Criminal Tax Manual
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24.00 FALSE STATEMENTS

Updated June 2001

24.01 **STATUTORY LANGUAGE: 18 U.S.C. § 1001**

§1001. *Statements or entries generally*

(a) . . . Whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully

(1) falsifies, conceals or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statements or representation;

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry;

shall be fined* under this title or imprisoned not more than five years, or both.[FN1]

*As to offenses committed after December 31, 1984, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596) enacted 18 U.S.C. § 3623 [FN2] which increased the maximum permissible fines for both misdemeanors and felonies. For the felony offense set forth in section 1001, the maximum permissible fine for offenses committed after December 31, 1984, is increased to at least $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

24.02 **GENERALLY**

This statute has a history of more than one hundred years. The courts have recognized that the statute is necessarily couched in very broad terms. "Congress could not hope to foresee the multitude and variety of deceptive practices which ingenious individuals might perpetrate upon an increasingly complex governmental machinery, a complexity that renders vital the truthful reporting of material data." *United States v. Beer*, 518 F.2d 168, 170 (5th Cir. 1975); *see also United States v. Fern*, 696 F.2d 1269, 1273-74 (11th Cir. 1983).

The statute technically describes two distinct offenses concerning any matter within the jurisdiction of a department or agency of the United States:

1. Falsifying, concealing, or covering up a material fact by any trick, scheme, or device.

2. Making materially false, fictitious, or fraudulent statements or representations; or making or using any false writing or document.

Each of these offenses requires different elements of proof. *United States v. Mayberry*, 913 F.2d 719, 722 n.7 (9th Cir. 1990).

The purpose of section 1001 is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from" false information. *United States v. Gilliland*, 312 U.S. 86, 93 (1941); *see Bryson v. United States*, 396 U.S. 64, 70 (1969); *United States v. Olson*, 751 F.2d 1126, 1128 (9th Cir. 1985); *United States v. Brack*, 747 F.2d 1142, 1151-52 (7th Cir. 1984); *But see*, *United States v. Machi*, 962 F.Supp 442 (S.D.N.Y. 1997). In the criminal tax context, the statute is normally used in connection with false documents or statements submitted to an Internal Revenue agent during the course of an audit or investigation. The statute is not normally used in the case of a false statement on a return because, if the return is signed under the penalties of perjury, as most are, section 7206(1) of the Internal Revenue Code (Title 26) is considered a more appropriate charge.

Before a section 1001 charge may be included in a criminal tax indictment, authority must be obtained from the Deputy Assistant Attorney General (Criminal), Tax Division. *See* Tax Division Directive No. 115 at pp. 3-47 - 48, *supra*. The Tax Division prefers to restrict authorization of section 1001 prosecutions to those instances where the false statement was made under oath or in writing, although each request will be considered on its merits.

24.03 **ELEMENTS**

Limiting this discussion to offenses involving false statements or representations and false documents, the government must prove the following elements beyond a reasonable doubt to establish a violation of section 1001:

1. The defendant made a false statement or representation, or made or used a false document;

2. In a matter within the jurisdiction of the executive, legislature or judicial branch of the Government of the United States;

3. The false statement or representation, or false document related to a material matter; and,

4. The defendant acted willfully and with knowledge of the falsity.

United States v. Gaudin, 515 U.S. 506 (1995); *United States v.*

Shafer, 199 F.3d 826, 828 (6th Cir. 1999); *United States v. David,* 83 F.3d 638 (4th Cir. 1996); *United States v. Barr*, 963 F.2d 641, 645 (3rd Cir. 1992); *United States v. Steele*, 933 F.2d 1313, 1318-19 (6th Cir. 1991) (*en banc*); *United States v. Gafczk*, 847 F.2d 685, 690 (11th Cir. 1988); *United States v. Brack*, 747 F.2d 1142, 1146 n.4 (7th Cir. 1984); *United States v. Race*, 632 F.2d 1114, 1116 (4th Cir. 1980); *United States v. Baker*, 626 F.2d 512, 514 (5th Cir. 1980); *United States v. Gilbertson*, 588 F.2d 584, 589 (8th Cir. 1978). .

24.04 **FALSE STATEMENTS OR REPRESENTATIONS**

The term "statement" as used in section 1001 has been given a broad interpretation. The Supreme Court has recognized that the term includes both oral and written statements. *United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952). Either can be a violation of section 1001. The Second Circuit, in *United States v. McCue*, 301 F.2d 452, 456 (2d Cir. 1962), stated that:

> The appellant's contention that Section 1001 does not apply to oral statements is disputed by the language of the statute itself which penalizes the making of "any false, fictitious or fraudulent statements" as well as the making or using of "any false writing or document."

