
Identity Theft

Final Report



Economic Crimes Policy Team

Andy Purdy (Chair)
Paula Desio
Linda Maxfield
Courtney Semisch
Paula Biderman
Tom Brown
Jeanneine Gabriel
Greg Gilmore
Cynthia Matthews
Mary Rushen

December 15, 1999

UNITED STATES SENTENCING COMMISSION

IDENTITY THEFT

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.

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

- 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 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.

TABLE OF CONTENTS

	<u>Page</u>
Executive Summary	i
I. Introduction	1
II. Legal Analysis	2
A. The Statute	2
B. Relevant Guidelines	5
1. Fraud-Based Guideline Application	5
2. Immigration-Based Guideline Application	6
III. External Sources of Information	7
IV. Analysis of Data	9
A. Overview	9
B. Methodology	9
C. Characteristics of the Unauthorized ID Means	10
1. General Observations	10
2. Number and Types	11
3. Breeder Documents	11
D. Nature of the Offense Conduct	14
1. General Observations	14
2. Victims	14
3. Loss Amounts	15
E. Sentencing Outcomes	16
1. General Observations	16
2. Sentencing Outcomes Under Section 1028	17
3. Conduct Relevant to the 15-Year Statutory Maximum	18
4. Conduct Relevant to the 20-Year Statutory Maximum	18
5. Terrorism Conduct Relevant to the 25-Year Statutory Maximum	19
V. Policy Considerations	19
Option One	21
Option Two	22
Option Three	23
1. Harm-Based Considerations	23
2. Offense Conduct Considerations	25
3. Prior Similar Criminal Conduct	27
Option Four	28
Appendices	viii

Appendices

Appendix A: Identify Theft and Assumption Deterrence Act of 1998

Appendix B: Title 18 United States Code § 1028 (1999)

Appendix C: List of Statutes Potentially Involving Identification Means

Appendix D: Explanation of Stratified Sampling

Appendix E: Illustrative Tables: Commission Data Sampling

Table 1 - Law Enforcement Agencies

Table 2 - Number and Type of Identification Means

Table 3 - Nature of Misused Identification Means

Table 4 - Fictitious vs. Actual Individuals

Table 5 - Distribution of Primary Sentencing Guidelines

Table 6 - Application of §2F1.1 Specific Offense Characteristics

Table 7 - Criminal History

Table 8 - Sentencing Outcomes

Table 9 - Chapter Three Adjustments

Appendix F: Illustrative Case Summaries

I. Introduction

The Identity Theft and Assumption Deterrence Act of 1998, (“Act”), enacted on October 30, 1998, 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. . . .”⁸ Congress also directed the Commission to consider the following specific factors in this review:⁹

- 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;
- 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.

⁸ Pub. L. 105-318(b)(1), Oct. 30, 1998, 112 Stat. 3007. *See* Appendix A.

⁹ *Id.* at § 4(b).

Part II of this Report, prepared by the Economic Crimes Policy Team,¹⁰ presents a detailed analysis of the new law, its legislative history, and relevant guidelines. Part III describes contacts with law enforcement agencies and consumer protection advocates as part of the staff's efforts to determine the frequency and nature of offense conduct involving the misuse of identification means. Part IV presents the results of the extensive analysis of Commission data that was developed in an effort to provide systematic, quantitative information on the scope of offense conduct covered by the new law. The Report concludes in Part V with preliminary policy options and approaches for the Commission's consideration in assessing and implementing the congressional directives to provide appropriate penalties for the offense conduct covered by the new law.

II. Legal Analysis

A. The Statute

The Act criminalizes the *unauthorized use or transfer of a means of identification*¹¹ 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. The new definition of "identification means" is very broad and encompasses the existing definition of "identification document" in 18 U.S.C. § 1028.¹²

The 15-year statutory maximum attaches to the fraudulent transfer or use of *more than one identification means* if more than *\$1,000 aggregate value is obtained during a one year period*.¹³

¹⁰ The Report was prepared by the staff's Economic Crimes Policy Team, which is directed by Acting General Counsel Andy Purdy. Team members designated to take the lead on the identity theft issue are Paula Desio, Linda Maxfield, and Courtney Semisch. Assistance was provided by Paula Biderman, Tom Brown, Jeanneine Gabriel, Janeen Gaffney, Greg Gilmore, Cynthia Matthews, and Mary Rushen.

¹¹ "Means of identification" is statutorily defined as "any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number; (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; (C) unique electronic identification number, address, or routing code; or (D) telecommunication identifying information or access device (as [previously] defined in section 1029(e))." See Appendix B for the full text of 18 U.S.C. § 1028 as amended by the Act.

¹² "Identification document" is defined as "a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals." 18 U.S.C. § 1028 (d)(2). An identification document containing one or more identification means will be considered a *single* identification means. 18 U.S.C. § 1028(h).

¹³ The 15-year statutory maximum of 18 U.S.C. § 1028(b)(1) (A) and (B) continues to apply to the production or transfer of **five or more identification documents** irrespective of dollar value involved, or to the production or transfer of even a **single identification document issued by the federal or a state government**.

If the \$1,000 monetary threshold is not satisfied within a year, the statutory maximum is three years. Specified conditions must exist for the enhanced 20- and 25-year statutory maximums. The 20-year statutory maximum attaches if the offense involving identification means or documents is committed to facilitate certain drug trafficking crimes and crimes of violence, as well as to the second conviction under the new law. The 25-year statutory maximum attaches if the offense involving identification means or documents is committed to facilitate an act of international terrorism.

Although the legislative history of the Act manifests a congressional intent to prevent the federalization of “innumerable state and local offenses, such as the status offense[s] of underage teenagers using fake ID cards to gain entrance to bars or to buy cigarettes,”¹⁴ in fact the statute as written covers an extremely broad range of conduct. By virtue of its definition of “identification means,” the new law captures offense conduct that is already criminalized by a multitude of other statutes. For example, the unauthorized use of credit cards (access devices) is already prosecuted under 18 U.S.C. § 1029, but now also falls within the ambit of the newly-enacted 18 U.S.C. § 1028(a)(7). Other similar examples include: providing a false social security number and other identification information in order to obtain a tax refund (traditional tax fraud offense), and presenting false passports or immigration documents by using the names and addresses and photos of lawful residents or citizens to enter the United States (traditional immigration fraud offense conduct). The offense conduct of some 180 federal criminal statutes can potentially involve the misuse of identification means, many of them as an element of the offense.

Another important change occasioned by the Act is to expand the range of identifiable victims to the individual whose identification means are fraudulently used. Previously, under most offenses that implicate the misuse of identification means, such as immigration fraud or credit card fraud, the “victim” was generally considered to be either the government or the financial institution that, under principles of commercial law, sustains the economic loss of a credit card theft or check forgery. For sentencing purposes, the individual was not generally taken into consideration as a victim of the offense conduct, nor were the harms suffered by the individual considered, as direct financial loss.¹⁵

The legislative history of the Act and the language of the statute make clear that the protections and punishment provided by the new law are intended to reach those instances where identification means are misused to such an extent as to cause significant harm to an individual, and these harms are not limited to readily quantifiable monetary losses.¹⁶ In specifying that the

¹⁴ 144 CONG. REC. S.9503 (daily ed. July 30, 1998) (statement of Sen. Leahy).

¹⁵ As Senator Hatch (R-Ut.), a co-sponsor of the legislation, observed, “Unfortunately, these [other criminal] statutes do little to compensate the victim or address the horror suffered by the individual whose life has been invaded. Often these general criminal statutes treat only affected banks, credit bureaus, and other financial institutions as the victim, leaving the primary victim, the innocent person, without recourse to reclaim his or her life and identity.” 144 CONG. REC. S. 9504 (daily ed. July 30, 1998) (statement of Sen. Hatch).

