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MEMORANDUM FOR ASSISTANT REGIONAL COUNSEL (CRIMINAL TAX)

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SUBJECT: Identity Theft and Assumption Deterrence Act of 1998

This memorandum provides analysis and review of the Identity Theft and Assumption Deterrence Act of 1998¹ and the impact it may have in the area of criminal tax law.

BACKGROUND

On October 30, 1998, President Clinton signed into law the Identity Theft and Assumption Deterrence Act of 1998, hereinafter referred to as the "Act". The Act amends 18 U.S.C. § 1028 making it illegal to steal another person's personal identification information with the intent to commit an unlawful act. Previously, under 18 U.S.C. § 1028, only the production or possession of false identification documents was prohibited. Now, because of the rapid expansion of information technology, criminals may not require actual documents to assume an identity. As amended, the new statute directly addresses what Congress perceived as a gap in the law and an impediment to law enforcement when prosecuting identity fraud cases.²

A. Brief Legislative History

On March 21, 1997, Sen. Jon Kyl (R-AZ) first introduced in the Senate "The Identity Theft and Assumption Deterrence Act."³ Referred to the Senate Committee on the

¹ Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (1998) (amending 18 U.S.C. § 1028).

² See, e.g., 144 Cong. Rec. S9501 (daily ed. July 30, 1998) (statement of Sen. Kyl).

³ S. 512, "The Identity Theft and Deterrence Act", 104th Cong. (1997).

CC:EL:CT-121851-98

Judiciary, the bill criminalized the theft of identity information and set out restitution provisions for individual victims of identity theft.⁴ Subsequently, the bill was referred to the Senate Subcommittee on Technology, Terrorism and Government Information, which held legislative hearings on March 29 and May 20, 1998. Testimony was received from the United States Secret Service, the Federal Trade Commission and two victim advocates.⁵ On June 12, 1998, the Subcommittee unanimously voted to amend the bill in the form of a substitute bill. The amended bill was ordered reported out of the full Senate Committee on the Judiciary, by unanimous consent, on July 9, 1998.⁶ The Senate passed the bill on July 30, 1998 and then referred it to the House of Representatives. A proposed bill, nearly identical to the Senate bill, had previously been introduced in the House of Representatives by Rep. Shadegg (R-Az) on June 25, 1998.⁷ This bill was amended to match the Senate bill, debated on the floor of the House of Representatives and passed on October 7, 1998. The bill was then referred to the Senate, where it passed on October 14, 1998. Finally, the bill was signed into law by the President on October 30, 1998.⁸

The Act was widely supported by both the public and private sectors. Proponents included the Department of Justice, Federal Bureau of Investigation, Treasury Department, United States Secret Service, Federal Trade Commission, United States Postal Inspectors, American Bankers Association, Associated Credit Bureaus, VISA and MasterCard, and the United States Public Interest Research Group.⁹ In contemplating the legislation, the drafters relied upon a briefing report released by the General Accounting Office in May of 1998 entitled "Identity Fraud: Information on

⁴ Id.

⁵ The testimony of the U.S. Secret Service indicated that law enforcement is currently frustrated that the unlawful use of personal information is not a crime since identity theft is often perpetrated by organized criminals who know these crimes can be committed with relative impunity. S. Rep. No. 105-274, at 6 (1998).

⁶ Original cosponsors of the bill were Senators Kyl, Leahy, Hatch, Feinstein, Dewine, Faircloth, Harkin, D'Amato, Grassley and Abraham. Id. at 5.

⁷ H.R. 4151, 105th Cong. (1998).

⁸ Identity Theft and Assumption Deterrence Act of 1998, Pub. L. No. 105-318, 112 Stat. 3007 (1998) (amending 18 U.S.C. § 1028).

⁹ S. Rep. No. 105-274, at 8 (1998).

CC:EL:CT-121851-98

Prevalence, Cost, and Internet Impact is Limited”.¹⁰ The Report documented the increasing rise of identity fraud in the United States, as well as the severe financial impact upon the victims of the crime and the national economy. The vast amount of information contained in the report was accumulated from federal agencies and private entities, such as the U.S. Secret Service, Social Security Administration, U.S. Post Office, Trans Union Corporation, a national credit bureau, and VISA and MasterCard. Most importantly, it provided a definition for identity fraud which served as the nucleus for the creation of the Act.

ANALYSIS

A. The New 18 U.S.C. § 1028

In general terms, identity fraud involves “stealing another person’s personal identifying information, e.g., Social Security number, date of birth, and mother’s maiden name. Criminals use such information to fraudulently establish credit, run up debt, or to take over existing financial accounts.” GGD-98-100BR, May 1998 at 1. As amended, 18 U.S.C. § 1028 establishes the offense of identity theft by criminalizing the conduct of one 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 unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.” 18 U.S.C. § 1028(a)(7).¹¹ The Act broadly defines “means of identification” to include:

[A]ny 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;

¹⁰ GGD-98-100BR, May 1998.