McCue, 301 F.2d at 456 (citations omitted); *See also United States v. Steele*, 933 F.2d 1313, 1318 n.4 (6th Cir.1991) (*en banc*); *United States v. Fitzgibbon*, 619 F.2d 874, 878 (10th Cir. 1980); *United States v. Massey*, 550 F.2d 300, 305 (5th Cir. 1977).

There also is no requirement that the statement be under oath. The statute applies to unsworn, as well as sworn, statements. *Massey*, 550 F.2d at 305; *Neely v. United States*, 300 F.2d 67, 70 (9th Cir. 1962).

A statement is false for purposes of this statute even if it is a technically true statement, but it is knowingly put to a false use. In *Peterson v. United States*, 344 F.2d 419 (5th Cir. 1965), in response to the question whether a payment was for past earned fees or fees to be earned, the defendant submitted a letter stating that his records showed the payment was an accrued fee, and accordingly, the payment was a deductible expense for a particular year. The court held that even if the literal language of the letter was true as to what the records reflected, it was clearly open to the jury to find that the statement in the letter as to the payment being an accrued fee was false. *Peterson*, 344 F.2d at 427. *See also United States v. Brack*, 747 F.2d 1142, 1150 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985) ("even though the statements were accurate as to the total amount of the contract, they constituted false statements within the meaning of section 1001 by concealing the fraudulent nature of the contract"). *Cf. Bronston v. United States*, 409 U.S. 352, 358 n.4 (1973) (fraudulent statements include "intentional creation of false impressions by a selection of literally true representations") (citations omitted).

A forged endorsement on a tax refund check has been held to be a false statement within the ambit of section 1001. *Gilbert v. United States*, 359 F.2d 285 (9th Cir. 1966). In *Gilbert*, the defendant, an accountant, endorsed checks with the taxpayer's name and his own name, and then deposited the checks into his own trust account. The court acknowledged that the defendant "made no pretense that the payees had themselves executed the endorsements," but held nevertheless that his endorsements constituted unlawful misrepresentations. *Gilbert*, 359 F.2d at 286.

Section 1001 prohibits false statements generally, not just those statements or documents required by law or regulation to be kept or furnished to a federal agency. As stated by the court in *United States v. Arcadipane*. 41 F.3d 1, 4-5 (1st Cir. 1994):

It seems self-evident that section 1001 is intended to promote the smooth

> functioning of government agencies and the expeditious processing of the government's business by ensuring that those who deal with the government furnish information on which the government confidently may rely. To this end, section 1001 in and of itself constitutes a blanket proscription against the making of false statements to federal agencies . Thus, while section 1001 prohibits falsification in connection with the documents that persons are regarded by law to file . . . , its prohibitory sweep is not limited to such documents. The statute equally forbids falsification of any other statements, whether or not legally required, made to a federal agency.

See United States v. Meuli, 8 F.3d 1481, 1485 (10th Cir. 1993); *United States v. De Rosa*, 783 F.2d 1401, 1407 (9th Cir.1986); *United States v. Olson*, 751 F.2d 1126, 1127 (9th Cir. 1985); *United States v. Diaz*, 690 F.2d 1352, 1358 (11th Cir. 1982). Thus, it is not necessary that the alleged false statement be a statement that the defendant was required by law to make. *Bryson v. United States*, 396 U.S. 64 (1969); *United States v. Knox*, 396 U.S. 77 (1969); *Neely*, 300 F.2d at 71; *Knowles v. United States*, 224 F.2d 168, 172 (10th Cir. 1955). As the court stated in *Bryson*, 396 U.S. at 72:

> Our legal system provides methods for challenging the Government's right to ask questions -- lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.

The absence of a requirement that the government prove that the statement made was one required by statute or regulation pertains only to the situation where the defendant is charged with making a false statement. The proof for such a prosecution is substantially different, in this regard, from the proof needed for a prosecution alleging concealment as a violation of section 1001. If the defendant is charged with concealing or failing to disclose material facts, the government must prove that the defendant had a legal duty to disclose the material facts at the time the defendant allegedly concealed them. *United States v. Dorey*, 711 F.2d 125, 128 (9th Cir. 1983); *But see Olson*, 751 F. 2d at 1127-28, limiting *Dorey*.

