

Legislative Analysis



ID THEFT: INCLUDE AS RACKETEERING AND ALLOW FORFEITURE

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House Bill 5953 with committee amendment
Sponsor: Rep. Lee Gonzales

House Bill 5954 (Substitute H-3)
Sponsor: Rep. Dudley Spade
Committee: Judiciary

Revised First Analysis (8-21-08)

BRIEF SUMMARY: House Bill 5953 would include felony violations of the Identity Theft Protection Act and violations of Section 145d of the Michigan Penal Code, which pertains to certain violations involving the Internet or a computer, in the definition of racketeering.

FISCAL IMPACT: Both bills would have an indeterminate fiscal impact on the state and local units of government. A more detailed discussion follows later in the analysis.

THE APPARENT PROBLEM:

Though identity theft declined by 12 percent in 2007, it remains the number one consumer fraud complaint received by the Federal Trade Commission, with reported fraud losses totaling more than \$1.2 billion. ("Study Claims Identity Theft 'Continues to Decline'", www.Consumeraffairs.com, Feb. 12, 2008, and "FTC Releases List of Top Consumer Fraud Complaints in 2007", Feb. 13, 2008, www.ftc.gov).

But ID theft involves more than just an individual criminal using information from a garbage can or mailbox to obtain personal information about another person in order to open a line of credit in that person's name.

According to the Identity Theft Resource Center, the number of data breaches (meaning data containing personal identifying information stored in electronic formats by businesses, educational institutions, and governmental agencies stolen or copied by thieves) has been increasing in recent years and has reached an all-time high this year with 342 reported incidents between January 1st and June 27th - a 69 percent increase from the same time period last year.

In addition, medical identity theft, in which a person obtains medical care in another person's name or medical workers sell patient information to organized crime or gang leaders for use in fake billings to purchase medical goods or prescription drugs, is also on the rise. According to one news article, a 2007 FTC study "estimated that medical identity theft affected about 250,000 million people in 2005" with anecdotal information

that this type of crime is increasing. ("Medical identity theft is often an "inside job", www.amednews.com, Mar. 3, 2008.)

Clearly, more needs to be done to protect citizens. Recently, the House passed a package of legislation that strengthened provisions of various laws relating to identity theft. In addition to issues addressed by those bills, some feel that the penalties for committing a crime of identity theft need to be at a level sufficient to act as a deterrent and appropriate, considering the financial and emotional toll the crime exacts on victims.

THE CONTENT OF THE BILLS:

House Bill 5953

Under the Michigan Penal Code, "racketeering" means committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit, for financial gain, an offense listed in the definition. House Bill 5953 would amend the code (MCL 750.159g) to include a felony violation of the Identity Theft Protection Act and a violation of Section 145d of the penal code as a predicate offense in the code's definition of racketeering.

(Section 145d prohibits use of the Internet, a computer, or a computer program, network, or system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another to commit any of the following:

- When the victim or intended victim is a minor or believed to be a minor— involvement in child sexually abusive activity or material, kidnaping, first-, second-, third-, or fourth-degree criminal sexual conduct (CSC), or assault with intent to commit CSC, solicitation of a child for immoral purposes, recruitment or inducement of a minor to commit a felony, kidnaping of a child under the age of 14, or disseminating sexually explicit material to a minor.
- Stalking or aggravated stalking.
- An explosives offense listed in Chapter 33 of the code; causing a death by explosives; selling explosives to a minor; or intentionally reporting a crime relating to a bombing, attempted bombing, or threat to bomb, knowing that the report is false.)

House Bill 5954

The bill would add several new sections to the Identity Theft Protection Act (MCL 445.74 et al.) to identify property subject to forfeiture, establish forfeiture procedures, authorize the seizing agency to retain or sell seized property, and require a seizing agency to submit a summary report annually to the attorney general for forwarding to the legislature regarding forfeiture of property. The provisions are similar to those in the

Public Health Code regarding the seizure and forfeiture of property related to crimes involving controlled substances.

