

involved the destruction, alteration, or fabrication of a substantial number of records, documents or tangible objects; (2) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (3) was otherwise extensive in scope, planning, or preparation. The amendment also adds an upward departure provision for offenses sentenced under § 2J1.2 that involve extreme acts of violence, for example, retaliating against a government witness by throwing acid in the witness's face. The Commission determined that existing adjustments in Chapter Three for aggravating role, § 3B1.1, and abuse of position of trust or use of special skill, § 3B1.3, adequately account for those particular factors described in section 805(a) of the Act.

Seventh, the amendment also increases the base offense level in the perjury guideline, § 2J1.3, from level 12 to level 14 in order to maintain the longstanding proportional relationship between the offense levels provided in the guidelines for perjury and obstruction of justice.

Eighth, the amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, relating to destruction of corporate audit records, is referenced to § 2E5.3. Section 1520 provides a statutory maximum penalty of ten years' imprisonment for knowing and willful violations of document maintenance requirements as set forth in that section or in rules or regulations to be promulgated by the Securities and Exchange Commission pursuant to that section. The amendment also expands the existing cross reference in § 2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses. Accordingly, if a defendant violated 18 U.S.C. 1520 in order to obstruct justice, the cross reference provision in § 2E5.3 requires the court to apply § 2J1.2 instead of § 2E5.3. Other new offenses are listed in Appendix A (Statutory Index), as well as in the statutory provisions of the relevant guidelines.

Finally, the amendment amends the contempt guideline, § 2J1.1, by adding an application note clarifying that (1) § 2B1.1 is the most analogous guideline in a case involving a violation of a judicial order enjoining fraudulent behavior; and (2) the enhancement at § 2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply in such a case.

3. Amendment: Section 2B1.1(b) is amended by inserting after subsection (b)(12) the following:

“(13)(A) (Apply the greatest) If the defendant was convicted of an offense under:

(i) 18 U.S.C. 1030, and the offense involved (I) a computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (II) an intent to obtain personal information, increase by 2 levels.

(ii) 18 U.S.C. 1030(a)(5)(A)(i), increase by 4 levels.

(iii) 18 U.S.C. 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by 6 levels.

(B) If subdivision (A)(iii) applies, and the offense level is less than level 24, increase to level 24.”.

The Commentary to § 2B1.1 captioned “Statutory Provisions” is amended by inserting “, 2701” after “2332b(a)(1)”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 3(A)(v), as redesignated by Amendment 2, by striking subdivision (III) and inserting the following:

“(III) Offenses Under 18 U.S.C. 1030.—In the case of an offense under 18 U.S.C. 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: Any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended by inserting before Note 13, as redesignated by Amendment 2, the following:

“12. Application of Subsection (b)(13).—

(A) Definitions.—For purposes of subsection (b)(13):

‘Critical infrastructure’ means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and

government operations that provide essential services to the public.

‘Government entity’ has the meaning given that term in 18 U.S.C. 1030(e)(9).

‘Personal information’ means sensitive or private information (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.

(B) Subsection (b)(13)(iii).—If the same conduct that forms the basis for an enhancement under subsection (b)(13)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(12)(B), do not apply the enhancement under subsection (b)(12)(B).”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 18, as redesignated by Amendment 2, by adding at the end of subdivision (A)(ii) the following:

“An upward departure would be warranted, for example, in an 18 U.S.C. 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted.”;

by redesignating subdivision (B) as subdivision (C); and by inserting after subdivision (A) the following:

“(B) Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(13)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.”.

The Commentary to § 2B1.1 captioned “Background” is amended by adding at the end the following paragraph:

“Subsection (b)(13) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(13)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.”.

Section 2B2.3(b)(1) is amended by striking “or” after “airport;” and by inserting after “residence” the following:

“; or (F) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security”.