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24.00 FALSE STATEMENTS

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

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

(a) . . . [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States,[1] 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 statement or representation; or
>
> (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 5 years . . . .[2]

Under 18 U.S.C. § 3571, the maximum fine under Section 1001 is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a

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[1] The ***False Statements Accountability Act of 1996***, Pub. L. No. 104-292, 110 Stat. 3459, changed the language of Section 1001, which previously criminalized false statements made "in any matter within the jurisdiction of any department or agency of the United States . . . [.]" The ***False Statements Accountability Act*** superseded the Supreme Court's 1995 decision in ***Hubbard v. United States,*** 514 U.S. 695, 702-03 (1995), which held that the previous version of Section 1001 prohibited only false statements made to the executive branch. The ***False Statements Accountability Act*** 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, this prohibition does not apply to a party to a judicial proceeding, or to that party's counsel, "for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding." 18 U.S.C. § 1001(b).

[2] The ***Intelligence Reform and Terrorism Prevention Act of 2004,*** Pub. L. No. 108-458, 118 Stat. 3638, with an effective date of December 17, 2004, increased the penalties under Section 1001 for crimes involving international or domestic terrorism to include a term of imprisonment of not more than 8 years. Two separate pieces of legislation, each of which would increase the term of imprisonment under Section 1001 for crimes involving terrorism to not more than 10 years, are currently pending in Congress. *See* ***Counter-Terrorism and National Security Act of 2007***, H.R. 3147, 110th Cong. (1st Sess. 2007); ***Violent Crime Control Act of 2007***, H.R. 3156, 110th Cong. (1st Sess. 2007).

pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

24.02 [DELETED]

24.03 GENERALLY

The purpose of Section 1001 is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from" concealment of material facts and from false material representations. ***United States v. Gilliland***, 312 U.S. 86, 93-94 (1941); *see* ***Bryson v. United States***, 396 U.S. 64, 70 (1969); ***United States v. Yeaman,*** 194 F.3d 442, 454-55 (3d. Cir. 1999); ***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). Because "Congress could not [have] hope[d] 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 . . .," Section 1001, which has its origin in a statute enacted in 1863, *see* ***United States v. Bramblett***, 348 U.S. 503, 504-05 (1955), *overruled on other grounds*, ***Hubbard v. United States***, 514 U.S. 695, 702-03 (1995), is "couched in very broad terms." ***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).

Under Section 1001(a), in a matter within the jurisdiction of a government agency, it is a crime (1) to falsify, conceal or cover up a material fact, (2) to make any materially false, fictitious or fraudulent statement, or (3) to make or use a document containing a materially false statement. ***United States v. Stewart***, 433 F.3d 273, 319 (2d Cir. 2006); ***United States v. Mayberry***, 913 F.2d 719, 721 n.1 (9th Cir. 1990). Some courts have interpreted the statute as describing two distinct offenses, namely concealment and false representation, and have held that these two distinct offenses require different elements of proof. ***United States v. Mayberry***, 913 F.2d at 722 n.7 (*citing* ***United States v. UCO Oil Co.***, 546 F.2d 833, 835 n.2 (9th Cir. 1996); ***United States v. Anzalone***, 766 F.2d 676, 682-683 (1st Cir. 1985); ***United States v. Diogo***, 320 F.2d 898, 902 (2d Cir. 1963); and ***United States v. Tobon-Builes***, 706 F.2d 1092, 1096-97 (11th Cir. 1983)); *see also* ***United States v. Mandanici***, 205 F.3d 519, 522 (2d Cir. 2000) ("By its plain terms, [Section 1001] established three separate offenses: (1) falsifying, concealing, or covering up by any trick, scheme, or device a material fact; (2)

making a false, fictitious, or fraudulent statement; and (3) making or using a false writing or document. A conviction under §1001 could be sustained if the jury found that the requirements of any one of these three offenses had been met." (internal footnote omitted)). The United States Court of Appeals for the Second Circuit has since held, however, that "[t]he several different types of fraudulent conduct proscribed by section 1001 are not separate offenses . . .; rather they describe different means by which the statute is violated." ***United States v. Stewart***, 433 F.3d at 319 (discussing ***United States v. Diogo***, 320 F.2d at 902, and ***United States v. UCO Oil Co.***, 546 F.2d at 835 n.2 (additional citations omitted)).

