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Cc: Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@EOP [WHO])
Subject: : LRM LJM84 - - JUSTICE Draft Bill on Strengthen Criminal Penalties for Identity Theft and Related Offenses
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White House Counsel has two comments. First, there does not appear to be a mens rea requirement in the proposed new provision, as opposed to the previous statute. That likely will cause substantial and unnecessary litigation over that question. Second, do we commonly propose penalty schemes to avoid application of the Guidelines? That's just a question.

----- Forwarded by Brett M. Kavanaugh/WHO/EOP on
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Patrick J. Bumatay
04/01/2002 08:21:15 AM
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From: Lisa J. Macecevic on 03/29/2002 11:37:11 AM
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Subject: LRM LJM84 - - JUSTICE Draft Bill on Strengthen Criminal Penalties for Identity Theft and Related Offenses

Please provide any comments on the attached draft legislation and sectional analysis by COB Monday, April 8th. Thank you. (A transmittal letter will be circulated at a later date for your review.)

- idtheftamendmentfinal.wpd
- idtheftsectionbysectionfinal.wpd

LRM ID: LJM84
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Friday, March 29, 2002

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution
below
FROM: Richard E. Green (for) Assistant Director for
Legislative Reference
OMB CONTACT: Lisa J. Macecevic
PHONE: (202)395-1092 FAX: (202)395-3109
SUBJECT: JUSTICE Draft Bill on Strengthen Criminal Penalties for
Identity Theft and Related Offenses

DEADLINE: COB Monday, April 8, 2002
In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Please provide any comments on the attached draft legislation and sectional analysis by COB Monday, April 8th. Thank you. (A transmittal letter will be circulated at a later date for your review.)

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LRM ID: LJM84 SUBJECT: JUSTICE Draft Bill on Strengthen Criminal
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RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Lisa J. Macecevic Phone: 395-1092 Fax: 395-3109
 Office of Management and Budget
 Branch-Wide Line (to reach legislative assistant):
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FROM: _____ (Date)

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_____(Agency)
_____(Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur
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Section 1. Aggravated identity theft

(1) Title 18, United States Code, is amended by adding a new section 1028A as follows—

"§ 1028A. Aggravated identity theft

(a) Whoever, during and in relation to any felony violation enumerated in subsection (d), transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

(b) Whoever, during and in relation to any felony violation enumerated in section 2332b(g)(5)(B), transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 5 years.

(c) Notwithstanding any other provision of law—

(1) a court shall not place on probation any person convicted of a violation of this section;

(2) except as provided in paragraph (4), no term of imprisonment imposed on a person under this section shall run concurrently with any other term of imprisonment imposed on the person under any other provision of law, including any term of imprisonment imposed for the felony during which the means of identification was transferred, possessed, or used;

(3) in determining any term of imprisonment to be imposed for the felony during which the means of identification was transferred, possessed, or used, a court shall not in any way reduce the term to be imposed for such crime so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for a violation of this section; and

(4) a term of imprisonment imposed on a person for a violation of this section may, in the discretion of the court, run concurrently, in whole or in part, only with another term of imprisonment that is imposed by the court at the same time on that person for an additional violation of this section, *provided* that such discretion shall be exercised in accordance with any applicable guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28.

(d) For purposes of the section, the term "felony violation enumerated in subsection (d)" means any offense that is a felony violation of:

(1) section 664 of title 18 (relating to theft from employee benefit plans);

(2) section 911 of title 18 (relating to false personation of citizenship);

(3) section 922(a)(6) of title 18 (relating to false statements in connection with acquisition of a firearm);

(4) any provision contained in chapter 47 of title 18 (relating to fraud and false statements), other than section 1028(a)(7) or section 1028A;

(5) any provision contained in chapter 63 of title 18 (relating to mail fraud);

(6) any provision contained in chapter 69 of title 18 (relating to nationality or citizenship);

