

Calendar No. 459

110TH CONGRESS
1ST SESSION

S. 2168

To amend title 18, United States Code, to enable increased federal prosecution of identity theft crimes and to allow for restitution to victims of identity theft.

IN THE SENATE OF THE UNITED STATES

OCTOBER 16, 2007

Mr. LEAHY (for himself, Mr. SPECTER, Mr. GRASSLEY, Mr. NELSON of Florida, Mr. DURBIN, Mr. SCHUMER, Mr. BIDEN, and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

NOVEMBER 1, 2007

Reported by Mr. LEAHY, with amendments

[Omit the part struck through and insert the part printed in italics]

A BILL

To amend title 18, United States Code, to enable increased federal prosecution of identity theft crimes and to allow for restitution to victims of identity theft.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Identity Theft En-
5 forcement and Restitution Act of 2007”.

1 **SEC. 2. CRIMINAL RESTITUTION.**

2 Section 3663(b) of title 18, United States Code, is
3 amended—

4 (1) in paragraph (4), by striking “; and” and
5 inserting a semicolon;

6 (2) in paragraph (5), by striking the period at
7 the end and inserting “; and”; and

8 (3) by adding at the end the following:

9 “(6) in the case of an offense under sections
10 1028(a)(7) or 1028A(a) of this title, pay an amount
11 equal to the value of the time reasonably spent by
12 the victim in an attempt to remediate the intended
13 or actual harm incurred by the victim from the of-
14 fense.”.

15 **SEC. 3. PREDICATE OFFENSES FOR AGGRAVATED IDENTITY**

16 **THEFT AND MISUSE OF IDENTIFYING INFOR-**
17 **MATION OF ORGANIZATIONS.**

18 (a) **IDENTITY THEFT.**—Section 1028 of title 18,
19 United States Code, is amended—

20 (1) in subsection (a)(7), by inserting “(includ-
21 ing an organization as defined in section 18 of this
22 title)” after “person”; and

23 (2) in subsection (d)(7), by inserting “or other
24 person” after “specific individual”.

25 (b) **AGGRAVATED IDENTITY THEFT.**—Section 1028A
26 of title 18, United States Code, is amended—

1 (1) in subsection (a)(1), by inserting “(includ-
2 ing an organization as defined in section 18 of this
3 title)” after “person”; and

4 (2) in subsection (c)—

5 (A) in the matter preceding paragraph (1),
6 by inserting “, or a conspiracy to commit such
7 a felony violation,” after “any offense that is a
8 felony violation”;

9 (B) by redesignating—

10 (i) paragraph (11) as paragraph (14);

11 (ii) paragraphs (8) through (10) as
12 paragraphs (10) through (12), respectively;

13 and

14 (iii) paragraphs (1) through (7) as
15 paragraphs (2) through (8), respectively;

16 (C) by inserting prior to paragraph (2), as
17 so redesignated, the following:

18 “(1) section 513 (relating to making, uttering,
19 or possessing counterfeited securities);”;

20 (D) by inserting after paragraph (8), as so
21 redesignated, the following:

22 “(9) section 1708 (relating to mail theft);”;

23 (E) in paragraph (12), as so redesignated,
24 by striking “; or” and inserting a semicolon;
25 and

1 (F) by inserting after paragraph (12), as
 2 so redesignated, the following:

3 “(13) section 7201, 7206, or 7207 of title 26
 4 (relating to tax fraud); or”.

5 **SEC. 4. ENSURING JURISDICTION OVER THE THEFT OF**
 6 **SENSITIVE IDENTITY INFORMATION.**

7 Section 1030(a)(2)(C) of title 18, United States
 8 Code, is amended by striking “if the conduct involved an
 9 interstate or foreign communication”.

