AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

112TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
112–639

STOPPING TAX OFFENDERS AND PROSECUTING IDENTITY THEFT ACT OF 2012

JULY 31, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 4362]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4362) to provide effective criminal prosecutions for certain identity thefts, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for the Legislation	2
Hearings	4
Committee Consideration	5
Committee Votes	5
Committee Oversight Findings	5
New Budget Authority and Tax Expenditures	5
Congressional Budget Office Cost Estimate	5
Performance Goals and Objectives	6
Advisory on Earmarks	6
Section-by-Section Analysis	6
Changes in Existing Law Made by the Bill, as Reported	7
Dissenting Views	9

19–006

Purpose and Summary

H.R. 4362, the "Stopping Tax Offenders and Prosecuting Identity Theft Act," provides additional tools to combat the serious problem of tax-return identity theft. This criminal activity has expanded exponentially as identity thieves file for and receive other people's income tax returns, victimizing unsuspecting taxpayers. H.R. 4362 adds tax fraud to the list of predicate offenses for aggravated identity theft and expands the definition of an "identity theft victim" to include businesses and charitable organizations, which often have their identities stolen and used in "phishing" schemes to extract the sensitive information from unsuspecting taxpayers used in tax return thefts. H.R. 4362 also calls for better coordination between the Department of Justice (DOJ) and state and local law enforcement in tax-return identity theft cases, and requires DOJ to report back on trends in tax-return identity theft, progress on prosecuting these crimes, and recommendations for additional legal tools to combat it.

Background and Need for the Legislation

Federal law prohibits identity theft and identity fraud, specifically the knowing possession, production, transfer, or use of an identification document, a false identification document, or a means of identification without lawful authority. Penalties for violating this law range from up to 5 years for garden-variety identity theft to up to 20 years if the identity theft facilitates a drug offense, crime of violence, or is a second offense, or up to 30 years if the identity theft facilitates an act of terrorism. This statute was enacted in 1998 at 18 U.S.C. § 1028.

In 2004, the law was expanded to add a provision known as "aggravated identity theft." Codified at 18 U.S.C. § 1028A, this statute provides for a consecutive 2-year sentence for

> "Whoever, during and in relation to any felony enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person . . ."

Subsection (c) contains a list of "predicate" felonies that if accompanied by identity theft can result in the consecutive 2-year sentence that is in addition to the sentence for the predicate felony. These felonies include theft, embezzlement, fraud, false statements, wire fraud, and false statements in connection to acquiring a firearm.

Like other forms of identity theft, tax fraud through identity theft is a rapidly growing problem in the United States. As a general matter, this crime is committed when an individual uses the Social Security Number and other information of another individual to file a false tax return with the Internal Revenue Service ("IRS") or fraudulently claims someone as a dependent in order to receive a refund.

Tax fraud through identity theft is often committed by gangs and organized crime organizations who defraud large groups of people.[1]

[1] Written Statement of Nina E Olson, National Taxpayer Advocate, Hearing on Tax Fraud by Identity Theft, Part 2: Statute, Progress, and Potential Solutions, Subcommittee on Fiscal Responsibility and Economic Growth, Committee on Finance, March 20, 2012.

These groups see it as a low-risk, high-return crime that often carries low penalties. Tax fraud is also being committed at high rates by prison inmates. In just 2009, there were 1,464 fraudulent tax returns filed by inmates.[2]

Criminals obtain Social Security Numbers from various sources, including medical facilities, schools, insurance companies, and pension funds. Another common source for Social Security Numbers is the Social Security Administration's Death Master File, a list containing the full name, Social Security Number, date of birth, and some address information for every person who dies in the United States that is published each year. In one instance, scam artists allegedly established a fake job placement company and used the information they learned from 300 victims to obtain more than $450,000 in returns from the IRS.[3] The fraudulent returns are either paid to the scam artist in the form of a check, direct deposit, or debit cards. Debit cards are particularly dangerous because once a refund is issued in that form, it is extremely difficult to trace.

