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# Mandatory Minimum Sentencing: Federal Aggravated Identity Theft

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## Summary

Aggravated identity theft is punishable by a mandatory minimum sentence of imprisonment for two years or by imprisonment for five years if it relates to a terrorism offense. At least thus far, the government has rarely prosecuted the five-year terrorism form of the offense. The two-year offense occurs when an individual knowingly possesses, uses, or transfers the means of identification of another person, without lawful authority to do so, during and in relation to one of more than 60 predicate federal felony offenses (18 U.S.C. 1028A). Section 1028A has the effect of establishing a mandatory minimum sentence for those predicate felony offenses, when they involve identity theft.

A sentencing court has the discretion not to “stack” or pancake multiple aggravated identity theft counts and, as with other mandatory minimums, may impose a sentence of less than the mandatory minimum at the request of the prosecution based on the defendant’s substantial assistance.

More than half of the judges responding to a United States Sentences Commission survey felt the two-year mandatory minimum penalty was generally appropriate. The Commission’s report on mandatory minimum sentencing statutes is mildly complimentary of the provision.

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## Introduction

Aggravated identity theft is punishable by imprisonment for two years, and by imprisonment for five years if the offense involves a federal crime of terrorism.<sup>1</sup> Aggravated identity theft only occurs when the identity theft happens “during and in relation” to one of several other federal crimes. It has the effect of establishing a mandatory minimum that would not otherwise exist for each of those predicate offenses.

More than half of the judges who responded to a United States Sentencing Commission survey felt that the two-year mandatory minimum was a generally appropriate sentence.<sup>2</sup> The Sentencing Commission’s report on mandatory minimum penalties made little if any mention of the five-year terrorism penalty and instead directed its attention to the two-year identity theft mandatory minimum.<sup>3</sup> The Commission further confined itself to comparatively complimentary observations rather than recommendations, due to the provision’s relatively recent emergence and its somewhat unique characteristics.<sup>4</sup>

Section 1028A, parsed to its elements, declares:

- Whoever
- during and in relation to
- any felony enumerated in
  - subsection (c) [predicate offense], [or]
  - section 2332b(g)(5)(B) [predicate terrorist offense]
- knowingly
- transfers, possesses, or uses
- without lawful authority
- a means of identification
- of another person

shall, in addition to the punishment provided for such [predicate offense or predicate terrorist offense], be sentenced to a term of imprisonment of 2 years [or a term of imprisonment of 5 years in the case of terrorist predicate offense].<sup>5</sup>

## Whoever

Section 1028A only punishes aggravated identity theft by individuals. Most federal crimes outlaw misconduct by both individuals and organizations, such as corporations, firms, and other legal entities. The Dictionary Act explains that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations,

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<sup>1</sup> 18 U.S.C. 1028A(a)(2), (a)(1).

<sup>2</sup> United States Sentencing Commission, *Results of Survey of United States District Judges, January 2010 through March 2010, Question 1* (June 2010), available at [http://www.ussc.gov/Research/Research\\_Projects/Surveys/20100608\\_Judge\\_Survey.pdf](http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf).

<sup>3</sup> *Commission Report II*, 325-44.

<sup>4</sup> *Id.* at 366-67.

<sup>5</sup> *United States v. Barrington*, 648 F.3d 1178, 1192 (11<sup>th</sup> Cir. 2011) (“To prove a violation of 18 U.S.C. §1028A, the evidence must establish that the defendant: (1) knowingly transferred, possessed, or used; (2) the means of identification of another person; (3) without lawful authority; (4) during and in relation to a felony enumerated in §1028A(c)”); see also, *United States v. Thomas*, 763 F.3d 689, 692 (7<sup>th</sup> Cir. 2014); *United States v. Adepoju*, 756 F.3d 250, 256 (4<sup>th</sup> Cir. 2014).

companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”<sup>6</sup> Section 1028A is one of those situations when “the context indicates otherwise.”

Entities other than individuals can be fined, but they cannot be imprisoned. Section 1028A punishes violations with a flat term of imprisonment, but no fine. Thus, only individuals may be punished for violating the section. For the same reason, persons other than individuals may not incur criminal liability indirectly as principals under 18 U.S.C. 2.<sup>7</sup>

Persons other than individuals may, however, incur criminal liability as conspirators. The federal conspiracy statute outlaws conspiracy to commit any federal crime, including aggravated identity theft.<sup>8</sup> It makes conspiracy punishable by both a fine and a term imprisonment.<sup>9</sup> Thus, it seems possible for a person other than an individual to incur criminal liability for conspiracy to commit aggravated identity theft.