In contrast to perjury statutes, 18 U.S.C. § 1621, *et seq.*, there are no strict requirements under section 1001 for the method of proving the falsity of statements. Thus, falsity may be proven by the uncorroborated testimony of a single witness. *United States v. Fern*, 696 F.2d 1269, 1275 (11th Cir. 1983); *United States v. Carabbia*, 381 F.2d 133, 137 (6th Cir. 1967); *United States v. Marchisio*, 344 F.2d 653, 665 (2d Cir. 1965); *Neely*, 300 F.2d at 70; *Travis v. United States*, 269 F.2d 928, 936 (10th Cir. 1959), *rev'd on other grounds*, 364 U.S. 631 (1961); *United States v. Killian*, 246 F.2d 77, 82 (7th Cir. 1957). Note that under 18 U.S.C. § 1623, the two-witness rule does not apply to perjury for false declarations in court proceedings or before grand juries. Section 1001 nevertheless differs from 18 U.S.C. § 1623 in that the perjury conviction requires proof of an oath while a false statement conviction does not. *United States v. D'Amato*, 507 F.2d 26, 29 (2d Cir. 1974).

24.05 **MATTER WITHIN JURISDICTION OF A BRANCH OF THE FEDERAL GOVERNMENT**

To establish a violation of section 1001, the false statement or representation must be shown to have been made in a matter within the jurisdiction of the executive, legislative or judicial branch of the Government of the United States. Relying upon Congressional intent, courts have given the term "jurisdiction" an expansive reading. In *United States v. Rodgers*, 466 U.S. 475 (1984), the Court stated that "[t]he term 'jurisdiction' should not be given a narrow or technical meaning for purposes of Section 1001." *Rogers*, 466 U.S. at 480 (quoting *Bryson v. United States*, 396 U.S. 64, 70 (1969)). *See United States v. Shafer*, 199 F.3d 826, 828 (6th Cir. 1999). Consequently, the jurisdiction of the executive legislative or judicial branch within the meaning of the statute is not limited to the power to

make final or binding determinations. Rather, it includes, as well, matters within an agency's investigative authority. *Rodgers*, 466 U.S. at 480. Thus, "a 'statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under Section 1001.'" *Rodgers*, 466 U.S. at 4512 (quoting *Bryson*, 396 U.S. at 70-71); *see also United States v. Milton*, 8 F.3d. 39 46 (D.C. Cir. 1993); *United States v. Bilzerian*, 926 F.2d 1285, 1300 (2d Cir. 1991). Likewise, a false statement submitted to a federal agency falls within the statute if the false statement relates to a "matter as to which the Department had the power to act." *Ogden v. United States*, 303 F.2d 724, 743 (9th Cir. 1962), *after remand*, 323 F.2d 818 (9th Cir. 1963); *see Shafer*, 199 F.3d at 828-829; *United States v. Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982); *United States v. Cartright*, 632 F.2d 1290, 1292 (5th Cir. 1980); *United States v. Adler*, 380 F.2d 917, 921-22 (2d Cir. 1967).

Whether a matter is within the jurisdiction of the executive, legislative or judicial branch of the government is a question of law. *Shafer*, 199 F.3d at 828; *United States v. Gafyczk*, 847 F.2d 685, 690 (11th Cir. 1988); *United States v. Lawson*, 809 F.2d 1514, 1517 (11th Cir. 1987); *United States v. Goldstein*, 695 F.2d 1228, 1236 (10th Cir. 1981); *Pitts v. United States*, 263 F.2d 353, 358 (9th Cir. 1959); *See United States v. Gaudin,* 515 U.S. 506 (1995). In *Gaudin*, the Supreme Court, recognizing that the Constitution requires that the jury decide all elements of the crime, held that it was error in a prosecution under 18 U.S.C 1001 to take from the jury the question of materiality. *Gaudin* strongly suggests that irrespective of the nature of the question whether a matter is within the jurisdiction of an agency of the executive branch (*i.e.*, fact or law), the question must be submitted to and resolved by the jury.

In the past, the courts have uniformly found that the Internal Revenue Service is a "department or agency of the United States" within the meaning of 18 U.S.C. § 1001. *United States v. Morris*, 741 F.2d 188, 190-91 (8th Cir. 1984); *United States v. Fern*, 696 F.2d 1269 (11th Cir. 1983); *United States v. Schmoker*, 564 F.2d 289, 291 (9th Cir. 1977); *United States v. Isaacs*, 493 F.2d 1124, 1156-57 (7th Cir. 1974); *United States v. Ratner*, 464 F.2d 101 (9th Cir. 1972); *United States v. McCue*, 301 F.2d 452, 455 (2d Cir. 1962). *See also United States v. Knox*, 396 U.S. 77, 80-81 (1969) (Court simply accepted, without directly holding, the applicability of the statute to false documents submitted to the Internal Revenue Service). As noted above, the statute has its origins in a perceived need to protect the government from monetary frauds. Clearly, this could not be accomplished without prohibiting false representations made to the Internal Revenue Service on matters relating to tax liability.

