

A definition of critical infrastructure is provided in the commentary. This definition is derived in part from the definition of critical infrastructure in the USA PATRIOT Act (*see* Pub. L. 107–56, section 1016; 42 U.S.C. 5195c(e)) but was modified to ensure that the enhancement will apply to substantial disruptions of critical infrastructure that are regional, rather than national, in scope. Examples of critical infrastructures are provided.

Second, the proposed amendment modifies the rule of construction relating to the calculation of loss in protected computer cases. This change was made to incorporate more fully the statutory definition of loss at 18 U.S.C. 1030(e)(11), added as part of the USA PATRIOT Act, and to clarify its application to all 18 U.S.C. 1030 offenses sentenced under § 2B1.1.

Third, the proposed amendment expands the upward departure note in § 2B1.1. That note provides that an upward departure may be warranted if an offense caused or risked substantial non-monetary harm, including physical harm. The amendment adds a provision that expressly states that an upward departure would be warranted for an offense under 18 U.S.C. 1030 involving damage to a protected computer that results in death.

Fourth, the amendment modifies § 2B2.3, to which 18 U.S.C. 1030(a)(3) (misdemeanor trespass on a government computer) offenses are referenced, and § 2B3.2, to which 18 U.S.C. 1030(a)(7) (extortionate demand to damage protected computer) offenses are referenced, to provide enhancements relating to computer systems used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security. The amendment expands the scope of existing enhancements to ensure that trespasses and extortions involving these types of important computer systems are addressed.

Finally, the amendment references offenses under 18 U.S.C. 2701 (unlawful access to stored communications) to § 2B1.1. Prior to the Act, a first offense under section 2701 was classified as a misdemeanor offense, and the guidelines did not reference the statute in Appendix A (Statutory Index). Given that the Act increased the penalties available for 18 U.S.C. 2701 offenses, the amendment references the statute in Appendix A. Section 2701 offenses are referenced to § 2B1.1 because such offenses involve the obtaining, altering, or denial of authorized access to stored wire or electronic communications,

conduct that is related to fraud, theft, and property damage, which are covered by § 2B1.1.

4. Amendment: The Commentary to § 2B1.1 captioned “Application Notes”, as amended by Amendment 3, is further amended in subdivision (A)(ii) of Note 18, as redesignated by Amendment 2, by adding at the end the following:

“An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.”

Section 2K1.3(a) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively; and by inserting after subdivision (2) the following:

“(3) 18, if the defendant was convicted under 18 U.S.C. 842(p)(2);”.

Section 2K1.3(b)(3) is amended by inserting “(A) was convicted under 18 U.S.C. 842(p)(2); or (B)” after “defendant”.

Section 2K1.3(c)(1) is amended by inserting “(A) was convicted under 18 U.S.C. 842(p)(2); or (B)” after “defendant”.

The Commentary to § 2K1.3 captioned “Application Notes” is amended in Note 3 by striking “(3)” and inserting “(4)”.

The Commentary to § 2K1.3 captioned “Application Notes” is amended in the second paragraph of Note 9 by striking “(3)” and inserting “(4)”.

The Commentary to § 2K1.3 captioned “Application Notes” is amended in Note 11 by adding at the end the following new paragraph:

“In addition, for purposes of subsection (c)(1)(A), “that other offense” means, with respect to an offense under 18 U.S.C. 842(p)(2), the underlying Federal crime of violence.”

Section 2K1.4(a)(1)(B) is amended by striking “or a ferry” and inserting “a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use”.

Section 2K1.4(a)(2) is amended to read as follows:

“(2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than (i) a dwelling, or (ii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or (C)

endangered (i) a dwelling, (ii) a structure other than a dwelling, or (iii) an airport, an aircraft, a mass transportation facility, a mass transportation vehicle, a ferry, a public transportation system, a state or government facility, an infrastructure facility, or a place of public use; or”.

The Commentary to § 2K1.4 captioned “Statutory Provisions” is amended by inserting “, 2332f” after “2332a”.

The Commentary to § 2K1.4 captioned “Application Notes” is amended in Note 1 by adding at the end the following new paragraph:

“‘State or government facility’, ‘infrastructure facility’, ‘place of public use’, and ‘public transportation system’ have the meaning given those terms in 18 U.S.C. 2332f(e)(3), (5), (6), and (7), respectively.”

Section 2M5.3 is amended in the heading by adding “or For a Terrorist Purpose” after “Organizations”.

Section 2M5.3(b)(1) is amended in subdivision (C) by striking “or” after “explosives;”; in subdivision (D) by inserting “the intent,” after “with” and by inserting a comma after “knowledge”; and by inserting “; or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act” after “(A) through (C)”.

The Commentary to § 2M5.3 captioned “Statutory Provision” is amended by striking “Provision” and inserting “Provisions”; by inserting “\$” before “2339B”; and by inserting “, 2339C(a)(1)(B), (c)(2)(B) (but only with respect to funds known or intended to have been provided or collected in violation of 18 U.S.C. 2339C(a)(1)(B))” after “2339B”.

The Commentary to § 2M5.3 captioned “Application Notes” is amended in Note 2(A) by inserting “funds or other” after “volume of the”.

Section 2M6.1(a)(2) is amended by inserting “and” after “(a)(3),”; and by striking “, and (a)(5)”.

Section 2M6.1(a)(3) is amended by inserting “or” after the semicolon.

Section 2M6.1(a)(4) is amended by inserting “(A)” after “if”; and by inserting “(B) the offense (i) involved a threat to use a nuclear weapon, nuclear material, or nuclear byproduct material, a chemical weapon, a biological agent, toxin, or delivery system, or a weapon of mass destruction; but (ii) did not involve any conduct evidencing an intent or ability to carry out the threat.” after “or”.

Section 2M6.1(a) is amended by striking subdivision (5).

Section 2M6.1(b)(1) is amended by striking the comma after “(a)(2)” and