A charge of making or using a false statement, representation, or document under Section 1001 requires different proof from a charge of concealment. When a defendant is charged with making a false statement, there is no requirement that the government prove that the statement made was one required by statute or regulation. ***United States v. Arcadipane.*** 41 F.3d 1, 4-5 (1st Cir. 1994); ***United States v. Meuli***, 8 F.3d 1481, 1485 (10th Cir. 1993). Requiring proof of an independent duty to disclose "under some other statute . . . 'would be inconsistent with the purpose of § 1001 because it is a catchall that reaches fraud not prohibited by other statutes.'" ***United States v. Austin***, 817 F.2d 1352, 1354-55 (9th Cir. 1987) (quoting ***United States v. DeRosa***, 783 F.2d 1401, 1407 (9th Cir. 1986)); ***United States v. Olson***, 751 F.2d 1126, 1127-28 (9th Cir. 1985). If, however, the defendant is charged with concealing or failing to disclose material facts under Section 1001, 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). "[I]n prosecuting a §1001 concealment violation, it is incumbent upon the government to prove that the defendant had a *legal duty* to disclose the material facts at the time he was alleged to have concealed them." ***United States v. Anzalone***, 766 F.2d 676, 683 (1st Cir. 1985) (emphasis original) (*citing* ***United States v. Irwin***, 654 F.2d 671, 678-79 (10th Cir. 1981), *overruled on other grounds by* ***United States v. Daily***, 921 F.2d 994 (10th Cir. 1990)). "'The duty to disclose a particular fact to the executive branch of the federal government or its agent arises from requirements in federal statutes, regulations, or government forms.'" ***United States v. Safavian***, 528 F.3d 957, 965 n.7 (D.C. Cir. 2008) (*quoting* ***United States v. Moore***, 446 F.3d 671, 680 (7th Cir. 2006)). Where the evidence does not establish that the defendant had a duty to disclose to the government, directly or indirectly, the material fact he is alleged to have concealed, there can be no concealment in violation of § 1001. ***United States v. Safavian***, 528 F.3d at 965; ***United States v. Anzalone***, 766 F.2d at 683 (*citing* ***United States v.***

Muntain, 610 F.2d 964, 971-72 (D.C. Cir. 1979); ***United States v. Phillips***, 600 F.2d 535, 536-37 (5th Cir. 1979); and ***United States v. Ivey***, 322 F.2d 523, 524-26 (4th Cir. 1963)).

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. *See, e.g.*, ***United States v. Fern***, 696 F.2d 1269, 1273-74 (11th Cir. 1983). Section 1001 is generally not 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 is considered a more appropriate charge. Because Section 1001 is normally used in criminal tax cases involving a defendant's use of false statements or documents, the following discussion of the elements of the offense will focus on false statements or documents, rather than on concealment.

24.04 ELEMENTS

To establish a violation of Section 1001 for an offense involving false statements, false representations, or false documents, the government must prove the following elements beyond a reasonable doubt:

> 1. The defendant made a statement or representation, or made or used a document;
>
> 2. The statement, representation, or document is false or fraudulent;
>
> 3. The statement, representation, or document is material;
>
> 4. The defendant made the statement or representation, or made or used the document, knowingly and willfully; and
>
> 5. The statement, representation, or document pertained to an activity within the jurisdiction of the federal agency to which it was addressed.

United States v. Abrahem, 678 F.3d 370, 373 (5th Cir. 2012) (A violation of 18 U.S.C. § 1001 requires proof of five elements: (1) a statement, that is (2) false, (and material, (4) made with the requisite specific intent, and (5) within the purview of government agency

jurisdiction); ***United States v. Siemaszko***, 612 F.3d 450, 462 (6th Cir. 2010); ***United States v. Shafer***, 199 F.3d 826, 828 (6th Cir. 1999) (*quoting* ***United States v. Lutz***, 154 F.3d 581, 587 (6th Cir. 1998) (*citing* ***United States v. Steele***, 933 F.2d 1313, 1318-19 (6th Cir. 1991) (*en banc*)); ***United States v. Manning***, 526 F.3d 611, 613 n.1 (10th Cir. 2008) (*citing* ***United States v. Kingston***, 971 F.2d 481, 486 (10th Cir. 1992)); ***United States v. Atalig***, 502 F.3d 1063, 1066-67 (9th Cir. 2007) (*citing* ***United States v. Camper***, 384 F.3d 1073, 1075 (9th Cir. 2004)); ***United States v. Hatch***, 434 F.3d 1, 4 (1st Cir. 2006) (*citing* ***United States v. McGauley***, 279 F.3d 62, 69 (1st Cir. 2002)); ***United States v. Pickett***, 353 F.3d 62, 66-67 (D.C. Cir. 2004); ***United States v. Ballistrea***, 101 F.3d 827, 834-35 (2d Cir. 1996); ***United States v. Ranum***, 96 F.3d 1020, 1028 (7th Cir. 1996); ***United States v. David,*** 83 F.3d 638, 640 (4th Cir. 1996); ***United States v. Barr***, 963 F.2d 641, 645 (3d Cir. 1992); ***United States v. Lawson***, 809 F.2d 1514, 1517 (11th Cir. 1987); ***United States v. Baker***, 626 F.2d 512, 514 (5th Cir. 1980); ***United States v. Gilbertson***, 588 F.2d 584, 589 (8th Cir. 1978).

