Chapter 15.00

IDENTITY AND ACCESS DEVICE CRIMES

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Introduction to Identity and Access Device Crimes Instructions
(current through July 1, 2019)

This chapter provides instructions for crimes established in three statutes on identity fraud and theft and access device fraud. The statutes are 18 U.S.C. §§ 1028, 1028A, and 1029. Section 1028 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information was enacted in 1982 and amended in 1986, 1988, 1990, 1994, 1996, 1998, 2000, 2003, 2004, 2005, and 2006. Section 1028A Aggravated Identity Theft was adopted in 2004. Finally, § 1029 Fraud and Related Activity in Connection with Access Devices was adopted in 1984 and amended in 1986, 1990, 1994, 1996, 1998, 2001 and 2002.

The pattern instructions cover the following:

15.01 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(1) (producing an identification document, authentication feature, or false identification document))

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15.04 Aggravated Identity Theft (18 U.S.C. § 1028A(a)(1))

15.05 Fraud and Related Activity in Connection with Access Devices (18 U.S.C. § 1029(a)(2) (trafficking in or using one or more unauthorized access devices during a one-year period))

The first three instructions, 15.01, 15.02 and 15.03, focus on § 1028, specifically on subsections 1028(a)(1), (a)(3), and (a)(6), respectively. If the indictment charges any other subsections of § 1028(a), the instructions may be modified. The fourth instruction, 15.04, focuses on subsection 1028A(a)(1); if the indictment charges the terrorism offense in subsection (a)(2), the instruction may be modified. The last instruction, 15.05, focuses on subsection 1029(a)(2), and again, if the indictment charges any of the other subsections of § 1029(a), the instruction may be modified.

For the crimes covered by the first three instructions – those focusing on § 1028 – inchoate liability is authorized in the statute. *See* § 1028(f); *see also* United States v. O'Brien, 951 F.2d 350 (6th Cir. 1991) (unpublished) (affirming conviction for attempted production of false identification documents under § 1028(a)(1)). If an attempt or conspiracy to violate § 1028

is charged, these elements instructions may be combined with those from Chapter 3 Conspiracy or Chapter 5 Attempts. For the crime covered by Instruction 15.05 – a crime focused on § 1029 – inchoate liability is also authorized by statute, *see* § 1029(b). As above, if an attempt or conspiracy to violate § 1029 is charged, Instruction 15.05 may be combined with instructions from earlier chapters on attempt and conspiracy.

15.01 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(1) (producing an identification document, authentication feature, or false identification document))

(1) Count ___ of the indictment charges the defendant with violating federal law by knowingly and without lawful authority producing an [identification document] [authentication feature] [false identification document] under certain circumstances.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly produced an [identification document] [authentication feature] [false identification document].

(B) Second: That the defendant produced the [identification document] [authentication feature] [false identification document] without lawful authority.

(C) Third: That the defendant produced the [identification document] [authentication feature] [false identification document] under the following circumstance *[insert at least one from three options below]*.

(i) [The [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under the authority of [the United States] [a sponsoring entity of an event designated as a special event of national significance.]]

(ii) [The production was in or affected interstate [foreign] commerce.]

(iii) [The [identification document] [false identification document] was transported in the mail in the course of the prohibited production.]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "produced" means made or manufactured and includes altering, authenticating, or assembling.

(B) The term "[identification document] [authentication feature] [false identification document]" is defined as follows. *[Insert definition(s) from three options below as appropriate.]*

(i) [The term "identification document" means a document made or issued by or under the authority of

– [the United States Government]
– [a State]
– [a political subdivision of a State]

– [a sponsoring entity of an event designated as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-government organization]

which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.]

(ii) [The term "authentication feature" means any

– [hologram]
– [watermark]
– [certification symbol]
– [code]
– [image]
– [sequence of numbers or letters]
– [other feature]

that is used by the issuing authority on an

– [identification document]
– [document-making implement]
– [means of identification]

to determine if the document is counterfeit, altered, or otherwise falsified.]

(iii) [The term "false identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that

– [is not issued by or under the authority of a governmental entity]
– [was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit]

and appears to be issued by or under the authority of

– [the United States Government]
– [a State]
– [a political subdivision of a State]
– [a sponsoring entity of an event designated by the President as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-governmental organization].]

(C) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. [The government is not required to prove that the defendant knew that his actions violated any particular provision of law, or even knew that his actions violated the law at all. Ignorance of the law is not a defense to this crime.]

(D) The phrase "was in or affected interstate [foreign] commerce" means that the prohibited production had at least a minimal connection with interstate [foreign] commerce. This means that the document's [feature's] production had some effect upon interstate [foreign] commerce. For instance, a showing that a document [feature] at some time traveled or was transferred electronically [across a state line] [in interstate commerce] [in foreign commerce] would be sufficient.

(i) The phrase "interstate commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. [The phrase "foreign commerce" means commerce between any state, territory or possession of the United States and a foreign country.] [The term "commerce" includes, among other things, travel, trade, transportation and communication.]

(ii) Producing a document [feature] which the defendant intended to be distributed or used in interstate [foreign] commerce would meet this minimal connection requirement. The government is not required to prove that the defendant was aware of a future effect upon interstate [foreign] commerce, but only that the scheme, if completed, would have had such results.

(iii) [The government need not prove that [the prohibited production was contemporaneous with the movement in or effect upon interstate [foreign] commerce] [the prohibited production itself affected interstate [foreign] commerce] [the defendant had knowledge of the interstate [foreign] commerce connection].]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

In paragraph (1)(C)(ii) and the paragraphs under (2)(D) on the effect on commerce, the instruction presumes that the commerce involved is interstate commerce; the bracketed term "foreign" should be substituted if warranted by the facts.