¹¹ The Act also includes a provision making “[a]ny person who attempts or conspires to commit any offense under this section...subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.” 18 U.S.C. § 1028(f).

CC:EL:CT-121851-98

(C) unique electronic identification number, address or routing code; or

(D) telecommunication identifying information or access device (as defined in section 1029(e)).

Id. at § 1028(d)(3). Legislative intent demonstrates that this definition is a key aspect of the new law, for it is “intended to capture the varieties of individual identification information technologically feasible which can be compromised and criminally transferred or used. The definition is intended to incorporate other means of identification which may be developed in the future, but are not currently available.” S. Rep. No. 105-274, at 11 (1998).

From a law enforcement perspective, the amended statute now allows cases to be prosecuted which may involve fraud occurring in connection with identification information.¹² Under the old statute, only fraud occurring in connection with identification documents was a crime. This forced law enforcement agencies to investigate fraud cases only after the stolen identity information had been used. Many times, indirect charges involving mail fraud, wire fraud or money laundering would be prosecuted, when in actuality, it was the theft of an individual’s personal information which was the impetus for the crime.¹³ Now, based on the new statute, a more proactive approach to combating identity theft may be employed.



In terms of penalties, the transfer or use of one (1) or more means of identification which results in the individual committing the offense obtaining anything of value aggregating \$1,000.00 or more, during any one (1) year period, is punishable by a fine

¹² It is important to note that the Act contains a Rule of Construction which seeks to clarify that each means of identification in any one identification or fake identification document can not be treated as a separate offense under 18 U.S.C. § 1028(a)(7).

¹³ See, e.g., 144 Cong. Rec. S9504 (daily ed. July 30, 1998) (statement of Sen. Hatch).

CC:EL:CT-121851-98

or up to 15 years of imprisonment, or both.¹⁴ In the event that the use or transfer of a person's means of identification does not meet these monetary and time requirements, then a fine or up to 3 years of imprisonment, or both, is authorized.¹⁵ Enhanced penalties are also available if the identity theft offense is committed to facilitate a drug trafficking crime,¹⁶ in connection with a crime of violence,¹⁷ to facilitate an act of international terrorism,¹⁸ or after a prior conviction of violating the new statute becomes final.¹⁹ In addition, a provision for criminal forfeiture was enacted which allows for the "forfeiture to the United States of any personal property used or intended to be used to commit the offense," of identity theft. 18 U.S.C. § 1028(b)(5). Finally, the Act directs the United States Sentencing Commission to review and amend as appropriate, the Federal sentencing guidelines and policy statements which relate to 18 U.S.C. § 1028, as amended.²⁰

In an effort to assist the victims of identity theft, the Act directs the Federal Trade Commission to establish a centralized complaint and consumer education service, not later than one year after enactment.²¹ This organization will receive and log complaints of individuals who demonstrate a reasonable belief that one or more of their means of identification have been stolen, provide information to these individuals, and refer complaints to law enforcement authorities and to the three major national credit reporting agencies.

B. Application to Criminal Tax

The following analysis is provided to demonstrate how the Identity Theft and Assumption Deterrence Act of 1998 may impact the area of criminal tax law. The examples and factual

¹⁴ 18 U.S.C. § 1028(b).

¹⁵ Id.

¹⁶ As defined in 18 U.S.C. § 929(a)(2).

¹⁷ As defined in 18 U.S.C. § 924(c)(3).

¹⁸ As defined in 18 U.S.C. § 2331(1).

¹⁹ 18 U.S.C. § 1028(b).

²⁰ 18 U.S.C. § 1028, Section 4.

²¹ Id. at § 1028, Section 5.

CC:EL:CT-121851-98

scenarios used are only illustrative and are not to be construed as conclusive of the Act's application to criminal tax.

One area in which the Act should have immediate and significant impact, with respect to criminal tax law, is in the filing of false claims for tax refunds. 18 U.S.C. § 286 makes it illegal to conspire to defraud the United States with respect to claims, while 18 U.S.C.

