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24.00 *FALSE STATEMENTS*

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

§1001. ***Statements or entries generally***

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined* not more than $10,000 or imprisoned not more than five years, or both.

*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 **1** 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. It was first enacted "in the wake of a spate of (monetary) frauds upon the Government." ***United States v. Bramblett***, 348 U.S. 503, 504 (1955). Over the years, it was gradually expanded so that it would cover all frauds, including nonmonetary fraud, against all branches of the federal government. ***Bramblett***, 348 U.S. at 506-07. 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 of agency of the United States:

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1 Changed to 18 U.S.C. § 3571, commencing November 1, 1986.

1. Falsifying, concealing, or covering up a material fact by any trick, scheme, or device.
2. Making 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. Brack***, 747 F.2d 1142, 1151-52 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985); ***United States v. Olson***, 751 F.2d 1126, 1128 (9th Cir. 1985).

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.

Recently, the statute's prohibition against concealing material facts from governmental agencies has been utilized in money laundering prosecutions. Courts have held that individuals who cause financial institutions to fail to file currency transaction reports as required by law are guilty of violating section 1001. ***United States v. Nersesian***, 824 F.2d 1294 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987); ***United States v. Richeson***, 825 F.2d 17 (4th Cir. 1987); ***United States v. Cure***, 804 F.2d 625 (11th Cir. 1986). Addition to the statutory scheme of anti-structuring provisions imposing criminal liability on those who cause financial institutions to fail to file currency transaction reports has eliminated the need to use section 1001 to prosecute such violations. *See* 31 U.S.C. § 5324.

Pursuant to Tax Division Directive No. 71, October 3, 1989, before a section 1001 charge may be included in a criminal tax indictment, authority must be obtained from the Director, Criminal Enforcement Sections, Tax Division. 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, though 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 a department or agency 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. Barr, 963 F.2d 641, 645 (3d Cir.), *cert. denied*, 113 S. Ct. 811 (1992); ***United States v. Norris***, 749 F.2d 1116, 1121-22 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); ***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. Steele***, 933 F.2d 1313, 1318-19 (6th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 303 (1991); ***United States v. Brack***, 747 F.2d 1142, 1146 n.4 (7th Cir. 1984), *cert. denied*, 469 U.S. 1216 (1985); ***United States v. Gilbertson***, 588 F.2d 584, 589 (8th Cir. 1978); ***United States v. Irwin***, 654 F.2d 671, 675-76 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); ***United States v. Gafczk***, 847 F.2d 685, 690 (11th Cir. 1988). *But see* ***United States v. Capo***, 791 F.2d 1054, 1068-69 (2d Cir. 1986) (materiality is not an element of section 1001 violation).

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 (2d Cir.), *cert. denied*, 370 U.S. 939 (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. Massey***, 550 F.2d 300, 305 (5th Cir. 1977); ***United States v. Steele***, 933 F.2d 1313, 1318 n.4 (6th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 303 (1991); ***United States v. Fitzgibbon***, 619 F.2d 874, 878 (10th Cir. 1980).

There also is no requirement that the statement be under oath. The statute applies to unsworn, as well as sworn, statements. ***United States v. Adler***, 380 F.2d 917, 922 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); ***Massey***, 550 F.2d at 305; ***United States v. Isaacs***, 493 F.2d 1124, 1157 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); ***Neely v. United States***, 300 F.2d 67, 70 (9th Cir.), *cert. denied*, 369 U.S. 864 (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 of 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 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.), *cert. denied*, 385 U.S. 882

(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 (the defendant's) 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. ***United States v. De Rosa***, 783 F.2d 1401, 1407 (9th Cir.), *cert. denied*, 477 U.S. 908 (1986); ***United States v. Olson***, 751 F.2d 1126, 1127 (9th Cir. 1985); ***United States v. Irwin***, 654 F.2d 671, 678 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); ***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 lack of a need to prove a statutory or regulatory requirement for a section 1001 violation 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); ***Irwin***, 654 F.2d at 678-79. *But see* ***United States v. Nersesian***, 824 F.2d 1294, 1310-13 (2d Cir.), *cert. denied*, 484 U.S. 957 (1987) (recognizing a split in the circuits as to whether a bank customer can be prosecuted under the concealment provision of section 1001 for failing to reveal information which would trigger a duty on the part of a bank to file a currency transaction report where there is no statutory duty on the part

of the customer to disclose); ***United States v. Richeson***, 825 F.2d 17, 20 (4th Cir. 1987) (by operation of 18 U.S.C. § 2, bank customer found liable as principle for violating section 1001 despite lack of statutory duty on customer).