In *United States v. Bramblett*, 348 U.S. 503 (1955), the Supreme Court held that the term "department" as used in section 1001, as written at that time, referred to all three branches of government. In *Hubbard v. United States*, 514 U.S. 695 (1995), the Court overruled *Bramblett* to hold that the term "department" refers only to a "component of the Executive Branch". 514 U.S. at 699-702, 715. With respect to the term "agency" in former Section 1001 with regard to which *Bramblett* was silent, the Supreme Court in *Hubbard* held only that a court is not an "agency", 514 U.S. at 715. *The False Statement Accountability Act of 1996* overruled *Hubbard* and included in section 1001 all branches of the federal government. Obviously, since the executive branch is explicitly listed in this law, the IRS is included within the reach of the statute. This argument is further strengthened by the long history of the judicial findings that the IRS is an "agency or department" within the meaning of section 1001, as it existed prior to 1996.

The false statement need not be made directly to or even received by the executive, legislative or judicial branch of the government. *United States v. Oren*, 893 F.2d 1057, 1064 (9th Cir. 1990); *United States v. Gibson*, 881 F.2d 318, 322 (6th Cir. 1989); *United States v. Suggs*, 755 F.2d 1538, 1542 (11th Cir. 1985); *United States v. Wolf*, 645 F.2d 23, 25 (10th Cir. 1981). If the defendant puts the statement or document in motion, that is sufficient. For example, a defendant who falsely endorsed tax

refund checks and deposited them in his bank account was guilty of violating section 1001. *Gilbert v. United States*, 359 F.2d 285, 287 (9th Cir.1966). Moreover, false statements made to state, local or even private entities who either receive federal funds or are subject to federal supervision can form the basis of a section 1001 violation. *See Shafer*, 199 F.3d at 829 (false statements made to state agency that received federal support and was subject to federal regulation "squarely within the jurisdiction of an agency or department of the United States); *Gibson*, 881 F.2d at 322 (overstated invoices submitted by private party to Tennessee Valley Authority was a matter within federal jurisdiction).

Since the false statements or documents need not actually be received by the executive, legislative or judicial branch, the Tax Division has authorized prosecution pursuant to section 1001 for false claims which have been prepared, but have yet to be filed with the Internal Revenue Service. This scenario occurs, for example, in electronic filing prosecutions where the filer has been apprehended either after or at the time of the presentation of his false claim to a tax filing service, but before transmission is effectuated. Because the false claim has not been submitted to the Service, the commonly used 18 U.S.C. § 287 charge is unavailable. Section 1001 provides a mechanism by which these false claims can be prosecuted. *See* Section 22.07, *infra*.

24.06 **MATERIALITY**

Although the word "material" was only explicitly mentioned in the first clause of prior section 1001, which refers to the falsification or concealment of a material fact, most courts "have read such a requirement into . . . [the false statement and false document clauses] . . . 'in order to exclude trivial falsehoods from the purview of the statute.'" *Hughes v. United States*, 899 F.2d 1495, 1498 (6th Cir. 1990) (citing *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir. 1983); *see also United States v. Baker*, 200 F.3d 558, 561 (8th Cir. 2000); *United States v. Gafyczk*, 847 F.2d 685, 691 (11th Cir. 1988) (citing *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir. 1980)); *United States v. Baker*, 626 F.2d 512, 514 & n.5 (5th Cir. 1980); *United States v. Adler*, 623 F.2d 1287, 1291 (8th Cir. 1980);. Thus, "[false statements made to conceal a fraud are no less material for the purposes of Section 1001 than false statements designed to induce a fraud." *United States v. Brack*, 747 F.2d 1142, 1150 (7th Cir. 1984). Even though materiality has been grafted onto the statutory scheme of the second and third clauses, failure to allege the false statement's or false document's materiality is not fatal to an indictment where the facts "advanced by the pleader warrant the inference of materiality." *United States v. Oren*, 893 F.2d 1057, 1063 (9th Cir. 1990).

The present wording of the statute is much more explicit and refers both to a "material fact" and to "any materially false, fictitious, or fraudulent statement or entry"; both phrases appear in the first paragraph of current section 1001 where the elements of the crimes are listed. This leaves little room for interpretation and clearly suggests that materiality is an element of all aspects of this crime.

Unlike the other circuits, the Second Circuit has refused to read a materiality requirement into the second and third clauses of the statute. The Second Circuit has repeatedly held that "materiality is not an element of the offense of making a false statement in violation of Section 1001." *United States v. Elkin*, 731 F.2d 1005, 1009 (2d Cir. 1984). *See also United States v. Bilzerian*, 926 F.2d 1285, 1299 (2d Cir. 1991), 502 U.S. 813, 63 (1991); *United States v. Silva*, 715 F.2d 43, 49 (2d Cir. 1983) (the court lists elements of a section 1001 false statement prosecution without mentioning materiality); *United States v. Gribben*, 792 F. Supp. 960 (S.D.N.Y. 1992), *rev'd on other grounds*, 984 F.2d 47 (2d Cir. 1993); *United States v. Sprecher*, 783 F. Supp. 133, 157 (S.D.N.Y. 1992). However, as noted above, the current language of the statute leaves little, if any, room for interpretation on this issue.