## During and in Relation to

The phrase “during and in relation to” describes the connection, necessary for a violation under the section, between the predicate offense and the other identity theft elements. The phrase also appears in the mandatory minimums of 18 U.S.C. 924(c) that apply when a firearm is used “during and in relation to” certain crimes of violence or drug trafficking.<sup>10</sup>

There, the Supreme Court has said the “in relation to” portion of the phrase requires that the firearm “must facilitate or have the potential of facilitating” the predicate offense.<sup>11</sup> This suggests that the “phrase ‘in relation to’ in §1028A ... means that the ‘in relation to’ element is met if the identity theft ‘facilitates or has the potential of facilitating’ that predicate felony.”<sup>12</sup> Whether the identity theft occurs “during” the predicate offense depends on the duration of the predicate offense.<sup>13</sup>

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<sup>6</sup> 1 U.S.C. 1.

<sup>7</sup> “(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal,” 18 U.S.C. 2; e.g., *United States v. Maxwell*, 778 F.3d 719, 729 (8<sup>th</sup> Cir. 2015)(evidence sufficient to support conviction on five counts of aiding and abetting aggravated identity theft); *United States v. Mariano*, 729 F.3d 874, 883 (8<sup>th</sup> Cir. 2013).

<sup>8</sup> 18 U.S.C. 371. Examples of cases affirming the convictions of individuals charged with conspiracy to commit aggravated identity theft include, *United States v. Johnson*, 756 F.3d 1218, 1220 (10<sup>th</sup> Cir. 2014); *United States v. Sardariani*, 754 F.3d 1118, 1120 (9<sup>th</sup> Cir. 2014).

<sup>9</sup> 18 U.S.C. 371 (emphasis added)(“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, *each shall be fined under this title* or imprisoned not more than five years, or both ...”).

<sup>10</sup> 18 U.S.C. 924(c)(1)(A).

<sup>11</sup> *Smith v. United States*, 508 U.S. 223, 239 (1993).

<sup>12</sup> *United States v. Mobley*, 618 F.3d 539, 548-50 (6<sup>th</sup> Cir. 2010).

<sup>13</sup> See e.g., *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999)(“Section 924(c)(1) criminalized a defendant’s use of a firearm ‘during and in relation to’ a crime of violence; in doing so, Congress proscribed both the use of the firearm and the commission of acts that constitute a violent crime. It does not matter that respondent used the .357 magnum revolver, as the Government concedes, only in Maryland because he did so ‘during and in relation to’ a kidnaping that was begun in Texas and continued in New York, New Jersey, and Maryland”).

## Subsection (c) Felony Predicates

Section 1028A recognizes two classes of predicate offenses—one of which involves terrorist offenses and carries a five-year term of imprisonment; the other of which does not and carries a two-year term. Proof of the commission of one of the qualifying predicate offenses is an element of aggravated identity theft.<sup>14</sup> The defendant, however, need not otherwise be charged or convicted of the predicate offense.<sup>15</sup> Moreover, the Constitution’s double jeopardy clause, which prohibits multiple punishments for the same offense, bars prosecution for both aggravated identity theft and the parallel identity theft provision.<sup>16</sup> Attached is the list of more than 60 federal theft, fraud, immigration, and related felonies for which the two-year mandatory minimum sentencing provision provides a sentencing floor when identity theft is involved.

## Federal Crimes of Terrorism Predicates

The terrorist predicate offenses are the federal crimes of terrorism, listed in 18 U.S.C. 2332b(g)(5)(B), regardless of whether the predicate offense was committed for a terrorist purpose.<sup>17</sup> A list of the close to 50 terrorist predicate offenses also appears below as an attachment. The five-year aggravated identity theft offense seems to have been infrequently prosecuted thus far.<sup>18</sup>

## Knowingly

The Supreme Court in *Flores-Figueroa* made clear that the knowledge element colors each of the other elements.<sup>19</sup> The government must prove that the defendant was aware that he transferred, possessed, or used something.<sup>20</sup> It must prove that the defendant was aware that he was doing so without lawful authority.<sup>21</sup> Finally, it must prove that the defendant was aware that the something he unlawfully possessed, transferred, or used was that of another person.<sup>22</sup>

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<sup>14</sup> *United States v. Curtis*, 635 F.3d 704, 718 n.49 (5<sup>th</sup> Cir. 2011), citing *Flores-Figueroa v. United States*, 556 U.S. 646 (2009); see also, *United States v. Magassouba*, 619 F.3d 202, 205 (2d Cir. 2010); *United States v. Jenkins-Watts*, 574 F.3d 950, 969 (8<sup>th</sup> Cir. 2009).

<sup>15</sup> *United States v. Jenkins-Watts*, 574 F.3d at 970.

<sup>16</sup> *United States v. Bonilla*, 579 F.3d 1233, 1242-243 (11<sup>th</sup> Cir. 2009) (“[A]ny conduct that would constitute a crime under §1028A(a)(1) would also be a crime covered by the provisions of §1028(a)(7). This is a clear example of one act violating two distinct statutory provisions and therefore violating the protection against double jeopardy”).