(7) any provision contained in chapter 75 of title 18 (relating to passports and visas) other than section 1546(c)(2);

(8) section 2723 of title 18 (relating to motor vehicle records);

- (9) section 523 of the Gramm-Leach-Bliley Act [15 U.S.C. 6823] (offenses involving customer information of financial institutions);
- (10) section 243 or 266 of the Immigration and Nationality Act [8 U.S.C. 1253, 1306] (relating to willful failure to depart and registration of aliens);
- (11) any provision contained in chapter 8, Title II of the Immigration and Nationality Act [8 U.S.C. 1321 *et seq.*] (relating to immigration offenses); or
- (12) section 208, 1107(b), or 1128B(a) of the Social Security Act [42 U.S.C. 408, 1307(b), or 1320a-7b(a)] (relating to false statements relating to programs under the Act).

(2) The table of sections for chapter 47 of title 18, United States Code, is amended by inserting after the item relating to section 1028 the following new item:

"1028A. Aggravated identity theft."

Section 2. Amendments to existing identity theft prohibition

Section 1028 of title 18, United States Code, is amended—

- (1) in subsection (a)(7)—
 - (A) by striking "transfers" and inserting "transfers, possesses,"; and
 - (B) by striking "abet," and inserting "abet, or in connection with,";
- (2) in subsection (b)(1)(D), by striking "transfer" and inserting "transfer, possession,";
- (3) in subsection (b)(2), by striking "three years," and inserting "five years,"; and
- (4) in subsection (b)(4), by inserting after "facilitate" the phrase "an act of domestic terrorism (as defined in section 2331(5) of this title) or".

Section 3. Use of false identification by aliens

Section 1546 of title 18, United States Code, is amended—

- (1) by redesignating subsection (c) as subsection (f); and
- (2) by adding new subsections (c), (d), and (e) as follows:
 - "(c) Any alien who, in a circumstance described in subsection (d) of this section—
 - (1) knowingly produces, transfers, uses, or possesses an identification document that is false, was not lawfully issued, or was obtained through fraud or misrepresentation; or
 - (2) transfers, uses, or possesses a means of identification of any other person with the intent to personate in any manner any other person,
 shall be fined under this title, imprisoned not more than 5 years, or both.
 - (d) The circumstance referred to in subsection (c) of this section is that—
 - (1) the document or means of identification is, or appears to be, issued by or under the authority of the United States Government, a State, or a political subdivision of a State;
 - (2) the alien is present in the United States or, being outside the United States, seeks or applies to enter the United States; or
 - (3) the alien presents the document, whether inside or outside the United States, to any officer or employee of the United States or any State.
 - (e) For purposes of this section—

- (1) the term "identification document" has the meaning given such term in subsection (d)(2) of section 1028 of this title;
- (2) the term "false identification document" has the meaning given such term in subsection (d)(3) of section 1028 of this title;
- (3) the term "means of identification" has the meaning given such term in subsection (d)(4) of section 1028 of this title; and
- (4) the term "State" has the meaning given such term in subsection (d)(8) of section 1028 of this title."

Section-By-Section Analysis of Proposed Legislation to Strengthen Criminal Penalties for Identity Theft and Related Offenses

Section 1. Aggravated identity theft

This section seeks to enhance the actual penalties for certain particularly harmful forms of identity theft and to streamline the requirements for prosecution of such cases.

Identity theft is one of the fastest growing crimes in the United States. Recent data indicates that 42% of the more than 200,000 consumer complaints received by the Federal Trade Commission in 2001 involved identity theft. These complaints included credit card fraud, unauthorized phone or utility service, bank fraud, fraudulent loans, and government document and benefit fraud. Identity theft also has been used to obtain employment and security clearances at airports. Identity theft has also been used in connection with planned terrorist activities. For example, an Algerian national facing federal charges of identity theft allegedly stole the identities of 21 members of Bally's Total Fitness health club in Cambridge, Massachusetts, and sold them to one of three Algerians convicted in a failed 1999 plan to bomb Los Angeles International Airport.