If multiple options are provided for meeting the jurisdictional element under paragraph (1)(C), the court may want to give a specific unanimity instruction. See the Commentary to Inst. 8.03 Unanimous Verdict.

In paragraph (2)(C), the bracketed sentences stating that the government need not prove knowledge of the law should be used only if relevant.

Paragraph (2)(D)(iii) lists items the government need not prove to establish an effect on commerce and should be used only if relevant.

Subsection 1028(d) provides definitions for many terms beyond those included in the instruction.

Brackets indicate options for the court.

Italics indicate notes to the court.

Committee Commentary Instruction 15.01
(current through July 1, 2019)

Title 18 U.S.C. § 1028(a)(1) provides: "Whoever, in a circumstance described in subsection (c) of this section-- (1) knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document . . . shall be punished . . . ."

The list of elements in paragraph (1) is derived from the statute, § 1028(a)(1). The specific language in paragraphs (1)(A) and (1)(B) is based on § 1028(a)(1). The language in paragraph (1)(C) is based on § 1028(c).

In the paragraphs under (1)(C), the circumstances listed provide the federal jurisdictional base for the offense. See United States v. Gros, 824 F.2d 1487, 1495 (6th Cir. 1987) (approving a jury instruction which referred to the content of current § 1028(c)(1) and (c)(3)(A) as "jurisdictional requirements"). The three options listed in paragraph (1)(C) are drawn from the options listed in § 1028(c) but include only the options relevant to the specific crime of producing an identification document or feature under subsection (a)(1). In paragraph (1)(C)(ii) which refers to an effect on commerce, the instruction presumes that the commerce involved is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. Only one of these circumstances listed in paragraph (1)(C) must be met. *See Gros*, 824 F.2d at 1494 (approving instructions in § 1028(a)(3) case which required only one jurisdictional requirement from § 1028(c) to be met).

The jurisdictional option in paragraph (1)(C)(iii) is not available in prosecutions based on producing an authentication feature. This is because the statute plainly provides this jurisdictional option for cases based on "identification documents" and "false identification documents," but omits the term "authentication feature." See § 1028(c)(3)(B). Under this statutory language, the jurisdictional option in paragraph (1)(C)(iii) is only available for prosecutions based on identification documents and false identification documents.

The language of paragraph (2)(A) defining the term "produced" as made or manufactured is based on the Random House Dictionary, 2010. The language regarding alter, authenticate, or assemble is taken from § 1028(d)(9), which states that the term produce "includes" alter, authenticate, or assemble.

The language of paragraph (2)(B) defining the terms identification document, authentication feature, and false identification document is based on subsections 1028(d)(3),

(d)(1), and (d)(4), respectively. Some of the options within each definition were bracketed to limit unnecessary words and allow the court to tailor the instruction to the facts of the case.

The definition of "knowingly" in paragraph (2)(C) is based on United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011), in which the court found no error in the instructions defining "knowingly" in a prosecution for possessing an unlawfully produced identification document under § 1028(a)(6) (see Inst. 15.03). The first sentence is drawn verbatim from the instruction used in *Svoboda, supra* at 485. The two sentences stating that the defendant need not have knowledge of the law are also drawn from *Svoboda*, but are included in brackets for use only when relevant in the particular case.

The definition of "was in or affected interstate commerce" in paragraphs (2)(D)(i), (ii), and (iii) is based on the statute, § 1028(c)(3)(A), and the instructions approved in *Gros*, 824 F.2d at 1494-95. The terms transfer and possession were deleted as irrelevant to this instruction on production. The option of "[across a state line]" was added as a plain-English way to describe a document traveling in interstate commerce, and the instruction substitutes the word "connection" for "nexus." Generally, duplicative words were omitted, the language was simplified, and the concepts were divided into subparagraphs. The definition presumes that the commerce involved is "interstate" commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. Paragraph (2)(D)(iii) lists items the government need not prove and should be used only if relevant in the case.

The good-faith defense (see Instruction 10.04) is not available to a defendant charged with a violation of § 1028(a)(1) who claims he relied on a legal interpretation of a layman. *Svoboda, supra* at 484.

15.02 Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(3) (possessing with intent to use or transfer unlawfully five or more identification documents, authentication features, or false identification documents))

(1) Count ___ of the indictment charges the defendant with violating federal law by knowingly possessing, with the intent to use or transfer unlawfully, five or more [identification documents] [authentication features] [false identification documents].

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant possessed five or more [identification documents] [authentication features] [false identification documents].

(B) Second: That the defendant knowingly possessed the [identification documents] [authentication features] [false identification documents] with intent to use or transfer them unlawfully.

(C) Third: That the defendant possessed the [identification documents] [authentication features] [false identification documents] under the following circumstances [*insert at least one from three options below]*.

(i) [The [identification document] [authentication feature] [false identification document] was or appeared to be issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance.]

(ii) [The possession was in or affected interstate [foreign] commerce.]

(iii) [The [identification document] [false identification document] was transported in the mail in the course of the prohibited possession.]

(2) Now I will give you more detailed instructions on some of these terms.

(A) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(B) The term "[identification document] [authentication feature] [false identification document]" is defined as follows. *[Insert definition(s) from three options below as appropriate.]*

(i) [The term "identification document" means a document made or issued by or under the authority of

– [the United States Government]
– [a State]

– [a political subdivision of a State]
– [a sponsoring entity of an event designated as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-government organization]

which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.]

