

under § 2A2.2 nevertheless involves bodily injury. Are there any other application issues pertaining to the assault guidelines that the Commission should address?

4. Section 3001 of the Act amends 18 U.S.C. 1512 (relating to tampering with a witness, victim, or an informant) in a number of ways. Section 3001 expands the scope of section 1512 to cover the use of physical force or threat of physical force with the intent to influence, delay, or prevent the testimony of any person in an official proceeding, or induce any person to withhold testimony or alter, destroy, mutilate, or conceal an object with the intent to impair the integrity or availability of the object for use in an official proceeding.

Section 3001 also increases the statutory maximum penalties for violations of section 1512 that involve the use or attempted use of physical force from 10 years' to 20 years' imprisonment (statutory maximum term of imprisonment under section 1512 is 20 years for attempted murder and 10 years for the threatened use of physical force). Additionally, conspiracy to commit an offense under section 1512 or under 18 U.S.C. 1513 (relating to retaliating against a witness, victim, or an informant) are now subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

The Commission, as part of the emergency amendment implementing the Sarbanes-Oxley Act, increased the base offense level in § 2J1.2 (Obstruction of Justice) from level 12 to level 14 (see Proposed Amendment 1, proposing to repropulgate the temporary, emergency amendment as a permanent amendment). The Commission requests comment regarding whether the offense levels in § 2J1.2 further should be increased in response to the maximum statutory penalties provided for these offenses, and if so, what should be the extent of the increase? For example, should the Commission increase further the base offense level in § 2J1.2 and, if so, to what offense level? Should the Commission increase the magnitude of the eight level enhancement at subsection (b)(1) for offenses that involve causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice? Alternatively, should the Commission increase the magnitude of the enhancement at subsection (b)(1) only for offenses which involve actual physical injury to a person? In addition, are higher offense levels needed specifically for cases under section 1513 involving

particularly severe retaliation against government witnesses, or is the availability of departures for such cases sufficient? *See, e.g., United States v. Levy*, 250 F.3d 1015 (6th Cir. 2001). Should an enhancement be added to § 3C1.1 (Obstructing or Impeding the Administration of Justice) for threatening, intimidating, tampering with, or retaliating against, a witness, and if so, what should be the extent of the enhancement?

5. The Act contains a number of miscellaneous provisions that may make amendments to the guidelines appropriate as follows:

(A) Section 14102 amends section 3 of the Sherman Act (15 U.S.C. 3) by providing a maximum fine of \$10,000,000 for any corporation, and a maximum fine of \$350,000 and three years' imprisonment for any person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons, to monopolize any part of the trade or commerce in or between any of the States, the District of Columbia, the territories of the United States, and foreign states. Should the Commission provide a Statutory Index reference to § 2R1.1 (Bid-Rigging, Price-Fixing or Market Allocation Agreements Among Competitors) for this offense? In addition, an amendment to Application Note 5 of § 5E1.2 (Fines for Individual Defendants) may be appropriate to incorporate the special fine provision.

(B) Section 3005 of the Act amends 21 U.S.C. 841 (relating to drug penalties) and 960 (relating to drug import and export penalties) to clarify that supervised release requirements for violations of those sections apply notwithstanding 18 U.S.C. 3583. An amendment to § 5D1.2 (Term of Supervised Release) may be appropriate to incorporate this provision.

(C) Section 2103 of the Act amends 18 U.S.C. 3565(b) and 3583(g) to require mandatory revocation of probation and supervised release, respectively, for testing positive, as part of drug testing, of illegal controlled substances more than three times over the course of one year. Amendments to § 7B1.3 (Revocation of Probation or Supervised Release) may be appropriate to incorporate this provision. In addition, the Commission requests comment regarding whether § 7B1.3 should be amended to address more comprehensively other provisions requiring mandatory revocation of probation of supervised release for certain violations.

(D) Section 3007 of the Act made a technical amendment to 18 U.S.C. 3583(d) to clarify that restitution is an

appropriate condition of supervised release. An amendment to § 5D1.3 (Conditions of Supervised Release) may be appropriate to incorporate this provision.

6. Cybercrime

Issue for Comment

On December 18, 2002, the Commission published a general issue for comment regarding section 225 of the Homeland Security Act of 2002 (the Cyber Security Enhancement Act of 2002), Public Law 107-296. *See* 67 FR 77532. The Commission seeks additional public comment on more detailed questions pertaining to section 225 as set forth herein.

Section 225 directs the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements applicable to persons convicted of an offense under section 1030 of title 18, United States Code, to ensure that the sentencing guidelines and policy statements reflect the serious nature of such offenses, the growing incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses.

The directive also includes a number of factors for the Commission to consider, including the potential and actual loss resulting from the offense, the level of sophistication and planning involved in the offense, whether the offense was committed for purposes of commercial advantage or private financial benefit, whether the defendant acted with malicious intent to cause harm in committing the offense, the extent to which the offense violated the privacy rights of individuals harmed, whether the offense involved a computer used by the government in furtherance of national defense, national security, or the administration of justice, whether the violation was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure, and whether the violation was intended to, or had the effect of, creating a threat to public health or safety, or injury to any person.

Section 1030 of title 18, United States Code, proscribes a variety of conduct relating to the misuse of computers, including conduct relating to the obtaining and communicating of restricted information (*see* 18 U.S.C. 1030(a)(1)), the unauthorized accessing of information from financial institutions, the United States government and "protected computers" (*see* 18 U.S.C. 1030(a)(2)), the unauthorized accessing of a government computer (*see* 18 U.S.C. 1030(a)(3)),