

**REVISED AMENDMENTS 5 AND 6: IDENTITY THEFT AND WIRELESS PHONE CLONING**

**Part I: Combined Enhancement for Phone Cloning and Identity Theft**

Subsections (b)(5) through (b)(7) are redesignated as subsection (b)(6) and (b)(8), respectively.

**§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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(5) If the offense involved—

- (A) the possession or use of any device-making equipment;
- (B) the production or trafficking of any unauthorized access device or counterfeit access device; or
- (C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of [5] or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification;

increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

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Commentary

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Application Notes:

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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.

Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If 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.

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21. For purposes of subsection (b)(5)—

“Counterfeit access device” (A) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (B) also includes a telecommunications instrument that has been unlawfully modified, or into which telecommunications identifying information has been unlawfully inserted, to obtain telecommunications service without authorization.

“Device-making equipment” (A) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (B) also includes (i) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (ii) a scanning device if it was used with the intent to defraud. “Scanning device” has the meaning given that term in 18 U.S.C. § 1029(e)(8).

“Means of identification” has the meaning given that term in 18 U.S.C. § 1028(d)(3), except that such means of identification shall be of an actual (i.e., not fictitious) individual other than the defendant or a participant in the jointly undertaken criminal activity.

“Produce” includes manufacture, design, alter, authenticate, duplicate, or assemble.

“Production” includes manufacture, design, alter, authenticate, duplicate, or assemble.

“Unauthorized access device” has the meaning given that term in 18 U.S.C. § 1029(e)(3).

22. Subsection (b)(5)(C)(i) applies in a case in which the means of identification of an individual other than the defendant (or a participant ~~in the jointly undertaken criminal activity~~ for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) are used without that individual’s authorization unlawfully to produce or obtain other means of identification.

Examples of conduct to which this subsection would apply are as follows:

(A) A defendant obtains an individual’s name and social security number from a source (e.g., from a piece of mail taken from the individual’s mailbox) and obtains a bank loan in that individual’s name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(B) A defendant obtains an individual’s name and address from a source (e.g., from a driver’s license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual’s name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

*Examples of conduct to which subsection (b)(5)(C)(i) would not apply are as follows:*

- (A) *A defendant uses a credit card from a stolen wallet to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain other means of identification.*
- (B) *A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing other means of identification.*

*Subsection (b)(5)(C)(ii) applies in any case in which the offense involved the possession of [five] or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.*

*In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:*

- (A) *The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
- (B) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in the individual's name.*
- (C) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*

~~2023. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved more than minimal planning. If any of subsection (b)(5), subsection (b)(8)(A), or subsection (b)(8)(B) applies, there shall be a rebuttable presumption that the offense also involved more than minimal planning under subsection (b)(2).~~

*If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis of an enhancement under subsection (b)(6), do not apply an enhancement under subsection (b)(6).*

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Background:

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*Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.*

*Subsections (b)(6)(A) and (B) implement the instruction to the Commission in section 4 of Public Law 105-172.*

*Subsection (b)(6)(C) implements the directive to the Commission in section 4 of the Identity Theft*

and Assumption Deterrence Act, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as “affirmative identity theft” or “breeding,” in which a defendant uses another individual’s name, social security number, or some other form of identification (the “means of identification”) to “breed” (i.e., produce or obtain) new or additional forms of identification. Because the statute broadly defines “means of identification,” the new or additional forms of identification can include items such as a driver’s license, a credit card, or a bank loan.

This subsection provides a minimum offense level of 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were “bred” (i.e., produced or obtained) 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.” Generally, the 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 accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual’s reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history indicates that Congress was especially concerned with providing increased punishment for this type of harm.

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## Part II - Minimum Loss Amount Rule

### §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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#### Commentary

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#### Application Notes:

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— In a case involving any counterfeit or unauthorized access device, loss includes any unauthorized charges made with the counterfeit or unauthorized access device. In any such case, loss shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access (including an electronic serial number/mobile identification number (ESN/MIN ) pair) that identifies a specific telecommunications instrument or telecommunications account, and that means was not used in the commission of the offense, loss shall be not less than \$100 per means.