10 **SEC. 5. MALICIOUS SPYWARE, HACKING AND KEYLOGGERS.**

11 (a) IN GENERAL.—Section 1030 of title 18, United
 12 States Code, is amended—

13 (1) in subsection (a)(5)—

14 (A) by striking subparagraph (B); and

15 (B) in subparagraph (A)—

16 (i) by striking “(A)(i) knowingly” and
 17 inserting “(A) knowingly”;

18 (ii) by redesignating clauses (ii) and
 19 (iii) as subparagraphs (B) and (C), respec-
 20 tively; and

21 ~~(iii) in subparagraph (C), as so red-~~
 22 ~~esignated, by striking “, and” and inserting~~
 23 ~~a period;~~

24 *(iii) in subparagraph (C), as so red-*
 25 *esignated—*

1 (I) by inserting “and loss” after
2 “damage”; and

3 (II) by striking “; and” and in-
4 serting a period;

5 (2) in subsection (c)—

6 (A) in paragraph (2)(A), by striking
7 “(a)(5)(A)(iii),”;

8 (B) in paragraph (3)(B), by striking
9 “(a)(5)(A)(iii),”;

10 (C) by amending paragraph (4) to read as
11 follows:

12 “(4)(A) except as provided in subparagraphs
13 (E) and (F), a fine under this title, imprisonment
14 for not more than 5 years, or both, in the case of—

15 “(i) an offense under subsection (a)(5)(B),
16 which does not occur after a conviction for an-
17 other offense under this section, if the offense
18 caused (or, in the case of an attempted offense,
19 would, if completed, have caused)—

20 “(I) loss to 1 or more persons during
21 any 1-year period (and, for purposes of an
22 investigation, prosecution, or other pro-
23 ceeding brought by the United States only,
24 loss resulting from a related course of con-
25 duct affecting 1 or more other protected

1 computers) aggregating at least \$5,000 in
2 value;

3 “(II) the modification or impairment,
4 or potential modification or impairment, of
5 the medical examination, diagnosis, treat-
6 ment, or care of 1 or more individuals;

7 “(III) physical injury to any person;

8 “(IV) a threat to public health or
9 safety;

10 “(V) damage affecting a computer
11 used by or for an entity of the United
12 States Government in furtherance of the
13 administration of justice, national defense,
14 or national security; or

15 “(VI) damage affecting 10 or more
16 protected computers during any 1-year pe-
17 riod; or

18 “(ii) an attempt to commit an offense pun-
19 ishable under this subparagraph;

20 “(B) except as provided in subparagraphs (E)
21 and (F), a fine under this title, imprisonment for
22 not more than 10 years, or both, in the case of—

23 “(i) an offense under subsection (a)(5)(A),
24 which does not occur after a conviction for an-
25 other offense under this section, if the offense

1 caused (or, in the case of an attempted offense,
2 would, if completed, have caused) a harm pro-
3 vided in subclauses (I) through (VI) of subpara-
4 graph (A)(i); or

5 “ (ii) an attempt to commit an offense pun-
6 ishable under this subparagraph;

7 “ (C) except as provided in subparagraphs (E)
8 and (F), a fine under this title, imprisonment for
9 not more than 20 years, or both, in the case of—

10 “ (i) an offense or an attempt to commit an
11 offense under subparagraphs (A) or (B) of sub-
12 section (a)(5) that occurs after a conviction for
13 another offense under this section; or

14 “ (ii) an attempt to commit an offense pun-
15 ishable under this subparagraph;

16 “ (D) a fine under this title, imprisonment for
17 not more than 10 years, or both, in the case of—

18 “ (i) an offense or an attempt to commit an
19 offense under subsection (a)(5)(C) that occurs
20 after a conviction for another offense under this
21 section; or

22 “ (ii) an attempt to commit an offense pun-
23 ishable under this subparagraph;

24 “ (E) if the offender attempts to cause or know-
25 ingly or recklessly causes serious bodily injury from

1 conduct in violation of subsection (a)(5)(A), a fine
 2 under this title, imprisonment for not more than 20
 3 years, or both;

4 “(F) if the offender attempts to cause or know-
 5 ingly or recklessly causes death from conduct in vio-
 6 lation of subsection (a)(5)(A), a fine under this title,
 7 imprisonment for any term of years or for life, or
 8 both; or

9 “(G) a fine under this title, imprisonment for
 10 not more than 1 year, or both, for—