(ii) [The term "authentication feature" means any
– [hologram]
– [watermark]
– [certification symbol]
– [code]
– [image]
– [sequence of numbers or letters]
– [other feature]

that is used by the issuing authority on an
– [identification document]
– [document-making implement]
– [means of identification]

to determine if the document is counterfeit, altered, or otherwise falsified.]

(iii) [The term "false identification document" means a document of a type intended or commonly accepted for the purposes of identification of individuals that
– [is not issued by or under the authority of a governmental entity]
– [was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit]

and appears to be issued by or under the authority of
– [the United States Government]
– [a State]
– [a political subdivision of a State]
– [a sponsoring entity of an event designated by the President as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-governmental organization].]

(C) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

(D) [The term "transfer" includes selecting an [identification document] [false identification document] [authentication feature] and placing or directing the placement of such document on an online location where it is available to others.]

(E) The phrase "was in or affected interstate [foreign] commerce" means that the prohibited possession had at least a minimal connection with interstate [foreign] commerce. This means that the document's [feature's] possession had some effect upon interstate [foreign] commerce. For instance, a showing that a document [feature] at some time traveled or was transferred electronically [across a state line] [in interstate commerce] [in foreign commerce] would be sufficient.

(i) The phrase "interstate commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. [The phrase "foreign commerce" means commerce between any state, territory or possession of the United States and a foreign country.] [The term "commerce" includes, among other things, travel, trade, transportation and communication.]

(ii) Possessing a document [feature] which the defendant intended to be distributed or used in interstate [foreign] commerce would meet this minimal connection requirement. The government is not required to prove that the defendant was aware of a future effect upon interstate [foreign] commerce, but only that the scheme, if completed, would have had such results.

(iii) [The government need not prove that [the prohibited possession was contemporaneous with the movement in or effect upon interstate [foreign] commerce] [the prohibited possession itself affected interstate [foreign] commerce] [the defendant had knowledge of the interstate [foreign] commerce connection].]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

This instruction does not include language from § 1028(a)(3) that if the prosecution is based on possession of identification documents, the identification documents must be "other than those lawfully for the use of the possessor." If the prosecution is based on possession of identification documents and the issue of whether they were issued lawfully for the use of the possessor is raised, this phrase should be added to paragraph (1)(A).

In paragraph (1)(C)(ii) and the paragraphs under (2)(E) on the effect on commerce, the instruction presumes that the commerce involved is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts.

The jurisdictional option in paragraph (1)(C)(iii) is not available in prosecutions based on possessing an authentication feature. This is because the statute plainly provides this jurisdictional option for cases based on "identification documents" and "false identification documents," but omits the term "authentication feature." See § 1028(c)(3)(B). Under this statutory language, the jurisdictional option in paragraph (1)(C)(iii) is only available for prosecutions based on identification documents and false identification documents.

If multiple options are provided for meeting the jurisdictional element under paragraph (1)(C), the court may want to give a specific unanimity instruction. See the Commentary to Inst. 8.03 Unanimous Verdict.

Paragraph (2)(E)(iii) lists items the government need not prove to establish an effect on commerce and should be used only if relevant.

Subsection 1028(d) provides definitions for many terms beyond those included in the instruction.

Brackets indicate options for the court.

Italics indicate notes to the court.

Committee Commentary Instruction 15.02
(current through July 1, 2019)

Title 18 U.S.C. § 1028(a)(3) provides: "Whoever, in a circumstance described in subsection (c) of this section-- (3) knowingly possesses with intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor), authentication features, or false identification documents . . . shall be punished . . . ."

The list of elements in paragraph (1) is derived from the statute, § 1028(a)(3) and United States v. Gros, 824 F.2d 1487 (6th Cir. 1987). The specific language in paragraphs 1(A) and 1(B) is based on § 1028(a)(1). The language in paragraph (1)(C) is based on § 1028(c). In *Gros*, the Sixth Circuit affirmed instructions for a § 1028(a)(3) conviction. The instructions basically provided that the elements were as follows: the prohibited document or feature, the jurisdictional element, the defendant's possession of five or more prohibited documents or features, and that defendant's possession of them was knowing and with the intent to use unlawfully. *Id.* at 1495. These elements appear in paragraph (1) in different order.

The instructions do not include language from § 1028(a)(3) that if the prosecution is based on possession of identification documents, the identification documents must be "other than those lawfully for the use of the possessor." If the prosecution is based on possession of identification documents and the issue of whether they were issued lawfully for the use of the possessor is raised, the court should add this phrase to paragraph (1)(A).

In the paragraphs under (1)(C), the circumstances listed provide the federal jurisdictional base for the offense. *See Gros*, 824 F.2d at 1495 (referring to the content of current § 1028(c)(1) and (c)(3)(A) as "jurisdictional requirements"). The three options listed in paragraph (1)(C) are drawn from the options listed in § 1028(c) but include only the options relevant to the specific crime of possessing an identification document or feature under subsection (a)(3). In paragraph (1)(C)(ii), which refers to an effect on commerce, the instruction presumes that the commerce involved is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. Only one of these circumstances listed in paragraph (1)(C) must be met. *See Gros*, 824 F.2d at 1494 (approving instructions in § 1028(a)(3) case which required only one jurisdictional requirement from § 1028(c) to be met).