The IRS detected 940,000 fake returns among the 2010 returns alone, for which the IRS would have paid over $6.5 billion in fraudulent payments if the fake returns had not been detected and stopped.[4] The IRS estimates, however, that it did pay as much as $5.2 billion in fraudulent refunds in 2010 for unidentified fake tax returns.[5] Fraudulent returns are often not detected because the IRS does not verify W–2 forms until after a refund is paid. Detection is also difficult when the identity stolen is not an active income tax filer, either because the person is deceased or because he is not required to pay Federal income taxes. In these cases, the victim is not notified of the fraud when he attempts to file a return and, thus, does not in turn notify the IRS of the fraud.

The billions of dollars in fraudulent tax returns that are paid each year harm the taxpayers as a whole because, in many cases, the IRS pays two refunds—one to the scam artist, and one to the actual taxpayer. Tax fraud through identity theft also can be devastating to the individual victim, who must prove their own identity to the IRS and, oftentimes, wait months or years to receive refunded money that is rightfully owed to them. In some instances, individual victims have faced enforcement actions by the IRS due to fraudulent returns filed by scam artists under their name. And recipients of Social Security disability payments could potentially face the loss of these benefits because the Social Security Administration uses tax returns as proof that someone is working.

The IRS reports that it is taking a number of steps to prevent, detect, and prosecute identity theft. These include:

- Implementing identity theft screening filters designed to spot fake returns before a refund is issued. As of March 2012,

[2] Senators Press IRS to Stop Prisoner Tax Fraud, Accounting Today, January 19, 2011, at http://www.accountingtoday.com/news/Senators-Press-IRS-Stop-Prisoner-Tax-Fraud-56973-1.html.

[3] *Identity Theft Tops List of Tax Scams,* CNBC, *available at* http://www.cnbc.com/id/47077876/Identity_Theft_Tops_List_of_Tax_Scams.

[4] Testimony of the Honorable J. Russell George, Treasury Inspector General for Tax Administration, Joint Hearing before the Committee on Ways and Means, Subcommittees on Oversight and Social Security, U.S. House of Representatives, May 8, 2012.

[5] *Id.*

these filters have stopped potentially fraudulent returns worth $1.15 billion in refunds.[6]

- Issuing identification numbers to taxpayers whose identities have been stolen in order to facilitate their income tax filing and prevent others from stealing their identity.
- Implementing procedures for using personal information gathered by law enforcement to flag taxpayer accounts that may be subject to identity theft.
- Expanding how the IRS uses lists of prisoners in order to stop inmates from filing false returns.
- Establishing a specialized unit for identity theft within the IRS's Criminal Investigation division.

A recently-released report by the Treasury Inspector General for Tax Administration, however, found that the IRS was falling short on its efforts to combat identity theft. Among the issues cited by the Inspector General are the length of time the IRS takes to resolve a case, the inadequacy of communications with victims, confusing and conflicting internal advice on how to handle such cases, and evidence that the IRS does not use the information it has to identify trends in identity theft in order to prevent future crimes.[7]

This legislation is designed to combat tax return ID theft specifically; it does not correct or address the Supreme Court's decision in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), involving another aspect of the identity fraud statute. In *Flores-Figueroa,* the Supreme Court held 9–0 that the aggravated identity theft statute requires the government to prove that the defendant knew the means of identification belonged to another person. Because of this interpretation, it is easier for a defendant to escape responsibility by asserting that while the documents he possessed were improper, he did not have knowledge that they belonged to an actual person. Until this decision is addressed, attempts to combat identity theft within the United States will be hampered.

