**15.5 Fraud in Connection with Identification Documents**

**—Document-Making Implements (18 U.S.C. § 1028(a)(5))**

 The defendant is charged in [Count \_\_\_\_\_\_ of] the indictment with [[possessing] [producing] [transferring]] [[a document-making implement] [an authentication feature]] in violation of Section 1028(a)(5) 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] [transferred] [possessed]] [[a document-making implement] [an authentication feature]];

 Second, the defendant intended the [document-making implement] [authentication feature] to be used in the production of [another document-making implement] [another authentication feature], which was to be used in producing a false identification document; and

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

*or*

 [Third, the document-making implement was designed or suited for making [an identification document] [an authentication feature] [a false identification document].]

*or*

 [Third, the [production] [transfer] [possession] [use] of the [document-making implement] [authentication feature] 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 defendant’s [production] [transfer] [possession] [use] of the document-making implement, it was transported in the mail.]

**Comment**

 The first and second elements are drawn from 18 U.S.C. § 1028(a)(5); 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,” “document-making implement,” “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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