**15.3 Fraud in Connection with Identification Documents—**

**Possession of Five or More Documents**

**(18 U.S.C. § 1028(a)(3))**

            The defendant is charged in [Count \_\_\_\_\_\_ of] the indictment with possessing five or more [identification documents] [authentication features] [false identification documents] for unlawful use or transfer in violation of Section 1028(a)(3) 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 possessed five or more [identification documents] [authentication features] [false identification documents];

            Second, the defendant intended to [use] [transfer] unlawfully those [identification documents] [authentication features] [false identification documents]; and

            [Third, the [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under the 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.]

            [In determining whether the defendant possessed five or more identification documents, you should not count any that were issued lawfully for the use of the defendant.]

**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).

            Section 1028(d) provides definitions for the terms: “identification document,” “authentication feature,” “false identification document,” “issuing authority,” and “transfer.”  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.

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