The jurisdictional option in paragraph (1)(C)(iii) is limited in one way that the other jurisdictional options are not and should be used with caution. The option in that paragraph is not available in prosecutions based on possessing an authentication feature. This is because the statute plainly authorizes this jurisdictional option for cases based on "identification documents" and "false identification documents," but omits the term "authentication feature." See § 1028(c)(3)(B). Under this statutory language, the jurisdictional option in paragraph (1)(C)(iii) is only available for prosecutions based on identification documents and false identification documents.

The definition in (2)(A) of "possess" is a cross-reference to other pattern instructions which define that term in federal crimes generally based on Supreme Court and Sixth Circuit cases. See Instructions 2.10, 2.10A, and 2.11

The language of paragraph (2)(B) defining the terms "identification document," "authentication feature," and "false identification document" is based on subsections 1028(d)(3), (d)(1), and (d)(4), respectively. Some of the options within each definition were bracketed to limit unnecessary words and to allow the court to tailor the instruction to the facts of the case.

The definition of "knowingly" in paragraph (2)(C) is based on United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011), in which the court found no error in the instructions defining "knowingly" in a prosecution for possessing an unlawfully produced identification document under § 1028(a)(6) (see Inst. 15.03). The definition is drawn verbatim from the instruction used in *Svoboda, supra* at 485.

The definition of "transfer" in paragraph (2)(D) is based on § 1028(d)(10). This subsection defining "transfer" does not mention authentication features, but authentication features are one of the items covered by the crime, see § 1028(a)(3), and are covered in this instruction. The committee assumed that the omission of "authentication feature" from the definition of transfer was inadvertent, so we included the term "authentication feature" in the definition of transfer in paragraph (2)(D) of the instruction.

The definition of "was in or affected interstate commerce" in paragraph (2)(E) is based on the statute, § 1028(c)(3)(A), and the instructions approved in *Gros*, 824 F.2d at 1494-95. The terms transfer and production were deleted as irrelevant to this instruction on possession. The option of "[across a state line]" was added as a plain-English way to describe a document

traveling in interstate commerce, and the instruction substitutes the word "connection" for "nexus." Generally, duplicative words were omitted, the language was simplified, and the concepts were divided into subparagraphs. The definition presumes that the commerce involved is "interstate" commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. Paragraph (2)(F)(iii) lists items the government need not prove and should be used only if relevant in the case.

The good-faith defense (see Instruction 10.04) is not available to a defendant charged with a violation of § 1028(a)(3) who claims he relied on a legal interpretation of a layman. *Svoboda, supra* at 484.

15.03 Fraud and Related activity in Connection with Identification Documents, Authentication Features, and Information (18 U.S.C. § 1028(a)(6) (possessing an identification document or authentication feature which was stolen or produced without lawful authority))

(1) Count ___ of the indictment charges the defendant with violating federal law by knowingly possessing an [identification document or authentication feature] of the United States that was [stolen or produced without lawful authority], knowing that the [document] [feature] was [stolen or produced without lawful authority].

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly possessed an [identification document or authentication feature] that was [stolen or produced without lawful authority]

(B) Second: That the defendant knew that the [identification document or authentication feature] was [stolen or produced without lawful authority].

(C) Third: That the [identification document] [authentication feature] was or appeared to be issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance.]

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "[identification document] [authentication feature]" is defined as follows. *[Insert definition(s) from two options below as appropriate.]*

(i) [The term "identification document" means a document made or issued by or under the authority of

– [the United States Government]
– [a State]
– [a political subdivision of a State]
– [a sponsoring entity of an event designated as a special event of national significance]
– [a foreign government]
– [a political subdivision of a foreign government]
– [an international governmental organization]
– [an international quasi-government organization]

which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.]

(ii) [The term "authentication feature" means any

– [hologram]
– [watermark]

– [certification symbol]
– [code]
– [image]
– [sequence of numbers or letters]
– [other feature]

that is used by the issuing authority on an

– [identification document]
– [document-making implement]
– [means of identification]

to determine if the document is counterfeit, altered, or otherwise falsified.]

(B) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction*].

(C) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

(D) The term "produced" means made or manufactured and includes altering, authenticating, or assembling.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Subsection 1028(d) provides definitions for many terms beyond those included in the instruction.

Brackets indicate options for the court.

Italics indicate notes to the court.

Committee Commentary Instruction 15.03
(current through July 1, 2019)

Title 18 U.S.C. § 1028(a)(6) provides: "Whoever, in a circumstance described in subsection (c) of this section-- . . . (6) knowingly possesses an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States or a sponsoring entity of an event designated as a special event of national significance which is stolen or produced without lawfully authority knowing that such document or feature was stolen or produced without such authority . . . shall be punished . . . ."

The list of elements in paragraph (1) is derived from the statute, § 1028(a)(6); United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011); and United States v. Gros, 824 F.2d 1487 (6th

Cir. 1987). The specific language in paragraphs (1)(A) and (1)(B) is based on § 1028(a)(6). The language in paragraph (1)(C) is based on § 1028(a)(6) and (c)(1). In *Svoboda, supra*, the court approved an instruction for § 1028(a)(6) requiring that the government prove that "'the defendant knowingly possessed an identification document or authentication feature that is or appears to be an identification document or authentication feature of the United States with knowledge that it was produced without lawful authority.'" Similarly, in United States v. Gros, 824 F.2d 1487 (6th Cir. 1987), the court approved instructions for § 1028(a)(6) stating that the government had to prove that (1) the defendant knowingly possessed identification documents that appeared to be identification documents of the United States and (2) that the defendant had knowledge that the above-described documents were stolen or produced without the authority of the United States. *Id.* at 1492. The instruction includes these elements but divides them into three parts.