<sup>17</sup> Subsection 2332b(g)(5) defines “federal crimes of terrorism” as any of the crimes listed in clause 2332b(g)(5)(B), consists of a list of federal crimes, when committed under the circumstances described in clause 2332b(g)(5)(A), that is, when “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” Subsection 1028A(a)(2) refers only to the list of offenses in clause (B), and therefore appears to have been intended to dispense with the requirements of clause (A).

<sup>18</sup> As of this date, none of the reported aggravated identity theft cases involved the five-year mandatory minimum sentence that accompanies a terrorism predicate offense, although some courts have mentioned it in their construction of the two-year offenses, e.g., *United States v. Maciel-Alcala*, 612 F.3d 1092, 1098 (9<sup>th</sup> Cir. 2010); *United States v. Godin*, 534 F.3d 51, 59 (1<sup>st</sup> Cir. 2008).

<sup>19</sup> *Flores-Figueroa v. United States*, 556 U.S. 646, 649 (2009) (“As a matter of ordinary English grammar, it seems natural to read the statute’s word ‘knowingly’ as applying to all the subsequently listed elements of the crime”).

<sup>20</sup> *Id.* (emphasis in the original) (“All the parties agree that the provision applies only where the offender knows that he is transferring, possessing, or using *something*”).

<sup>21</sup> *Id.* (emphasis in the original) (“And the Government reluctantly concedes that the offender likely must know that he is transferring, possessing, or using that *something* without lawful authority”).

<sup>22</sup> *Id.* (emphasis in the original) (“The question is whether the statute requires the Government to show that the (continued...)”).

## Transfers, Possesses, or Uses

What constitutes a proscribed transfer, possession, or use appears to have been a matter of dispute only rarely, perhaps because of the limitations posed by the other elements.<sup>23</sup> For example, the requirement that possession be knowing and in relation to a predicate offense cabins the otherwise natural scope of the term “possession.”

## Without Lawful Authority

The “lawful authority” element addresses whether the law permits the defendant to use the identification of another, not whether the defendant has the permission of another to borrow the means of identification. Thus, “the use of another person’s social security number to commit a qualifying felony, even with that person’s permission, serve[s] as use ‘without lawful authority’ in violation of §1028A.”<sup>24</sup> Moreover, a defendant may be guilty of using the means of identity of another without lawful authority for certain purposes, even though he has lawful authority to use the identification for other purposes.<sup>25</sup>

## A Means of Identification

The term “means of identification” in the aggravated identify theft provision draws its meaning from the definition of that term in the generic identity theft provision, 18 U.S.C. 1028.<sup>26</sup> “The ‘overriding requirement’ of [that] definition is that the means of identification ‘must be sufficient to identify a specific individual.’”<sup>27</sup> One court has suggested that use of no more than the name of

(...continued)

defendant *knew* that the ‘means of identification’ he or she unlawfully transferred, possessed, or used, in fact, belonged to ‘another person.’ We conclude that it does”); see also, *United States v. Baldwin*, 774 F.3d 711, 723 (11<sup>th</sup> Cir. 2014); *United States v. Soto*, 720 F.3d 51, 55 (1<sup>st</sup> Cir. 2013); *United States v. Dvorak*, 617 F.3d 1017, 1025 (8<sup>th</sup> Cir. 2010).

<sup>23</sup> But see, *United States v. Miller*, 734 F.3d 530, 539-42 (6<sup>th</sup> Cir. 2013), resolve on the basis of the rule of lenity the interpretation of the word “uses” for purposes of 18 U.S.C. 1028A: “Miller did not ‘use’ a means of identification within the meaning of §1028A by signing a document in his own name which falsely stated that Foster and Lipson gave him authority, as Fellowship’s managing member, to act on behalf of Fellowship and pledge its property for the DEMCO loan.”

<sup>24</sup> *United States v. Otuya*, 720 F.3d 183, 189 (4<sup>th</sup> Cir. 2013); see also, *United States v. Osuna-Alvarez*, 788 F.3d 1183, 1185 (9<sup>th</sup> Cir. 2015); *United States v. Rodriguez*, 773 F.3d 65, 68 (8<sup>th</sup> Cir. 2014); *United States v. Lumbard*, 706 F.3d 716, 722-25 (6<sup>th</sup> Cir. 2013); *United States v. Ozuna-Cabrera*, 663 F.3d 496, 499 (1<sup>st</sup> Cir. 2011); *United States v. Retana*, 641 F.3d 272, 274-75 (8<sup>th</sup> Cir. 2011).

<sup>25</sup> *United States v. Abdelshafi*, 592 F.3d 602, 608 (4<sup>th</sup> Cir. 2010) (“Abdelshafi came into lawful possess, initially, of Medicaid patients’ identifying information and had ‘lawful authority’ to use that information for proper billing purposes. He did not have ‘lawful authority,’ however, to use Medicaid patients’ identifying information to submit fraudulent billing claims”); see also, *United States v. Reynolds*, 710 F.3d 434, 436 (D.C.Cir. 2013), citing in accord, *United States v. Lumbard*, 706 F.3d 716, 725 (6<sup>th</sup> Cir. 2013) (“But ‘use [] ... without lawful authority’ easily encompasses situations in which a defendant gains access to identity information legitimately but then uses it illegitimately – in excess of the authority granted”).