¹⁶ A victim-constituent of Senator Kyl (R-Az), also a co-sponsor of the legislation “spent many hours working with [the legislative] staff on the identity-theft proposal.” The perpetrator “possessed enough information

victims of identity theft offenses are to be recognized for sentencing purposes,¹⁷ the new law adopts the definition of “victim” at 18 U.S.C. § 3663A(a)(2):

. . . [T]he term ‘victim’ means a person directly and proximately harmed as a result of the commission of an offense.

The Act then delineates two types of such direct and proximate harm of identity theft—harm to reputation and inconvenience—but also extends considerations of harm to “other difficulties resulting from the offense.”¹⁸ A typical example of these difficulties is an undeserved poor credit rating that impedes job opportunities or the ability to obtain financing. A more rare but no less egregious example of harm flowing from identity theft is an unmerited arrest record or detention by law enforcement personnel.¹⁹

In light of the breadth of the new statute, a number of questions arise that do not lend themselves to one definitive answer, including: precisely how the new law will be used by federal prosecutors, whether it will be charged alone or in combination with other actionable offenses such as 18 U.S.C. § 1029 (credit card/access device fraud), 18 U.S.C. § 922 (unlawful acquisition of a firearm), or 18 U.S.C. §1341 (mail fraud), and whether and how the statute will be applied to offense conduct that does not have an identifiable loss amount.²⁰ The Commission is faced with the challenge, particularly in the absence of specific prosecutorial guidance and judicial experience on the new law’s application, of delineating the range of offense conduct and associated aggravating characteristics in setting penalties for violations of the new law consistent with the structure of the existing sentencing guidelines.²¹

to have a driver’s license and credit cards issued in [the victim’s] name. With these credit cards, the criminal made purchases under [the victim’s name] that exceeded \$100,000. While trashing [the victim’s] credit, and carrying a license as the [victim] in his wallet, the identity thief was busy committing serious crimes.” 143 CONG. REC. S.2742 (daily ed. Mar. 21, 1997) (statement of Sen. Kyle).

¹⁷ Pub. L. 105-318(b)(1), § 4(b).

¹⁸ *Id.*

¹⁹ See Washington Post, August 18, 1999, at B2. See also “Identity Theft: When Bad Things Happen to Your Good Name,” Federal Trade Commission, November, 1999 at 10.

²⁰ The Department of Justice has directed that instances of identity theft that do not meet the threshold amount of \$1,000 within one year should be referred to state and local law enforcement authorities, “unless there is evidence of a pattern of individual occurrences that suggests the presence of a larger scheme or organized conspiracy if there is sufficient evidence that supports prosecution for other federal criminal violations.” Department of Justice, “Law Enforcement Agency Guidance Memorandum,” July, 1999.

²¹ Only one defendant is known to have been convicted under the new law. At sentencing, §2F1.1 was applied. The defendant falsely represented his name and social security number to obtain his job and to claim social security disability benefits. The defendant used his cousin’s name to apply for a social security number, a state identification card, credit, and checking and savings accounts. There is no discussion in the Pre-Sentence Report of whether there was either monetary or non-monetary harm caused to the individual whose ID means were

B. Relevant Guidelines

The new law penalizing the unauthorized use of identification means was added to section 1028 of Title 18 of the United States Code. Prior to the Act, the first six subsections of section 1028 were collectively designated as “Fraud and related activity in connection with identification documents” (emphasis added). The statutory index in Appendix A lists three guideline sections as applicable to violations of section 1028. These are §2F1.1, the fraud guideline, and §§2L2.1 and 2L2.2, which govern the misuse of immigration and naturalization documents. Application note 11 of the commentary to §2F1.1 refers the sentencing court to §2L2.1 or §2L2.2 when the fraud was committed for the primary purpose of violating or assisting others to violate the immigration or naturalization laws. As a preliminary matter, the Commission needs to determine whether these guideline references are sufficient for section 1028(a)(7) in light of the breadth and the new law and the congressional directives.

1. Fraud-Based Guideline Application

A number of the factors contained in the congressional directive are already considered to some extent in the applicable guidelines. For example, §2F1.1 already takes into account (at least in part) the first factor—the number of victims involved in the offense—with the enhancement for a scheme to defraud more than one victim.²² In this context, however, application note 4 limits the definition of “victim” to the “person or entity from which the funds are to come directly.” As the Eleventh Circuit noted in a recent case of identity theft, application note 4 makes it clear that the “multiple victim adjustment of §2F1.1(b)(2)(B) account[s] solely for the two financial institutions and the telephone provider that [the defendant] defrauded . . . [It does] not consider the indirect victims . . . who suffered because of [the] scheme.”²³

Similarly, the language in Chapter Three on multiple counts (grouping) may discourage consideration of individual victims of identity theft. Application note 2 to §3D1.2 states that the term “victim” is not intended to include indirect or secondary victims. Without clearer guidance here and in other contexts in the guidelines, sentencing courts may not consider the individual whose identifications means are fraudulently used as “victims” for sentencing purposes.

Generally, such consequential damages mentioned in the congressional directives, such as “harm to reputation, inconvenience and other difficulties from the offense,” are not accounted for in the guidelines. To a limited extent, there is some provision in this regard in the fraud guideline

misused. These factors were used to support the two-level enhancement for more than minimal planning under §2F1.1(b)(2)(A). Losses totaling \$72,000 resulted in a six-level enhancement under §2F1.1(b)(1)(G). The total adjusted offense level of 14 with a Criminal History Category IV resulted in a 21-month sentence of incarceration.

²² §2F1.1(b)(2) provides for a two level increase if the “offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim.”

²³ United States. v. Melvin, 187 F. 3d 1316, 1321 (11th Cir. 1999).

at §2F1.1, at application notes 11 and 12. When “loss does not fully capture the harmfulness and seriousness of the conduct,” an upward departure may be warranted under either note 11(a) when “a primary objective of the fraud was non-monetary or the fraud caused or risked reasonably foreseeable substantial non-monetary harm,” or under note 11(c) when “the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma.” Nonetheless, these standards for an upward departure may fail to capture the harm caused to the individual victims of identity theft. At least one sentencing court has found that the emotional distress caused by a victim’s inability to obtain financing because of a damaged credit rating does not fulfill the criteria for an upward departure.²⁴

Application note 12, on the other hand, specifically addresses the possibility of upward departures for offenses involving fraudulent identification and access devices (violations of 18 U.S.C. §§ 1028 and 1029) where the actual loss does not adequately reflect the seriousness of the conduct. While this standard is certainly applicable to the harm caused to individual victims in many instances of identity theft,²⁵ actual upward departures on this basis may be infrequent in the absence of specific directives in the guidelines.

2. Immigration-Based Guideline Application

The majority of offenses sentenced under section 1028(1)-(6) are immigration offenses. The focus of these guidelines at Part L of Chapter Two is on the harm to the societal interest in protecting the integrity of nation’s borders, and society-at-large is considered the direct victim.²⁶ The immigration guidelines do not take into account the number of victims or any financial loss caused by the fraudulent use of immigration documents or passports. Similarly, there is no provision for incorporating the corollary harm to the individual victims whose identification information or documents have been misused.

The number of identification means involved in the offense conduct—one of the specific congressional factors to be considered—does affect the penalty levels under one of the immigration guidelines, however. Under §2L2.1,²⁷ increases of three, six, and nine levels are possible if the offense involved 6-24, 25-99, or more than 100 documents, respectively. In

²⁴ See Case No. 358708 in the Commission’s data sample.

²⁵ The Eleventh Circuit, for example, upheld the district court’s total 15-level upward departure for an employee at a children’s hospital who obtained personal information of 135 patients and procured 36 unauthorized credit cards. The court gave a two-level enhancement under §3A1.1 because of the vulnerable nature of the victims and based the remainder of the upward departure generally on notes 11 and 12 of the commentary to the §2F1.1 fraud guideline. United States v. Melvin, 187 F.3d at 1322-23.

²⁶ See §3D1.2 Application Note 2.

