

U.S. Sentencing Commission
IDENTITY THEFT – Final Report (December 15, 1999)
Executive Summary

I. Introduction

The “Identity Theft and Assumption Deterrence Act of 1998 (“Act”),” enacted on October 30, 1998, contains several specific directives to the Sentencing Commission. This Report details the legislative history, analyzes the key provisions of the new statute, and assesses its impact upon existing sentencing guidelines. The Report also presents an analysis of Commission data in the context of the congressional directives, and concludes with an assessment of preliminary policy options for Commission consideration. The following summary presents the salient points contained in the Report.

II. Significance of Legislation for the Commission

The Act criminalizes the *unauthorized use or transfer of a means of identification with the intent to commit or to aid or abet any federal violation or state felony*, and can result in a maximum sentence of up to 3, 15, 20, or 25 years depending on whether certain statutorily enumerated factors are present.¹ The Act also directs the Commission to “review and amend the Federal sentencing guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate penalty for each offense under section 1028 of title 18, United States Code, as amended by this Act. . . .”² Congress also directed the Commission to consider the following specific factors in this review:³

- 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;
- the number of means of identification, identification documents, or false identification documents (as those terms are defined in section 1028(d) of title 18, United States Code, as amended by this Act) involved in the offense, is an adequate measure for establishing penalties under the Federal sentencing guidelines;
- the extent to which the value of the loss to an individual caused by the offense is an adequate measure for establishing penalties under the Federal sentencing guidelines;
- the range of conduct covered by the offense;

¹ See Appendix A.

² Pub. L. 105-318(b)(1), Oct. 30, 1998, 112 Stat. 3007.

³ *Id.* at § 4(b).

- 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;
- the extent to which Federal sentencing guidelines sentences for the offense have been constrained by the statutory maximum penalties;
- the extent to which Federal sentencing guidelines for the offense adequately achieve the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code; and
- any other factor that the United States Sentencing Commission considers to be appropriate.

Prior to the passage of this Act, only the unauthorized use or transfer of identity *documents* was illegal under 18 U.S.C. § 1028(a)(1)-(6),⁴ while the unauthorized use of credit cards, PINs, ATM codes, and other electronic access devices was illegal under 18 U.S.C. § 1029. The addition of subsection (a)(7) to section 1028 reflects the rapidly evolving developments in technology and commerce by which an individual’s “means of identification” can now properly include *information* such as social security and other government identification numbers, dates of birth, and unique biometric data, as well as electronic *access devices and routing codes* used in the telecommunications and financial sectors. Recognizing that the new definition of “identification means” includes prior statutory definitions of “identification documents,” the new law has structured this relationship by defining a document that contains one or more identification means as a single identification means.⁵

The key impact of these new statutory definitions is to make the proscriptions of the identity theft law applicable to a wide range of offense conduct that can be independently prosecuted under numerous existing statutes and is covered by a variety of existing sentencing guidelines. Any unauthorized use of identification means is now properly chargeable either as a violation of the new law or in conjunction with other federal statutes. Notwithstanding the breadth of the new law, however, the legislative intent manifested a primary concern with offense conduct that harms an individual’s credit rating and general reputation. In its most egregious manifestation, the targeted conduct can be most accurately characterized as identity take-over and assumption.

Another important change occasioned by the new legislation is the expanded universe of identifiable victims. Previously, the “victim” generally was considered to be either the government, as with immigration fraud offenses, or the financial institution that, under principles of commercial law, sustains the economic loss of a credit card theft or check forgery. Until now, the individual whose name and other identification means were purloined and misused by the perpetrator was generally not considered to be a “victim” under most existing criminal statutes and for sentencing purposes.

⁴ See Appendix B.

⁵ 18 U.S.C. § 1028(h).

The legislative history of the Act makes clear, however, that the protections and punishment provided by the new law are intended to reach those very instances where identification means are misused to such an extent as to cause significant harm to an individual. Furthermore, these harms are not limited to readily quantifiable monetary losses. For sentencing purposes, victims are those persons who are “directly and proximately harmed as a result of the commission of [the] offense.”⁶

In this same context, the new law delineates two types of such direct and proximate harm resulting from identity theft—harm to reputation and inconvenience—but also clearly requires that “other difficulties resulting from the offense” be considered in assessing the total harm to the victim.⁷ Typical examples of such difficulties include: an undeserved poor credit rating that impedes job opportunities, the ability to obtain financing, or even bankruptcy proceedings. A more rare but no less egregious harm flowing from identity theft is an unmerited arrest record or detention by law enforcement personnel.

III. Guideline Application Issues

Two key points emerged from the legal analysis and data study. First, the immigration guidelines are the guidelines most frequently implicated by offense conduct associated with the fraudulent or unauthorized use of identification documents under 18 U.S.C. § 1028, prior to its amendment by the Act. In considering the possibility of penalty increases, the Commission may wish to assess whether the penalty structure inherent in the applicable immigration guidelines already sufficiently provides for the misuse of identification means (including documents), and whether penalty increases under consideration should attach to these offenses, as well as to offenses with more direct economic ramifications to institutions and individuals.