<sup>26</sup> *United States v. Barrington*, 648 F.3d 1178, 1193 (11<sup>th</sup> Cir. 2011). Subsection 18 U.S.C. 1028(d)(7) states that, “the term ‘means of identification’ means 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 defined in section 1029(e)).”

<sup>27</sup> *Id.*, quoting, *United States v. Mitchell*, 518 F.3d 230, 234 (4<sup>th</sup> Cir. 2008).

another would be insufficient,<sup>28</sup> but others have indicated that forging the signature of another constitutes use of the means of identification of another without lawful authority.<sup>29</sup>

## Of Another Person

The statute does not extend to the use of a “fake ID” that does not identify with a real person.<sup>30</sup> Nor does it extend to the transfer to an individual of a counterfeit document containing the individual’s identifying information.<sup>31</sup> On the other hand, the “other person” element reaches both the living and dead.<sup>32</sup> Moreover, although only an individual may engage in aggravated identity theft, the victim of such a theft might well include persons who are legal entities rather than individuals.<sup>33</sup>

## Sentencing

Aggravated identity theft sentencing is distinctive in a number of ways. First, violations carry a flat mandatory two-year sentence of imprisonment or a flat mandatory five years for terrorism related offenses.<sup>34</sup> Most federal criminal statutes provide a maximum term of imprisonment (“shall be imprisoned for not more than ...”).<sup>35</sup> If they require a mandatory minimum sentence, it

<sup>28</sup> *United States v. Mitchell*, 518 F.3d at 234 (“A name alone, for example, would likely not be sufficiently unique to identify a specific individual because many persons have the same name”).

<sup>29</sup> *United States v. Silva*, 554 F.3d 13, 23 n.14 (1<sup>st</sup> Cir. 2009) (“Silva argues a forged prescription containing a forged doctor’s name is excluded as a ‘means of identification.’ ... Silva’s contention runs afoul of the plain language of the statute”); see also, *United States v. Wilson*, 788 F.3d 1298, 1310-311 (11<sup>th</sup> Cir. 2015); *United States v. Porter*, 745 F.3d 1035, 1039-43 (10<sup>th</sup> Cir. 2014); *United States v. Blixt*, 548 F.3d 882, 886-88 (9<sup>th</sup> Cir. 2008); *United States v. Kuc*, 737 F.3d 129, 134 (1<sup>st</sup> Cir. 2014) (“Even assuming that the phrase ‘means of identification’ requires the sum total of the identifying pieces of information to identify a specific individual, Kuc’s use of Samuel’s identifying information meets that standard. Kuc did not, as he argues, only use Samuel’s name. In reality, he used Samuel’s full name in addition to the name of Samuel’s company”).

<sup>30</sup> *Flores-Figueroa v. United States*, 556 U.S. 646, 649 (2009); *United States v. Wilson*, 788 F.3d at 1318; *United States v. Ward*, 747 F.3d 1184, 1192 (9<sup>th</sup> Cir. 2013) (“[A]ggravated identity theft requires proof that the victim was a real person”); *United States v. Soto*, 720 F.3d 51, 55 (1<sup>st</sup> Cir. 2013); *United States v. Clark*, 668 F.3d 568, 573-74 (8<sup>th</sup> Cir. 2012); *United States v. Mobley*, 618 F.3d 539, 547 (6<sup>th</sup> Cir. 2010).

<sup>31</sup> *United States v. Spears*, 729 F.3d 753, 754, 757-56 (7<sup>th</sup> Cir. 2013) (en banc) (emphasis in the original) (“Spears made a counterfeit handgun permit for Tirsah Payne, who was awaiting trial on a drug charge and could not obtain a legitimate permit. Payne used the fake credential – which contained her own name and birthdate – when trying to buy a gun.... Because the ‘means of identification’ was the counterfeit card, however, it was indeed ‘transferred’ from Spears to Payne. But a transfer is not enough. The ‘means of identification’ must be that of ‘another person.’ ... The phrase ‘another person’ is ambiguous; neither text nor context tells us whether ‘another’ means ‘person other than the defendant’ or ‘person who did not consent to the information’s use.’ That §1028A deals with identity *theft* helps resolve the ambiguity in favor of the latter understanding, while reading ‘another person’ to mean ‘person other than the defendant’ treats §1028A as forbidding document counterfeiting and other forms of fraud, a crime distinct from theft”).