²⁷ Section 2L2.1 is entitled “Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law.”

contrast, under §2L2.2²⁸ there is no consideration of the number of documents involved in the offense conduct. The distinction involving the number of documents used is based on the fact that §2L2.2 is applicable when only the defendant tried to illegally enter the United States, in contrast to §2L2.1, which applies when a defendant smuggles other individuals, often for profit. As a practical matter, an individual attempting to cross the border with a handful of false identification documents does not currently receive an enhancement under the guidelines for multiple documents, whereas the number of documents used by a professional smuggler is considered an indicia of the more serious nature of offense conduct.

The three guidelines addressed above are the ones that are currently referenced to section 1028 in the Statutory Index of Appendix A. As the discussion in Parts IV and V will illustrate, the range of offense conduct covered by the new identity theft potentially implicates a number of additional guidelines, depending upon how the Commission applies the statutory directives in the context of the guideline structure.

III. External Sources of Information

The prevention, detection, and prosecution of identity theft involves the resources of numerous law enforcement agencies and jurisdictions. During the course of its work, the Team consulted with the Criminal Division of the Department of Justice; the U.S. Secret Service (which has jurisdiction over credit card and other access device fraud, fraudulent identification, and financial fraud involving computer access),²⁹ the U.S. Postal Service (which focuses on account takeover fraud perpetrated through the diversion of the U.S. mails),³⁰ the U.S. Marshals Service (which tracks fugitives), the Inspector General of the Social Security Administration (which focuses on the use of social security numbers to commit all types of fraud), and, the Immigration and Naturalization Service (which focuses on counterfeit documents and the fraudulent use of legitimate documents for entry into the United States).³¹

To more fully explore the implications of this new law, the Attorney General's Council on White Collar Crime designated a Subcommittee on Identity Theft within the Law Enforcement Initiatives Committee to examine identity theft trends and enforcement strategies. Representatives

²⁸ Section 2L2.2 is entitled "Fraudulently Acquiring Documents Relating to Naturalization, Citizenship or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport."

²⁹ The Secret Service drafted and promoted the legislation that was ultimately enacted into law as 18 U.S.C. § 1028(a)(7).

³⁰ The Postal Service also drafted legislation in 1998 which defined identity theft and proposed sentencing enhancements based on the volume of theft of mail and credit line of access devices.

³¹ The Secret Service, state law enforcement agencies, the Federal Bureau of Investigation, and the Immigration and Naturalization Service were the most frequently involved agencies in the cases examined by the Team. In 41 percent of the cases, two or more law enforcement agencies worked together. *See* Appendix G, Table 1.

from over a dozen executive agencies, as well as the National Association of Attorneys General, the National District Attorneys Association, and the International Association of Chiefs of Police³² attend these monthly meetings to exchange information and identify areas for improved coordination. The Commission staff have participated in the Subcommittee's monthly meetings and have made two briefings on the Team's research and preliminary analysis of data. The Department of Justice will coordinate the concerns of the federal law enforcement agencies to present a proposal for sentencing enhancements under the Act to the Commission.

The Federal Trade Commission, which was charged under the new law with establishing a clearinghouse for consumer reporting of identity theft incidences, is developing a reporting and tracking methodology of identity theft-related consumer complaints for use by law enforcement agencies. The Federal Trade Commission has also prepared a reference book for consumers about the prevention and detection of identity theft, and lists federal, state, and non-governmental sources of assistance.³³

At the direction of the President, on March 15 and 16, 2000, the Treasury Department will convene a National Summit on Identity Theft to announce a framework for development of a public-private partnership on identity theft. Commission staff has been invited to deliver a presentation on the Commission's research, analysis, and current sentencing developments.

³² While a number of states have begun to enact laws directed at "identity crimes," most of these laws are directed at the unlawful access of financial records or the unlawful procurement of goods and services. The few state laws that are broader in scope (Arizona and California, for example) are of such recent vintage as to provide little practical guidance at this time with respect to offense characteristics and sentencing factors.

³³ "Identity Theft: When Bad Things Happen to Your Good Name," Federal Trade Commission, November, 1999.

IV. Analysis of Data

A. Overview

The data collection phase of this project was guided by two major purposes:

- address the issues raised by the new law and the factors set forth by Congress in its directives to the Commission, and
- systematically collect and analyze the range of offense conduct covered by the new identity theft law.³⁴

In the absence of comprehensive and consistent quantifiable data from law enforcement agencies about the full range of offense conduct associated with identity theft,³⁵ the staff also developed a systematic and manageable method of analyzing existing Commission data to assist the Commission with its policy considerations.

B. Methodology

The initial data collection effort focused on the guidelines used in association with convictions under 18 U.S.C. § 1028 before subsection (a)(7) was added to cover identity theft. However, a focus on section 1028 cases alone would have been of little practical value in identifying the full range of offense conduct covered by the new law. Therefore, the full range of federal statutes that proscribe the same offense conduct—the unauthorized use of identification means—that can now also be prosecuted under the new identity theft law at section 1028(a)(7) was identified. This structured search resulted in a list of 180 separate federal statutes, comprised of 216 subsections.³⁶ These include, by way of illustration, credit card fraud (18 U.S.C. § 1029); tax fraud (26 U.S.C. § 7206); a plethora of false statement (18 U.S.C. §§ 1001,1030,1015,1035) and immigration/nationality (8 U.S.C. §§ 1160, 1325; 18 U.S.C. §§ 911, 1542, 1546) statutes; drug, alcohol, and gun control statutes (21 U.S.C. § 843; 26 U.S.C. § 5603; 18 U.S.C. §922(a)(6)); and statutes governing the use and control of social security data (42 U.S.C. § 408).

A search of the Commission’s FY 1998 datafiles indicated a total of 6,214 cases and at least one conviction with respect to 94 of the 180 statutes. From these 6,214 cases, a stratified

³⁴ While anecdotal information from law enforcement sources is abundant, there is a corresponding dearth of quantifiable information on the incidence and scope of the offense conduct that comprises “identity theft” as defined by the new law. The General Accounting Office recognized the lack of consistent statistical data on identity theft as a separate offense category among law enforcement agencies. *See, generally*, GAO/GGD-98-100BR, “Identity Fraud: Information on Prevalence, Cost, and Internet Impact is Limited” (May, 1998).

³⁵ *Id.* at 25-37.

³⁶ *See* Appendix C for a complete list of these statutes.

sample was generated,³⁷ a detailed coding instrument calibrated to the legislative directives was developed, and 305 cases were analyzed. Of these 305 cases, 146 involved one or more “identification means” (“ID means”) as defined by the new law, and were coded by the Team.

Broadly speaking, the data and findings below convey the breadth of conduct now subsumed under the broad statutory companion definitions of “identity means” and “identity theft.”³⁸ The analysis attempted to identify the salient characteristics of the offense conduct that can be prosecuted as identity theft, as well as aggravating and mitigating factors that may inform policy decisions. The following overview of the data specifically addresses the relevant legislative directives.

C. Characteristics of the Unauthorized ID Means

1. General Observations

In light of the congressional directive to consider the number of ID means when assessing the appropriateness of enhanced penalties, the staff collected extensive information regarding the nature of ID means involved in the offense conduct sampled. Credit cards, driver’s licenses, social security numbers, and birth certificates were the most common ID means in the cases in the sample. Most offenders in the sample used ten or fewer ID means, and the majority of ID means in the sample (60%) were genuine physical objects such as driver’s licenses and credit cards, as opposed to lists of information. When lists of information comprised the ID means in the offense conduct, they consisted primarily of lists of names and/or credit card numbers, and social security numbers.

A significant aspect of ID means-related offense conduct is the use of “breeder” ID means or documents. This term refers to the unauthorized use of ID means to generate and acquire additional fraudulent ID means. Driver’s licenses, social security numbers, and birth certificates were most frequently used to generate or “breed” other fraudulent ID means. In contrast, the sample reflected that immigration documents are rarely used to “breed” other fraudulent ID means. Nonetheless, any document or ID means can be used to “breed” others.

³⁷ See Appendix D for a complete explanation of the nature and relevance of a stratified sample.