§ 287 criminalizes the making or presentment of a claim upon the United States which is known to be false, fictitious or fraudulent.²² The filing of a false tax return pursuant to a scheme to obtain unjustified tax refunds has been held to establish a § 287 violation. United States v. Miller, 545 F.2d 1210, 1212 n.10 (9th Cir.), cert. denied, 430 U.S. 930 (1977). See, e.g., United States v. Hanyie, 568 F.2d 1091 (5th Cir. 1978)(defendant filed two returns, one real and one false, claiming refunds on both - the defendant was not entitled to any refund); and Kercher v. United States, 409 F.2d 814 (8th Cir. 1969)(multiple filing of false tax returns for actual individuals with refund checks mailed to an address controlled by the defendant). The fact pattern from Kercher demonstrates the clearest example of how the unauthorized use of another person's personal identity information, used in order to file false income tax returns, would violate the Act and § 287.

In Kercher, the defendant was convicted of violating 18 U.S.C. § 287 for presenting to the Department of the Treasury fraudulent claims for tax refunds. The claims were in the form of tax returns for ten actual, individual taxpayers. In the previous tax year, the taxpayers had authorized the defendant to prepare their tax returns. However, for the following year, the taxpayers did not authorize the defendant to prepare their tax returns. Without their knowledge or authority, the defendant used their names and personal information to file 1040A tax returns which claimed refunds. The returns were processed by the Internal Revenue Service and the refunds were sent to addresses controlled by the defendant. By unlawfully using their names, the defendant knowingly used a means of identification of another person with the intent to commit a violation of law. Clearly, this conduct would substantiate a violation of the Identity Theft and Assumption Deterrence Act of 1998.

Another area of criminal tax law where the Act may have far reaching ramifications is that of money laundering in violation of 18 U.S.C. § 1956. In general terms, if a bank account is established, through the unauthorized use of another person's name, social

²² 18 U.S.C. § 287 provides that "[w]hoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned for not more than five years and shall be subject to a fine in the amount provided in this title."

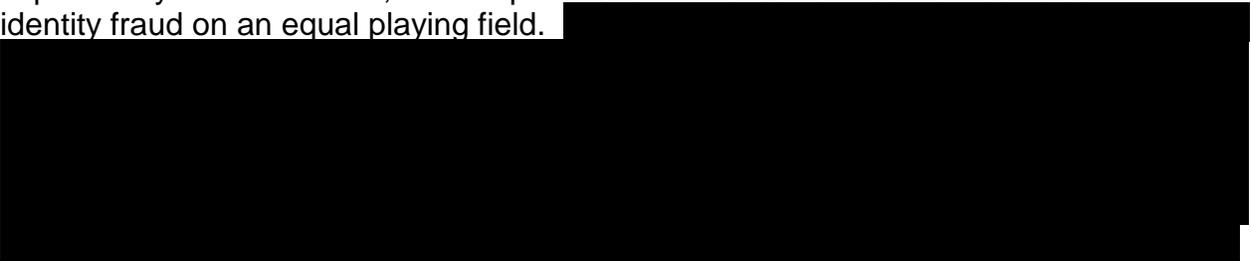
CC:EL:CT-121851-98

security number or other means of identification, and it is then used as a depository to conceal money which represents the proceeds of some unlawful activity, then the money laundering statute, as well as the Act will have been violated. The recent case of United States v. Akintobi, 159 F.3d 401 (9th Cir. 1998) demonstrates a more specific example of how the Act may be implicated in the realm of money laundering.

In Akintobi, the defendants obtained credit cards stolen from the mails and proceeded to make purchases and draw cash advances until the available credit limits were exhausted. Then, using the stolen credit cards and illegally obtained credit information on the cardholders, the defendants opened checking accounts in the cardholders' names. Subsequently, they withdrew the money used to open the checking accounts, leaving zero balances. Finally, the defendants used blank "starter" checks, issued to them when the checking accounts were opened, to pay down the balances on the original stolen credit cards. In a multi-count indictment, the defendants were charged with money laundering, inter alia, in violation of 18 U.S.C. § 1956 (a) (1) (A) (i). The Ninth Circuit ruled that the fraudulently obtained starter checks could be "proceeds" under 18 U.S.C. § 1956 (a) (1) (A) (i) and that submission of these checks to credit card companies, in order to pay down illegally obtained credit card accounts, constituted money laundering. In terms of identity theft, by establishing checking accounts in the cardholders' names with the intent to commit a violation of law, the actions of the defendants would have easily justified an added charge of violating the new Act.

CONCLUSION

The Identity Theft and Assumption Deterrence Act of 1998 is an effective and preemptive weapon to be employed against the crime of identity fraud. In an age of technological innovation, where the latest computer and scientific inventions are exploited by criminal minds, the Act permits law enforcement authorities to combat identity fraud on an equal playing field.



If you have any further questions regarding the Identity Theft and Assumption Deterrence Act of 1998, its new implications or legislative history, please contact Chris Monica of the Criminal Tax Division on (202) 622-4470.