(a), produces a total maximum penalty that is less than the maximum of the guideline range that would have resulted if the enhanced offense level and criminal history category had been applied?

Proposed Amendment 9: MANPADS and Other Destructive Devices

Synopsis of Amendment: This amendment proposes to increase by [5]–[13] additional levels the existing two-level enhancement in § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) for cases in which the offense involved destructive devices that are portable rockets, missiles, or devices used for launching portable rockets or missiles, and by increasing the enhancement by up to [7] additional levels if the offense involved any other kind of destructive device. It also proposes to add certain attempts and conspiracies to the list of offenses for which the three-level reduction in § 2X1.1 (Attempt, Solicitation, or Conspiracy) is prohibited.

As defined in 26 U.S.C. 5845(f), a “destructive device” means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrels of which have a bore of more than one-half inch in diameter; or (3) any combination of parts designed or intended for use in converting any device into a destructive device as described above.

In its annual submission to the Commission dated August 1, 2003, the Department of Justice recommended that guideline penalties be increased if the offense involved the use or attempted use of, or conspiracy to use,

a kind of destructive device known as the man-portable air defense system (MANPADS) or any similar destructive device. MANPADS are portable rockets and missiles that pose particular risks due to their portability, potential range, accuracy, and destructive power. This amendment addresses that concern by increasing the enhancement in § 2K2.1(b)(3) for involvement of these types of destructive devices from 2 levels to [7]–[15] levels, correspondingly increasing the maximum cumulative offense level in that guideline from level 29 to level [30]–[42], and increasing the enhancement for all other destructive devices from two levels to up to [9] levels. An issue for comment follows regarding whether the increase should pertain to all destructive devices within the meaning of 26 U.S.C. 5845(f) or only to MANPADS and similar weapons, or to some other subcategory of destructive devices, or whether there should be a graduated increase for different kinds of destructive devices.

Similarly, the Department of Justice also urged the Commission to increase guideline penalties for attempts and conspiracies to commit certain offenses if those offenses involved the use of a MANPADS or similar destructive device. Those offenses include 18 U.S.C. 32 (destruction of an aircraft or aircraft facilities), 18 U.S.C. 1993 (terrorist attacks and other acts of violence against mass transportation systems), and 18 U.S.C. 2332a (use of certain weapons of mass destruction). In response to this concern, the amendment proposes to amend the special instruction in § 2X1.1(d) to prohibit application of the three-level reduction for attempts and conspiracies for these offenses generally, and not just in the context of the use of a MANPADS or similar destructive device. These offenses are comparable in nature to the offenses already listed in § 2X1.1(d). Issues for comment follow regarding the appropriate Statutory Index references for these offenses the definition of “destructive device.”

Proposed Amendment:

Section 2K2.1(b) is amended by striking subdivision (3) in its entirety and inserting the following:

“(3) If the offense involved—

(A) a portable rocket, a missile, or a device for use in launching a portable rocket or a missile, increase by [7]–[15] levels; or

(B) a destructive device other than a destructive device referred to in subdivision (A), increase by [2]–[9] levels.”

Section 2K2.1(b) is amended in the paragraph beginning “Provided, that”

by striking “29” and inserting “[30]–[42]”.

The Commentary to § 2K2.1 captioned “Application Notes” is amended in Note 11 by striking “a two-level” and inserting “the applicable”.

Section 2X1.1(d) is amended by striking subdivision (1) in its entirety and inserting the following:

“(1) Subsection (b) shall not apply to:

(A) Any of the following offenses, if such offense involved, or was intended to promote, a federal crime of terrorism as defined in 18 U.S.C. 2332b(g)(5):

18 U.S.C. 81;
18 U.S.C. 930(c);
18 U.S.C. 1362;
18 U.S.C. 1363;
18 U.S.C. 1992;
18 U.S.C. 2339A;
18 U.S.C. 2340A;
49 U.S.C. 46504;
49 U.S.C. 46505; and
49 U.S.C. 60123(b).

(B) Any of the following offenses:

18 U.S.C. 32;
18 U.S.C. 1993; and
18 U.S.C. 2332a.”

Issues for Comment:

1. The Commission requests comment regarding whether the proposed increase in the enhancement in § 2K2.1(b)(3) for involvement of a destructive device should pertain to all destructive devices within the meaning of 26 U.S.C. 5845(f) or only to man-portable air defense systems (MANPADS) and similar destructive devices or to some other subcategory of destructive devices. In addition, what is the appropriate extent of such an increase? Specifically, are there types of destructive devices other than MANPADS and similar destructive devices that should receive a [7]–[15] level enhancement, as is proposed for MANPADS and similar destructive devices? Should the extent of the increase vary according to the kind of destructive device involved? Should the limitation on the cumulative offense level of level 29 in § 2K2.1(b) be amended if the extent of the enhancement in § 2K2.1(b)(3) is increased, and, if so what should the limitation on the cumulative offense level be? Alternatively, should the limitation on the cumulative offense level be eliminated?

2. The Commission also requests comment regarding whether 18 U.S.C. 1993(a)(8), relating to attempts, threats, or conspiracies, to commit any of the substantive terrorist offenses in 18 U.S.C. 1993(a), should be referenced in Appendix A (Statutory Index) to § 2A5.2 (Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Operation, or Maintenance of