The elements for this crime listed in paragraph (1) do not include a jurisdictional base because it is unnecessary. The statute lists three ways to establish jurisdiction in subsection (c). The jurisdictional option in subsection (c)(1) will automatically be established by proof of the other elements of the crime under subsection (a)(6). This is because subsections (a)(6) and (c)(1) have identical language. The law is clear that only one of the three jurisdictional circumstances listed in subsection (c) of the statute must be met, *see Gros*, 824 F.2d at 1494 (approving instructions in § 1028(a)(3) case which required only one jurisdictional requirement from § 1028(c) to be met). Because the elements under subsection (a)(6) will inevitably establish the jurisdictional base from subsection (c)(1), it is unnecessary to include those provisions again in the instruction.

The language of paragraph (2)(A) defining the terms "identification document" and "authentication feature" is based on §§ 1028(d)(3) and (d)(1), respectively. Some of the options within each definition were bracketed to limit unnecessary words and to allow the court to tailor the instruction to the facts of the case.

The definition in paragraph (2)(B) of "possess" is a cross-reference to other pattern instructions which define the term possess in federal crimes generally based on Supreme Court and Sixth Circuit cases. See Instructions 2.10, 2.10A, and 2.11

The definition of knowingly in paragraph (2)(C) is based on *Svoboda, supra*, in which the court found no error in the instructions defining "knowingly" in a prosecution under § 1028(a)(6). The definition is drawn verbatim from the instruction used in *Svoboda, supra* at 485.

The definition in paragraph (2)(D) of "produced" as made or manufacture**d** is based on the Random House Dictionary, 2010. The language on alter, authenticate, or assemble is taken from § 1028(d)(9), which states that the term produce "includes" alter, authenticate, or assemble.

The good-faith defense (see Instruction 10.04) is not available to a defendant charged with a violation of § 1028(a)(6) who claims he relied on a legal interpretation of a layman. *Svoboda, supra* at 484.

15.04 Aggravated Identity Theft (18 U.S.C. § 1028A(a)(1))

(1) Count _____ of the indictment charges the defendant with [transferring] [possessing] [using] a means of identification of another person during and in relation to a felony violation listed in the statute.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant committed the felony violation charged in Count _____ . The violation charged in count ____ is a felony violation listed in the statute.

(B) Second: That the defendant knowingly [transferred] [possessed] [used] a means of identification of another person without lawful authority.

(C) Third: That the defendant knew the means of identification belonged to another person.

(D) Fourth: That the [transfer] [possession] [use] was during and in relation to the crime charged in Count ____.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "means of identification" is defined as any name or number that may be used to identify a specific individual, including any

– [name]
– [social security number]
– [date of birth]
– [official government-issued driver's license or identification number]
– [alien registration number]
– [government passport number]
– [employer or taxpayer identification number]
– [unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation]
– [unique electronic identification number, address, or routing code] or
– [telecommunication identifying information or access device].

(B) The term "[transfer] [possess] [use]" is defined as follows. *[Insert definition(s) from three options below as appropriate.]*

(i) [The term "transfer" includes selecting an [identification document] [false identification document] and placing or directing the placement of such document on an online location where it is available to others.]

(ii) [*Insert applicable definition of possession from Instructions 2.10, 2.10A, and 2.11 here or as a separate instruction.*]

(iii) [The term "use" means active employment of the means of identification during and in relation to the crime charged in Count ____ . "Active employment" includes activities such as displaying or bartering. "Use" also includes a person's reference to a means of identification in his possession for the purpose of helping to commit the crime charged in Count _____ .]

(C) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason. [The government is not required to prove that the defendant knew that his actions violated any particular provision of law, or even knew that his actions violated the law at all. Ignorance of the law is not a defense to this crime.]

[(D) The phrase "without lawful authority" does not require that the defendant stole the means of identification information from another person but includes the defendant obtaining that information from another person with that person's permission or consent.

(E) The term "during and in relation to" requires that the means of identification have some purpose or effect with respect to the crime charged in Count ____; in other words, the means of identification must facilitate or further, or have the potential of facilitating or furthering the crime charged in Count ____, and its presence or involvement cannot be the result of accident or coincidence.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

If the predicate felony violation is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of the predicate felony violation beyond a reasonable doubt.

This instruction assumes that the defendant is charged in the same indictment with both the predicate felony violation and the aggravated identity crime; if these crimes are not charged in the same indictment, this instruction must be modified.

In paragraph (1)(A), the felony violation identified as the predicate for the aggravated identity crime must appear on the list of felony violations in § 1028A(c). The court must confirm that the predicate felony violation is on the list of felony violations in the statute.

In paragraph (1)(B), insert the appropriate verb or verbs implicated by the facts of the case from the three options of transfer, possess or use. In paragraph (2)(B), insert the appropriate definitions to correspond with the verb(s) used in paragraph (1)(B).

In paragraph (2)(C), the bracketed sentences stating that the government need not prove knowledge of the law should be used only if relevant.

Bracketed paragraph (2)(D) should be used only if relevant.

18 U.S.C. § 1028(d) provides definitions for many terms used in § 1028A.

Brackets indicate options for the court. Brackets with italics are notes to the court.

Committee Commentary Instruction 15.04
(current through July 1, 2019)

Title 18 U.S.C. § 1028A(a)(1) states: "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." This section establishes a mandatory consecutive penalty enhancement of two years in addition to any term of imprisonment for the underlying offense. See Section-by-section analysis and discussion of H.R. 1731, H.R. Rep. No.108-528 at page 785-86 (June 8, 2004).