In light of the *Flores-Figueroa* opinion, the Committee supports amending Section 1028A to correct the problem the Supreme Court addressed. To achieve this, in 2011, the Committee reported H.R. 2552, the Identity Theft Improvement Act of 2011. H.R. 2552 specifically amends Title 18, United States Code, Section 1028, so that the Government need not prove that the defendant knew the means of identification was of another person in order to prosecute for identity theft. This legislation would restore the identity theft statute and enable law enforcement to prosecute those who steal and use other people's identities.

Hearings

The Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on June 28, 2012, on "Identity Theft and Tax Preparation Fraud." Testimony was received from Ms. Rebecca Sparkman, Director, Operations Policy & Support, Criminal Investigation

[6] Testimony of Steven T. Miller, Deputy Commissioner for Services and Enforcement, Internal Revenue Service, Before the Senate Committee on Finance, Subcommittee on Fiscal Responsibility and Economic Growth, March 20, 2012.

[7] *Most Taxpayers Whose Identities Have Been Stolen to Commit Refund Fraud Do Not Receive Quality Customer Service,* Treasury Inspector General for Tax Administration, May 3, 2012.

Division, Internal Revenue Service; Ms. Nina Olson, National Taxpayer Advocate, U.S. Department of Treasury; Mr. Sanford Zinman, National Tax Chair, National Conference of CPA Practitioners; and Mr. Michael Robinson, a victim of tax-return identity theft.

Committee Consideration

On July 10, 2012, the Committee met in open session and ordered the bill H.R. 4362 favorably reported without amendment, by voice vote, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no rollcall votes during the Committee's consideration of H.R. 4362.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 4362, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 26, 2012.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4362, the "STOP Identity Theft Act of 2012."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 4362—STOP Identity Theft Act of 2012.

As ordered reported by the House Committee on the Judiciary on July 10, 2012.

H.R. 4362 would direct the Department of Justice (DOJ) to better utilize its existing resources to combat identity theft related to the filing of tax returns. The department currently allocates its funding to investigate and prosecute a wide range of criminal activity, including identify theft. CBO expects that the legislation could result in a reallocation of DOJ resources, but we estimate that implementing the bill would have no significant net cost to the Federal Government. Enacting H.R. 4362 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 4362 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

On August 1, 2011, CBO transmitted a cost estimate for H.R. 2552, the Identity Theft Improvement Act of 2011, as ordered reported by the House Committee on the Judiciary on July 21, 2011. That legislation would eliminate the state-of-mind requirement in certain identity theft cases. CBO estimated that H.R. 2552 would not have a significant impact on the Federal budget.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 4362 is intended to clarify the statutory authority for the longstanding practice of the Department of Justice of providing investigatory assistance on request of State and local authorities with respect to certain violent crimes.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 4362 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

Section-by-Section Analysis

Section 1—Short Title.

This section cites the short title of the Act as the Stopping Tax Offenders and Prosecuting Identity Theft Act (STOP Identity Theft).

Section 2—Use of Department of Justice Resources With Regard to Tax Return Identity Theft.

This section encourages the Department of Justice to dedicate additional resources, including the use of investigative task forces,

to address tax-return identity theft. The section encourages the Department to focus its resources in areas with a high rate of tax-return identity theft, to coordinate investigations with state and local law enforcement agencies, and to protect vulnerable victims, including veterans, seniors and minors.

Section 3—Victims of Identity Theft May Include Organizations.

This section amends the Federal identity theft statute (18 U.S.C. § 1028) to clarify that the victim of such an offense includes not just individuals, but businesses and organizations as well.

Section 4—Tax Fraud as a Predicate for Aggravated Identity Theft.

This section amends the Federal aggravated identity theft statute to add tax fraud to the list of predicate offenses.

Section 5—Reporting Requirement.

This section instructs the Department of Justice to include in an existing annual report information about trends in tax-return identity theft, the effectiveness of the additional prosecutorial tools provided by the Act, recommendations for additional improvements to Federal law, and the status of the Department's implementation of the DOJ IG's 2010 report entitled "The Department of Justice's Efforts to Combat Identity Theft."