The commonly used test for determining whether a matter is material is

whether the falsity or concealment had a natural tendency to influence, or was capable of influencing, the agency or department. *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Baker*, 200 F.3d at 561; *United States v. White*, 27 F. 3d 1531, 1534 (11th Cir. 1994); *United States v. Hutchinson*, 22 F.3d 846, 851 (9th Cir. 1992); *United States v. Meuli*, 8 F.3d 1481, 1484 (10th Cir. 1993); *United States v. Steele*, 933 F.2d 1313, 1319 (6th Cir. 1991) (*en banc*); *United States v. Grizzle*, 933 F.2d 943, 948 (11th Cir. 1991); *Brack*, 747 F.2d at 1147; *United States v. Green*, 745 F.2d 1205, 1208 (9th Cir. 1984); *United States v. Diaz*, 690 F.2d 1352, 1357 (11th Cir. 1982); *Baker*, 626 F.2d at 514 & n.5; *United States v. Jones*, 464 F.2d 1118, 1122 (8th Cir. 1972). As the Ninth Circuit stated:

> [T]he test for determining the materiality of the falsification is whether the falsification is calculated to induce action or reliance by an agency of the United States, -- is it one that could affect or influence the exercise of governmental functions, -- does it have a natural tendency to influence or is it capable of influencing agency decision?

United States v. East. 416 F.2d 351, 353 (9th Cir. 1969).

It is not essential that the agency or department actually rely on or be influenced by the falsity or concealment. *Baker*, 200 F.3d at 561; *United States v. Myers,* 878 F.2d 1142, 1143 (9th Cir. 1989); *United States v. Lawson*, 809 F.2d 1514, 1520 (11th Cir. 1987); *Brack*, 747 F.2d at 1147; *Green*, 745 F.2d at 1208; *United States v. Fern*, 696 F.2d 1269, 1275 (11th Cir. 1983); *Diaz*, 690 F.2d at 1357; *United States v. Markham*, 537 F.2d 187, 196 (5th Cir. 1976); *Jones*, 464 F.2d at 1122; *Gonzales*, 286 F.2d at 122. Accordingly, in *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992), the Tenth Circuit found that false Forms 1099 were material despite the defendant's argument that the amount claimed "were so ludicrous that no IRS agent would believe them." *Parsons*, 967 F.2d at 455. On the contrary, the court explained that the very fact that the amounts were high increased the likelihood that the Service would be influenced by the forms' contents:

> The large amounts involved do not reduce the forms to scraps of blank paper. If anything, the reverse is the case. They cry out for attention and it would be a blameworthy administration to ignore them.

Parsons, 967 F.2d at 455.

Nor is it required that the false statement be one which the defendant was obligated by statute or regulation to make. *United States v. Hutchison*, 22 F.3d 846 (9th Cir., 1993) (rejected argument that false Forms 1099-S were not material because defendant was not required to file them). Moreover, as stated above, the federal agency need not actually receive the statement. *United States v. Hooper*, 596 F.2d 219, 223 (7th Cir. 1979). Simply stated, "[t]he false statement must . . . have the capacity to impair or pervert the functioning of a government agency." *Lichenstein*, 610 F.2d at 1278.

Likewise, proof of pecuniary or property loss to the government is not necessary. *Lichenstein*, 610 F.2d at 1278-79. For example, the fact that the government had begun its own tax investigation did not make the defendant's statements regarding income tax entries immaterial to a section 1001 prosecution. *United States v. Schmoker*, 564 F.2d 289, 291 (9th Cir. 1977).

Prior to 1995 there was a split in the circuits as to whether "materiality" was a question of law for the court or a question of fact for the jury. The Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits had held that materiality was a question of law. *Grizzle*, 933 F.2d at 948; *United States v. Rigdon*, 874 F.2d 774, 779 (11th Cir. 1989); *Fern*, 696 F.2d at 1274; *Baker*, 626 F.2d at 514 n.4; *United States v. Hicks*, 619 F.2d 752, 758 (8th Cir. 1980). The Ninth and Tenth Circuits, on the other hand, had found that materiality was a factual question.