Property Subject to Forfeiture

The bill would subject the following property to forfeiture when used (or intended to be used) to commit a felony violation of the Identity Theft Protection Act (ITPA):

- Equipment of any kind.
- With some exceptions, a conveyance used or intended to be used to facilitate the transportation of property. "Conveyance" would include aircraft, vehicles, and watercraft.
- Books, records, and research products and materials, including formulas, microfilm, tapes, and data.
- Any thing of value furnished or intended to be furnished in exchange for identity information obtained in a felony violation of the act. This would include, but not be limited to, money, negotiable instruments, or securities. Money found in close proximity to property subject to forfeiture would be presumed to also be subject to forfeiture; this presumption could be rebutted by clear and convincing evidence. If the owner of the thing of value could establish that an act or omission had been committed or omitted without his or her knowledge or consent, the item would not be subject to forfeiture.

Process for Seizure

Property subject to forfeiture could be seized upon process issued by the circuit court with jurisdiction over the property. Seizure without process could be made incident to a lawful arrest, under a search warrant, or under an administrative inspection warrant; if the property was the subject of a prior judgment in favor of Michigan in an injunction or forfeiture proceeding under the act; if probable cause existed to believe the property was directly or indirectly dangerous to health or safety; or if probable cause existed to believe the property was used or intended to be used to commit a felony violation of the act.

Forfeiture Proceedings

A forfeiture proceeding would have to be instituted promptly if property were seized under the above provisions.

If the property had been seized without process and the total value of the seized property did not exceed \$50,000, certain notification requirements would apply as detailed in the bill. A person claiming an interest in the property could file a claim within 20 days, but would also have to post a bond of 10 percent of the unclaimed property's value, subject to minimum and maximum amounts specified in the bill; the obligor would be responsible for all costs and expenses of the forfeiture proceedings. The seizing agency would have to transmit the claim and bond, along with a list of the seized property, to the attorney general, county prosecutor, or city or township attorney for the local unit of government

in which the seizure had been made. However, a city or township attorney could not institute forfeiture proceedings without the consent of the county prosecutor or attorney general if he or she were actively handling a case involving or relating to the property. Property that was not claimed within 20 days could be declared as forfeited and the property would then be disposed of as provided in the bill.

Property taken or detained under the bill would not be subject to an action to recover personal property; it would be considered to be in the custody of the seizing agency and subject only to this provision or an order or judgment of the court.

- The seizing agency could place the seized property under seal, remove it to a place designated by the court, or require the administrator to take custody of the property and remove it to an appropriate location for disposition in accordance with law. (The term "administrator" is not defined in the act, but a similar provision in the Public Health Code regarding forfeiture of property related to crimes involving controlled substances defines the term to mean the administrator of the Office of Substance Abuse Services.)

Money seized under the act would have to be deposited into an interest-bearing account in a financial institution, defined to mean a state or nationally chartered bank, or federally chartered savings and loan association, savings bank, or credit union whose deposits were federally insured and that maintained a principal or branch office within the state. The attorney for a person charged with a crime related to or involving the money would have to be given 60 days within which to examine the money, beginning with the day notice had been given to the property's owner but before the money had been deposited. If a county prosecutor, city or township attorney, or the attorney general fails to sustain his or her burden of proof in the forfeiture proceedings, the court would have to order the money returned, including any interest earned while deposited.

Title to real property forfeited under the act would be determined by a court of competent jurisdiction. If the real property were encumbered by a bona fide security interest, it would be subject to the interest of the secured party who neither had knowledge of nor consented to the crime.

If a court entered an order of forfeiture, the court could order a person who claimed an interest in the forfeited property to pay the expenses of the proceedings of forfeiture to the entity having budgetary authority over the seizing agency (local unit of government or State of Michigan).