³⁸ Because the resulting sample is not representative of the entire FY98 datafile, results from the analysis cannot be used to make inferences about all cases. Nonetheless, the cases in the sample are useful tools to portray accurately the range of ID means-related conduct for cases convicted of the statutes from which they were selected.

2. Number and Types

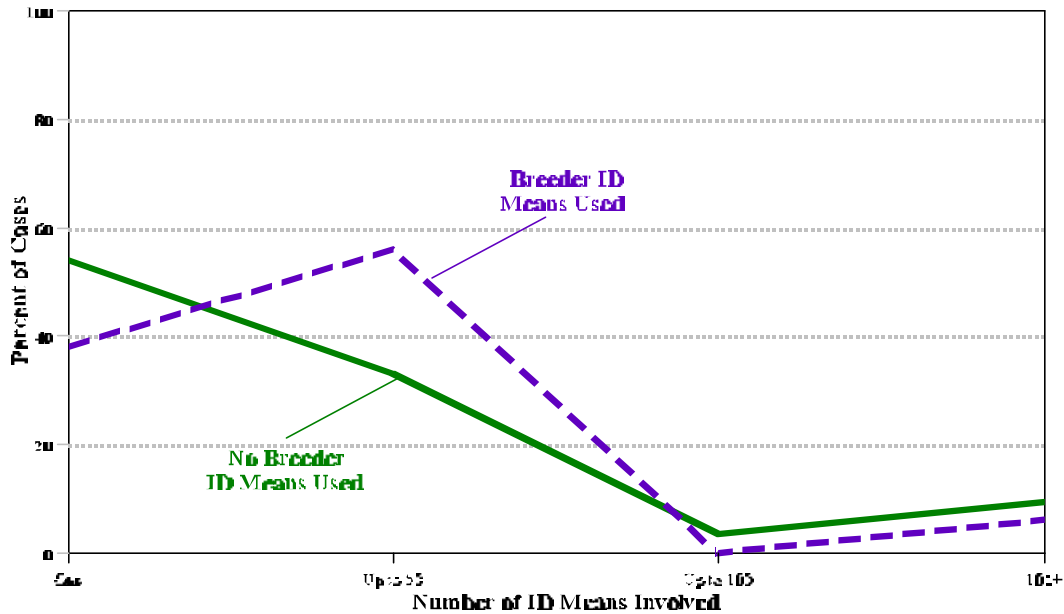
The most frequently misused ID means in the sample were credit cards, driver's licenses, social security numbers, birth certificates, checks, and alien registration cards. Military identifications, physicians' DEA numbers and prescription pads, passports, Medicaid cards, and ATM cards also appeared in the sample. The majority of the cases involved a single ID means, regardless of type, except for credit cards, and 64 percent of the cases involved ten or fewer ID means.¹² In six cases, however, the owner of the fraudulent used ID means consented to or was otherwise aware of its misuse. The data results in this regard suggest that reliance solely on the number of ID means involved in the offense may fail to take into account such situations where the individual "victim" is clearly not the one that Congress intended in enacting this legislation.

3. Breeder Documents

A significant aspect of identity theft involves the use of "breeder" documents or "breeder" ID means. "Breeder" ID means can be of any type; their significance is in their use to obtain additional, separate false or fraudulent ID means which then pass into the exclusive control of the perpetrator without the victim's knowledge, or ability to know. The importance of breeder ID means in the context of identity theft is the sophistication of the scheme and the ability to delay detection, thus causing potentially greater loss and harm to the victims.

¹² The possession of multiple credit cards and/or credit account numbers by offenders may reflect the nature of the credit industry, in that obtaining credit from a subsequent lender becomes more routine once an initial account has been established. In addition, "dumpster diving," or unauthorized computer access at locations like car rental companies, often yields mass quantities of credit-related information and permits perpetrators to obtain numerous credit cards. The most extreme instance in the sample involved a defendant in possession of 5,191 credit card account numbers, although the actual offense conduct for which he was prosecuted involved a million dollar loss to the brokerage accounts of twenty-seven individuals. *See* Summary of Case No. 396241 at Appendix F.

Figure 1
Number of ID Means Involved in
Breeder and Non-Breeder Means Cases*



*SOURCE: U.S. Sentencing Commission ID Theft Database. Of the 146 cases in the sample, the 49 that involved the use of breeder ID means are represented by the dashed line and the 97 that did not involve the use of breeder ID means are represented by the solid line.

Approximately one third of the cases in the sample involved the use of breeder documents. Given that the offenders in these cases acquired additional ID means, the overall number of ID means involved tends to be greater than for cases without breeder documents. As illustrated in Figure 1, more than 50 percent of non-breeder document cases involved a single ID means, while the same proportion of breeder document cases involved between two and 50 identification means. Cases involving more than 50 identification means are relatively uncommon for both categories.

Some ID means are much more commonly used as ‘breeders’ than others. As illustrated in Table 1, driver’s licenses, social security numbers, and birth certificates were the most frequently occurring breeder ID means (83%, 82%, and 55% of cases, respectively). Breeder ID means occur most often in the course of committing credit card fraud (for the purpose of establishing the “authenticity” required to obtain a new account), although their incidence is fairly frequent in conjunction with check fraud, document fraud/counterfeiting, signature forgery, and bank/loan fraud as well. In contrast, immigration fraud and government benefits fraud generally involve misstatements on application forms or the outright purchase of fraudulent documents, so that there is less necessity for “breeder” documents in committing this offense conduct.

Table 1¹³
Relationship of Breeder Documents to ID Means Offense Conduct

ID Means Offense Conduct	Total Number of Cases Involving This Conduct	Number of Cases Involving Breeder Documents
Credit Card Fraud	44	27
Check Fraud	36	13
Document/ID Means Counterfeiting	30	12
Immigration Document Fraud	29	4
Signature Forgery	25	12
Bank/Loan Fraud	22	11
Fraudulently Obtained Driver's License	13	12
Government Benefits	9	4
Trafficking in Fraudulent Documents	7	2
Tax Fraud	4	2
Firearms	3	2
Drugs	2	1

¹³ The categories in Table 1 are defined by the following ranges of offense conduct: credit card fraud (using a credit card to obtain a cash advance, make purchases on an existing account, apply for a new account); check fraud (obtaining and cashing checks for an existing account, creating and using counterfeit checks); immigration document fraud (misuse of a passport, illegal entry, and obtaining employment without proper authorization); bank/loan fraud (making applications for car loans, mortgages, or other loans, creating new accounts, making withdrawals from existing accounts); signature forgery (on prescriptions, loan applications, savings bonds).

D. Nature of the Offense Conduct

1. General Observations

Consistent with the congressional directive, the analysis also focused on the extent of victimization and the amount of loss. Most of the cases in the sample involved the ID means of known actual, as opposed to fictitious, individuals, and the majority of these victimized single rather than multiple individuals.

Nearly half of the cases in the sample were sentenced under the fraud (§2F1.1) guideline with losses generally falling between \$5,000 and \$40,000. While the majority of cases involving both breeder and non-breeder ID means were sentenced under the fraud guideline, the non-breeder cases were sentenced under a much wider spectrum of guidelines than the breeder cases.

2. Victims

a. Extent of Victimization

Nearly 60 percent of the cases in the sample involved the ID means of known actual, as opposed to fictitious, individuals.¹⁴ However, individuals have not historically been considered the victims of ID means-related offenses. Consistent with this omission, the PSRs in only 11 of the 85 cases involving ID means of actual individuals mention any losses or damages. Monetary losses were reported for five of the 11 individual victims, while harm to credit, denial of loans, and or emotional stress was reported for victims in the remaining six cases.

Significantly, the number of victims does not vary according to the use of breeder documents as part of the offense conduct. Nearly 60 percent of cases both with and without breeder documents involve single individual victims. Similarly, both categories of cases have a very low proportion of cases involving more than 50 victims.