This instruction assumes that the defendant is charged in the same indictment with both the underlying felony violation and the aggravated identity crime, and that the evidence of both is sufficient. The Committee used this approach because the predicate felony violation and the aggravated identity crime will usually be charged in the same indictment. *See, e.g.,* United States v. White, 296 F. App'x 483 (6th Cir. 2008) (unpublished). No authority from the Supreme Court addresses whether these specific crimes must be charged in the same indictment. A panel of the Sixth Circuit has noted that both offenses need not be charged in the same indictment. United States v. Jacobs, 545 F. App'x 365, 366-67 (6th Cir. 2013) (unpublished), *citing* United States v. Jenkins-Watts, 574 F.3d 950, 970 (8th Cir. 2009). So if the underlying felony violation and the aggravated identity crime are not charged in the same indictment, this instruction should be modified. Moreover, if the predicate felony violation is not charged in the same indictment, the court must instruct the jury on its duty to find the elements of the predicate felony violation beyond a reasonable doubt. *Jacobs, id.* Requiring the jury to find the elements of the underlying felony violation is additionally important because the penalty enhancement for aggravated identity theft does not include its own jurisdictional base, but rather depends on the jurisdictional base established in the underlying felony violation.

The list of four elements in paragraph (1) is supported by United States v. Gandy, 926 F.3d 248, 258 (6th Cir. 2019) (*citing* Inst. 15.04 with approval).

The predicate felony violation identified in paragraph (1)(A) must be on the list of qualifying felony violations in § 1028A(c). The court must confirm that the felony violation involved in the case is one of the qualifying felony violations listed in the statute. As noted above, based on Sixth Circuit case law for an analogous firearms crime, the court must instruct the jury on the elements of the underlying felony violation. United States v. Kuehne, 547 F.3d 667 at 680-81 (6th Cir. 2008) (holding in § 924(c) case, failure to separately instruct jury regarding elements of underlying drug trafficking crime was error but harmless).

The language in paragraph (1)(B) requiring that the transfer, possession, or use be without lawful authority is drawn verbatim from the statute; *see also Gandy, supra*.

The language of paragraph (1)(C) requiring the defendant to know that the identification belonged to another person is based on Flores-Figueroa v. United States, 129 S.Ct. 1886, 1894 (2009). In *Flores-Figueroa*, the Court stated that for the aggravated identity crime in § 1028A(1), based on "ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Id*. at 1890 (*citing* United States v. X-Citement Video, Inc., 513 U.S. 64, 79 (1994)). The Court further noted that the statute is designed to deal with identity theft and that in other theft statutes, Congress required the offender to know that the item he took actually belonged to a different person. *Id.* at 1893. The Sixth Circuit quoted paragraph (1)(C) with approval in *Gandy, supra*. The *Gandy* court also concluded that the convictions were adequately supported by circumstantial evidence that the defendants knew the identifications belonged to real people. *Gandy, supra* at 259 ("In sum, the government put forth circumstantial evidence from which the jury could have concluded beyond a reasonable doubt that [defendants] knew that they were using the names and personal identifying information of real people.").

In paragraph (2)(A), the definition of "means of identification" is based on § 1028(d)(7). That subsection states:

> (7) the term "means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any--
>
> (A) name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
>
> (B) unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
>
> (C) unique electronic identification number, address, or routing code; or
>
> (D) telecommunication identifying information or access device (as defined in section 1029(e)) . . . .

The definition in paragraph (2)(A) incorporates this exact statutory language except that it omits the prefatory phrase "alone or in conjunction with any other information" as unnecessary and it omits the parenthetical cite at the end. If the issue of whether the means of identification was used alone or along with other information is raised by the facts of the case, this phrase may be reinserted.

In paragraph (2)(B)(i), the language in the second sentence stating that transfer includes selecting and placing an item on an online location, is based on § 1028(d)(10). The Committee put options in the definition into brackets to minimize unnecessary words and facilitate tailoring the instruction to fit the case. The options (identification document and false identification document) are not defined in the instruction but definitions are available in § 1028(d)(3) and (d)(4), respectively.

The definition of "possess" in paragraph (2)(B)(ii) is a cross-reference to other pattern instructions which define that term in federal crimes generally based on Supreme Court and Sixth Circuit cases. See Instructions 2.10, 2.10A, and 2.11.

In paragraph (2)(B)(iii), the definition of "use" is adapted from Supreme Court and Sixth Circuit case law defining that term in the context of the firearms crime of using or carrying a firearm during and in relation to a predicate crime under § 924(c). See Bailey v. United States, 516 U.S. 137 (1995) and United States v. Combs, 369 F.3d 925, 932 (6th Cir. 2004) (*quoting Bailey*'s definition of use). In *Bailey*, the Court held that under § 924(c)(1), use of a firearm "requires evidence sufficient to show an *active employment* of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 516 U.S. at 143 (emphasis in original). The Court explained further:

> To illustrate the activities that fall within the definition of "use" provided here, we briefly describe some of the activities that fall within "active employment" for a firearm, and those that do not.
>
> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm. . . . [E]ven an offender's reference to a firearm in his possession could satisfy § 924(c)(1). Thus, a reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use," just as the silent but obvious and forceful presence of a gun on a table can be a "use."
>
> * * *
>
> A possibly more difficult question arises where an offender conceals a gun nearby to be at the ready for an imminent confrontation [citation omitted]. . . . In our view, "use" cannot extend to encompass this action. If the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not "used." . . . Placement for later active use does not constitute "use."