Disposition of Forfeited Property

The seizing agency could do any of the following:

- Retain the property for official use.
- Sell whatever is not required to be destroyed by law or harmful to the public. The proceeds of the sale and any money or other thing of value forfeited would have

to be deposited with the treasurer of the entity having budgetary authority over the seizing agency. These funds would be applied to cover expenses relating to the forfeiture and sale. The remaining balance would be distributed equitably among the agencies involved in the forfeiture. Money and all interest and other earnings on forfeited money received by a seizing agency would have to be used to enhance law enforcement efforts pertaining to identity theft. A seizing agency could direct its portion of the forfeiture to nonprofit organizations whose primary activity is to assist law enforcement agencies with criminal investigations and obtaining information for solving crimes related to identity theft (for example, Crime Stoppers).

- Forward it to the Department of State Police for disposition.

A receiver could be court-appointed to dispose of real property that had been forfeited. The receiver would be entitled to reasonable compensation and could list the forfeited real property for sale; arrange for necessary maintenance and preservation of the property; accept purchase offers; and/or execute instruments transferring title to the property.

Reporting Duties

Before February 1 of each year, each local unit of government that -- during its preceding fiscal year -- had forfeiture proceedings pending in the circuit court; had seized property without a court order as allowed in the bill; or had received money, negotiable instruments, or any other thing of value would have to submit a report to the attorney general for analysis and transmittal to the Secretary of the Senate and Clerk of the House of Representatives. The report would have to summarize the local unit of government's activities regarding forfeiture of property and include information as specified in the bill such as the number of forfeiture proceedings instituted, still pending, or concluded in the circuit court; the number accomplished without a court order; the net total proceeds of all property forfeited statutorily required to be accounted for and reported to the state treasurer; an inventory of the property received; and a statement explaining how the money received by the local unit had been used or was being used to enhance the law enforcement efforts pertaining to the Identity Theft Protection Act.

Further, the records of a local unit of government regarding the forfeiture of property would have to be audited in accordance with either Public Act 71 of 1919 or the Uniform Budgeting and Accounting Act. The records could also be audited by an auditor of the local unit of government.

BACKGROUND INFORMATION:

Previously this session, the House passed House Bills 6097-6103 and 6105. Among other things, the bill package would allow a victim to bring a civil action to recover damages and would create a separate criminal offense for using the personal identifying information of another to commit, or attempt to commit, a crime or to mislead law enforcement regarding a crime involving identity theft. House Bills 6096 and 6104,

which would require the Department of State Police to create a model reporting form for identity theft incidents and create the Identity Theft Protection Commission, were reported from the Judiciary Committee and are pending floor action.

FISCAL INFORMATION:

The bill's fiscal impact would depend on how it affected racketeering-related convictions and forfeitures. To the extent that more offenders were sentenced to prison, the state could incur increased costs averaging about \$32,000 per offender per year, a figure that includes allocated portions of various fixed administrative and operational costs. To the extent that more offenders were sentenced to jail, affected counties could experience increased costs; jail costs vary by county. To the extent that more felons were sentenced to felony probation, the state could incur increased costs of probation supervision; parole and probation supervision average about \$2,000 per supervised offender per year.

Any increases in penal fine revenues could benefit local libraries, who are the constitutionally-designated recipients of those revenues. Any increases in revenue from disposing of forfeited racketeering-related property would benefit the seizing law enforcement agencies.

Although there are no data to indicate how many additional offenders would be sanctioned under the bill, preliminary data on felony dispositions in 2007 indicate that there were 743 offenders sentenced for the predicate offenses that the bill would include in the racketeering statute (Table 1).

2007 Felony Dispositions for Selected Crimes (Preliminary Data; Includes Attempts)

MCL	Description	Prison	Probation	Jail	Other	Total
750.145d	Internet/computer crimes	102	84	3	2	191
445.65	Identity theft	100	300	51	33	484
445.67	Identity theft; obtain ID with intent to commit	<u>17</u>	<u>35</u>	<u>8</u>	<u>8</u>	<u>68</u>
Totals		219	419	62	43	743

Table 1

Also in 2007, of the 66 offenders sentenced for racketeering violations, 50 received prison sentences (Table 2).