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. Marchisio***, 344 F.2d 653, 665 (2d Cir. 1965); ***Gevinson v. United States***, 358 F.2d 761, 766 (5th Cir.), *cert. denied*, 385 U.S. 823 (1966); ***United States v. Carabbia***, 381 F.2d 133, 137 (6th Cir.), *cert. denied*, 389 U.S. 1007 (1967); ***United States v. Killian***, 246 F.2d 77, 82 (7th Cir. 1957); ***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. Fern***, 696 F.2d 1269, 1275 (11th Cir. 1983). 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 FEDERAL AGENCY***

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 a department or agency 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)). Consequently, the jurisdiction of a department or agency 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. Bilzerian***, 926 F.2d

1285, 1300 (2d Cir.), *cert denied*, 112 S. Ct. 63 (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), *cert. denied*, 376 U.S. 973 (1964); *see* ***United States v. Adler***, 380 F.2d 917, 921-22 (2d Cir.), *cert. denied*, 389 U.S. 1006 (1967); ***United States v. Cartright***, 632 F.2d 1290, 1292 (5th Cir. 1980); ***United States v. Diaz***, 690 F.2d 1352, 1357 (11th Cir. 1982).

Whether a matter is within the jurisdiction of a federal agency or department is a question of law. ***Pitts v. United States***, 263 F.2d 353, 358 (9th Cir.), *cert. denied*, 360 U.S.935 (1959); ***United States v. Goldstein***, 695 F.2d 1228, 1236 (10th Cir. 1981), *cert. denied*, 462 U.S. 1132 (1983); ***United States v. Gafyczk***, 847 F.2d 685, 690 (11th Cir. 1988); ***United States v. Lawson***, 809 F.2d 1514, 1517 (11th Cir. 1987).

It is uniformly conceded 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. McCue***, 301 F.2d 452, 455 (2d Cir.), *cert. denied*, 370 U.S. 939 (1962); ***United States v. Isaacs***, 493 F.2d 1124, 1156-57 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); ***United States v. Morris***, 741 F.2d 188, 190-91 (8th Cir. 1984); ***United States v. Schmoker***, 564 F.2d 289, 291 (9th Cir. 1977); ***United States v. Ratner***, 464 F.2d 101 (9th Cir. 1972); ***United States v. Fern***, 696 F.2d 1269 (11th Cir. 1983). *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). The statute, as noted above, has its origins in protecting the government from monetary frauds. ***United States v. Bramblett***, 348 U.S. 503, 504-7 (1955). Clearly, this could not be accomplished without prohibiting false representations made to the Internal Revenue Service on matters relating to tax liability.

For federal agency jurisdiction, the false statement need not be made directly to or even received by the agency or department. ***United States v. Gibson***, 881 F.2d 318, 322 (6th Cir. 1989); ***United States v. Oren***, 893 F.2d 1057, 1064 (9th Cir. 1990); ***United States v. Suggs***, 755 F.2d 1538, 1542 (11th Cir. 1985). If the defendant starts 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.), *cert. denied*, 385 U.S. 882 (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* ***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 federal agency, 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*. Even though section 1001 is interpreted broadly, it is not proper to charge an individual with violating this section for making a false statement or introducing false documents as evidence in a judicial proceeding. The courts reject such a charge due to the lack of federal agency jurisdiction. ***United States v. Abrahams***, 604 F.2d 386, 393 (5th Cir. 1979); ***United States v. Erhardt***, 381 F.2d 173, 175 (6th Cir. 1967); ***United States v. Mayer***, 775 F.2d 1387 (9th Cir. 1985). Accordingly, a false statement submitted to a Department of Justice attorney in response to a federal grand jury subpoena has been held not prosecutable under section 1001. In ***United States v. Deffenbach Industries, Inc.***, 957 F.2d 749, 753 (10th Cir. 1992), the Tenth Circuit held that even though the false statement was submitted to a government attorney, and not directly to the grand jury, the attorney was acting "under the umbrella" of the grand jury which constituted part of the judicial process and, therefore, the false statement could not be prosecuted under section 1001.

A section 1001 charge, however, is viable where the false statement made by a criminal defendant in a judicial proceeding relates merely to an administrative matter. Hence, where a criminal defendant gave his brother's name, rather than his own, at the time of his first appearance before a

federal magistrate, the Fourth Circuit upheld his section 1001 conviction. ***United States v. Holmes***, 840 F.2d 246, 248 (4th Cir.), *cert. denied*, 488 U.S. 831 (1988). In addition, false statements made during federal civil proceedings are actionable under section 1001 where such statements involve a "deception upon a federal investigative or regulatory agency." ***Lawson***, 809 F.2d at 1519 (presentation of false documents during a deposition was actionable under section 1001 even though the government was not officially a party because the government had a stake in the outcome).

