**Chapter 15.00**

**IDENTITY AND ACCESS DEVICE CRIMES**

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**Introduction to Identity and Access Device Crimes Instructions**

(current through May 1, 2025)

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))

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 unlawfully or transfer unlawfully five or more identification documents,

authentication features, or false identification documents))

15.03 Fraud and Related Activity in Connection with Identification Documents,

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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 May 1, 2025)

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 May 1, 2025)

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 May 1, 2025)

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 of [*include name of felony*

*and citation*] 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 felony

of [*include name of felony and citation*] 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 [transfer] [possession] [use] of a means of identification is “during and in relation

to” the felony of [*include name of felony and citation*] charged in Count \_\_\_\_\_ if the

[transfer] [possession] [use] of the means of identification was at the crux of the

underlying felony. Stated another way, the [transfer] [possession] [use] must have been a

key mover in the criminality. [In cases where the underlying crime involves fraud or

deceit, the means of identification must have been [transferred] [possessed] [used] in a

manner that is fraudulent or deceptive.]

(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 May 1, 2025)

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); *see also* United States v.Vance,

956 F.3d 846, 857 (6th Cir. 2020) (identifying the same factors in two elements).

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 paragraphs (1)(A), (1)(D), and (2)(E), the language requiring the identification of the

underlying felony violation by name and citation is based on United States v. Nicolescu, 17 F.4th

706 (6th Cir. 2021).

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 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 drawn from Dubin v.

United States, 143 S. Ct. 1557 (2023). In *Dubin*, the Court held that “§ 1028A(a)(1) is violated

when the defendant's misuse of another person's means of identification is at the crux of what

makes the underlying offense criminal, rather than merely an ancillary feature of a billing

method.” *Id.* at 1563. The Court stated that being “at the crux of the criminality” requires more

than a causal relationship, such as facilitation of the offense or being a but-for cause of its

success. *Id.* at 1573. Instead, with underlying fraud or deceit crimes like the one in this case

(health care fraud, § 1347), the means of identification specifically must be used in a manner that

is fraudulent or deceptive. *Id.* at 1568. Noting the Sixth Circuit’s reasoning in United States v.

Michael, 882 F.3d 624 (6th Cir. 2018), the Court explained, “When a means of identification is

used deceptively, this deception goes to ‘who’ is involved, rather than just ‘how’ or ‘when’

services were provided.” *Id.* The Court rejected the government's reading that any time another

person's means of identification was employed in a way that facilitated a crime, the statute

covered it.

The case law provides some examples. In *Dubin*, when the defendant overbilled

Medicaid for psychological testing performed by the company he helped manage, the Court

concluded that “use” was not met because the use of the patient's name was not at the crux of

what made the underlying overbilling fraudulent. The crux of the fraud was a misrepresentation

about the qualifications of petitioner's employee, and the patient's name was only an ancillary

feature of the billing method employed. *Id.* at 1573-1574. The Court drew on the Sixth Circuit’s

analysis in *Michael*. There, the court held that § 1028A could apply to a case in which a

pharmacist falsely used the name and prescriber doctor and the name and date of birth of a

patient to submit claims for insurance reimbursement for medication that the doctor had not

prescribed and the patient had not requested be submitted. 882 F.3d at 628 (distinguishing

United States v. Medlock, 792 F.3d 700 (6th Cir. 2015) (where named patients actually received

ambulance services but the defendants mischaracterized the nature of services)).

The extent of the *Dubin* holding is somewhat uncertain. As quoted in the first paragraph

of the commentary, the statute prohibits conduct with three verbs: transfer, possess, and use.

The *Dubin* case involved “use” and so clearly applies to that verb, but the opinion leaves some

uncertainty on whether and how it applies to “transfer” and “possession.” These two verbs may

constitute open questions, but the Committee decided at this point that it was best to assume

*Dubin* applied to all three verbs. Whether this assumption is correct can only be resolved with

the development of more case law.

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 May 1, 2025)

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.