Bailey, 516 U.S. at 148-49. The language in the definition stating that the use of the means of identification must be "for the purpose of helping to commit the crime charged in Count ___" is a plain English version of the standard "calculated to bring about a change in the circumstances of the predicate offense" articulated in *Bailey* and quoted *supra*.

In United States v. Miller, 734 F.3d 530 (6th Cir. 2013), the court resolved a statutory interpretation question on the breadth of the term "use" when applied only to another person's name under § 1028A(a)(1). Based on the context of that particular statute, the court concluded the term was ambiguous and so applied the rule of lenity to adopt the narrower interpretation. Thus when the defendant used the name of another person to falsely state that person did something he did not do, but the defendant did not pass himself off as that person, the defendant did not "use" the name of another person as that term is defined in § 1028A(a)(1).

In United States v. Medlock, 792 F.3d 700 (6th Cir. 2015), the court again found that "use" was not met. The defendants submitted claims for reimbursement to Medicare for

transporting patients. The court held that the defendants did not "use" the names and Medicare identification numbers of the particular patients on the claims because the defendants really did transport those patients; what they lied about was their eligibility for reimbursement. *Id.* at 706, 708, 712. In support of this limited definition of use, the court quoted the definition of use in Instruction 15.04(2)(B)(iii). *See Medlock*, 792 F.3d at 706 ("In addition, the Sixth Circuit's Pattern Jury instructions seem to contemplate a narrow reading of 'use' in § 1028A.").

In United States v. White, 846 F.3d 170 (6th Cir. 2017), the court distinguished *Miller* and *Medlock* and held that "use" was met. The defendant was a travel agent who manufactured fake military identification cards and sent them to airlines to get lower airfares for her non-military-member clients. *Id.* at 172. The court explained, "White did more than simply lie about whether her clients were eligible for military discounts. . . . . The distinction in this case . . . arises from White's actions in creating false military identification cards and attempting to pass them off as her clients' own personal means of identification." *White*, 846 F.3d at 177.

In the absence of authority under § 1028A, the definition of knowingly in paragraph (2)(C) is based on United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011), in which the court found no error in instructions defining "knowingly" in a prosecution under § 1028(a)(6) (see Inst. 15.03). The first sentence is drawn verbatim from the instruction used in *Svoboda, supra* at 485. The two sentences stating that the defendant need not have knowledge of the law are also drawn from *Svoboda*, but are included in brackets for use only when relevant in the particular case.

In paragraph (2)(D), the definition of "without lawful authority" is based on United States v. Lumbard, 706 F.3d 716, 723-25 (6th Cir. 2013)). In an unpublished opinion, a panel found no abuse of discretion when the trial court instructed that, "If the defendant obtained someone else's means of identification and used it for some unlawful purpose, the defendant has acted 'without lawful authority.' " United States v. Rosenbaum, 628 Fed. Appx. 923, 932-933 (6th Cir. 2015) (unpublished)

The definition of "during and in relation to" in paragraph (2)(E) is derived from Supreme Court and Sixth Circuit cases defining that phrase for the crime of using or carrying a firearm during and in relation to another crime under 18 U.S.C. § 924(c)(1)(a)(i). The definition is based on Smith v. United States, 508 U.S. 223 (1993), overruled on other grounds, Bailey v. United States, 516 U.S. 137 (1995), in which the Supreme Court held that "in relation to" requires that the item have some "purpose or effect" with respect to the crime. *Smith*, 508 U.S. at 238.

The good-faith defense (see Instruction 10.04) is not available to a defendant charged with a violation of § 1028(a)(6) who claims he relied on a legal interpretation of a layman. *Svoboda, supra* at 484.

15.05 Fraud and Related Activity in Connection with Access Devices (18 U.S.C. § 1029(a)(2) (trafficking in or using one or more unauthorized access devices during a one-year period))

(1) Count ___ of the indictment charges the defendant with violating federal law by knowingly trafficking in or using one or more unauthorized access devices with intent to defraud during a one-year period and thereby obtaining anything of value totaling $1,000 or more.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First: That the defendant knowingly [trafficked in] [used] one or more unauthorized access devices during any one-year period.

(B) Second: That the defendant thereby obtained things of value totaling $1,000 or more during that one-year period.

(C) Third: That the defendant acted with intent to defraud.

(D) Fourth: That the offense affected interstate [foreign] commerce.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "access device" means any
-[credit card]
-[card]
-[plate]
-[code]
-[account number]
-[electronic serial number]
-[mobile identification number]
-[personal identification number]
-[telecommunications service, equipment or instrument identifier]
-[other means of account access used to obtain money or any other thing of value or used to initiate a transfer of funds].

(B) An access device is "unauthorized" if it is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud.

(C) [The term "traffics in" means to transfer, or otherwise dispose of, to another, or to obtain control of, with intent to transfer or dispose of.]

(D) An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

(E) To act with "intent to defraud" means to act with intent to deceive or cheat for the purpose of obtaining anything of value.

(F) The phrase "affected interstate [foreign] commerce" means that the prohibited [trafficking] [use] had at least a minimal connection with interstate [foreign] commerce. This means that the [trafficking in] [use of] the unauthorized access device had some effect upon interstate [foreign] commerce. It would also be sufficient if banking channels were used for authorizing approval of charges to the access devices.

(i) The phrase "interstate [foreign] commerce" means commerce between any combination of states, territories, and possessions of the United States, including the District of Columbia. [The phrase "foreign commerce" means commerce between any state, territory or possession of the United States and a foreign country.] [The term "commerce" includes, among other things, travel, trade, transportation and communication.]