24.05 FALSE STATEMENTS OR REPRESENTATIONS

"Statement" as used in Section 1001 has been given a broad interpretation. Both oral and written statements can form the basis for a charge under Section 1001. ***United States v. Beacon Brass Co.***, 344 U.S. 43, 46 (1952). The United States Court of Appeals for the Second Circuit has stated that:

> The . . . 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."

United States v. McCue, 301 F.2d 452, 456 (2d Cir. 1962) (citations omitted); *see also* ***United States v. Steele***, 933 F.2d 1313, 1318 n.4 (6th Cir. 1991) (*en banc*); ***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; ***United States v. Isaacs***, 493 F.2d 1124, 1157 (7th Cir. 1974). Section 1001 is not limited to "formal statements, to written statements, or to statements under oath. It applies to 'any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States.'" ***Neely v. United States***, 300 F.2d 67, 70

(9th Cir. 1962) (*quoting* ***Marzani v. United States***, 168 F.2d 133, 141-42 (D.C. Cir.1948)).

The Second Circuit has stated that a conviction for a false statement or false representation requires evidence of actual falsity. ***United States v. Stewart***, 433 F.3d 273, 319 (2d Cir. 2006) (*citing* ***United States v. Diogo***, 320 F.2d at 902)). The court has also stated that a defendant may not be convicted under Section 1001 for a statement that is, although misleading, literally true. ***United States v. Mandanici***, 729 F.2d 914, 921 (2d Cir. 1984) (*citing* ***Bronston v. United States***, 409 U.S. 352, 359-62 (1973)).

In ***Bronston,*** a case involving a charge of perjury, the Supreme Court held that the burden to elicit the truth remains on the questioner and a witness may not be convicted of perjury "for an answer, under oath, that is *literally true but not responsive* to the question asked and arguably misleading by negative implication." ***Bronston v. United States***, 409 U.S. at 353 (emphasis added). However, the Supreme Court also said in ***Bronston***, 409 U.S. at 358 n.4, that a different standard applies to criminally fraudulent statements, noting that, in that context, the law goes rather far in punishing the intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations.

Peterson v. United States, 344 F.2d 419 (5th Cir. 1965), is illustrative. There, in response to a question whether a payment was for past earned fees or fees to be earned, a defendant submitted a letter stating that *his records reflected* that the payment was for accrued fees and that the fees were accordingly a deductible expense for the codefendant for a particular year. 344 F.2d at 427. On appeal, the Fifth Circuit held that whether the letter was true was a question for the jury and 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's being for an accrued fee was false. ***Id***.; *see also* ***United States v. Brack***, 747 F.2d 1142, 1150 (7th Cir. 1984) ("even though the statements were accurate as to the total amount of the contract they constituted false statements within the meaning of § 1001 by concealing the fraudulent nature of the contract").

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 286-87.

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 the First Circuit held,

> 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 documents that persons are required by law to file with agencies of the federal government, . . . 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.

United States v. Arcadipane. 41 F.3d 1, 4-5 (1st Cir. 1994) (emphasis in original) (*citing* ***United States v. Meuli,*** 8 F.3d 1481, 1485 (10th Cir. 1993) (prohibiting false statements "whether or not another law requires the information be provided"); ***United States v. Dale***, 991 F.2d 819, 828-29 (D.C. Cir. 1993) (involving a fraudulent application for a Department of Defense security clearance); ***United States v. Kappes***, 936 F.2d 227, 231 (6th Cir. 1991) (Section 1001, itself, "provides clear statutory authority to justify holding [persons] to the reporting requirement"); ***United States v. Olson***, 751 F.2d 1126, 1127 (9th Cir. 1985) (*per curiam*) (Section 1001's prohibition on false statements is not restricted to those submissions that are submitted under some other statutory requirement)). *See also* ***United States v. De Rosa***, 783 F.2d 1401, 1407-08 (9th Cir. 1986) (Section 1001 does not limit its prohibition against falsifications to matters that another statute or a regulation requires a person to provide). Thus, a prosecutor does not have to establish that the alleged false statement was a statement that the defendant was required by law to make, in order to establish a violation of Section 1001 . ***Neely***,

300 F.2d at 70-71 (citing ***Knowles v. United States***, 224 F.2d 168, 172 (10th Cir. 1955); ***Cohen v. United States***, 201 F.2d 386 (9th Cir 1953)).