The Supreme Court in *United States v. Gaudin*, 515 U.S. 506 (1995), decided this issue and held that materiality is a question for the jury. In *Gaudin*, the defendant had been convicted of making false statements on Department of Housing and Urban Development loan documents, in violation of 18 U.S.C. § 1001. The trial court instructed the jury that materiality was a question of law for the court. The Supreme Court, in rejecting this holding, employed the following syllogism:

> The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality: [the defendant] therefore had a right to have the jury decide materiality.

In *Gaudin*, the Court did not address the issue of whether materiality is an element of any § 1001 offense. Rather, the parties agreed that materiality was an element of the offense under § 1000. *Gaudin*, 515 U.S. at 509.

24.07 **WILLFULNESS**

To establish a section 1001 violation, the government must prove that the defendant acted knowingly and willfully. *United States v. Hildebrandt*, 961 F.2d 116, 118 (8th Cir. 1992). As used in section 1001, the term "willful" simply means that the defendant did the forbidden act (*e.g.*, made a false, fictitious, or fraudulent statement) deliberately and with knowledge. *Hildebrandt*, 961 F.2d at 118.

The government need not prove an intent to deceive. *United States v. Yermian*, 468 U.S. 63, 69, (1984); *United States v. Arcadipane* 41 F.3d 1, 5 (1st Cir. 1994); *Hildebrandt*, 961 F.2d at 118; *see United States v. Ranum,* 96 F. 3d 1020, 1027-1029 (7th Cir. 1996) Nor need the government prove that the defendant had actual knowledge of federal agency jurisdiction -- *i.e.*, knowledge that the statements were made within federal agency jurisdiction. *Yermian*, 468 U.S. at 69, 73; *Hildebrandt*, 961 F.2d at 118-19. Furthermore, several courts have held that the element of knowledge can be satisfied by proof of "willful blindness" or "conscious avoidance." *United States v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977); *United States v. Abrams*, 427 F.2d 86, 91 (2d Cir. 1970).

For a further discussion of willfulness, *see*, *e.g.*, Sections 8.06, *supra*, and 40.09, *infra*.

24.08 **DEFENSES**

24.08[1] **Exculpatory No Doctrine**

Due to the sweeping language of this statute and the potential for governmental abuse, many courts had created an exception to prosecution which was commonly referred to as the "exculpatory no" doctrine. This judicially-created doctrine prohibited the government from prosecuting individuals who had done nothing more than provide negative responses to questions put to them in the course of a federal criminal investigation.[FN3] However, the Supreme Court, in *Brogan v. United States*, 522 U.S.398 (1998), eliminated this avenue of defense for potential defendants.

Until *Brogan,* the courts had failed to formulate a single cohesive test concerning the doctrine's applicability. It had, however, been accepted by the First, Fourth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. *See Moser v. United States*, 18 F.3d 469, 473-74 (7th Cir. 1994); *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *United States v. Tabor*, 788 F2d 714, 717-19 (11th Cir. 1986); *United States v. Fitzgibbon*, 619

F.2d 874, 880-81 (10th Cir. 1980); *United States v. Rose*, 570 F.2d 1358, 1364 (9th Cir. 1978); *United States v. Chevoor*, 526 F.2d 178, 183-84 (1st Cir. 1975).

The Second, Third, Sixth, and D.C. Circuits had neither adopted nor rejected the "exculpatory no" doctrine. *See United States v. LeMaster*, 54 F.3d 1224, 1229-1230 (6th Cir. 1995); *United States v. Barr*, 963 F.2d 641, 647, (3d Cir. 1992); *United States v. White*, 887 F.2d 267, 273 (D.C. Cir. 1989).

The Fifth Circuit, which had been the first to adopt the doctrine in *Paternostro v. United States*, 311 F.2d 298 (5th Cir. 1962), was the only circuit to reject it. In *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (*en banc*), that Court concluded that there was no support for the doctrine in either statute or reason.

The Fourth, Eighth and Ninth Circuits had adopted a five-part test to determine the doctrine's applicability:

1. the false statement must be unrelated to a privilege or claim against the government;

2. the declarant must be responding to inquiries initiated by a federal agency or department;

3. a truthful answer would involve self-incrimination;

4. the government agency's inquiries must not constitute a routine exercise of administrative as opposed to investigative responsibility; and,

5. the false statement must not impair the basic functions entrusted by law to the agency.