<sup>32</sup> *United States v. Zuniga-Arteaga*, 681 F.3d 1220, 1223 (11<sup>th</sup> Cir. 2012); *United States v. LaFaive*, 618 F.3d 613, 617 (7<sup>th</sup> Cir. 2010); *United States v. Maciel-Alcala*, 612 F.3d 1092, 1096-102 (9<sup>th</sup> Cir. 2010); *United States v. Kowal*, 527 F.3d 741, 745-47 (8<sup>th</sup> Cir. 2008).

<sup>33</sup> Cf., *United States v. Reynolds*, 710 F.3d 434, 436 (D.C. Cir. 2013).

<sup>34</sup> 18 U.S.C. 1028A(a)(1), (a)(2); *United States v. Catrell*, 774 F.3d 666, 669 (10<sup>th</sup> Cir. 2014) (“Aggravated identity theft under 18 U.S.C. §1028A requires a ‘term of imprisonment of 2 years’ – no more, no less”), citing in accord, *United States v. Dooley*, 688 F.3d 318, 319 (7<sup>th</sup> Cir. 2012); see also, *United States v. Adepoju*, 756 F.3d 250, 259 (4<sup>th</sup> Cir. 2014).

<sup>35</sup> E.g., 18 U.S.C. 1341 (“Whoever, having devised ... any scheme ... to defraud ... places in any post office ... any matter ... shall be ... imprisoned not more than 20 years ...”); 18 U.S.C. 1001(a)(1) (“... whoever, in any matter within the jurisdiction of the executive ... branch ... of the United States ... (1) falsifies, conceals, or covers up by any trick, (continued...)”).



is usually well below the maximum (“shall be imprisoned not less than ...”) or the maximum is unstated.<sup>36</sup>

Second, it explicitly states that the sentence imposed for the predicate offenses may not be reduced to account for the mandatory minimum.<sup>37</sup> Third, it explicitly states that as a general rule the two- or five-year sentence may not be served concurrently with any sentence imposed for the predicate offense or another.<sup>38</sup> Finally, it establishes an exception to the general rule under which multiple mandatory minimum sentences under the section may be served concurrently at the discretion of the court when consistent with the Sentencing Guidelines.<sup>39</sup>

The Sentencing Guidelines suggest that in exercising its discretion as to whether to impose consecutive or concurrent sentences for multiple aggravated identity theft violations, a court should consider the statutory sentencing factors mentioned in 18 U.S.C. 3553(a)(2), as well as the nature and seriousness of the offense and the extent to which predicate offenses are related.<sup>40</sup> If

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(...continued)

scheme, or device any material fact ... shall be ... imprisoned not more than 5 years ...”).

<sup>36</sup> E.g., 21 U.S.C. 841(a)(1)(A)(“In the case of a violation of subsection (a) of this section [relating to drug trafficking] involving 1 kilogram or more of ... heroin ... such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life ... ”); 18 U.S.C. 924(c)(1)(A)(i)(“ ... any person who, during and in relation to a crime of violence ... uses or carries a firearm ... shall, in addition to the punishment provided for such crime of violence ... (i) be sentence to a term of not less than 5 years”).

<sup>37</sup> 18 U.S.C. 1028A(b) 18 U.S.C. 1028A(b)(3)(“[I]n 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”).

Nevertheless, “a district court, in sentencing a defendant on a 18 U.S.C. §1028A aggravated identity theft conviction, is not precluded from taking §1028A’s mandatory sentence into account in sentencing defendant on *other counts of conviction* charged in the same indictment that are *not predicate felonies* underlying the §1028A conviction,” *United States v. Vidal-Reyes*, 562 F.3d 43, 56 (1<sup>st</sup> Cir. 2009)(emphasis added); *United States v. Horob*, 735 F.3d 866, 871 (9<sup>th</sup> Cir. 2013).

Moreover, a sentence imposed for the predicate offense may not be *enhanced* to account for presence of the aggravate identity theft penalty to be imposed, U.S.S.G. §2B1.6, app.n.2; *United States v. Charles*, 757 F.3d 1222, 1226-227 (11<sup>th</sup> Cir.2014); *United States v. Lyons*, 556 F.3d 703, 708 (8<sup>th</sup> Cir. 2009); *United States v. Sharapka*, 526 F.3d 58, 62 (1<sup>st</sup> Cir. 2008).

<sup>38</sup> 18 U.S.C. 1028A(b)(2)(“[E]xcept 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”).

<sup>39</sup> 18 U.S.C. 1028A(b)(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”); see also, *United States v. Vidal-Reyes*, 562 F.3d 43, 50 (1<sup>st</sup> Cir. 2009)(internal citations omitted)(“We note that the only exception to this statutorily mandated rule requiring that all other sentences run consecutively to a sentence under §1028A grants a district court discretion to run additional §1028A sentences imposed at the same time concurrently with each other”); *United States v. Lee*, 545 F.3d 678, 680 (8<sup>th</sup> Cir. 2008).

