

STOPPING TAX OFFENDERS AND PROSECUTING IDENTITY
THEFT ACT OF 2014

SEPTEMBER 8, 2014.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 744]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
(H.R. 744) to provide effective criminal prosecutions for certain
identity thefts, and for other purposes, having considered the same,
reports favorably thereon with an amendment and recommends
that the bill as amended do pass.

CONTENTS

	Page
The Amendment	2
Purpose and Summary	2
Background and Need for the Legislation	3
Hearings	5
Committee Consideration	5
Committee Votes	5
Committee Oversight Findings	6
New Budget Authority and Tax Expenditures	7
Congressional Budget Office Cost Estimate	7
Duplication of Federal Programs	8
Disclosure of Directed Rule Makings	8
Performance Goals and Objectives	8
Advisory on Earmarks	8
Section-by-Section Analysis	8
Changes in Existing Law Made by the Bill, as Reported	9
Dissenting Views	10

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Stopping Tax Offenders and Prosecuting Identity Theft Act of 2014” or the “STOP Identity Theft Act of 2014”.

SEC. 2. USE OF DEPARTMENT OF JUSTICE RESOURCES WITH REGARD TO TAX RETURN IDENTITY THEFT.

(a) IN GENERAL.—The Attorney General should make use of all existing resources of the Department of Justice, including any appropriate task forces, to bring more perpetrators of tax return identity theft to justice.

(b) CONSIDERATIONS TO BE TAKEN INTO ACCOUNT.—In carrying out this section, the Attorney General should take into account the following:

(1) The need to concentrate efforts in those areas of the country where the crime is most frequently reported.

(2) The need to coordinate with State and local authorities for the most efficient use of their laws and resources to prosecute and prevent the crime.

(3) The need to protect vulnerable groups, such as veterans, seniors, and minors (especially foster children) from becoming victims or otherwise used in the offense.

SEC. 3. VICTIMS OF IDENTITY THEFT MAY INCLUDE ORGANIZATIONS.

Chapter 47 of title 18, United States Code, is amended—

(1) in section 1028—

(A) in subsection (a)(7), by inserting “(including an organization)” after “another person”; and

(B) in subsection (d)(7), in the matter preceding subparagraph (A), by inserting “or other person” after “specific individual”; and

(2) in section 1028A(a)(1), by inserting “(including an organization)” after “another person”.

SEC. 4. IDENTITY THEFT FOR PURPOSES OF TAX FRAUD.

Section 1028(b)(3) of title 18, United States Code, is amended—

(1) in subparagraph (B), by striking “or” at the end;

(2) in subparagraph (C), by inserting “or” after the semicolon; and

(3) by adding at the end the following:

“(D) during and in relation to a felony under section 7206 or 7207 of the Internal Revenue Code of 1986;”.

SEC. 5. REPORTING REQUIREMENT.

Not later than 180 days after the date of the enactment of this Act, the Attorney General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report that contains the following information:

(1) Information readily available to the Department of Justice about trends in the incidence of tax return identity theft.

(2) Recommendations on additional statutory tools that would aid in the effective prosecution of tax return identity theft.

(3) The status on implementing the recommendations of the Department’s March 2010 Audit Report 10-21 entitled “The Department of Justice’s Efforts to Combat Identity Theft”.

Purpose and Summary

H.R. 744 increases the penalty for Federal identity theft offenses committed during and in relation to tax fraud and clarifies that, in addition to individuals, businesses and organizations can be considered victims of Federal identity theft offenses. H.R. 744 encourages the Department of Justice to dedicate additional resources, including the use of investigative task forces, to address tax return identity theft and coordinate investigations with state and local law enforcement agencies and requires the Department to submit a report on the trends in tax return identity theft, recommendations for additional improvements to Federal law, and the status of the De-

partment's implementation of the DOJ IG's 2010 report entitled "The Department of Justice's Efforts to Combat Identity Theft."

