

PROPOSED AMENDMENT: IDENTITY THEFT

The Identity Theft and Assumption Act of 1998 (the “Act”), Pub. L. 105–318, amended 18 U.S.C. § 1028 to criminalize the unauthorized use or transfer of a means of identification with the intent to commit or aid or abet any federal violation or state felony. In addition, the Act directed the Commission to “provide an appropriate penalty for each offense under section 1028 of title 18, United States Code.” In carrying out this directive the Act instructed the Commission to consider the following factors:

(1) the extent to which the number of victims (as defined in section 3663A(a) of title 18, United States Code) involved in the offense, including harm to reputation, inconvenience, and other difficulties resulting from the offense, is an adequate measure for establishing penalties under the Federal sentencing guidelines;

(2) the number of means of identification, identification documents, or false identification documents involved in the offense is an adequate measure for establishing penalties under the Federal sentencing guidelines;

(3) the extent to which the value of loss to any individual caused by the offense is an adequate measure for establishing penalties under the Federal sentencing guidelines;

(4) the range of conduct covered by the offense;

(5) the extent to which sentencing enhancements within the Federal sentencing guidelines and the court’s authority to sentence above the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense;

(6) the extent to which Federal sentencing guidelines sentences for the offenses have been constrained by statutory maximum penalties;

(7) the extent to which Federal sentencing guidelines for the offenses adequately achieve the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code; and

(8) any other factor that the United States Sentencing Commission considers to be appropriate.

Two options to implement this directive follow.

Option 1

Synopsis of Proposed Amendment: *Although 18 U.S.C. § 1028 covers a broad range of conduct, and the directive specifies that the Commission should look at all the offenses listed in*

§ 1028, the legislative history and congressional testimony suggest that Congress was primarily name, social security number, birth certificate) to obtain or make unauthorized identification means to commit some other criminal offense, typically financial fraud. This conduct, often option focuses on the individual victim rather than the financial institution. The legislative history suggests that Congress was particularly concerned with protecting the individual victim (Moreover, the loss table and loss definition generally captures any harm to the financial institution.)

(1) It adds to the fraud guideline a two-prong enhancement, with a two-level increase provides an increase “if the offense involved the use of one or more identification means of an individual victim to obtain or make any unauthorized identification the jointly undertaken criminal activity) used any identifying information of an individual victim to make or obtain (“breed”) any unauthorized identification example, the recently reported case of the identity theft ring that used the names and social security numbers of military personnel, taken from a website which credit cards with the identifying information of those military personnel.)

The second prong applies “if the offense involved the unauthorized identification “breeding” of unauthorized identification means of multiple victims.

(2) as “any identification means that has been obtained or made by using one or more identification means without the consent of the individual victim whose unauthorized identification means.” This definition is meant to specify that the unauthorized identification means are made (“bred”) by using the individual defendant obtains a credit card by using the individual victim’s name and social security number). The note also specifies that the victim of the offense conduct is application of the enhancement any offense involving the identification means of a fictitious individual.

- (3) *For purposes of application of the first prong, the amendment also proposes to create a presumption, in any case in which the offense involved the possession of two or more unauthorized identification means, that the identification means were obtained or made through the use of one or more identification means of an individual victim. The enhancement would apply because of the reasonable likelihood that such an offense involved the conduct of obtaining or making unauthorized identification means. (The difference between application of this presumption and application of the second prong is that the presumption would apply even if there were two unauthorized identification means with respect to one individual victim.)*
- (4) *The proposed amendment provides a minimum offense level (or floor) of [12][13]. This minimum offense level, as explained in the proposed background commentary, accounts for the fact that the unauthorized identification means often are within the defendant's exclusive control, making it difficult for the individual victim to detect the offense. In fact, the individual victim often does not become aware of the offense until certain harms have already occurred (for example, harm to the victim's credit standing or reputation). Additionally, the minimum offense level addresses the fact that some of the harm to the individual victim may be difficult or impossible to quantify (e.g., harm to reputation, the inconvenience of rectifying a damaged credit report, or other difficulties associated with the offense). This reasoning is consistent with the Commission's general approach to minimum offense levels, which the Commission typically uses when some aspect of the offense conduct is difficult to quantify or measure, and/or the scope of the activity is substantial. (see, e.g., §2B1.1(b)(5), providing a floor of level 14 for offenses involving an organized scheme to steal vehicles or vehicle parts; the minimum offense level addresses fact that such schemes typically are large in scope but the value of the stolen property is often difficult to ascertain.)*
- (5) *The proposed amendment provides for an upward departure if the guideline calculation does not adequately address the seriousness of the offense and provides examples of when an upward departure may be warranted.*
- (6) *[The proposed amendment adds a note to the loss commentary providing that reasonably foreseeable monetary harms to the individual victim are included in the loss calculation.]*
- (7) *Finally, the proposed amendment provides several issues for comment.*