Almost 90 percent of the cases received the two-level enhancement at §2F1.1(b)(2) for “more than minimal planning/more than one victim.” Of the 10 percent of cases in the sample (n=9) that did not receive the enhancement, only two cases would qualify for the §2F1.1(b)(2) enhancement if the individual victim of ID means-related offense conduct were included in the

¹⁴ Whether all the provisions of the statute apply in instances where the individual victim is a fictitious entity may be open to challenge as cases are brought under the new law. According to a co-sponsor of the new law, its purpose was to recognize and assist the *victim* of the crime, a purpose that arguably would be inconsistent with the use of ID means for a fictitious individual. (See 143 CONG. REC. S2741-2 (daily ed. Mar. 21, 1997) (statement of Sen. Kyle). Similarly, the section 1028(d)(3) definition of “means of identification” as “any name or number . . . to identify a *specific individual*” (emphasis added) suggests a unique and actual individual, as opposed to a fictitious one.

Significant for sentencing purposes, however, is the fact that many of the factors enumerated in the legislative directives, *e.g.*, harm to a victim’s reputation and inconvenience to the victim, will be inapplicable when the misused ID means is not that of an actual individual.

guidelines' definition of "victim."¹⁵ Only one case sampled merited the enhancement of §2F1.1(b)(5) for use of the foreign bank accounts.¹⁶ Finally, only two defendants in the entire 146-case sample received the guideline adjustment at §3A1.1(b) for "vulnerable victim."¹⁷

b. Victim/Offender Relationship

As part of the examination of the relationship of the defendant to the individual victim(s) of the identity theft it was necessary to determine how many of the ID means corresponded to *actual* as opposed to *fictitious* (or unknown) individuals. The most frequently-used ID means corresponding to *fictitious individuals* were alien registration cards, driver's licenses, and birth certificates.¹⁸ Where it was possible to determine that at least one of the unauthorized ID means used by the perpetrator/defendant corresponded to an *actual individual victim*, the perpetrator/defendant was related to, or acquainted with, the victim in 70 percent of such cases.

3. Loss Amounts

Almost half of the cases in the sample involved fraud-related offense conduct sentenced under §2F1.1. Eighteen percent of these cases had a loss amount under \$2,000, so there was no enhancement under §2F1.1(b)(1). None of these cases met the \$1,000 threshold of the new identity theft law.¹⁹

¹⁵ See §2F1.1, comment. (n.4) and §3D1.2, comment. (n. 2).

¹⁶ This enhancement applied to cases sentenced before the §2F1.1(b)(5) enhancement was broadened in May, 1998 to cover "sophisticated concealment" and then, in September, 1998, to cover "sophisticated means."

¹⁷ One instance involved a hospital employee's theft of the mail of Veterans Administration patients and access to patient records to obtain additional personal information. The offender then completed credit applications and obtained new cards in the patients' names. Because many of the patients were already suffering from stress and paranoia, they were determined to be "vulnerable" for purposes of the guideline adjustment. The defendant in this case was found to have caused a \$25,905 loss, and was sentenced to 11 months alternative confinement.

The second case involved several types of offense conduct, but the ID means-related conduct (using a DEA number to forge a doctor's signature to obtain drugs for her own use) was not directly related to the defendant's additional conduct of tampering with patient-controlled analgesic devices by replacing morphine with saline solution. This defendant, who was convicted of both tampering with consumer products and the unauthorized dispensing of drugs, was sentenced to 70 months' imprisonment.

¹⁸ See Appendix E, Table 4.

¹⁹ The Act establishes a 15-year maximum penalty for the unauthorized transfer or use of one or more ID means if more than \$1,000 aggregate value is obtained during a one-year period. See 18 U.S.C. 1028(b)(1)(D), as added by Section 3(b)(1) of the Identity Theft and Assumption Deterrence Act of 1998.

Of the overwhelming majority (82 %) of cases where the defendant received the §2F1.1(b)(1) enhancement, the majority corresponded to loss amounts between \$5,000 and \$40,000. Only 16 percent received enhancements for loss amounts greater than \$200,000.²⁰

The majority of cases involving both breeder and non-breeder ID means are sentenced under the fraud guideline. However, a much greater proportion of cases involving breeder ID means are sentenced under the fraud guideline, compared to cases involving non-breeder ID means (74 % versus 53%). In other words, there is a much broader spectrum of offense conduct and corresponding guidelines for cases without breeder documents. When breeder documents occur, the nature of the offense conduct is much more likely to fall under the fraud guidelines.

Although more cases involving the use of breeder documents are sentenced under the fraud guidelines, there is no differentiation between these two categories based on their corresponding loss amounts. The majority of cases in both categories have loss amounts below \$40,000. And, despite some variation across loss amount categories, there is no clear pattern of loss amounts that distinguishes the cases involving breeder ID means from those cases without breeders.

E. Sentencing Outcomes

1. General Observations

Because the offense conduct involving the misuse of ID means can theoretically implicate over 180 statutes, a correspondingly large number of sentencing guidelines are likely to be implicated. Despite the fact that the sample was selected from 94 statutes of conviction, however, the vast majority of the cases in the sample (79%) were sentenced under two primary guideline categories: fraud/theft and immigration. The primary sentencing guidelines for the remaining 21 percent of the cases, however, vary dramatically (*e.g.*, money laundering, tax, controlled substances, firearms, administration of justice, civil rights, assault),²¹ again reflecting the breadth of offense conduct that may potentially involve the misuse of ID means and the sampling method used to select these cases.

Three-quarters of the defendants sentenced under the fraud guidelines received sentences of confinement which averaged 16 months. Similarly 83 percent of the defendants with immigration-related offense conduct involving the misuse of ID means were incarcerated, but the average sentence of confinement was 10 months.²²

2. Sentencing Outcomes Under Section 1028

²⁰ See Appendix E, Table 6. Four cases in the sample were sentenced under the theft guidelines and met the \$1,000 threshold of the loss table at §2B1.1(b).

²¹ See Appendix E, Table 5.

²² See Appendix E, Table 8.

The new identity theft law has been incorporated within 18 U.S.C. § 1028, which has historically proscribed fraud in connection with *identification documents*. While a review of cases sentenced under this law proved to be unworkable for the purpose of identifying the full range of offense conduct covered by the new law, the data from these cases is useful for assessing the need for enhanced penalties under the new provisions at section 1028(a)(7).

Table 2
18 § 1028 Convictions: FY96 to FY98

	Cases with a Single §1028 Conviction Only ²³		Cases with at Least One §1028 Conviction ²⁴	
	All Cases	Immigration Excluded	All Cases	Immigration Excluded
Total	1,491	60	651	116
Percent Imprisoned	31.8	48.4	80.7	69.9
Average Prison Length (months)	5	10	9	26

The overwhelming majority—82 percent—of section 1028 cases sentenced in the past three years, before either the enactment of 18 U.S.C. § 1028(a)(7) or the prosecution of any cases under this newly enacted subsection, were immigration-related offenses. Only 16 percent involved fraud, theft, and counterfeiting.²⁵ Half of the non-immigration defendants with a single section 1028 conviction were sentenced to prison, and the average prison sentence was ten months. As illustrated in Table 2, when section 1028 convictions occurred in conjunction with one or more other statutes, the imprisonment rate rises to 70 percent, and the average prison sentence increased to 26 months.

3. Conduct Relevant to the 15-Year Statutory Maximum

The Act establishes a 15-year maximum penalty for the unauthorized transfer or use of one or more ID means if more than \$1,000 aggregate value is obtained during a one-year period. Forty-

²³ These cases had a single count of conviction under 18 U.S.C. § 1028 and no other convictions. All non-immigration cases were sentenced under the fraud guidelines.

²⁴ These cases had at least one count of conviction under 18 U.S.C. § 1028 and at least one other conviction, which may or may not have been under the same statute.

²⁵ An insignificant number are associated with offense conduct sentenced under other types of guidelines: extortion/bribery (1 case); drugs (5 cases); administration of justice (2 cases); firearms (8 cases); and money laundering (1 case).

five of the cases in the sample met each of these criteria, and the median sentence for these offenders was 13 months.

