**15.8 Fraud in Connection with Identification**

**Documents—Trafficking (18 U.S.C. § 1028(a)(8))**

 The defendant is charged in [Count \_\_\_\_\_\_ of] the indictment with trafficking in authentication features in violation of Section 1028(a)(8) 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 trafficked in [false] authentication features;

 Second, the [false] authentication features were for use in [false identification documents] [document-making implements] [means of identification]; 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 transfer of the [false] 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 transferring the authentication feature, it was transported in the mail.]

**Comment**

 The first and second elements are drawn from 18 U.S.C. § 1028(a)(8); 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: “authentication feature,” “false authentication feature,” “false identification document,” “document-making implement,” “means of identification,” “traffic,” “issuing authority,” and “transfer.” A “means of identification” need not be a physical thing, and 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). “A non-physical association between the ‘authentication feature’ and the ‘means of identification’ can therefore be sufficient.” *Id.* (holding non-physical PIN constituted “authentication feature” even though it was not physically on EBT card). The Ninth Circuit has held that a signature qualifies as a “means of identification.” *United States v. Blixt*, 548 F.3d 882, 887 (9th Cir. 2008). A test account (i.e., an account created to test the functionality of a software application) may qualify as a “means of identification” provided that the accounts could be used to “‘identify a specific individual.’” *United States v. Kvashuk*, 29 F.4th 1077, 1089 (9th Cir. 2022). Because Congress “intended ‘to construct an expansive definition’ of the term ‘means of identification,’” the “purpose, prerequisites, and functionality” of a name or number “does not bear on whether they ‘identify a specific individual.’” *Id*. 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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