Table 2

2007 Felony Dispositions for Racketeering Violations (Preliminary Data; Includes Attempts)

MCL	Description	Prison	Probation	Jail	Other	Total
750.159i (1)	Criminal enterprise - conducting	44	10	4	2	60
750.159i (4)	Criminal enterprise - conspiracy	<u>6</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>6</u>
Totals		50	10	4	2	66

House Bill 5954 will have an indeterminate fiscal impact on the judiciary. The bill creates new procedures for handling forfeiture of property proceedings under the ID Theft Protection Act, which would increase the administrative workload and casework

with the presumed increase in forfeiture proceedings. However, language within the bill indicates that in those instances that the property is deemed forfeited, the local unit of government may use the proceeds from the sale of the property for the payment of proper expenses of the proceedings for forfeiture and sale. This provision would seemingly reduce the fiscal burden this bill would have on the judiciary.

ARGUMENTS:

For:

With as many as nine million incidents of identity theft a year, the Federal Trade Commission ranks the crime as the number one consumer complaint category. In 2007, the FTC received over a quarter million complaints regarding ID theft, which equaled 32 percent of the complaints received that year. (By comparison, the next largest complaint category was "shop-at-home/catalog sales" with 62,811 complaints accounting for 8 percent of the total number.) Overall economic losses total more than a billion a year. In addition, it can take years for a victim to undo the damage to his or her credit and finances caused by a single incident of ID theft.

Though last year saw a decline in the number of incidents, ID theft continues to thrive. As consumers have become more educated in how to lower their risk of becoming a victim, such as shredding documents with sensitive information and identifying attempts online or via unsolicited telephone calls, thieves have changed tactics. Last year, ID thefts from data breaches and medical ID thefts grew dramatically. Since such thefts are often connected with organized crime and gang activity, the penalties in the bills are especially appropriate. House Bill 5953 would allow prosecutors to charge violators under the racketeering statute and House Bill 5954 would allow the seizure and forfeiture of property used in a crime of ID theft. Though the racketeering statute also allows for forfeiture of property, the process allowed in House Bill 5954 is more streamlined, preferred by law enforcement, and would apply in cases that were not charged under the racketeering statute.

For:

House Bill 5953 would also include certain computer and Internet crimes in the definition of racketeering. Many of those include crimes against children. With the proliferation of Internet pedophile rings and adults enticing minors through emails to "hook-up" for sexual encounters, the bill would give an appropriate tool to prosecutors with which to charge offenders. Moreover, many a disgruntled "ex" has used the Internet to track down a former spouse, girlfriend, or boyfriend with the intent to continue harassing him or her, or worse. The bill would even strengthen the fight against terrorists who use explosives, or the threat or false reporting of an incident involving explosives, by giving prosecutors another avenue with which to charge a perpetrator.

Against:

Some, including the NFIB, have raised concerns over the forfeiture provisions contained in House Bill 5954. Especially worrisome is that under House Bill 5954, and unlike most forfeiture statutes, the person would not have to be convicted before the provisions would

be triggered; property could be seized and forfeited merely upon suspicion of wrongdoing. This is particularly troubling to businesses which, as the NFIB states in its written testimony on the bill, fear being accused and having property seized when in fact, they may be "guilty of nothing more than paper mistakes or errors in the handling of information" - not ID theft. By including identity theft in the definition of racketeering, as House Bill 5953 would do, law enforcement agencies would already have a legal process by which to seize property used to commit crimes involving ID theft.

POSITIONS:

The Department of State Police indicated support for the bills. (7-23-08)

Google indicated a position of neutrality on the bills. (7-23-08)

The National Federation of Independent Business (NFIB) opposes House Bill 5954. (7-23-08)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.