4. Conduct Relevant to the 20-Year Statutory Maximum

The new law provides for a 20-year maximum penalty if the identity crime facilitates certain types of drug crimes and crimes of violence, or for a second conviction under the new law. Five cases in the sample of 146 potentially met the first criterion.²⁶ One case involved assault (shooting of a business partner), but the ID means-related offense conduct of using a false passport to attempt to flee the country arguably did not facilitate the assault.

The four remaining cases involved drug trafficking. In three of these cases the ID means-related conduct facilitated the drug trafficking, making the defendants eligible for the 20-year statutory maximum.²⁷

Because the law has been in effect for only one year, staff is not yet able to identify cases which implicate the second criterion for the 20-year statutory maximum. Nonetheless, the information on criminal history for the offenders sampled may be useful in this regard. Of the 83 defendants in the sample with prior convictions, 35 percent included offense conduct that involved the unauthorized use of some type of ID means.²⁸ All but one of these (an immigration case) involved theft, fraud, or forgery-related offense conduct. Eligibility for the enhanced 20-year statutory maximum will depend, of course, on prosecutorial charging decisions at both the state and federal levels, decisions which could be affected by the predictability of incarceration as a sentencing outcome.

5. Terrorism Conduct Relevant to the 25-Year Statutory Maximum

The new law also provides for a 25-year maximum penalty if the identity crime facilitates an act of international terrorism. None of the cases reviewed contained such conduct. Because of the importance of this provision to the new statute, the entire Commission datafile for the past three

²⁶ The five firearms cases in the sample involved the use of unauthorized ID means to purchase firearms. None of these cases on their facts appear to meet the criteria of “crimes of violence” as defined in 18 U.S.C. §§ 1028 (b)(2)(B) and 924(c)(3).

²⁷ In the first case a pharmacist used the prescription pads of physicians and forged the prescribed amounts to obtain extra pills to sell on the black market (9-year prison term under the money laundering guideline, §2S1.1). The second case involved the use of false names, addresses, and phone numbers by a defendant who was laundering the proceeds from his marijuana growing business (7-year prison term under §2S1.1). The third case involved a defendant who, having failed to surrender for his sentencing for a 1979 drug trafficking conviction, allegedly continued narcotics trafficking (and other offenses) through the use of numerous false identification documents over the course of 18 years (6-year prison term under §2F1.1, no loss amount involved). *See* Summary of Case No. 359894 at Appendix F.

²⁸ Twenty-four of these prior offenses were local or state offenses, four were federal, and one defendant had both state and federal prior convictions.

years was reviewed to locate cases that involved an act of international terrorism.²⁹ Only two such cases were located—one involving a World Trade Center bombing defendant, and the other involving violence against commercial U.S. aircraft in East Asia.

The World Trade Center defendant used, and was in possession of, numerous false identification documents such as photographs, bank documents, medical histories, education records, and photographs from which numerous false identities could have been created. The defendant, who was found guilty of a number of offenses that caused injury or death, was sentenced to life plus 240 years of imprisonment.³⁰ The defendant in the second case, who was found guilty of using explosives against U.S. commercial aircraft serving East Asia, also used false identification and travel documents, and was sentenced to life plus 60 years of imprisonment. Despite the unavailability of more examples, the penalty structure of most of the statutes under which similar acts of international terrorism are likely to be charged, in combination with the structure of sentencing guideline §3A1.4,³¹ suggest that sentences will most likely be at, or exceed, the 25-year statutory maximum of the new law.

V. Policy Considerations

In addressing the issues raised by the Identity Theft and Assumption Deterrence Act, the Commission has a range of options that can be used alone or in combination with one another. The selection of any or some of these options will be based on the Commission's determination about the scope of the offense conduct that merits increased punishment. As a threshold matter, the Commission will need to determine whether additional punishment should attach to any offense in which the misuse of ID means is part of the offense (*e.g.*, false statements on tax returns about the claimant's identity, purchase of a weapon by a convicted felon under a false name, escape from custody by using false identification, crossing the border with false identification documents) or only to certain aggravated forms of conduct (*e.g.*, affirmative identity theft).

The breadth of the statute suggests that Congress intended for potential additional punishment to apply to every type of offense involving the misuse of an ID means. Nonetheless, the legislative history clearly indicates that Congress was focused on the misuse of ID means in the context of financial and credit account take-overs.

²⁹ Although the sentencing guidelines were amended in 1996 to include an enhancement for acts of terrorism at §3A1.4, this guideline has not been applied to any cases sentenced through FY 1998. The cases which were reviewed for this study were selected based on a conviction under 18 U.S.C. § 2332b ("Acts of terrorism in transcending national boundaries").

³⁰ The offenses of conviction included: 18 U.S.C. § 844(d)(f) & (i); 18 U.S.C. §§ 33 & 34; 18 U.S.C. § 924(C); 18 U.S.C. § 1952; 18 U.S.C. § 111.

³¹ The guideline enhancement at §3A1.4 provides for a minimum base offense level of 32 and an automatic Criminal History of Category VI, with a corresponding incarceration range between 210 and 262 months.

Quite apart from the statute and the apparent legislative intent, it appears in fact that identity theft encompasses a continuum of offense conduct. The most basic type of identity theft occurs when a thief snatches a wallet and uses the stolen credit card to make a purchase. An illegal alien who uses a stolen passport solely for the purpose of gaining entry at the border also commits the most basic type of identity theft. In the former example, which is essentially traditional credit card fraud, the individual knows that he or she is a victim and has an immediate opportunity to report the stolen card and cancel unauthorized charges. Similarly, the victim whose passport is stolen is aware of the offense and can report it to the State Department so that its unlawful use can be curtailed.

Although a literal reading of the statute appears to cover even the most basic type of identity theft on the continuum, Congress's main focus in enacting this legislation was on a more sophisticated form of offense conduct that involves additional affirmative steps to misuse and control an individual's ID means. Irrespective of how the perpetrator comes into possession of the various identification means, the perpetrator fraudulently uses one or more ID means to "breed" additional identification means. These fraudulent ID means then pass into the perpetrator's exclusive control without the individual victim's knowledge or ability to know.

The perpetrator may subsequently use these "new" fraudulent ID means to facilitate the commission of additional offenses.³² The individual victims of such offenses are unlikely, in the normal course of events, to discover that their identity has been stolen and misused. Discovery of the crime may not occur until they have problems obtaining credit or are contacted by collection agencies. In some extreme circumstances, individual victims may be arrested by law enforcement authorities or subjected to bankruptcy proceedings as a result of the perpetrator having generated additional fraudulent documents in the individual's identity.

This type of offense conduct—affirmative identity theft—is considerably more sophisticated than basic identity theft because of the additional steps the perpetrator takes to "breed" additional documents to continue fraudulent conduct. Such conduct makes detection by both individual and institutional victims much more difficult. It has the potential to increase harm, both monetary and non-monetary, to the individual victims about whom Congress was particularly concerned in enacting this legislation, and can also result in substantial disruption of recordkeeping by governmental and quasi-governmental agencies.

Finally, at the extreme end of the continuum of offense conduct is the instance when a perpetrator obtains, misuses, and generates ID means to the extent of becoming "immersed" in the victim's identity. While these "take-over" occurrences or "assumptions" are extremely rare (there were none in the Commission's study, consistent with observations from law enforcement agencies), this pernicious manifestation of identity theft was profiled at the legislative hearings and may need to be addressed within the guideline structure as well. Because the primary issue here is the *scope* of the conduct that merits increased punishment, the options below present different

³² The legislative history, information from law enforcement sources, and the Commission's data analysis indicate that such affirmative identity theft occurs most often in the context of committing financial fraud.

approaches that range from covering a broad scope of conduct (*i.e.*, misuse of ID means that occurs in the context of any offense) to covering identity theft conduct that occurs only in the context of economic crimes to identity theft conduct that occurs only in the context of fraud and theft offenses.