Background and Need for the Legislation

Like other forms of identity theft, tax return 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 return identity theft is often committed by gangs and organized crime organizations who defraud large groups of people.¹ 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 2012, there were more than 173,000 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 580,000 fake returns among the 2013 returns alone, for which the IRS would have paid over \$3.6 billion in fraudulent claims had the perpetrators not been caught.⁴ In Fiscal Year 2013, the IRS initiated 1,492 identity theft related criminal investigations; this is an increase of 66 percent over investigations initiated in FY 2012.⁵ The IRS estimates that it prevented refunds for 96% of these known fraudulent returns.⁶ However, there are potentially a great many other fraudulent returns that are not detected. 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 those cases, the victim is not noti-

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 Stephen Olemacher, Tax Fraud a Popular Pastime Among Prison Inmates, Associated Press, January 17, 2013. See, <http://bigstory.ap.org/article/tax-fraud-popular-pastime-among-prison-inmates>.

³ Identity Theft Tops List of Tax Scams, http://www.cnn.com/id/47077876/Identity_Theft_Tops_List_of_Tax_Scams.

⁴ Delvin Barrett and John McKinnon, Identity Theft Triggers a Surge in Tax Fraud, Wall St. Journal, February 23, 2014. See, <http://online.wsj.com/news/articles/SB10001424052702304834704579401411935878556>.

⁵ IRS Combats Identity Theft and Refund Fraud on Many Fronts, See <http://www.irs.gov/uac/Newsroom/IRS-Combats-Identity-Theft-and-Refund-Fraud-on-Many-Fronts-2014>.

⁶ *Id.*

fied 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 return identity theft also can be devastating to the individual victims, who must prove their own identities 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 the taxpayer's 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 tax return identity theft. These include:

- Implementing identity theft screening filters designed to spot fake returns before a refund is issued. As of March 2012, these filters have stopped potentially fraudulent returns worth \$1.15 billion in refunds.⁷
- 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 2012 report released 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.⁸

During full Committee consideration of H.R. 744, Mr. Scott (D-VA) offered an amendment to section 3 of the bill. The amendment would replace the existing mandatory sentences in the Aggravated Identity Theft statute (18 U.S.C. 1028A) with statutory maximum sentences, but only for those aggravated identity thefts committed against organizations. The mandatory sentences would continue to apply to those aggravated identity thefts committed against individuals. Section 3 of H.R. 744 makes a technical clarification to the identity theft and aggravated identity theft statutes to ensure that

⁷ 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.

⁸ 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.

these statutes apply to identity thefts committed against both individuals and organizations. Not-for-profit organizations and businesses are not immune to identity theft schemes, and they should not be excluded from the protections afforded victims in our Federal criminal law.

Aggravated identity thefts are those committed in furtherance of specific, enumerated felonies. Congress specifically designed this statute to assign a determinate penalty for identity theft committed in furtherance of one of these felonies and to require such penalty to run consecutively to the penalty imposed for the underlying felony.

Mr. Scott argued that his amendment would assign higher penalties for aggravated identity thefts committed against organizations than those provided by the underlying statute. But this claim is true in number only. While the penalties contemplated by Mr. Scott's amendment (4 years or 10 years) are, indeed, higher than the existing mandatory sentences in current law (2 years or 5 years), they are statutory maximum penalties and, therefore, assign only the top of the sentencing range that a Federal judge may apply. In practice, a Federal judge would be free to impose a sentence well below the maximum prescribed by Mr. Scott's amendment and even below the mandatory sentences currently required for aggravated identity thefts.⁹ Those who are found guilty of aggravated identity theft should be held accountable as required by the law regardless of whether their victim was an individual or an organization.

Hearings

The Committee on the Judiciary held no hearings on H.R. 744.

Committee Consideration

On July 16, 2014, the Committee met in open session and ordered the bill H.R. 744 favorably reported with an 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 the following rollcall votes occurred during the Committee's consideration of H.R. 744.

1. An amendment by Mr. Scott of Virginia to replace the existing mandatory penalties in 18 U.S.C. 1028A with statutory maximum penalties for offenses under this section committed against organizations. Defeated by a rollcall vote of 12 to 16.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Coble (NC)		X	

⁹ See U.S. SENTENCING GUIDELINES MANUAL § 2B1.6(a) (2013).