11 “(i) any other offense under subsection
 12 (a)(5); or

13 “(ii) an attempt to commit an offense pun-
 14 ishable under this subparagraph.”; and

15 (D) by striking paragraph (5); and
 16 (3) in subsection (g)—

17 (A) in the second sentence, by striking “in
 18 clauses (i), (ii), (iii), (iv), or (v) of subsection
 19 (a)(5)(B)” and inserting “in subclauses (I),
 20 (II), (III), ~~(IV)~~, ~~(V)~~, ~~or (VI)~~ (IV), or (V) of sub-
 21 section (c)(4)(A)(i)”;

22 (B) in the third sentence, by striking “sub-
 23 section (a)(5)(B)(i)” and inserting “subsection
 24 (c)(4)(A)(i)(I)”.

1 (b) CONFORMING CHANGES.—Section
2 2332b(g)(5)(B)(i) of title 18, United States Code, is
3 amended by striking “1030(a)(5)(A)(i) resulting in dam-
4 age as defined in 1030(a)(5)(B)(ii) through (v)” and in-
5 serting “1030(a)(5)(A) resulting in damage as defined in
6 1030(c)(4)(A)(i)(II) through (VI)”.

7 **SEC. 6. CYBER-EXTORTION.**

8 Section 1030(a)(7) of title 18, United States Code,
9 is amended to read as follows:

10 “(7) with intent to extort from any person any
11 money or other thing of value, transmits in inter-
12 state or foreign commerce any communication con-
13 taining any—

14 “(A) threat to cause damage to a protected
15 computer;

16 “(B) threat to obtain information from a
17 protected computer without authorization or in
18 excess of authorization or to impair the con-
19 fidentiality of information obtained from a pro-
20 tected computer without authorization or by ex-
21 ceeding authorized access; or

22 “(C) demand or request for money or
23 other thing of value in relation to damage to a
24 protected computer, where such damage was
25 caused to facilitate the extortion;”.

1 **SEC. 7. CONSPIRACY TO COMMIT CYBER-CRIMES.**

2 *Section 1030(b) of title 18, United States Code, is*
3 *amended by inserting “conspires to commit or” after “Who-*
4 *ever”.*

5 **SEC. 8. USE OF FULL INTERSTATE AND FOREIGN COM-**
6 **MERCE POWER FOR CRIMINAL PENALTIES.**

7 *Section 1030(e)(2)(B) of title 18, United States Code,*
8 *is amended by inserting “or affecting” after “which is used*
9 *in”.*

10 **SEC. 9. FORFEITURE FOR SECTION 1030 VIOLATIONS.**

11 *Section 1030 of title 18, United States Code, is amend-*
12 *ed by adding at the end the following:*

13 *“(i)(1) The court, in imposing sentence on any person*
14 *convicted of a violation of this section, or convicted of con-*
15 *spiracy to violate this section, shall order, in addition to*
16 *any other sentence imposed and irrespective of any provi-*
17 *sion of State law, that such person forfeit to the United*
18 *States—*

19 *“(A) such person’s interest in any personal prop-*
20 *erty that was used or intended to be used to commit*
21 *or to facilitate the commission of such violation; and*

22 *“(B) any property, real or personal, constituting*
23 *or derived from, any proceeds that such person ob-*
24 *tained, directly or indirectly, as a result of such vio-*
25 *lation.*

1 “(2) *The criminal forfeiture of property under this*
 2 *subsection, any seizure and disposition thereof, and any ju-*
 3 *dicial proceeding in relation thereto, shall be governed by*
 4 *the provisions of section 413 of the Comprehensive Drug*
 5 *Abuse Prevention and Control Act of 1970 (21 U.S.C. 853),*
 6 *except subsection (d) of that section.*

7 “(j) *For purposes of subsection (i), the following shall*
 8 *be subject to forfeiture to the United States and no property*
 9 *right shall exist in them:*

10 “(1) *Any personal property used or intended to*
 11 *be used to commit or to facilitate the commission of*
 12 *any violation of this section, or a conspiracy to vio-*
 13 *late this section.*