Second, putting aside the offense conduct that implicates the immigration guidelines, a great deal of offense conduct involving the misuse of identification means is already prosecuted under a myriad of fraud statutes and sentenced under either the fraud, theft, or tax guidelines at §§2F1.1, 2B1.1, and 2T1.1, respectively. These guidelines already provide proportionate increases for: the amount of pecuniary loss, both actual and intended; more than minimal planning; more than one victim; and sophisticated means in committing the offense. The consideration of additional enhancements for the misuse of identification means, which is often a predicate for other fraudulent offense conduct, will need to take into account the possibility of inadvertent double counting of heartland offense conduct already contained in existing guidelines.

The following additional issues raised by the new law have important conceptual implications for the sentencing guidelines, and may well inform the Commission’s consideration of possible sentencing enhancements.

- Because identity theft as defined by the new law can be an element of other offense conduct (*e.g.*, obstruction of justice, immigration, mail, credit card, and tax fraud, misuse of social

⁶ Pub. L. 105-318 at § 4(b)(1) (referencing definition of “victim” in 18 U.S.C. § 3663A(a)).

security numbers), as well as a unique and separate offense under the new law, how should this particular offense conduct be treated for sentencing purposes within the guideline structure?

- Did Congress intend to increase the guideline penalties of existing offenses which can include the misuse of identity means (*e.g.*, immigration, credit card, tax, and bankruptcy fraud, misuse of social security numbers)?
- How do the statutory requirements for offenses with statutory maxima of 3-, 15-, 20-, and 25-year sentences mesh or conflict with the existing guideline structure?
- How adequate is the guidelines' definition of "victim" to capture harm to the individual victims of identity theft, whether or not an institutional victim also exists?
- How adequate is the guidelines' current measure of "loss" to capture both the indirect monetary harm and corollary, non-monetary harm to individual victims caused by identity theft? If such harms are not readily quantifiable in the absence of expert testimony, how can the guidelines best provide for consideration of such harms without overburdening the sentencing hearing?
- While some of the factors listed by Congress in the directive are currently taken into account by some of the existing guidelines (*e.g.*, number of victims within the fraud and deceit guidelines), how should these factors be taken into account in the context of offenses where there may be no identifiable individual victim?

IV. Policy Considerations

The information developed through the staff's legal and quantitative analysis illustrates that identity theft encompasses a continuum of offense conduct. Such conduct ranges from the most basic credit card fraud to affirmative acts of generating or "breeding" additional fraudulent identification means to the extreme instance of complete identity take-over or "assumption." Because the primary issue here is the scope of the conduct that merits increased punishment, a range of options based on this threshold determination has been developed for the Commission's consideration.

Option One presents the broad approach fashioned upon an adjustment in Chapter Three. Option Two limits sentencing enhancements and/or departures to the context of economic crimes, while Option Three is the most narrowly targeted to limiting sentencing enhancements and/or departures to the context of the fraud and theft guidelines. Finally, Option Four creates a general upward departure in Chapter Five.

Under the broad approach of Option One, the Commission could provide a sentencing adjustment in Chapter Three for any offense in which identification means or documents are used. This approach would (1) treat all manifestations of the offense conduct the same, from the most basic form of identity theft, such as credit card theft, to the most egregious forms involving identity assumption; (2) raise penalty levels for virtually every offense in which the misuse of an

identification means is part of the offense conduct; and (3) implicate various non-monetary based guidelines as well as economic crime guidelines.

Option Two limits sentencing enhancements and/or departures to the context of economic crimes. This approach is narrower than Option Three and is somewhat consistent with the primary focus of the legislative history on the financial ramifications of identity theft crimes.

Option Three limits enhancements and/or departures to the fraud and theft guidelines. This option attempts to target the harm-based considerations and offense conduct considerations associated with identity theft. (Although these policy considerations are presented in the context of the theft and fraud guidelines, any policy consideration can be modified to fit within Options One, Two or Four.) The specific policy options are as follows:

- Harm-based Considerations—
 - (a) provide a special rule in the "loss" definition to cover indirect monetary harms in identity theft cases;
 - (b) to the extent that identity theft cases involve access devices, modify the current rule for minimum loss amounts in credit card cases to cover all access devices;
 - (c) give more specific guidance for upward departures when loss does not adequately cover monetary harms in identity theft cases;
 - (d) provide a specific offense characteristic for non-monetary harms or give more specific guidance for upward departures for such harms.

- Offense Conduct Considerations—
 - (a) provide a specific offense characteristic based on the number of ID means;
 - (b) provide a specific offense characteristic based on how the ID means were used;
 - (c) provide a specific offense characteristic based on number of victims.

Commission data also show that a high portion of identity theft offenders previously have been convicted of similar offense conduct at either the federal or state level. Accordingly, this option raises the possibility of developing an enhancement to take into account prior similar conduct.

Finally, Option Four proposes a general upward departure provision for Chapter 5.