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Bachus (AL)			
Mr. Issa (CA)		X	
Mr. Forbes (VA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)	X		
Ms. Farenthold (TX)			
Mr. Holding (NC)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Mr. Smith (MO)		X	
[Vacant]			
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Mr. Scott (VA)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)	X		
Ms. DelBene (WA)	X		
Mr. Garcia (FL)			
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Total	12	16	

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. 744, 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 25, 2014.

Hon. BOB GOODLATTE, 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. 744, the “STOP Identity Theft Act of 2013.”

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. 744—STOP Identity Theft Act of 2013.

As ordered reported by the House Committee on the Judiciary
on July 16, 2014.

H.R. 744 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 identity 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. 744 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 744 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.

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

Duplication of Federal Programs

No provision of H.R. 744 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 744 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. 551.

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. 744 would provide additional tools for the effective criminal prosecution of tax return identity theft.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 744 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 of 2013 or the STOP Identity Theft Act of 2014.

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 statutes (18 U.S.C. § 1028 and 1028A) to clarify that the victims of such an offense includes not just individuals, but businesses and organizations as well.

Section 4—Identity Theft for Purposes of Tax Fraud. This section amends the Federal identity theft statute (18 U.S.C. § 1028) to authorize a statutory maximum sentence of 20 years for identity thefts committed during and in relation to tax fraud under sections 7206 or 7207 of the Internal Revenue Code.

Section 5—Reporting Requirement. This section instructs the Department of Justice to issue to the House and Senate Judiciary Committees within 180 days of enactment a report on the trends in tax return identity theft, recommendations for additional improvements to Federal law, and the status of the Department’s im-

plementation 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) Whoever, in a circumstance described in subsection (c) of this section—

(1) * * *

* * * * *

(7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person (*including an organization*) with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; or

* * * * *

(b) The punishment for an offense under subsection (a) of this section is—

(1) * * *

* * * * *

(3) a fine under this title or imprisonment for not more than 20 years, or both, if the offense is committed—

(A) * * *

(B) in connection with a crime of violence (as defined in section 924(c)(3)); **[or]**

(C) after a prior conviction under this section becomes final; or

(D) *during and in relation to a felony under section 7206 or 7207 of the Internal Revenue Code of 1986;*

* * * * *

(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 *or other person*, including any—

(A) * * *

* * * * *

§ 1028A. Aggravated identity theft

(a) OFFENSES.—

(1) IN GENERAL.—Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person (*including an organization*) shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

* * * * *

Dissenting Views

INTRODUCTION

H.R. 744, the “Stopping Tax Offenders and Prosecuting Identity Theft Act” or the “STOP Identity Theft Act,” encourages the Department of Justice to increase its efforts to fight tax return identity theft and makes a number of changes to the existing identity theft statutes with the goal of enhancing the ability of prosecutors to bring charges against perpetrators of this type of crime. While well-intentioned, the bill raises longstanding concerns we have with mandatory minimum sentencing by expanding the scope of possible defendants who would be subject to the existing mandatory penalty of the aggravated identity theft statute, 18 U.S.C. § 1028A. For this reason, and those stated below, we are unable to support this legislation and respectfully dissent.

DESCRIPTION AND BACKGROUND

H.R. 744 is primarily intended to combat the serious problem of tax return identity theft. 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 These groups see it as a low-risk, high-return crime. Tax fraud is also being committed at high rates by prison inmates. In 2009, there were 1,464 fraudulent tax returns filed by inmates.²

¹ *Tax Fraud by Identity Theft, Part 2: Statute, Progress, and Potential Solutions: Hearing Before the Subcomm. on Fiscal Responsibility and Economic Growth of the S. Comm. on Finance, 112th Cong. (2012)* (written statement of Nina E Olson, National Taxpayer Advocate).

² *Senators Press IRS to Stop Prisoner Tax Fraud*, Accounting Today, Jan. 19, 2011, available at <http://www.accountingtoday.com/news/Senators-Press-IRS-Stop-Prisoner-Tax-Fraud-56973-1.html>.