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

PART I—CRIMES

* * * * * * *

CHAPTER 47—FRAUD AND FALSE STATEMENTS

* * * * * * *

§ 1028. Fraud and related activity in connection with identification documents, authentication features, and information

(a) * * *

* * * * * * *

(d) In this section and section 1028A—

(1) * * *

* * * * * * *

(7) 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] *specific person*, including any—

(A) * * *

* * * * * * *

§ 1028A. Aggravated identity theft

(a) * * *

* * * * * * *

(c) DEFINITION.—For purposes of this section, the term "felony violation enumerated in subsection (c)" means any offense that is a felony violation of—

(1) * * *

* * * * * * *

(10) 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); **[**or**]**

(11) section 208, 811, 1107(b), 1128B(a), or 1632 of the Social Security Act (42 U.S.C. 408, 1011, 1307(b), 1320a-7b(a), and 1383a) (relating to false statements relating to programs under the Act)**[**.**]***; or*

(12) section 7206 or 7207 of the Internal Revenue Code of 1986.

* * * * * * *

Dissenting Views

INTRODUCTION

H.R. 4362 amends the Federal aggravated identity theft statute to add tax fraud to the list of predicate offenses. The penalty for aggravated identity theft is a mandatory term of imprisonment of 2 years or 5 years for a terrorism offense. This bill would, therefore, subject more people to mandatory minimum sentences and would consequently present all of the problems associated with those sentences. For these reasons, and those stated below, we urge our colleagues to oppose this legislation and we respectfully dissent.

DESCRIPTION AND BACKGROUND

Identity theft is a serious problem. Like other forms of identity theft, tax fraud through identity theft is a growing problem in the United States. This crime is committed when an individual uses the Social Security number and other information of another individual to file a false tax return with the Internal Revenue Service ("IRS") or fraudulently claims someone as a dependant in order to receive a refund. Tax fraud through identity theft is often committed by gangs and organized crime organizations who defraud large groups of people.[1]

The IRS detected 940,000 fake returns among the 2010 returns alone, for which the IRS would have paid over $6.5 billion in fraudulent payments if the fake returns had not been detected and

[1] Written Statement of Nina E Olson, National Taxpayer Advocate, Hearing on Tax Fraud by Identity Theft, Part 2: Statute, Progress, and Potential Solutions, Subcommittee on Fiscal Responsibility and Economic Growth, Committee on Finance, March 20, 2012, 2–3.

stopped.[2] The IRS estimates, however, that it did pay as much as $5.2 billion in fraudulent refunds in 2010 for unidentified fake tax returns.[3]

H.R. 4362 directs the Department of Justice to bring more prosecutions of tax return identity theft; expands the definition of victims of identity theft to include organizations in addition to individuals; requires the Department of Justice to report on the incidence of tax return identity theft and enforcement efforts; and adds tax fraud as a predicate for aggravated identity theft under 18 U.S.C. § 1028A(c), which subjects offenders to a mandatory minimum sentence of two or 5 years.[4] A detailed section-by-section follows.

Section 1, Short Title. This section cites the short title of the Act as the Stopping Tax Offenders and Prosecuting Identity Theft Act (STOP Identity Theft).

Section 2, Use of Department of Justice Resources with Regard to Tax Return Identity Theft. This section encourages the Department of Justice to dedicate additional resources, including the use of investigative task forces, to address tax-return identity theft. The section encourages the Department to focus its resources in areas with a high rate of tax-return identity theft, to coordinate investigations with state and local law enforcement agencies, and to protect vulnerable victims, including veterans, seniors and minors.

Section 3, Victims of Identity Theft May Include Organizations. This section amends the Federal identity theft statute (18 U.S.C. § 1028) to clarify that the victim of such an offense includes not just individuals, but businesses and organizations as well.