The current federal identity theft statute (18 U.S.C. § 1028(a)(7)) was enacted in 1998. That provision makes it unlawful to "knowingly transfer[] or use[], without lawful authority, a means of identification of another person 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," if the identification document in question was, or appears to be, issued by the United States or the offense involved the use of the mails or affected interstate or foreign commerce. The existing statute has a sweeping substantive breadth that reaches all identity thefts that have a federal interest – even those involving State law felonies. This breadth makes it a valuable part of the federal criminal code and an important part of the federal arsenal against crime. However, precisely because of its breadth, the existing statute groups a large and disparate class of behavior into a single category. For the same reason, it also imposes across-the-board proof requirements that may not make sense in certain cases.

This section attempts to address these concerns by proposing a new section 1028A to the criminal code. Section 1028A would define a class of "aggravated identity theft" that includes the most serious and harmful forms of this pernicious practice. The penalties for this newly defined crime of "aggravated identity theft" are significantly enhanced as compared to existing law, and the proof requirements are simplified.

In defining "aggravated identity theft," section 1028A – like the existing statute – uses the concept of predicate offenses. That is, identity theft generally isn't committed for the sheer thrill of impersonation; it is almost always done for the purpose of committing *another* State or federal offense. The "aggravated" forms of identity theft are defined by the nature of the predicate offense, and include all of the most frequently occurring and most serious predicate offenses. See proposed section 1028A(b), (d). Thus, anyone who uses another person's identity to commit one of the enumerated serious predicate offenses will be guilty of "aggravated identity

theft." Because virtually all of the most serious forms of identity theft involve predicate criminal activity (e.g., bank fraud, wire fraud, mail fraud) that is covered by *federal* law, section 1028A does not include any State law predicate crimes in its definition of "aggravated identity theft." Compared to the general federal identity theft statute, section 1028A would thus apply to a focused and narrower set of predicate offenses.

In prescribing the penalties for this new offense, section 1028A does not rely upon the Sentencing Commission or the Sentencing Guidelines. This approach is the most sensible one in light of the unusual fact that identity theft is an entirely *derivative* offense. That is, as explained above, identity theft is virtually always committed in connection with the commission of another offense. The Sentencing Guidelines, however, are generally designed and intended to be "charge-neutral": the sentence depends on the underlying "relevant conduct" and not on the particular offense charged in the indictment. Thus, the Guidelines will generally ignore the fact that two offenses have been charged (a derivative offense and a predicate offense); the same sentence would be imposed in such a case as would be imposed even if only the predicate offense had been charged. Consequently, application of the Guidelines would mean that there would be virtually no practical advantage to charging the derivative criminal offense. Prosecutors would have to charge more and prove more without obtaining any additional punishment.

In order to avoid this problem, section 1028A fashions a penalty scheme for the derivative offense of aggravated identity theft by relying upon the existing model that the criminal code itself provides for another wholly derivative offense: 18 U.S.C. § 924(c). Section 924(c) makes it a federal offense to use or carry a firearm "during or in relation to" a crime of violence or a drug trafficking crime. Because an underlying predicate crime must be proved – either a crime of violence or a drug trafficking crime – application of the Guidelines would have collapsed the sentencing for the § 924(c) offense together with the underlying predicate offense. Section 924(c) avoids this by instead providing for an *additional* prescribed term of imprisonment over and above that imposed on the underlying offense. Because "aggravated identity theft" is, like § 924(c), an unusual derivative offense, a similar approach makes sense here.