The IRS detected 940,000 fake returns among the 2010 returns alone, for which the IRS would have paid more than \$6.5 billion in fraudulent payments if the fake returns had not been detected and stopped.³ The IRS estimates, however, that it did pay as much as \$5.2 billion in fraudulent refunds for unidentified fake tax returns filed for 2010.⁴

This bill encourages 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 Justice Department to report on the incidence of tax return identity theft and enforcement efforts; and adds tax fraud as a predicate for identity theft under 18 U.S.C. § 1028(b). A detailed section-by-section analysis of the bill as reported follows:

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the Stopping Tax Offenders and Prosecuting Identity Theft Act of 2013 or STOP Identity Theft Act of 2013.

Sec. 2. Use of Department of Justice Resources with Regard to Tax Return Identity Theft. Section 2 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 of the country 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.

Sec. 3. Victims of Identity Theft May Include Organizations. Section 3 amends the Federal identity theft statute (18 U.S.C. § 1028) and the aggravated identity theft statute (18 U.S.C. § 1028A), as requested by the Department of Justice, to clarify that the victims of such an offense include not just individuals, but businesses and organizations as well. Depending on the circumstances of the offense and the purpose for which the identity theft is perpetrated, the maximum penalty for the basic identity theft provision is 30 years in prison. However, the aggravated identity theft statute, which applies when the theft of the identity of another person facilitates certain types of conduct, such as theft of public money, false personation of citizenship, and acquisition of a firearm, provides for a *mandatory additional* 2-year sentence. When the conduct facilitated by the identity theft is an offense related to crimes of terrorism, the mandatory additional sentence under the aggravated identity theft statute is 5 years.

Sec. 4. Identity Theft for Purposes of Tax Fraud. Section 4 amends the Federal identity theft statute to provide sentences of up to 20 years in prison for those who engage in identity theft during and in relation to certain tax fraud offenses.

Sec. 5. Reporting Requirement. Section 5 instructs the Justice Department to submit, within 180 days of enactment, a report to the Committees on the Judiciary of the House of Representatives and the Senate concerning trends in the incidence of tax return identity theft, recommendations on additional statutory tools that would aid in the prosecution of tax return identity theft, and the status of im-

³*Identity Theft and Tax Fraud: Joint Hearing before the Subcomm. on Oversight and the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 112th Cong. (2012) (testimony of J. Russell George, Treasury Inspector General for Tax Administration).

⁴*Id.*

plementation of recommendations concerning combating identity theft included in a 2010 report of the Inspector General of the Department of Justice.

CONCERNS WITH H.R. 744

H.R. 744's proposed changes to the aggravated identity theft statute would compound the unjust sentencing scheme in that statute. In section 3, the bill would amend the primary Federal identity theft statute (18 U.S.C. § 1028) and the aggravated identity theft statute (18 U.S.C. § 1028A) to provide that these statutes prohibit identity theft against organizations, in addition to the current prohibition related to the theft of identities of individuals. While extending the protections against identity theft to organizations may be a worthy goal, this section unfortunately expands the application of the mandatory sentences provided in 18 U.S.C. § 1028A. The statute currently provides for a *mandatory* 2-year sentence for identity theft that facilitates certain crimes and a *mandatory* 5-year sentence when the conduct facilitated by the identity theft is an offense related to crimes of terrorism.

In order to address this flaw, Congressman Robert C. "Bobby" Scott (D-VA) offered an amendment at markup that would have prevented this extension of the mandatory sentences. The amendment provided that, instead of the mandatory terms of imprisonment for offenses against organizations under the aggravated identity theft statute, judges would be allowed to impose sentences of up to 4 and 10 years, which is double the current mandatory amounts, but without being mandatory in nature. Judges should be permitted to exercise their constitutional role as neutral arbiters imposing a proportional sentence that is sufficient but not greater than necessary to accomplish the deterrent and rehabilitative goals of punishment. Because the amendment was defeated by a vote of 12 to 16, the bill as reported by the Committee retains this flaw concerning mandatory sentencing.