§2F1.1.

Other than Counterfeit Bearer Obligations of the United States

- (a) Base Offense Level:
- (b)

* * *

If the offense involved (A) the use of one or more identification means of means; or (B) the unauthorized identification means of [5] or more ² less than level [], increase to level [].

—(7)

(7)

Commentary

Application Notes

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Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other unlawfully taken; it does not, for example, include interest the victim could have earned on such Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or \$40,000 was genuine, the loss would be \$40,000.

loss or intended loss:

[(f) _____]

In a case that involves the use of one or more identification means of an individual monetary harm incurred by the individual victim that generally results from an identity

theft offense. Such harm would include, for example, any expenses incurred by the individual victim to rectify a damaged credit rating.]

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12. *Offenses involving ~~fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the such a case, of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct. [Please note that there is an issue for comment pertaining to access devices at the end of this proposed amendment.]~~*

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The commentary to §2F1.1 captioned “Application Notes” is amended by redesignating Notes 16 through 20 as notes 18 through 22, and inserting the following as new notes 16 and 17:

16. *For purposes of subsection (b)(6) and Application Note 8(f)—*

“Identification means” means any means of identification as defined in 18 U.S.C. § 1028(d)(3).

“Individual victim” means an individual, other than the defendant or any individual involved in the jointly undertaken criminal activity, whose identification means were used to obtain or make an unauthorized identification means. “Individual victim” does not include a fictitious individual.

“Unauthorized identification means” means any identification means that has been obtained or made by the use of one or more other identification means without the consent of the individual victim whose name or other identifying information appears on, or as part of, that unauthorized identification means.

17. *Offenses involving identification documents and identification means, in violation of 18 U.S.C. § 1028 are covered by this guideline. If (A) the offense involved unauthorized identification means, or the unlawful production, transfer, possession, or use of an identification document; and (B) the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1.*

Subsection (b)(6)(A) provides an enhancement in any case in which one or more identification means of an individual victim is used, without that individual’s consent, to obtain or make an unauthorized identification means. This subsection would apply, for example, when a defendant obtains another individual’s name and social security number from a source (e.g., from a stolen wallet) and obtains and uses a credit card in that individual’s name, without the individual’s consent. This subsection would not apply, however, if the defendant uses a credit card from a

card to obtain or make an unauthorized identification means.

In any case in which the offense involved the possession of two or more unauthorized means were obtained or made through the use of one or more identification means of an individual victim. In such a case, subsection (b)(6)(A) shall apply because of the reasonable identification means.

Subsection (b)(6)(B) addresses offenses involving the unauthorized identification means of

In a case involving unauthorized identification means, an upward departure may be warranted if the guideline calculation does not adequately address the seriousness of the offense. Examples

(a) the extent of the offense conduct is such that the defendant established or made assuming and living under that victim's identity;

(b) identification means of the victim in connection with some criminal conduct, or the individual victim is denied a job because an arrest record has been made in the victim's

* * *

18 . *"The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in (7)(8) rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a See 18 U.S.C. § 982(a)(4).*

2022. *(b)(7)(A) or (B)(b)(6) or (b)(8)(A) or (B) presumption that the offense involved "more than minimal planning."*

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* * *

conceal illicit profits and criminal conduct involve a particularly high level of sophistication and

complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

A minimum offense level of [12][13] is provided in subsection (b)(6) for offenses involving unauthorized identification means, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the unauthorized identification means often are within the defendant's exclusive control, making it difficult for the individual victim to detect that his or her identity has been "stolen" and used to establish unauthorized identification means. Generally, the individual victim does not become aware of the offense until certain harms have already occurred (e.g., a damaged credit rating or inability to obtain a loan). The minimum offense level also is provided because some of the harm to the individual victim whose name or identifying information is part of the unauthorized identification means may be difficult or impossible to quantify (e.g., harm to the individual victim's reputation or credit rating, inconvenience, and other difficulties resulting from the offense).