Accordingly, 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, and Option Three is the most narrowly targeted to limiting sentencing enhancements and/or departures to the context of the fraud and theft guidelines. For ease and clarity of presentation, Option Three sets out the details of possible specific offense characteristics and departure provisions to take into account several aggravating factors prevalent in identity theft cases. Although presented in the context of the theft and fraud guidelines, any of those provisions can be modified and tailored to fit within either Option One or Two. Finally, Option Four is presented which creates a general upward departure in Chapter Five if the offense involving the fraudulent use of ID means causes harm not adequately taken into account in the guidelines.

Option One: Create an adjustment in Chapter Three whenever any identifications means is used with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of federal law or that constitutes a felony under any applicable State or local law.

Option One is the broadest approach presented for implementing the directive. By providing a Chapter Three adjustment, the use of one or more ID means to facilitate another offense would merit a sentencing adjustment for any offense in which that conduct occurs.³³ Although this approach may be the most direct method of implementing the directive, the problematic impact of adopting this broad approach is twofold: First, this approach might run the risk of treating all manifestations of offense conduct along the 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. This approach would have the effect of raising penalty levels for virtually every offense in which the misuse of an identification means is part of the offense conduct, whether or not that misuse is egregious or is a significant part of the offense conduct.

Second, this approach would implicate various non-monetary based guidelines (*e.g.*, immigration, firearms, drugs, and the administration of justice), as well as various economic crime guidelines (*e.g.*, theft, fraud, counterfeiting, tax, and money laundering). The arguable disadvantage to this approach is that certain guideline sections already take the offense characteristic of false identification documents or means into consideration when setting the base offense level. In addition, there is the possibility of a double counting problem regarding one of the immigration guidelines because §2L2.1 already provides a sentencing increase by means of a

³³ The Commission, of course, has the option of establishing numerical ranges for proportionate increases, based on the number of identification means, similar to the table in §2L2.1(b)(2), which provides 3, 6, and 9 level increases when 6-24, 25-99, and more than 100 documents or passports, respectively, are used in immigration and naturalization offenses.

specific offense characteristic for the number of false documents involved in the offense. To ameliorate this problem, the Chapter Three adjustment could limit its application to circumstances in which the conduct is not already accounted for by the particular Chapter Two guideline, or the particular Chapter Two guideline itself could prohibit application of the Chapter Three adjustment in such circumstances.

Option Two: Provide enhancements and/or departures in the economic crime guidelines (theft, fraud, counterfeiting, tax, money laundering) for the fraudulent use of any identification means in the course of the offense conduct.

Option Two limits sentencing enhancements and/or departure provisions to the context of economic crimes, an approach that is considerably less broad than Option One and somewhat more consistent with the primary focus of the legislative history on the financial ramifications of identity theft crimes. Nonetheless, currently the victim under most economic crime guidelines (excluding fraud and theft) like tax fraud, counterfeiting, and money laundering, is generally considered to be the government or “society at large.” In contrast, as amply manifested in the legislative history, Congress was focused on preventing and punishing conduct that has the primary effect of *harming individual victims*, particularly in terms of disrupted credit standings and financial reputation. Accordingly, although this approach limits some of the problems associated with the breadth of Option One, the Commission may determine that this approach still does not most accurately target the range of offense conduct about which Congress was most concerned unless, of course, those guidelines were modified to account for the harm to these individual victims.

Thus, there are two potential disadvantages of Option Two. First, it may cover conduct such as money laundering, counterfeiting, and tax fraud with respect to which the fraudulent use of ID means was not a compelling congressional concern. Second, and perhaps more important, incorporating an enhancement or departure provision into each economic crime guideline would require an intricate tailoring of the enhancement or departure provision for each such guideline because the fraudulent use of ID means would arise under each of these guidelines by different means and to different degrees.

Option Three: Provide enhancements and/or departures in the fraud and theft guidelines for the fraudulent use of any identifications means in the course of the offense conduct.

Option Three would limit sentencing increases for the misuse of ID means to offense conduct covered by the fraud and theft guidelines at §§2F1.1 and 2B1.1. As demonstrated by the Commission’s data, most offenses involving the misuse of ID means are sentenced under the fraud and theft guidelines. Limiting sentencing enhancements to the fraud and theft guidelines is also consistent with the existing guideline structure in that offenses involving false documentation and fraudulent misrepresentations are already sentenced under the fraud guideline. Furthermore, the offense conduct covered by the fraud and theft guidelines seems closest to the congressional focus and intent in recognizing the impact upon, and harm to, individual victims. In fashioning appropriate increased punishment for the fraudulent use of ID means, the following aggravating factors could be taken into account.

1. Harm-Based Considerations

a. Indirect Monetary Harms

The first issue the Commission would have to consider should it wish to explore the approach contained in Option Three is whether or not the current “loss” calculation in the fraud and theft guidelines adequately accounts for the pecuniary harm caused by the fraudulent use of ID means. Arguably the current definition does not provide adequate punishment because it does not provide for consideration of indirect monetary harms to the individual victims, such as the costs incurred in attempting to repair damaged credit ratings. One method for accommodating this situation is to provide a special rule in the commentary to §2F1.1 that, for purposes of identity theft, “loss” includes indirect monetary harms.³⁴ The fraud guideline already makes similar provisions for damages other than direct damages in procurement fraud and product substitution cases.

A variation on this method, to the extent that the ID means which is misused in the offense conduct is an “access device,”³⁵ is to amend the special rule in the theft guideline for minimum loss in credit card fraud cases to include all access devices (*e.g.*, ATM cards, telephone serial numbers).³⁶

Even if the “loss” definition is modified in one of the ways suggested above to include the indirect monetary harms of identity theft, the loss calculation may still not entirely capture the seriousness of the offense.³⁷ The Commission’s data together with experiential data suggest that the amount of indirect monetary costs incurred by individual victims in many such circumstances may be inadequate to substantially increase penalties under the existing fraud loss table.

³⁴ This is an issue that the Economic Crimes Policy Team has explored generally in the context of possible revision to the definition of “loss.”

³⁵ As defined in 18 U.S.C. § 1029(e)(1), “access device” includes “card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service equipment, or instrument identifier, or other means of account access . . . to obtain money, goods, services or any other thing of value, or that can be used to initiate a transfer of funds.”

³⁶ This is an issue that the Economic Crimes Policy Team has reviewed, particularly in the context of wireless telephone fraud. The prior Commission also considered the issue as it relates to intended loss. The Treasury Department has supported such an amendment to the guidelines, proposing to expand the rule to all access devices and increase the minimum loss amount per device to \$1,000.

³⁷ For example, identity theft victim, attorney Maria Frank, said that her identity theft “nightmare” lasted almost a year, and took 500 hours of her time. She wrote 90 letters (return receipt requested) to various agencies and incurred out-of-pocket costs of approximately \$10,000. This included postage, long distance calls, travel expenses, additional security systems to her home (she was also being stalked by the identity perpetrator), and many other incidentals. See <http://www.identitytheft.org>.

Nonetheless, the seriousness of such offense conduct can be addressed through enhancements and departures within the fraud and theft guidelines.

Two application notes to the fraud guideline may already invite upward departures in instances when identity theft occurs. Application note 11 provides for an upward departure “when loss . . . does not fully capture the harmfulness and seriousness of the conduct.” Application note 12 specifically addresses the possibility of upward departures for offenses involving fraudulent identification documents and access devices (violations of 18 U.S.C. §§ 1028 and 1029) when the “actual loss does not adequately reflect the seriousness of the conduct.” While these two application notes arguably include much of the indirect monetary harm caused to individual victims of identity theft, the Commission may wish to consider adding language to one of these application notes or creating a separate provision that specifically invites upward departures in such instances. Another possibility for capturing the indirect monetary harm that results from identity theft is to provide an enhancement through a specific offense characteristic to the fraud guideline, possibly related to the number of individual victims of the offense.³⁸

b. Non-Monetary Harms

Nonetheless, “loss,” even if modified as discussed above, may still not adequately capture all the harms that result from identity theft and assumption cases. In particular, the “loss” definition will not capture the non-monetary harms about which Congress was concerned in enacting the new law because the “loss” calculation generally is limited to the calculation of pecuniary harm. Non-monetary harms typically will include harm to an individual’s financial reputation, as well as the ensuing inconvenience which, in some cases, may rise to true emotional distress. Generally, quantifying such non-monetary harms is impracticable within the sentencing process, and therefore the only ways to adequately account for such harm are through a bright-line rule that provides an enhancement to account for that harm or through a departure.