24.06 ***MATERIALITY***

Although the word "material" is only explicitly mentioned in the first clause of 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.), *cert. denied*, 464 U.S. 821 (1983)); *see also* ***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); ***United States v. Valdez***, 594 F.2d 725, 728 (9th Cir. 1979); ***United States v. Gafyczk***, 847 F.2d 685, 691 (11th Cir. 1988) (citing ***United States v. Lichenstein***, 610 F.2d 1272, 1278 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980)). Thus, "[f]alse 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), *cert. denied*, 469 U.S. 1216 (1985). 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).

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.), *cert. denied*, 469 U.S. 822 (1984). *See also* ***United States v. Bilzerian***, 926 F.2d 1285, 1299 (2d Cir.), *cert. denied*, 112 S. Ct. 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).

For those courts requiring a showing of materiality, the commonly used test is whether the falsity or concealment had a natural tendency to influence, or was capable of influencing, the agency or department. ***United States v. Norris***, 749 F.2d 1116, 1122 (4th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985); ***Baker***, 626 F.2d at 514 & n.5; ***United States v. Steele***, 933 F.2d 1313, 1319 (6th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 303 (1991); ***Brack***, 747 F.2d at 1147; ***United States v. Jones***, 464 F.2d 1118, 1122 (8th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973); ***United States v. De Rosa***, 783 F.2d 1401, 1408 (9th Cir.), *cert. denied*, 477 U.S. 908 (1986); ***United States v. Green***, 745 F.2d 1205, 1208 (9th Cir. 1984); ***Gonzales v. United States***, 286 F.2d 118, 122 (10th Cir. 1960), *cert. denied*, 365 U.S. 878 (1961); ***United States v. Grizzle***, 933 F.2d 943, 948 (11th Cir.), *cert. denied*, 112 S. Ct. 271 (1991); ***United States v. Diaz***, 690 F.2d 1352, 1357 (11th Cir. 1982). *Accord* ***Kungys v. United States***, 485 U.S. 759 (1987) (false statements to Immigration and Naturalization Service in violation of 8 U.S.C. § 1451(a)); ***United States v. Goberman***, 458 F.2d 226, 229 (3d Cir. 1972) (18 U.S.C. § 1014 prosecution). 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. ***Norris***, 749 F.2d at 1121; ***United States v. Markham***, 537 F.2d 187, 196 (5th Cir. 1976); ***Brack***, 747 F.2d at 1147; ***Jones***, 464 F.2d at 1122; ***Green***, 745 F.2d at 1208; ***United States v. Myers***, 878 F.2d 1142, 1143 (9th Cir. 1989); ***Gonzales***, 286 F.2d at 122; ***United States v. Lawson***, 809 F.2d 1514, 1520 (11th Cir. 1987); ***United States v. Fern***, 696 F.2d 1269, 1275 (11th Cir. 1983); ***Diaz***, 690 F.2d at 1357. *Accord* ***Goberman***, 458 F.2d at 229. Accordingly, in ***United States v.***

Parsons, 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 452, 455 (10th Cir. 1992). 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***, 1994 WL 193972 (9th Cir. May 19, 1994) (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); ***United States v. Smith***, 740 F.2d 734, 737 (9th Cir. 1984). 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. ***United States v. Bramblett***, 348 U.S. 503, 507 n.4 (1955); ***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).

It should be noted that there is a split in the circuits as to whether "materiality" is a question of law for the court or a question of fact for the jury. The Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits have held that materiality is a question of law. ***Norris***, 749 F.2d at 1122; ***Baker***, 626 F.2d at 514 n.4; ***United States v. Abadi***, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983); ***United States v. Hicks***, 619 F.2d 752, 758 (8th Cir. 1980); ***Grizzle***, 933 F.2d at 948; ***United States v. Rigson***, 874 F.2d 774, 779 (11th Cir.), *cert. denied*, 493 U.S. 958 (1989); ***Fern***, 696 F.2d at 1274. The Ninth and Tenth Circuits, on the other hand, have held that materiality is a factual question.

United States v. Gaudin, No. 90-30334 (9th Cir. June 21, 1994) (*en banc*); ***De Rosa***, 783 F.2d at 1408 (substantial evidence from which the jury could find materiality); ***Valdez***, 594 F.2d at 729; ***United States v. Irwin***, 654 F.2d 671, 677 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982).