Cogdell, 844 F.2d at 179, 183; *Taylor*, 907 F.2d at 805-7; *United States v. Becker*, 855 F.2d 644, 646 (9th Cir. 1988) (citing *United States v. Medina de Perez*, 799 F.2d 540 (9th Cir. 1986)). Because the test was phrased in the conjunctive, the doctrine was only invoked where the false statement was thought to interfere with an agency's functions *and* when a truthful response would have incriminated the defendant. *Becker*, 855 F.2d at 646; *see also United States v. Morris*, 741 F.2d 188, 191 (8th Cir. 1984) ("exculpatory no" doctrine does not apply where an affirmative response to an IRS inquiry would not have involved possible self-incrimination); *United States v. Myers*, 878 F.2d 1142, 1144 (9th Cir. 1989) ("exculpatory no" doctrine applied to statements made in response to Secret Service inquiries, but not to FAA inquiries concerning the same incident).

This five-part test was explicitly rejected by the Sixth Circuit. *United States v. Steele*, 933 F.2d 1313, 1320 (6th Cir. 1991) (*en banc*). That court expressed concerns relating to the sweeping language of the statute and concluded that these concerns did not legitimize the broad exception to the statute created by the five-part test, noting that the materiality requirement of the statute reasonably limited its applicability. In addition, the court noted that the mechanism of prosecutorial discretion upon which Congress appeared to have primarily relied was a valid means of limiting the potential application of the statute. *Steele*, 933 F.2d at 1321.

With *Brogan*, the Supreme Court ended the debate by affirming the Second Circuit's decision, holding that "no" is a statement within the statute's phrase "statements or representations". Brogan was an officer of a local union which represented workers at JRD Management Corporation. Labor Department and IRS agents conducted a search of JRD and seized records that showed bribes paid to Brogan, among others. After the search, and without prior notification, Labor and IRS agents went to Brogan's home. They told him that they were seeking his cooperation, and, if he decided to cooperate, he should retain a lawyer to contact the United States Attorney's office. They then asked if he would answer some questions, and he agreed. They asked if he had received any payments from JRD, and he replied, "no." They then, for the first time, told him that they had

seized records which indicated that he had been paid by JRD, and they informed him that it was a criminal offense to lie to federal investigators. Brogan did not amend his answer and the interview was soon terminated. *United States v. Wiener*, 96 F.3d 35, 36 (2d Cir. 1996), *aff'd. sub nom., Brogan v. United States*, 522 U.S. 398 (1998).

Brogan was convicted in the Southern District of New York of unlawfully receiving money from an employer and of making a false statement to federal agents. On appeal, the Second Circuit was squarely presented with the exculpatory "no" doctrine for the first time (all prior cases had presented additional facts which had allowed the Court to postpone addressing the doctrine) and held that "no" is a statement within the statute's phrase, "statements or representations." The Court reasoned that the disjunctive phrasing indicated that there was no Congressional intention to limit the application of the statute to so-called "aggressive or inducing statements only." *Wiener*, 96 F.3d 38, n.2..

In the Supreme Court, Brogan conceded that his statement was false, and was made "knowingly and willfully." He conceded, therefore, that under a literal reading of the statute, he would lose. The Supreme Court stated that "the plain language of §1001 admits of no exception for an 'exculpatory no,' " and affirmed the Second Circuit. *Brogan*, 522 U.S. at 408.

The issue of willfulness remained unresolved by the Supreme Court's decision in *Brogan*, because Brogan conceded that he had acted willfully. However, the Second Circuit strongly indicated that, in Section 1001 cases, the willfulness element would require proof of knowledge that it was a crime to lie to federal agents in the course of their investigation. The Second Circuit also noted that the fact-finder might be influenced by whether the declarant was taken by surprise or had time to consider the gravity of the situtation in deciding willfulness. *Wiener*, 96 F.3d at 40.

24.08[2] **Wrong Statute Charged**

In *United States v. Fern*, 696 F.2d 1269 (11th Cir. 1983), the defendant argued that the enactment of 26 U.S.C. § 7207 made section 1001 inapplicable to a situation involving false statements made to the Internal Revenue Service. *See* Section 16.00 *supra*, for a discussion on section 7207. Since section 7207 is a misdemeanor and section 1001 is a felony, the argument is an important one. Although the Eleventh Circuit indicated a preference for specific statutes and noted that section 1001 is the more general statute and provides for a greater penalty, the court held that the government still may choose to prosecute under section 1001 when a false statement has been made to the Internal Revenue Service. *Fern*, 696 F.2d at 1273-74.

A similar argument was raised by the defendant in *United States v. Greenberg*, 268 F.2d 120 (2d Cir. 1959). There, the defendant claimed that he should have been prosecuted under the perjury statute, 18 U.S.C. § 1621, instead of section 1001, for aiding and abetting the submitting of false payroll reports to the Navy. The court held that the government was not barred from prosecuting under section 1001 merely because it also could have proceeded under section 1621: "a single act or transaction may violate more than one criminal statute . . . [and] the government had the authority to decide under which statute the offenses here were to be prosecuted." *Greenberg*, 268 F.2d at 122. *See also United States v. Hughes*, 964 F.2d 536 (6th Cir. 1992) (double jeopardy did not prevent multiple convictions for section 1001 and 26 U.S.C. § 7204 for filing false Forms W-2); *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991); *United States v. Hajecate*, 683 F.2d 894 (5th Cir. 1982) (government has discretion to choose between section 1001 and 26 U.S.C. § 7206); *United States v. D'Amato*, 507 F.2d 26, 29 (2d Cir. 1974).

