**15.1 Fraud in Connection with Identification Documents**

**—Production (18 U.S.C. § 1028(a)(1))**

The defendant is charged in [Count \_\_\_\_\_\_ of] the indictment with producing without legal authority [an identification document] [an authentication feature] [a false identification document] in violation of Section 1028(a)(1) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly produced [an identification document] [an authentication feature] [a false identification document];

Second, the defendant produced the [identification document] [authentication feature] [false identification document] without lawful authority; and

[Third, the [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under authority of [the United States] [*specify issuing authority*].]

*or*

[Third, the production of the [identification document] [authentication feature] [false identification document] was in or affected commerce between one state and [an]other state[s], or between a state of the United States and a foreign country.]

*or*

[Third, in the course of production, the [identification document] [authentication feature] [false identification document] was transported in the mail.]

**Comment**

The first and second elements are drawn from 18 U.S.C. § 1028(a)(2); the alternative third elements are drawn from 18 U.S.C. §§ 1028(c)(1), (c)(3)(A) and (c)(3)(B). A defendant knowingly produces an identification document “without lawful authority” if the defendant produces the document knowing that the recipient has not completed the eligibility requirements for the document. *United States v. Turchin*, 21 F.4th 1192, 1197 (9th Cir. 2022).

It is plain error to instruct the jury “that the federal nexus required by § 1028(c)(1) was automatically satisfied merely by showing that the identification document in question was issued by a *state* government.” *United States v. Turchin*, 21 F.4th 1192, 1202 (9th Cir. 2022).

Section 1028(d) provides definitions for the terms: “identification document,” “authentication feature,” “false identification document,” “issuing authority,” and “produce.” An “authentication feature” need not be a physical thing affixed to or imprinted on another physical thing. *United States v. Barrogo*, 59 F.4th 440, 446 (9th Cir. 2023) (holding non-physical PIN constituted “authentication feature” even though it was not physically on EBT card). Private financial institutions do not fit within the definition of “issuing authority,” which means “‘any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features.’” *United States v. Kirilyuk*, 29 F.4th 1128 (2022) (quoting 18 U.S.C. § 1028(d)(6)(A)).

Section 1028(b) provides for various enhanced statutory maximum penalties in certain circumstances, such as when particular types of identification documents are involved or when their use occurs in connection with certain other criminal conduct. In the event that such enhanced penalties are charged, a special verdict form may need to be submitted to the jury regarding the presence or absence of such facts.

When a defendant presents false information to a government agent to obtain an identification document, it is unnecessary to show that the government agent who actually produced the identification document intended to commit identification fraud. *United States v. Lee*, 602 F.3d 974, 976 (9th Cir. 2010).

*Revised March 2023*