<sup>40</sup> U.S.S.G. §5G1.2, app.n. 2.(B)(“In determining whether multiple counts of 18 U.S.C. § 1028A should run concurrently with, or consecutively to, each other, the court should consider the following non-exhaustive list of factors: (i) The nature and seriousness of the underlying offenses. For example, the court should consider the appropriateness of imposing consecutive, or partially consecutive, terms of imprisonment for multiple counts of 18 U.S.C. § 1028A in a case in which an underlying offense for one of the 18 U.S.C. § 1028A offenses is a crime of violence or an offense enumerated in 18 U.S.C. § 2332b(g)(5)(B). (ii) Whether the underlying offenses are groupable under §3D1.2 (Groups of Closely Related Counts). Generally, multiple counts of 18 U.S.C. § 1028A should run concurrently with one another in cases in which the underlying offenses are groupable under §3D1.2. (iii) Whether the (continued...)”).

the purposes of subsection 3553(a)(2) are better served by imposing consecutive sentences, the court may do so even if the predicate offenses are “grouped” (i.e., are closely related).<sup>41</sup>

As in the case of other mandatory minimum sentencing statutes, a court may sentence a defendant convicted of aggravated identity theft to a term of less than two years pursuant to subsection 3553(e).<sup>42</sup> The prosecution must seek the exception, which is only available on the basis of the defendant’s substantial assistance in the investigation or prosecution of a federal crime.<sup>43</sup>

## Sentencing Commission Report

The Sentencing Commission’s assessment of sentencing under the provision is guardedly laudatory: “The problems associated with certain mandatory minimum penalties are not observed, or are not as pronounced, in identity theft offenses. The Commission believes this is due, in part, to 18 U.S.C. §1028A requiring a relatively short mandatory penalty and not requiring stacking of penalties for multiple counts. The statute is relatively new and is used in only a handful of districts, however, so specific findings are difficult to make at this time.”<sup>44</sup>

### Two-Year Predicate Offenses (Citations)

- 18 U.S.C. 641 (relating to theft of public money, property, or rewards),
- 18 U.S.C. 656 (relating to theft, embezzlement, or misapplication by bank officer or employee),
- 18 U.S.C. 664 (relating to theft from employee benefit plans),
- 18 U.S.C. 911 (relating to false personation of citizenship),
- 18 U.S.C. 922(a)(6) (relating to false statements in connection with the acquisition of a firearm),
  
- 18 U.S.C. ch. 47 (any provision contained in this chapter (relating to fraud and false statements), other than this section (section 1028A) or section 1028(a)(7):
  - 18 U.S.C. 1001 (relating to false statements or entries generally),
  - 18 U.S.C. 1002 (relating to possession of false papers to defraud United States),
  - 18 U.S.C. 1003 (relating to demands against the United States involving \$1,000 or more),
  - 18 U.S.C. 1004 (relating to certification of checks),
  - 18 U.S.C. 1005 (relating to bank entries, reports and transactions),

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(...continued)

purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2) are better achieved by imposing a concurrent or a consecutive sentence for multiple counts of 18 U.S.C. § 1028A”); see also, U.S.S.G. §2B1.6, app.n. 1.(B); *United States v. Chibuko*, 744 F.3d 259, 261-65 (2d Cir. 2014).

<sup>41</sup> *United States v. Collins*, 640 F.3d 265, 269-70 (7<sup>th</sup> Cir. 2011), citing in accord *United States v. Kreitinger*, 576 F.3d 500, 504 (8<sup>th</sup> Cir. 2009). Subsection 3553(a)(2) states: “(a) The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider ... (2) the need for the sentence imposed - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”

<sup>42</sup> E.g., *United States v. Johnson*, 756 F.3d 1218, 1220 (10<sup>th</sup> Cir. 2014); *United States v. Barrington*, 648 F.3d 1178, 1183-184 (11<sup>th</sup> Cir. 2011); *United States v. Moore*, 581 F.3d 681, 683 (8<sup>th</sup> Cir. 2009).

<sup>43</sup> 18 U.S.C. 3553(e) (“Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code”); the Sentencing Guidelines carry the provision forward along with factors for determining the extent of the appropriate reduction below the minimum, U.S.S.G. §5K1.1.

<sup>44</sup> *Id.* at 369.