Accordingly, proposed section 1028A provides that, if a person commits aggravated identity theft by stealing someone's identity in order to commit a serious federal predicate offense, that person will be sentenced to an additional two years' imprisonment over and above the sentence for the underlying offense. *See* proposed section 1028A(a), (c)(2). If the predicate offense is a terrorism offense, the additional punishment is increased to five years. *See* proposed section 1028A(b), (c)(2). Section 1028A, however, would depart from § 924(c) in one critical respect. The Supreme Court has held that multiple counts under § 924(c) that are charged in the same indictment must run consecutively to each other. *Deal v. United States*, 508 U.S. 129 (1993). This mandatory cumulative stacking of sentences, if applied here, could result in unduly severe and inflexible sentences. Accordingly, proposed section 1028A leaves it to the discretion of the sentencing judge whether to run consecutively or concurrently any multiple counts of aggravated identity theft that are sentenced at the same time. *See* proposed section 1028A(c)(3). In order to avoid unwarranted disparities in the exercise of this discretion, the Sentencing

Commission is explicitly authorized to issue guidance concerning whether and to what extent such multiple sentences should be concurrent or consecutive. *Id.*

Section 1028A would also substantially simplify the proof requirements for "aggravated identity theft." The existing identity theft statute contains multiple mental-state elements. In addition to proving all of the elements of the predicate crime (including the scienter element), prosecutors also must establish that the defendant "knowingly" transferred or used the identification "with the intent to commit" a federal or state crime. Section 1028A would streamline the proof by requiring proof of only that level of scienter that is already required by the underlying predicate offense and the knowing use of another's identity. Moreover, because "aggravated identity theft" is defined with reference only to *federal* predicate offenses, there is no need for any additional proof of a federal jurisdictional connection. Accordingly, the additional federal jurisdictional showing required under § 1028(a)(7) is not carried over into this new offense.

Section 2. Improvements to the existing identity theft prohibition

This section seeks to close several gaps in the coverage of the existing identity theft prohibition (18 U.S.C. § 1028(a)(7)) and to increase the penalties for certain violations of that section.

As currently drafted, section 1028(a)(7) punishes anyone who "knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet" any violation of Federal law or any State or local felony. This bill would amend this provision to prohibit, not just the "transfer or use" of someone else's identity information, but also the *possession* of such information with the requisite criminal intent. The bill would also add language to this provision that would extend its coverage to those criminals who steal someone's identity "in connection with" another crime. The bill also amends section 1028(a)(7) to increase from three to five years the maximum term of imprisonment for ordinary identity theft and for possession of false identification documents. Lastly, section 2 of the bill would amend section 1028(b)(4) to impose a higher maximum penalty for identity theft used to facilitate acts of domestic terrorism.

Section 3. Use of False Identification by Aliens

This section would impose a strengthened and streamlined prohibition on the transfer, use, possession, or production of false identification documents by aliens in the United States as well as in certain other instances.

Existing law contains a federal prohibition on the possession of false identification documents, but it is limited to possession of five or more documents and requires a showing of a specific federal jurisdictional nexus. 18 U.S.C. § 1028(a)(3), (c). Separate provisions specifically criminalize possession of false *federal* identification documents, *id.*, § 1028(a)(6), use of false immigration documents, *id.*, § 1546(a), and use of false identification documents for the purpose of satisfying certain immigration requirements, *id.*, § 1546(b).

Recent experience has demonstrated that possession of false identification documents by aliens is widespread and that possession of such documents makes it easier for persons unlawfully in the United States – including potential foreign terrorists – to evade detection and to continue to reside here illegally.

Section 3 of this bill would strengthen existing law by adding a new subsection (c) to 18 U.S.C. § 1546 that would create a flat prohibition on the transfer, use, possession, or production of any false identification document by an alien within the United States. *See* proposed § 1546(c), (e)(1). This prohibition would include both wholly fictitious documents and documents that were based on theft of another's identity. The bill would also reach aliens outside the United States (i) who use false identification in seeking to enter, or to apply to enter, the United States or (ii) who present false identification to officers of the United States. *See* proposed § 1546(c), (e)(2), (3).