



SOCIAL SECURITY

Office of the Inspector General

MAR 10 2000

ATTN: Public Information-Public Comment
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500 South
Washington, D.C. 20002-8002

Dear Sir/Madam:

Thank you for the opportunity to comment on the proposed amendment to the sentencing guidelines for United States Courts on Identity Theft. The Office of the Inspector General, Social Security Administration (SSA) is acutely aware of the identity theft problem. Our Office of Audit analyzed the Social Security number (SSN) misuse allegations made to Fraud Hotline and found that 81.5 percent related directly to identity theft. As the report stated:

Identity Theft affects many areas of our society. Private citizens have had their credit histories destroyed by individuals who steal and use their SSN to obtain credit. These individuals run up large credit debts and then move on without paying on the debt. This type of behavior not only destroys the citizen's credit history, it adversely affects the national economy as creditors raise interest rates to cover the losses arising from this fraudulent activity." Management Advisory Report, Analysis of Social Security Number Misuse Allegations Made To The Social Security Administration's Fraud Hotline, A-15-99-92019, at page 8 (August 1999).

As this report reflects, the misuse of an individual's SSN can be a key component of identity theft. We have found that the SSN is used as a "breeder document", i.e., to obtain benefits, other documents, loans, etc. As a result, our Special Agents spend a major part of their time investigating cases involving some aspect of identity theft.

Our concern is that the Guidelines ultimately adopted by the Commission adequately address the egregious conduct we investigate involving SSN misuse. Examples of this egregious conduct are:

- (1) An individual provides identifying information of another person to improperly obtain a SSN from the SSA.
- (2) An individual provides another person's SSN when applying for government benefits, including Social Security benefits.
- (3) An individual provides another person's SSN to obtain employment, a credit card, driver's license, loan, etc.

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- (4) An individual uses two SSN, one theirs and one another person's, to work and obtain Social Security benefits at the same time.

If the language of the proposed Guidelines is strained to include this egregious conduct, we would ask the Commission to see that the conduct described above is captured in the Guidelines that are ultimately adopted by the Commission.

With respect to the issues you have asked to be addressed, we have the following comments.

1. The proposed amendment in Option 1 provides a two-level enhancement in the fraud guideline for the possession of [5] or more unauthorized identification means. The enhancement, as proposed, applies regardless of whether the offense involves the possession of unauthorized identification means of one individual victim or more than one individual victim as long as at least [5] unauthorized identification means were possessed. Should the Commission consider providing an additional part to the proposed enhancement that would increase sentences based on the number of individual victims involved in the offense? If so, on what number of individual victims should the enhancement be based? The Commission also invites comment on whether it should provide an additional increase, cumulative to the 2-level increase already proposed in Option 1, for cases involving specified numbers of individual victims or unauthorized identification means. For example, such an enhancement could provide an additional [4-level] enhancement if the offense involved more than [10-25] unauthorized identification means and/or more than [5-25] individual victims. Alternatively, should the Commission provide an upward departure for cases involving a large number of unauthorized identification means and/or a large number of individual victims?

Response - We believe that the Commission should consider providing an additional part to the proposed enhancement that would increase sentences based on the number of individual victims involved in the offense. We would suggest that there should be an additional 4-level enhancement if there are more than 10 individual victims and/or more than 15 unauthorized identification means. These numbers would indicate an organized effort to commit identity theft on the part of the defendant(s).

2. The proposed amendment in Option 1 limits the enhancement for identity theft to the fraud guideline. Given the breadth of offense conduct covered by 18 U.S.C. Sec. 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., Sec. 2B1.1 (Theft), Sec. 2S1.1 (Laundering of Monetary Instruments), Sec. 2T1.4 (Tax Fraud))?

Response - We recognize that there is a great diversity in the types of cases that are prosecuted. Identity theft may be involved to varying degrees. Therefore, we agree that the Commission should provide a similar sentencing increase for identity theft conduct in any or all other economic crime guidelines. Identity theft is an integral

part of many other types of crimes. In many of these cases, there may be an ancillary charge of identity theft in the indictment that is dismissed in a plea agreement. Allowing for similar sentencing increase could help ensure that the defendant receives a sentence commensurate with the crime.

3. Given the breadth of offense conduct covered by 18 U.S.C. Sec. 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?

Response – A general adjustment to Chapter Three of the Guidelines Manual may be the best way to proceed. We would defer to those with more experience on this issue. However, we believe that if a general adjustment to Chapter Three is provided for, there should be a table or tiered adjustment based on the number of unauthorized identification means involved in the offense. We believe that the individual circumstances of each case should be determinative of the sentence received and that an across-the-board general adjustment could unfairly punish a defendant who had used a minimal number of unauthorized identification means versus a defendant who had used many unauthorized identification means. As stated in the Identity Theft Report issued December 15, 1999 by the Economic Crimes Policy Team, United States Sentencing Commission, we too are concerned about “the risk of treating all manifestations of offense conduct along with identity theft continuum the same, from the most basic form of identity theft such as credit card theft to the most egregious forms involving identity assumption.”

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?

Response – We are concerned about encouraging departures in sentencing guidelines “if the guideline range does not adequately reflect the seriousness of the offense conduct.” Our concern is based on the basis of the decision as to when the guideline range does not adequately reflect the seriousness of the offense conduct. If this were adopted, we would suggest that the reasons for the departure must be clearly stated and that the amendment to Chapter 5 clearly state what is and is not acceptable as a basis for a departure.

5. The Treasury Department has recommended that the Commission amend its current minimum loss amount rule for stolen credit card offenses in Sec. 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 \$1,000 per access device. Given that the Identity Theft and Assumption Deterrence 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 (such as debit cards, bank account numbers, electronic serial numbers, and mobile identification numbers) and to place that amended rule in Sec. 2F1.1. Such a rule would have the effect of subjecting an offense that involves an unauthorized identification means -- is a credit card number to the same minimum loss amount as an offense that involves the stolen credit card itself. If the Commission should consider such an amendment, should the Commission additionally amend the rule to increase the minimum loss amount per access device, for example [\$500][\$750][\$1000] per access device? (Such an amendment may need to be coordinated with efforts to revise the theft guideline in connection with offenses involving access devices and cellular phone cloning.)

Response -- Based on our reading of the documents provided, we are unsure of the effect of this proposal. We would point out that requiring a minimum loss per access device may adversely affect identity theft prosecutions. We have cases in which the defendant was found in possession of several individuals' means of identification where there had been no loss.

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., Secs. 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 (Sec. 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?

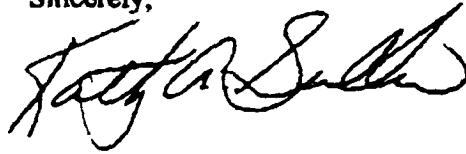
Response -- We agree that the Commission should provide for an enhancement for the criminal history of the defendant for prior offenses involving identity theft conduct under either approach adopted. We would suggest that the appropriate number of levels for enhancement should be tiered. For example, if the defendant has three or less prior convictions, the enhancement should be two levels. Four-seven prior convictions, the enhancement should be four levels. However, we have concerns that the prior convictions not be too remote to the current charge. Therefore, we would

suggest that the prior convictions have occurred within 10 years of the current charge to be considered.

We would agree that the enhancement should require a minimum offensive level.

We will be happy to discuss these concerns in more detail and provide the Commission with additional information that they may need.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathy A. Buller", written in a cursive style.

Kathy A. Buller
Counsel to the Inspector General