- 18 U.S.C. 1006 (relating to Federal credit institution entries, reports and transactions),
- 18 U.S.C. 1007 (relating to Federal Deposit Insurance Corporation transactions),
- 18 U.S.C. 1010 (relating to Department of Housing and Urban Development and Federal Housing Administration transactions),
- 18 U.S.C. 1011 (relating to Federal land bank mortgage transactions),
- 18 U.S.C. 1014 (relating to loan and credit applications generally; renewals and discounts; crop insurance),
  
- 18 U.S.C. 1015 (relating to naturalization, citizenship or alien registry),
- 18 U.S.C. 1016 (relating to acknowledgment of appearance or oath),
- 18 U.S.C. 1017 (relating to government seals wrongfully used and instruments wrongfully sealed),
- 18 U.S.C. 1019 (relating to certificates by consular officers),
- 18 U.S.C. 1020 (relating to highway projects),
  
- 18 U.S.C. 1021 (relating to title records),
- 18 U.S.C. 1022 (relating to delivery of certificate, voucher, receipt for military or naval property),
- 18 U.S.C. 1023 (relating to insufficient delivery of money or property for military or naval service),
- 18 U.S.C. 1024 (relating to purchase or receipt of military, naval, or veteran's facilities property),
- 18 U.S.C. 1025 (relating to false pretenses on high seas and other waters involving \$1,000 or more),
  
- 18 U.S.C. 1027 (relating to false statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974),
- 18 U.S.C. 1028 (relating to felony violations involving fraud and related activity in connection with identification documents and information),
- 18 U.S.C. 1029 (relating to fraud and related activity in connection with access devices),
- 18 U.S.C. 1030 (relating to felony violations involving fraud and related activity in connection with computers),
- 18 U.S.C. 1031 (relating to major fraud against the United States),
  
- 18 U.S.C. 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution),
- 18 U.S.C. 1033 (relating to crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce),
- 18 U.S.C. 1035 (relating to false statements relating to health care matters),
- 18 U.S.C. 1036 (relating to entry by false pretenses to any real property, vessel, or aircraft of the United States or secure area of any airport or seaport),
- 18 U.S.C. 1036 (relating to fraud and related activity in connection with electronic mail),
  
- 18 U.S.C. 1038 (relating to false information and hoaxes),
- 18 U.S.C. 1039 (relating to fraud and related activity in connection with obtaining confidential phone records information of a covered entity),
- 18 U.S.C. 1040 (relating to fraud in connection with major disaster or emergency benefits),
  
- 18 U.S.C. ch. 63 (any provision contained in chapter 63 (relating to mail, bank, and wire fraud);
  - 18 U.S.C. 1341 (relating to mail fraud),
  - 18 U.S.C. 1342 (relating to fraudulent use of false name or address for postal purposes),
  - 18 U.S.C. 1343 (relating to wire fraud),
  - 18 U.S.C. 1344 (relating to bank fraud),
  
  - 18 U.S.C. 1347 (relating to health care fraud),
  - 18 U.S.C. 1348 (relating to securities fraud),
  - 18 U.S.C. 1349 (relating to attempts or conspiracies to violate the provisions of chapter 63),
  - 18 U.S.C. 1350 (relating to certification of corporate financial reports),

- 18 U.S.C. 1351 (relating to fraud in foreign labor contracting),
- 18 U.S.C. ch. 69 (any provision contained in chapter 69 (relating to nationality and citizenship);  
18 U.S.C. 1421 (relating to accounts of court officers),  
18 U.S.C. 1422 (relating to fees in naturalization proceedings),  
18 U.S.C. 1423 (relating to misuse of evidence of citizenship or naturalization),  
18 U.S.C. 1424 (relating to misuse of papers in naturalization proceedings),  
18 U.S.C. 1425 (relating to procurement of citizenship or naturalization unlawfully),
- 18 U.S.C. 1426 (relating to reproduction of naturalization or citizenship papers),  
18 U.S.C. 1427 (relating to sale of naturalization or citizenship papers),  
18 U.S.C. 1428 (relating to surrender of canceled naturalization certificate),  
18 U.S.C. 1429 (relating to neglect or refusal to answer naturalization-related subpoena)
- 18 U.S.C. ch. 75 (any provision contained in chapter 75 (relating to passports and visas);  
18 U.S.C. 1541 (relating to issuance without authority),  
18 U.S.C. 1542 (relating to false statement in application and use of passport),  
18 U.S.C. 1543 (relating to forgery or false use of passport),  
18 U.S.C. 1544 (relating to misuse of passport),  
18 U.S.C. 1545 (relating to safe conduct violation),  
18 U.S.C. 1546 (relating to fraud and misuse of visas, permits, and other documents),
- 15 U.S.C. 6823 (section 523 of the Gramm-Leach-Bliley Act (relating to obtaining customer information by false pretenses)),
- 8 U.S.C. 1253 (section 243 of the Immigration and Nationality Act (relating to willfully failing to leave the United States after deportation)),
- 8 U.S.C. 1306 (section 266 of the Immigration and Nationality Act (relating to creating a counterfeit alien registration card)),
- 8 U.S.C. ch.12 (any provision contained in chapter 8 of title II of the Immigration and Nationality Act (8 U.S.C. 1321 et seq.) (relating to various immigration offenses);  
8 U.S.C. 1321 (relating to prevention of unauthorized landing of aliens),  
8 U.S.C. 1324c(e) (relating to document fraud),  
8 U.S.C. 1325 (relating to marriage fraud),  
8 U.S.C. 1326 (relating to reentry of removed aliens),  
8 U.S.C. 1327 (relating to aid or assisting certain aliens to enter),  
8 U.S.C. 1328 (relating to importation of alien for immoral purpose)
- 42 U.S.C. 408 (section 208 of the Social Security Act (relating to penalties for miscellaneous misconduct)),  
42 U.S.C. 1011 (section 811 of the Social Security Act (relating to fraud)),  
42 U.S.C. 1307(b) (section 1107(b) of the Social Security Act (relating to false statements)),  
42 U.S.C. 1320a-7b(a) (section 1128B(a) of the Social Security Act (relating to fraud),  
42 U.S.C. 1383a (section 1632 of the Social Security Act (relating to fraud)).