* * *

Subsection (b)(~~6~~)(7)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

Subsection (b)(6) implements the instruction to the Commission in section 4 of Public Law 105-318.

Subsection (b)(~~7~~)(8)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(~~7~~)(8)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.

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Option 1 - Issues for Comment:

The Commission invites comment on the following issues pertaining to identity theft:

- 1. Should the Commission consider providing an enhancement, as an alternative or in addition to the proposed enhancement in §2F1.1, that would provide a sentencing increase based on the number of unauthorized identification means involved in the offense? If so, should the enhancement be structured to tie offense level increases to specified numbers of identification means (see, for example, the table at §2L2.1(b)(2), which provides offense level increases based on the number of documents or passports involved in the offense)? What are the appropriate "cut offs" for the numbers of unauthorized identification means and what are the appropriate corresponding offense level increases? Should such an enhancement also address the unauthorized use of [a specified number of] identification documents and/or the use of false documents?*

2. *The proposed amendment limits the enhancement for identity theft to the fraud guideline. Given the breadth of offense conduct covered by 18 U.S.C. § 1028, should the Commission also provide a similar sentencing increase (including, if appropriate, an enhancement that ties offense level increases to specified numbers of identification means) for identity theft conduct in [any or] all other economic crime guidelines (e.g., §2B1.1 (Theft), §2S1.1 (Laundering of Monetary Instruments), §2T1.4 (Tax Fraud))?*
3. *Given the breadth of offense conduct covered by 18 U.S.C. § 1028, as an alternative to amending Chapter Two, should the Commission amend Chapter Three of the Guidelines Manual, relating to general adjustments, to provide a new adjustment that would apply in every case that involves the unauthorized use of an identification means? If so, how should that adjustment be structured (e.g., should there be a table or tiered adjustment based on the number of unauthorized identification means involved in the offense)? Should the adjustment also include the unauthorized use of any identification document or the use of any false identification document?*
4. *As an alternative to a Chapter Three adjustment, should the Commission amend Chapter Five, Part K, of the Guidelines Manual, relating to departures, to encourage a departure above the authorized guideline sentence in any case involving the unauthorized use of an identification means if the guideline range does not adequately reflect the seriousness of the offense conduct?*
5. *The Treasury Department has recommended that the Commission amend its current minimum loss amount rule for stolen credit card offenses in §2B1.1 (a minimum loss amount of \$100 per credit card) to include all access devices, and that the minimum loss amount be increased to \$1000 per access device. Given that the Identity Theft and Assumption Act of 1998 included access devices in the definition of “means of identification,” the Commission invites comment on whether it should consider amending that rule to include all access devices and to place that amended rule in §2F1.1. If so, should the Commission additionally amend the rule to increase the minimum loss amount per access device, for example [\$500][\$750][\$1000] per access device?*
6. *Commission data indicate that a high portion of offenders involved in identity theft conduct have previously been convicted of similar offense conduct at either the state or federal level. Although Chapter Four addresses criminal history, the Commission has provided enhancements in certain Chapter Two guidelines for prior similar conduct (e.g., §§2L2.1(b)(4) and 2L2.2(b)(2), which provide two- and four-level increases if “the defendant committed any part of the instant offense after sustaining one or more convictions for felony immigration and naturalization offenses.”) Should the Commission provide an enhancement in*

the relevant Chapter Two guideline (§2F1.1, if the Commission adopts a limited approach to identity theft) or guidelines (the economic crime guidelines, if the Commission adopts a more expansive approach to identity theft) if the defendant had previously been convicted of conduct similar to identity theft? If so, what is the appropriate number of levels for the enhancement? Should such an enhancement require a minimum offense level?