Application note 11(a) to §2F1.1 already invites an upward departure when “a primary objective of the fraud was non-monetary or the fraud caused or risked reasonably foreseeable substantial non-monetary harm.” Similarly, application note 11(c) to §2F1.1 does already invite an upward departure when “the offense caused reasonably foreseeable . . . psychological harm or severe emotional trauma.” Should the Commission determine that the non-monetary harms associated with identity theft are more severe than for other types of fraud victims, then it may consider that an enhancement or more specific invited departure is warranted. This could be accomplished by adding a specific offense characteristic or language to application note 11(a) or elsewhere in the commentary to §2F1.1 that invites an upward departure and provides an example of the types of harm that would trigger such a departure.³⁹

³⁸ The congressional directive included the number of victims for Commission consideration. An enhancement based on this factor is described at section 2.c. below.

³⁹ An analogous departure is found in application note 15 to §2B1.1, which recognizes that the theft of medical records or a diary may involve a substantial invasion of privacy that is not addressed by the monetary loss

2. Offense Conduct Considerations

After having assessed the preceding options, the Commission may still determine that additional considerations are required in providing sentencing enhancements. Accordingly, the Commission may wish to consider providing specific offense characteristics based on any or all of the following aggravating factors, which are listed in or derived from the congressional directive. In conjunction with any of these offense characteristics, the Commission may wish to consider providing “floor” offense levels to any enhancement it wishes to develop. The Commission has typically used a “floor” approach when the extent of the offense conduct, or the loss generated by the offense conduct, is difficult to capture adequately or even to ensure a particular offense level, such as a level that would guarantee a term of imprisonment.⁴⁰

a. Number of ID Means

One of the factors in the directive instructed the Commission to consider the number of ID means involved in an identity theft offense. The Commission could choose to structure a specific offense characteristic based on the involvement of a specified number of ID means in the offense conduct. This approach has already been implemented in the context of false documents used for immigration smuggling offenses at §2L2.1.

As demonstrated by the Commission’s data, the number of ID means can be expected to be associated more frequently with affirmative identity theft than with the more basic manifestations of such offense conduct. Therefore, if the Commission determines that affirmative identity theft is a more aggravated type of conduct about which Congress was particularly concerned, then the number of means could be considered to be a fair proxy for culpability. A disadvantage to adopting the number of ID means as the sole basis for an enhancement, however, is that it may result in overpunishing individuals who commit basic identity theft, such as a thief who steals a wallet containing ten ID means in the same individual’s name but uses a single credit card to make an unauthorized purchase.

b. Method of Using ID Means

The Commission could also choose to structure a specific offense characteristic based on how the ID means are used in the offense conduct. One variation of this approach is to provide an enhancement based on the fact that the offense conduct involved the use of one or more (or some higher “threshold” number of) ID means to create, or “breed,” additional unauthorized ID means. Another variation is to provide an enhancement based on the fact that the offense conduct involved the use of one or more of the unauthorized ID means that were created or “bred.” The Commission

provisions of the guideline.

⁴⁰ In a sense, providing a floor offense level provides an alternative minimum measure of loss. Examples of floor offense levels include: §2B1.1(b)(5) (floor of offense level 14 for “chop shops”); and §2F1.1(b)(5) (floor of offense level 15 for “sophisticated concealment”).

may ultimately determine that both of these aspects of offense conduct are equally culpable and provide the same, rather than a graduated, enhancement for both.

The advantage of structuring an enhancement around the use of “breeder” ID means is that it addresses the more aggravated type of identity theft conduct about which Congress was most concerned. When new and fraudulent ID means are generated without the individual victim’s knowledge, harms to the individual, as well as to the institutional, victims are likely to be greater because detection of the offense will take much longer. Such an approach also provides a systematic method for sentencing enhancements based on distinguishing basic from affirmative identity theft along the continuum of offense conduct.

c. Number of Victims

Yet, another factor identified in the congressional directive for Commission consideration is the number of victims of the offense. Reliance on this factor *alone*, however, can result in either overstating or understating the harm. In instances of basic identity theft, for example, the number of victims may overstate the harm. In instances of true identity assumption, it may significantly understate the harm because there will likely be a single, or extremely small, number of victims whose identity the perpetrator is using. Furthermore, the Commission’s data does not reflect an appreciable difference in the number of victims between cases involving breeder documents and those cases in which the identity theft did not rise to this affirmative level.

Nonetheless, when breeder means or documents are involved and the individual is unaware that his or her identity is being used to obtain credit and conduct other financial transactions, total harm to the individual victim (indirect monetary and non-monetary harms) is likely to be substantially greater than when breeder documents are not involved. In addition, the longer that an offense goes undetected, the greater the likelihood of increased financial loss to the financial institutions that must absorb the monetary loss under principles of commercial law. Therefore, should the Commission decide to base an enhancement on the number of victims, it might also wish to account for this factor in combination with taking into account the use that the perpetrator makes of the ID means.

Furthermore, consideration of a sentencing enhancement based on the number of victims will necessarily require the threshold determination of whether institutional, as well as individual, victims are to be included in the calculation. Related to this consideration is the definition of “victim” at application note 4 to §2F1.1, which currently defines “victim” for purposes of §2F1.1(b)(2)(B) (scheme to defraud more than one victim) as the “person or entity from which the funds are to come *directly (emphasis added)*.” Whether or not the Commission decides that the number of victims is to be considered in providing an enhancement,⁴¹ it may wish to consider

⁴¹ One important point to note about this type of enhancement, however, is that it is presented as an alternative to more than minimal planning. As a practical matter, the fact that the current definition is limited to the direct victim (*i.e.*, financial institution) will not likely prevent the court from applying this two-level enhancement because more than minimal planning will likely be a component of many, if not most, identity theft

adjusting the current definition of “victim” to include, for purposes of identity theft, the individual whose ID means are misused.⁴²

3. Prior Similar Criminal Conduct

Another factor for the Commission to consider in establishing penalties for identity theft is the fact that a high portion of such offenders have previously been convicted of similar offense conduct at either the state or federal levels. Accordingly, the Commission may wish to consider an enhancement for prior convictions of offense conduct involving ID means. This approach is not often used because sentencing increases for prior offense conduct are generally addressed by Chapter Four of the guidelines (“Criminal History and Criminal Livelihood”). Nonetheless, certain guideline enhancements have taken into account prior similar conduct through specific offense characteristics.⁴³

Option Four: Provide a general upward departure in Chapter Five whenever an offense involving the fraudulent use of identification means causes harm not adequately taken into account in the guidelines.

Finally, the Commission could consider providing a general upward departure in Chapter Five whenever an offense involving the fraudulent use of ID means causes harm not adequately taken into account in the guidelines. This option could most appropriately be used in conjunction with any of the Options described above or standing alone.

cases. The definition will only become problematic if the Commission, should it consider the broader Economic Crime Package, votes to incorporate more than minimal planning into the loss table.

⁴² If this approach is adopted, it may be necessary to ensure that the misused ID means correspond to actual, as opposed to fictitious, individuals. On the other hand, if this requirement would unduly burden the sentencing hearing, the Commission may determine that all the names on misused ID means would be attributed to individual victims.

⁴³ See §§2L2.1(b)(4) and 2L2.2(b)(2), which provide for 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.” See also §2K2.1(a) and §2A6.2(b)(1)(D) and app.n.1.