### **Terrorist Predicate Offenses: Five Year Mandatory Minimum (Citations)**

- 18 U.S.C. 32 (relating to destruction of aircraft or aircraft facilities),  
18 U.S.C. 37 (relating to violence at international airports),  
18 U.S.C. 81 (relating to arson within special maritime and territorial jurisdiction),  
18 U.S.C. 175 or 175b (relating to biological weapons),  
18 U.S.C. 175c (relating to variola virus),
- 18 U.S.C. 229 (relating to chemical weapons),

- 18 U.S.C. 351 (a), (b), (c), (d) (relating to congressional, cabinet, and Supreme Court killing, kidnaping, or attempts or conspiracies to kill or kidnap),
- 18 U.S.C. 831 (relating to nuclear materials),
- 18 U.S.C. 832 (relating to participation in nuclear and weapons of mass destruction threats to the U.S.)
- 18 U.S.C. 842(m) or (n) (relating to plastic explosives),
  
- 18 U.S.C. 844(f)(2) or (3) (relating to arson and bombing of Federal property risking or causing death),
- 18 U.S.C. 844(i) (relating to arson and bombing of property used in interstate commerce),
- 18 U.S.C. 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon),
- 18 U.S.C. 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad),
- 18 U.S.C. 1030(a)(1) (relating to protection of computers),
  
- 18 U.S.C. 1030(a)(5)(A) resulting in damage as defined in 1030(c)(4)(A)(i)(II) through (VI) (relating to protection of computers),
- 18 U.S.C. 1114 (relating to killing or attempted killing of officers and employees of the United States),
- 18 U.S.C. 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons),
- 18 U.S.C. 1203 (relating to hostage taking),
- 18 U.S.C. 1361 (relating to government property or contracts),
  
- 18 U.S.C. 1362 (relating to destruction of communication lines, stations, or systems),
- 18 U.S.C. 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States),
- 18 U.S.C. 1366(a) (relating to destruction of an energy facility),
- 18 U.S.C. 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff killing, kidnaping, or attempts or conspiracies to kill or kidnap),
- 18 U.S.C. 1992 (relating to terrorist attacks and other acts of violence against mass transit)
  
- 18 U.S.C. 2155 (relating to destruction of national defense materials, premises, or utilities),
- 18 U.S.C. 2156 (relating to national defense material, premises, or utilities),
- 18 U.S.C. 2280 (relating to violence against maritime navigation),
- 18 U.S.C. 2281 (relating to violence against maritime fixed platforms),
- 18 U.S.C. 2332 (relating to certain homicides and other violence against U.S. nationals occurring outside of the U.S.),
  
- 18 U.S.C. 2332a (relating to use of weapons of mass destruction),
- 18 U.S.C. 2332b (relating to acts of terrorism transcending national boundaries),
- 18 U.S.C. 2332f (relating to bombing of public places and facilities),
- 18 U.S.C. 2332g (relating to missile systems designed to destroy aircraft),
- 18 U.S.C. 2332h (relating to radiological dispersal devices),
  
- 18 U.S.C. 2339 (relating to harboring terrorists),
- 18 U.S.C. 2339A (relating to providing material support to terrorists),
- 18 U.S.C. 2339B (relating to providing material support to terrorist organizations),
- 18 U.S.C. 2339C (relating to financing of terrorism),
- 18 U.S.C. 2339D (relating to military-type training from a foreign terrorist organization),
  
- 18 U.S.C. 2340A (relating to torture),
- 21 U.S.C. 960a (section 1010A of the Controlled Substances Import and Export Act) (relating to narco-terrorism),
- 42 U.S.C. 2122 (section 92 of the Atomic Energy Act of 1954)(relating to prohibitions governing atomic weapons)
- 42 U.S.C. 2284 (section 236 of the Atomic Energy Act of 1954 (relating to sabotage of nuclear facilities or fuel)

49 U.S.C. 46502 (relating to aircraft piracy),

49 U.S.C. 46504 (second sentence)(relating to assault on a flight crew with a dangerous weapon),

49 U.S.C. 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft),

49 U.S.C. 46506 (if homicide or attempted homicide is involved)(relating to application of certain criminal laws to acts on aircraft),

49 U.S.C. 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility).

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