The extension of the 2-year and 5-year mandatory sentences in H.R. 744, even if it may only apply to a limited number of cases, is problematic. Mandatory minimum sentences are the wrong way to determine punishment under this or any other statute because they not only lead to unjust outcomes for individuals, but also have serious systemic consequences by contributing to the problem of overincarceration. As of September 2010, 75,579 Federal prisoners—more than one-third (39.4%)—were serving mandatory minimum sentences.⁵ This represents a 155% increase from the number of Federal prisoners serving mandatory minimum sentences in 1995 (29,603).⁶ Since Congress enacted harsh mandatory minimums in the 1980s, the Federal prison population has exploded by over 800% to more than 216,000 by June, 2014.⁷

In addition, higher than warranted sentences resulting from mandatory minimum sentencing strain public finances. For exam-

⁵ United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal System, at 148 (Oct. 2011), *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_07.pdf.

⁶ *Id.* at 81, *available at* http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_04.pdf.

⁷ Bureau of Prisons, Historical Information, *at* <http://www.bop.gov/about/history/> and Inmate Statistics: Offenses, *at* http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

ple, the average cost of incarceration for a Federal inmate in fiscal year 2011 was \$28,893.40.⁸ In fact, the U.S. Department of Justice has referred to the increased year-to-year spending on Federal prisons as “unsustainable” and a threat to public safety.⁹ For fiscal year 2014, close to a third (28.8%) of the Justice Department’s \$27.7 billion budget is earmarked for Federal prisons and detention.¹⁰ Every dollar expended on lengthy mandatory minimum incarcerations is a dollar that cannot be spent on crime prevention, victim services, training, investigation, and prosecution.¹¹ Absent smarter sentencing policies and reformation of mandatory minimum sentences, prison populations and their associated costs will continue to escalate.¹² We need to take steps to ensure that sentences are appropriately severe, but are not set beyond levels that no longer serve legitimate criminal justice purposes.

This is one reason why the Committee’s bipartisan Over-Criminalization Task Force was authorized in 2013 to “assess our current Federal criminal statutes and make recommendations for improvements.”¹³ While the Committee examines the information and testimony gathered by the Task Force and continues to study a range of issues related to the criminal justice system, including the penalties in the Federal criminal code, we should not, as this bill would do, expand mandatory minimum sentencing.

In addition to the serious concerns related to mandatory minimum sentencing, we question the need for Section 4 of the bill, which would amend the Federal identity theft statute, 18 U.S.C. §1028, to allow for penalties of up to 20 years imprisonment for violations of that statute involving certain tax fraud offenses in the Internal Revenue Code. It appears that the current statutes, including the underlying identity theft statute and the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, may adequately apply to and provide appropriate penalties for instances of tax return identity theft. In fact, the mail and wire fraud statutes already provide for lengthy prison sentences of up to 20 years for each violation.

While tax return identity theft is a serious problem that defrauds both individuals and their government, the most effective means of addressing this crime may well be better enforcement of current law. If Federal prosecutors are not prosecuting offenders as often as they should, then we should encourage them to do more and provide them with the resources to do so.

CONCLUSION

Tax return identity theft is a serious problem and Congress has an interest in ensuring Federal law enforcement authorities are vigorously combating it. While H.R. 744 is a well-intentioned effort

⁸ Bureau of Prisons, Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. No. 52 at 16711 (Mar. 18, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-03-18/pdf/2013-06139.pdf>.

⁹ Michael E. Horowitz, Inspector General, Top Management and Performance Challenges Facing the Dep’t of Justice—2013, *at* <http://www.justice.gov/oig/challenges/2013.htm>.

¹⁰ U.S. Senate Committee on Appropriations, Summary: Fiscal Year 2014 Omnibus Appropriations Bill 5-7 (Jan. 13, 2014), *at* <http://www.appropriations.senate.gov/news.cfm?method=news.view&id=5aa8e660-f52e-4074-945f-9618eb963ae9>.

¹¹ *Id.*

¹² Horowitz, *supra* n.7.

¹³ U.S. House of Representatives, Committee on the Judiciary, Press Release, Feb. 5, 2014, *available at* <http://judiciary.house.gov/index.cfm/2014/2/house-judiciary-committee-reauthorizes-bipartisan-over-criminalization-task-force>.

to address this problem, it is flawed because it expands the scope of possible defendants who would be subject to mandatory minimum sentencing, an unjust and unwise policy that leads to rising prison populations and strained public finances.

For the foregoing reasons, we respectfully dissent.

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