(ii) [Trafficking in] [Using] an access device which the defendant intended to be distributed or used in interstate [foreign] commerce would meet this minimal connection requirement. The government is not required to prove that the defendant was aware of a future effect upon interstate [foreign] commerce, but only that the scheme, if completed, would have had such results.

(iii) [The government need not prove that [the prohibited [trafficking] [use] was contemporaneous with the effect upon interstate [foreign] commerce.] [the prohibited [trafficking] [use] itself affected interstate [foreign] commerce.] [the defendant had knowledge of the interstate commerce connection.]]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Use Note

Paragraph (2)(F)(iii) lists items the government need not prove to establish an effect on commerce and should be used only if relevant.

Brackets indicate options for the court.

Italics indicate notes to the court.

Committee Commentary Instruction 15.05
(current through July 1, 2019)

Title 18 U.S.C. § 1029(a)(2) provides: "Whoever-- . . . (2) knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period . . . shall, if the offense affects interstate or foreign commerce, be punished . . . ."

The list of elements in paragraph (1) is based on United States v Tunning, 69 F.3d 107, 112 (6th Cir. 1995). In *Tunning*, the court listed the elements of § 1029(a)(2) as follows: "(1) the intent to defraud; (2) the knowing use of or trafficking in an unauthorized access device; (3) to obtain things of value in the aggregate of $1,000 or more within a one-year period; and (4) an effect on interstate or foreign commerce." *Id.* In the instruction, the four elements are listed in a different order.

The definition of "access device" in paragraph (2)(A) is mostly drawn from the definition in the statute, see § 1029(e)(1). The exception is the term credit card; inclusion of that term is based on *Tunning, supra*, where the prosecution involved an American Express card and the court repeatedly referred to the § 1029 crime as credit card fraud.

The definition of "unauthorized" in paragraph (2)(B) comes from § 1029(e)(3). In *Tunning*, the Sixth Circuit held that the credit card, which the defendant obtained by using someone else's name, did not qualify as unauthorized for the offense of trafficking in or using under § 1029(a)(2). *Tunning*, 69 F.3d at 113. The court explained that the card was not lost, stolen, expired, revoked or canceled, and therefore, "the only way that the government could establish that the American Express card was 'unauthorized' was by showing that Tunning had 'obtained [it] with intent to defraud.'" *Id.* The court then found that the government's proof offered at the defendant's Alford-type guilty plea hearing was insufficient to find that Tunning had intent to defraud and therefore the factual basis for finding the credit card was unauthorized was insufficient for § 1029(a)(2). The conviction was vacated. *Id.* at 114.

The definition in paragraph (2)(C) of the term "traffics in" comes from the statute, § 1029(e)(5). The definition is in brackets because it should only be given if the offense identified in paragraph (1) was based on trafficking in as opposed to using the access device.

In the absence of authority under § 1029(a)(2), the definition of knowingly in paragraph (2)(D) is based on United States v. Svoboda, 633 F.3d 479 (6th Cir. 2011), in which the court found no error in instructions defining "knowingly" in a prosecution under § 1028(a)(6) (see Inst. 15.03). The definition is drawn verbatim from the instruction used in *Svoboda, supra* at 485.

The definition in paragraph (2)(E) of "intent to defraud" is based on two cases. The language on "to deceive or cheat" comes from United States v. Frost, 125 F.3d 346, 371 (6th Cir. 1997) (construing mail fraud, § 1341). The language on "for the purpose of obtaining property" is based on United States v. Williams, 1992 U.S. App. Lexis 29350 (6th Cir. 1992) (unpublished). In *Williams*, the panel found that an intent to defraud under § 1029(a)(2) was

established at the defendant's guilty plea hearing based on the defendant's admission that he "switched around" social security numbers and submitted them to lenders to obtain property in the form of credit. *Id.* at *7-*9.

The definition of "affected interstate [foreign] commerce" in the paragraphs under (2)(F) is based on the instructions approved under § 1028 in United States v. Gros, 824 F.2d 1487, 1494-95 (6th Cir. 1987) with some modifications. The terms "production, transfer, and possession" were replaced with terms relevant to this instruction, "traffics in or uses." Generally, duplicative words were omitted, the language was simplified, and the concepts were reordered. The definition presumes that the commerce affected is interstate commerce, and the bracketed term "foreign" should be substituted if warranted by the facts. For plain English, the instruction substitutes the word "connection" for "nexus." The statement that an effect on commerce is established by using banking channels for authorizing approval of charges to an access device is based on United States v. Scartz, 838 F.2d 876, 879 (6th Cir. 1988). Paragraph (2)(D)(iii) lists items the government need not prove and should be used only if relevant.

Generally, the Sixth Circuit has addressed the effect on interstate commerce under § 1029 in two cases. In United States v. Scartz, 838 F.2d 876, 879 (6th Cir. 1988), the court held that under § 1029(a)(1), "inasmuch as banking channels were used for gaining authorization approval of the charges on the cards, interstate commerce was affected." *Id.* In addition, a panel of the Sixth Circuit has held that under § 1029(a)(3), the government proved a sufficient effect on interstate commerce where the credit card numbers were valid numbers with foreign banks and banks located throughout the United States. *See* United States v. Drummond, 255 F. App'x 60, 64-65 (6th Cir. 2007) (unpublished). This last method of affecting interstate commerce is not included in the text of the instruction, so if this method is relevant, the instruction may be modified.