14 “(2) *Any property, real or personal, which con-*
 15 *stitutes or is derived from proceeds traceable to any*
 16 *violation of this section, or a conspiracy to violate*
 17 *this section”.*

18 **SEC. 10. DIRECTIVE TO UNITED STATES SENTENCING COM-**
 19 **MISSION.**

20 (a) *DIRECTIVE.*—*Pursuant to its authority under sec-*
 21 *tion 994(p) of title 28, United States Code, and in accord-*
 22 *ance with this section, the United States Sentencing Com-*
 23 *mission shall review its guidelines and policy statements*
 24 *applicable to persons convicted of offenses under sections*
 25 *1028, 1028A, 1030, 2511, and 2701 of title 18, United*

1 *States Code, and any other relevant provisions of law, in*
2 *order to reflect the intent of Congress that such penalties*
3 *be increased in comparison to those currently provided by*
4 *such guidelines and policy statements.*

5 **(b) REQUIREMENTS.**—*In determining its guidelines*
6 *and policy statements on the appropriate sentence for the*
7 *crimes enumerated in subsection (a), the United States Sen-*
8 *tencing Commission shall consider the extent to which the*
9 *guidelines and policy statements may or may not account*
10 *for the following factors in order to create an effective deter-*
11 *rent to computer crime and the theft or misuse of personally*
12 *identifiable data:*

13 **(1)** *The level of sophistication and planning in-*
14 *volved in such offense.*

15 **(2)** *Whether such offense was committed for pur-*
16 *pose of commercial advantage or private financial*
17 *benefit.*

18 **(3)** *The potential and actual loss resulting from*
19 *the offense including—*

20 **(A)** *the value of information obtained from*
21 *a protected computer, regardless of whether the*
22 *owner was deprived of use of the information;*
23 *and*

24 **(B)** *where the information obtained con-*
25 *stitutes a trade secret or other proprietary infor-*

1 *mation, the cost the victim incurred developing*
2 *or compiling the information.*

3 *(4) Whether the defendant acted with intent to*
4 *cause either physical or property harm in committing*
5 *the offense.*

6 *(5) The extent to which the offense violated the*
7 *privacy rights of individuals.*

8 *(6) The effect of the offense upon the operations*
9 *of an agency of the United States Government, or of*
10 *a State or local government.*

11 *(7) Whether the offense involved a computer used*
12 *by the United States Government, a State, or a local*
13 *government in furtherance of national defense, na-*
14 *tional security, or the administration of justice.*

15 *(8) Whether the offense was intended to, or had*
16 *the effect of, significantly interfering with or dis-*
17 *rupting a critical infrastructure.*

18 *(9) Whether the offense was intended to, or had*
19 *the effect of, creating a threat to public health or safe-*
20 *ty, causing injury to any person, or causing death.*

21 *(10) Whether the defendant purposefully involved*
22 *a juvenile in the commission of the offense.*

23 *(11) Whether the defendant's intent to cause*
24 *damage or intent to obtain personal information*
25 *should be disaggregated and considered separately*

1 *from the other factors set forth in USSG*
2 *2B1.1(b)(14).*

3 *(12) Whether the term “victim” as used in*
4 *USSG 2B1.1, should include individuals whose pri-*
5 *vacancy was violated as a result of the offense in addi-*
6 *tion to individuals who suffered monetary harm as a*
7 *result of the offense.*

8 *(13) Whether the defendant disclosed personal in-*
9 *formation obtained during the commission of the of-*
10 *fense.*

11 *(c) ADDITIONAL REQUIREMENTS.—In carrying out*
12 *this section, the United States Sentencing Commission*
13 *shall—*

14 *(1) assure reasonable consistency with other rel-*
15 *evant directives and with other sentencing guidelines;*

16 *(2) account for any additional aggravating or*
17 *mitigating circumstances that might justify excep-*
18 *tions to the generally applicable sentencing ranges;*

19 *(3) make any conforming changes to the sen-*
20 *tencing guidelines; and*

21 *(4) assure that the guidelines adequately meet*
22 *the purposes of sentencing as set forth in section*
23 *3553(a)(2) of title 18, United States Code.*

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A BILL

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