Option 2:

Synopsis of Proposed Amendment: *Option 2, proposed by the Department of Justice, adds two new specific offense characteristics to the fraud guideline.*

The first specific offense characteristic provides a two-level increase and a floor offense level of [10][12] for harm to an individual's reputation or credit standing, inconvenience related to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties. The corresponding application note provides that this enhancement only applies, however, if those harms are more than minimal. For example, a single, negative credit entry that was corrected in a short time would not qualify, but multiple credit entries or a poor credit rating would. This application note also provides for an upward departure if the harm to the individual is not adequately addressed by application of the specific offense characteristic, or if the harm is to a significant number of individuals.

The second specific offense characteristic provides a two-level increase if the offense involved the production or transfer of 6 or more identification documents, false identification documents, or means of identification. However, the provision specifies that the two-level increase is not to be applied if the defendant's conduct also resulted in an increase under the fraud loss table.

The proposed amendment additionally sets forth two issues for comment.

Option 2 - Proposed Amendment:

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

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(b) Specific Offense Characteristics

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- (7) If the offense involved (A) harm to an individual's reputation or credit standing, inconvenience related to the correction of records or restoration of an individual's reputation or credit standing, or similar difficulties; and (B) such harm, inconvenience, or difficulties were more than minimal,

increase by **2** **10]**
12], increase to level [] [12

(8) If the offense involved the production or transfer of 6 or more
identification, increase by **2**
defendant's conduct also resulted in an increase under subdivision (1).

(-9)

(A) substantially jeopardized the safety and soundness of a financial

(B) affected a financial institution and the defendant derived more

increase by **4** **24,**
24.

Commentary

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Offenses involving fraudulent identification documents, means of identification, devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use or means of identification for the purpose of violating, or assisting

§2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving false access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

[Application Notes 16 through 20 is redesignated as Notes 17 through 21 respectively, and the following new note is inserted after Note 15]:

Subsection (b)(7) provides an upward adjustment of 2 levels and a floor of level [10] [12] for harm to an individual's reputation or credit standing, inconvenience related to the correction of

However, such harm, inconvenience, or similar difficulties must be more than minimal in order

to qualify. Thus, for example, neither an individual's speculation about potential harm to his or her reputation or credit standing nor a single, negative credit entry that was corrected in a short time would qualify for the 2-level adjustment under this subsection, but a showing of multiple, negative credit entries or a poor credit rating would. If the offense involved a level of harm, inconvenience, or other difficulty not adequately addressed by subsection (b)(7) or by § 2F1.1 in general, an upward departure may be warranted. For example, if the wrong person were arrested because of the fraudulent use of such person's means of identification by another, or if an individual's identity were completely taken over by another, an upward departure would be warranted to recognize the extraordinary harm to the victim's reputation or the resulting inconvenience in the restoration of his or her reputation or the necessary correction of records. Moreover, harm of the type described in subsection (b)(7) to a significant number of individuals would also warrant an upward departure.

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189. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(79)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

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201. If subsection (b)(79)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."

Background:

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Subsection (b)(79)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(79)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.

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Option 2 - Issues for Comment: *The Commission invites comment on whether it should add conforming amendments to other guidelines that may apply to offenses involving identity fraud, such as §2B1.1, §2L2.1, §2L2.2, and §2T1.4.*

The Commission also invites comment on whether it should expand and increase the minimum loss rule in the theft guideline, §2B1.1, Application Note 4, which now establishes a minimum of \$100 of loss for each stolen credit card, and consider adopting such a rule for the fraud guideline as well, §2F1.1. The rule might provide an increased minimum amount, and it should apply to certain access devices other than credit cards, such as debit cards, bank account

numbers, electronic serial numbers, and mobile identification numbers. As a result of such a minimum loss rule as offenses involving the theft of the credit card itself. However, such an amendment may need to be coordinated with efforts to revise the theft guideline in connection both sets of amendments, the Commission invites comment on whether it should include an “issue for comment” in this regard in its publication of a guideline amendment for identity theft and fraud.