24.08[3] **Variance**

In *United States v. Lambert*, 501 F.2d 943 (5th Cir. 1974), the defense of variance between the charge and the proof was upheld, and the indictment was dismissed. The indictment specified certain false statements that

the defendant allegedly made, but the evidence at trial did not establish that the defendant had made those specific statements. This decision emphasizes the need to use the precise false statements made when drafting charges and not to utilize generic language or a summary.

24.09 **VENUE**

Venue in a section 1001 prosecution lies where the false statement was made, where the false document was prepared and signed or where it was filed or presented. *United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir. 1991); *United States v. Mendel*, 746 F.2d 155, 165 (2d Cir. 1984); *United States v. Herberman*, 583 F.2d 222, 225-27 (5th Cir. 1978). *See United States v. Greene*, 862 F.2d 1512, 1515 (11th Cir. 1989); *United States v. Wuagneux*, 683 F.2d 1343, 1356 (11th Cir. 1982). The general venue statute, 18 U.S.C. § 3237(a), provides that any offense "begun in one district and completed in another . . . may be prosecuted in any district in which such offense was begun, continued, or completed." Thus, in the case of a scheme, venue should lie where any overt act in furtherance of the scheme occurred.

In a case where the false statements were forged endorsements on tax refund checks, it was held that venue was proper in the district where the defendant deposited the checks into his bank account. *Gilbert v. United States*, 359 F.2d 285, 288 (9th Cir.1966); *but see Travis v. United States*, 364 U.S. 631 (1961) (venue was proper only in the district where the false document was filed since another federal statute provided that criminal penalties would attach for false affidavits on file with the National Labor Relations Board, and therefore, there was no federal jurisdiction until the NLRB actually received the affidavit); *United States v. DeLoach*, 654 F.2d 763, 766-767 (D.C. Cir. 1980) (limiting *Travis* to its facts).

Venue need only be established by a preponderance of the evidence, and not by proof beyond a reasonable doubt. Furthermore, such proof can be by circumstantial evidence alone. Direct evidence is not required. *Wuagneux*, 683 F.2d at 1356-57.

24.10 **STATUTE OF LIMITATIONS**

The statute of limitations is five years for prosecutions under section 1001. 18 U.S.C. § 3262. The statute of limitations starts to run when the crime is completed, which is when the false statement is made or the false document is submitted. *United States v. Roshko*, 969 F.2d 9, 12 (2d Cir. 1992). *See United States v. Smith*, 740 F.2d 734, 736 (9th Cir. 1984).

FN *1. The False Statement Accountability Act of 1996* changed the language of this statute, which previously provided, "Whoever in any manner within the jurisdiction, of any department or agency of the United States . . . ." The 1996 law overturned the Supreme Court's decision in *United States v. Hubbard*, 514 U.S. 695 (1995), which held that Section 1001 prohibits only false statements made as to the executive branch, not to the judicial or legislative branches. The Act overruled *Hubbard* and extended the application of Section 1001 to false statements or entries on any matter within the jurisdiction of the executive, legislative or judicial branch of the federal government. However, the law specifically provides that this prohibition does not apply to a party to a judicial proceeding, or to that party's counsel, for statements, representations, or writings and documents submitted by such a party or counsel to a judge or magistrate in that proceeding.

FN 2. Changed to 18 U.S.C. Section 3571, commencing November 1, 1986.

FN 3. An early Fifth Circuit case, *Paternostro v. United States*, 311 F.2d

298 (5th Cir. 1962), sketched out the contours of the doctrine. In that case, a police lieutenant was asked a series of questions by an IRS Special Agent about his knowledge of graft within the police department. His answers were essentially negative responses:

> [H]e made no statement relating to any claim on his behalf against the United States or an agency thereof; he was not seeking to obtain or retain any official position or employment in any agency or department of the Federal Government; and he did not aggressively and deliberately initiate any positive or affirmative statement calculated to pervert the legitimate functions of Government. At most, assuming that appellant's answers to the agent were proved to be false by believable and substantial evidence, considering all he said, the answers were mere negative responses to questions propounded to him by an investigating agent during a question and answer conference, not initiated by the appellant.

Paternostro, 311 F.2d at 305.