

15.10 Counterfeit Access Devices—Producing, Using, or Trafficking (18 U.S.C. § 1029(a)(1))

The defendant is charged in [Count _____ of] the indictment with [production of] [use of] [trafficking in] [a] counterfeit access device[s] in violation of Section 1029(a)(1) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly [used] [produced] [trafficked in] a counterfeit access device;

Second, the defendant acted with intent to defraud; and

Third, the defendant’s conduct in some way affected commerce between one state and [an] other state[s], or between a state of the United States and a foreign country.

A “counterfeit access device” means any access device that is counterfeit, fictitious, altered or forged, or an identifiable component of an access device or a counterfeit access device.

[To “produce” a telecommunications instrument means to design, alter, authenticate, duplicate, or assemble it.]

[To “traffic” in a telecommunications instrument means to transfer or otherwise dispose of it to another, or to obtain control of it with intent to transfer or dispose of it.]

Comment

Use this instruction in conjunction with Instruction 15.16 (Access Device—Defined).

For a definition of “intent to defraud,” see Instruction 4.13 (Intent to Defraud).

18 U.S.C. § 1029(e) defines the terms “access device,” “counterfeit access device,” “produce,” and “traffic.”

For a definition of “knowingly,” see Instructions 4.8 (Knowingly) and 4.9 (Deliberate Ignorance).

Regarding a jury finding that commerce was affected, consult *United States v. Gomez*, 87 F.3d 1093, 1096-97 (9th Cir. 1996) (discussing role of jury in determining fact which is both element of offense and jurisdictional fact). See also *United States v. Lopez*, 514 U.S. 549, 558-63 (1995) (discussing “affecting” commerce requirement); *United States v. Clayton*, 108 F.3d 1114, 1117-18 (9th Cir. 1997) (applying test in *Lopez* to alleged violation of § 1029).

18 U.S.C. § 1029(b)(1) and (b)(2) specify penalties for an attempt or a conspiracy to violate any subsection of § 1029(a). Where the indictment charges such an attempt or conspiracy, adjust this instruction accordingly, using relevant elements from Instructions 4.4 (Attempt) or 11.1 (Conspiracy—Elements).

For specific cases referring to counterfeit access devices, see the following: *United States v. McCormick*, 72 F.3d 1404, 1408 (9th Cir. 1995) (holding that submission of credit card application containing false or inflated information produces counterfeit access device); *United States v. Brannan*, 898 F.2d 107, 109 (9th Cir. 1990) (submitting fictitious credit card applications to bank was functional equivalent to manufacture of counterfeit access devices); *United States v. Luttrell*, 889 F.2d 806, 810 (9th Cir. 1989) (discussing distinction between unauthorized and counterfeit access devices) *opinion amended in part, vacated in part on rehearing*, 923 F.2d 764 (9th Cir. 1991).

18 U.S.C. § 10 defines interstate and foreign commerce.

Revised Mar. 2021