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.), *cert. denied*, 113 S. Ct. 225 (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, 73 (1984); ***Hildebrandt***, 961 F.2d at 118. 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. Sarrantos***, 455 F.2d 877, 881 (2d Cir. 1972); ***United States v. Abrams***, 427 F.2d 86, 91 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970); ***United States v. Evans***, 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

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 have created an exception to prosecution which is commonly referred to as the "exculpatory no" doctrine. ***United States v. Medina de Perez***, 799 F.2d 540, 543-44 (9th Cir. 1986) (citing ***United States v. Bedore***, 455 F.2d 1109, 1110 (9th Cir. 1972)). This judicially-created doctrine prohibits the government from prosecuting individuals who merely provide negative responses to questions put to them in the course of a federal criminal

investigation. **2** The courts, however, have failed to formulate a single cohesive test concerning the doctrine's applicability.

The Fourth, Eighth and Ninth Circuits have a 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.

United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); ***United States v. Taylor***, 907 F.2d 801, 805-7 (8th Cir. 1990); ***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 is phrased in the

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2 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.

conjunctive, the doctrine is only invoked where the false statement interferes 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, however, has been explicitly rejected by the Sixth Circuit. ***United States v. Steele***, 933 F.2d 1313, 1320 (6th Cir.) (*en banc*), *cert. denied*, 112 S. Ct. 303 (1991). Indeed, although the court expressed concerns relating to the sweeping language of the statute, it 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.

The Second, Third and District of Columbia Circuits have refused to either adopt or reject the "exculpatory no" doctrine. ***United States v. Bakhtiari***, 913 F.2d 1053, 1061-62 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1319 (1991); ***United States v. Barr***, 963 F.2d 641, 647 (3d Cir.), *cert. denied*, 113 S. Ct. 811 (1992); ***United States v. White***, 887 F.2d 267, 273-74 (D.C. Cir. 1989). The Second Circuit, however, has indicated that if it were to adopt the doctrine, it would narrowly construe its applicability. Any statement that went beyond a simple "no" by containing affirmative misrepresentations would not fall within the exception. ***Bakhtiari***, 913 F.2d at 1062 (citing ***United States v. Capo***, 791 F.2d 1054, 1069 (2d Cir. 1986), *rev'd in part on other grounds*, 817 F.2d 947 (2d Cir. 1987)).

Despite a long history of adherence to the "exculpatory no" doctrine, **3** the Fifth Circuit, sitting *en banc*, recently overruled that exception to application of section 1001. In a comprehensive opinion, the Court concluded that there was no support for the doctrine in either the statute or reason. ***United States v. Rodriguez-Rios***, No. 92-8257 (5th Cir. Feb. 11, 1994) (*en banc*).

The law in this area remains in a state of flux. Consequently, when faced with a situation where an "exculpatory no" defense may be a viable defense to a charge under section 1001, thorough research of the appropriate circuit law should be undertaken.

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.

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3 *See e.g.*, ***United States v. Hajecate***, 683 F.2d 894 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); ***United States v. Schnaiderman***, 568 F.2d 1208, 1212 (5th Cir. 1978); ***United States v. Bush***, 503 F.2d 813 (5th Cir. 1974).

See also ***United States v. Bilzerian***, 926 F.2d 1285 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991); ***United States v. D'Amato***, 507 F.2d 26, 29 (2d Cir. 1974); ***United States v. Hajecate***, 683 F.2d 894 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983) (government has discretion to choose between section 1001 and 26 U.S.C. § 7206); ***United States v. Hughes***, 964 F.2d 536 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) (double jeopardy did not prevent multiple convictions for section 1001 and 26 U.S.C. § 7204 for filing false Forms W-2).

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 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 the specific statements charged. This decision emphasizes the need to use the precise false statements made when drafting charges and not generic language or a summary.

24.09 ***VENUE***

Venue in a section 1001 prosecution lies where the false statement was made or 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.), *cert. denied*, 112 S. Ct. 63 (1991); ***United States v. Mendel***, 746 F.2d 155, 165 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); ***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.), *cert. denied*, 493 U.S. 809 (1989); ***United States v. Wuagneux***, 683 F.2d 1343, 1356 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983); ***United States v. Reed***, 601 F. Supp. 685, 724 (S.D.N.Y. 1985). 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.), *cert. denied*, 385 U.S. 882 (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), *cert. denied*, 450 U.S. 933 (1981) (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). Where a scheme is charged, the statute of limitations does not start running until the scheme ends. ***Bramblett v. United States***, 231 F.2d 489, 491-92 (D.C. Cir.), *cert. denied*, 350 U.S. 1015 (1956).