Section 4, Tax Fraud as a Predicate for Aggravated Identity Theft. This section amends the Federal aggravated identity theft statute to add tax fraud to the list of predicate offenses. The penalty for aggravated identity theft is a mandatory term of imprisonment of 2 years or, for a terrorism offense, 5 years.

Section 5, Reporting Requirement. This section instructs the Department of Justice to include in an existing annual report information about trends in tax-return identity theft, the effectiveness of the additional prosecutorial tools provided by the Act, recommendations for additional improvements to Federal law, and the status of the Department's implementation of the DOJ IG's 2010 report entitled "The Department of Justice's Efforts to Combat Identity Theft."

CONCERNS WITH H.R. 4362

By adding certain tax offenses to the list of predicate crimes for aggravated identity theft, H.R. 4362 includes mandatory minimums of 2 or 5 years. Mandatory minimums have been studied extensively and have been found to distort rational sentencing systems, to discriminate against minorities, and to violate common sense. Even if everyone involved in a case, from arresting officer, prosecutor, judge and victim, believes that the mandatory minimum would be an unjust sentence for a particular defendant in a

[2] Testimony of the Honorable J. Russell George, Treasury Inspector General for Tax Administration, Joint Hearing before the Committee on Ways and Means, Subcommittees on Oversight and Social Security, U.S. House of Representatives, May 8, 2012, 1.

[3] *Id.* at 3.

[4] *See* Charles Doyle, Mandatory Minimum Sentencing: Federal Aggravated Identity Theft, Congressional Research Service Report for Congress (Feb. 15, 2012), at 1.

case, it still must be imposed. Mandatory minimum sentences, based merely on the name of a crime, remove sentencing discretion from the sentencing commission and the judge. Regardless of the role of the offender in the particular crime, the offender's record or lack thereof, or the facts and circumstances of the case, the judge has no discretion but to impose the mandatory minimum set by legislators long before the crime has been committed.

One major consequence is that mandatory minimums contribute to over-incarceration. As Federal Public Defender Michael Nachmanoff testified before the U.S. Sentencing Commission in 2009, "[t]he Federal prison population is currently at 206,786 inmates, a nearly five-fold increase since mandatory minimums and mandatory guidelines became law."[5]

Congressman John Conyers, Jr. (D–MI) and Congressman Robert C. "Bobby" Scott (D–VA) offered an amendment to double the statutory maximum for tax fraud identity theft and remove the mandatory minimums. As previously discussed, the current law provides for penalties of 2 years for aggravated identity theft and 5 years for aggravated identity theft involving terrorism. The amendment offered by Congressmen Conyers and Scott doubles those maximum sentences to 4 years for aggravated identity theft and 10 years for aggravated identity theft involving terrorism. The amendment also removes the mandatory minimum sentences. This approach is superior because it permits the sentencing judge to impose longer sentences than current law allows in cases where longer sentences are warranted but does not mandate sentences of a set length regardless of the circumstances. The amendment failed by voice vote.

CONCLUSION

Although tax fraud identity theft is a serious problem and Congress has an interest in combating it, mandatory minimums are not the solution. H.R. 4362 includes several provisions that would have effectively addressed the problem, such as the provision directing the Department of Justice to bring more prosecutions of tax return identity theft, without causing the harms of mandatory minimums. With the mandatory minimums included, H.R. 4362 exacerbates current law by including one more irrational sentencing provision that will result in unjust sentences for some defendants.

For the foregoing reasons, we respectfully dissent.

JOHN CONYERS, JR.
ROBERT C. "BOBBY" SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
JUDY CHU.

○

[5] Statement of Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Public Hearing Before the United States Sentencing Commission, "The Sentencing Reform Act of 1984: 25 Years Later," New York, New York, July 9, 2009, available at http://www.fd.org/pdfllib/Statement%20of%20Michael%20Nachmanoff%20USSC%20Regional%20Hearing%207.9.09.pdf.