In contrast to the perjury statutes (18 U.S.C. § 1621, *et seq.*), under which the general rule is that "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment," *Hammer v. United States*, 271 U.S. 620, 626 (1926),[3] there are no particular requirements under Section 1001 as to how the prosecutor may prove the falsity of statements. Thus, falsity may be proven by the uncorroborated testimony of a single witness. *E.g.*, ***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), *superseded by statute on other grounds, as noted in* ***United States v. Mandanici***, 205 F.3d 519, 522 (2d Cir. 2000); ***McCue***, 301 F.2d at 456; ***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).

24.06 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 United States Government. The term "jurisdiction" in this statute is not used in a technical sense. *See* ***Ogden v. United States***, 303 F.2d 724, 743 (9th Cir. 1962). Relying upon Congressional intent, courts have given the term "jurisdiction" an expansive reading. For example, 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.'" 466 U.S. at 480 (quoting ***Bryson v. United States***, 396 U.S. 64, 70 (1969)); *see also* ***United States v. Shafer***, 199 F.3d 826, 828-29 (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 also includes matters within an agency's investigative authority. ***Rodgers***, 466 U.S. at 480-81. Thus, "a 'statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent

[3] 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).

statements under § 1001.'" ***Rodgers***, 466 U.S. at 481 (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); ***United States v. Shafer***, 199 F.3d at 828-29; ***United States v. Diaz***, 690 F.2d 1352, 1357 (11th Cir. 1982); ***United States v. Cartwright***, 632 F.2d 1290, 1292-93 (5th Cir. 1980); ***United States v. Adler***, 380 F.2d 917, 921-22 (2d Cir. 1967).

"'[T]he phrase "within the jurisdiction" merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.'" ***Shafer***, 199 F.3d at 829 (*quoting* ***Rodgers***, 466 U.S. at 479.) Under case law prior to the Supreme Court's decision in ***United States v. Gaudin,*** 515 U.S. 506 (1995), whether a matter fell within the jurisdiction of the executive, legislative or judicial branch of the government was treated as a question of law. *See, e.g.*, ***Shafer***, 199 F.3d at 828; ***United States v. Gafyczk***, 847 F.2d 685, 690 (11th Cir. 1988); ***United States v. Goldstein***, 695 F.2d 1228, 1236 (10th Cir. 1981); ***Pitts v. United States***, 263 F.2d 353, 358 (9th Cir. 1959). 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 the question of materiality from the jury. 515 U.S. at 511-23. Holding that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged[,]" ***Gaudin*** strongly suggests that whether a matter falls within the jurisdiction of an agency of the government for purposes of § 1001 is an issue that must be submitted to and resolved by the jury, irrespective of whether it is considered a question of fact or a question of law. 515 U.S at 522-23.

Prior to 1996, Section 1001 criminalized false statements made "in any matter within the jurisdiction of any department or agency of the United States . . . [.]" Act of June 25, 1948, ch. 645, 62 Stat. 749 (1948) (current version at 18 U.S.C. § 1001). In the past, the courts uniformly found that the Internal Revenue Service was a "department or agency of the United States" within the meaning of that version of 18 U.S.C. § 1001. *E.g.*, ***United States v. Morris***, 741 F.2d 188, 190-91 (8th Cir. 1984); ***United States v. Fern***, 696 F.2d 1269, 1273 (11th Cir. 1983); ***United States v. Schmoker***, 564 F.2d 289, 291 (9th Cir. 1977); ***United States v. Johnson***, 530 F.2d 52, 54-55 (5th Cir. 1976); ***United States v. Isaacs***, 493 F.2d 1124, 1156-57 (7th Cir. 1974); ***United States v. Ratner***,

464 F.2d 101, 104 (9th Cir. 1972); ***United States v. McCue***, 301 F.2d 452, 455-56 (2d Cir. 1962); *see also* ***United States v. Knox***, 396 U.S. 77, 80-81 & n.3 (1969) (Court simply accepted, without directly holding, the applicability of the statute to false documents submitted to the IRS). Indeed, as noted in ***United States v. Beer***, Section 1001 has its origins in a perceived need to protect the government from monetary frauds. 518 F.2d 168, 170 (5th Cir. 1975) (*citing* ***United States v. Bramblett***, 348 U.S. 503 (1955), *overruled on other grounds by* ***Hubbard v. United States***, 514 U.S. 695, 715 (1995); ***United States v. Gilliland***, 312 U.S. 86 (1941); and ***United States v. Stark***, 131 F. Supp. 190, 199-202 (D. Md. 1955)). It is reasonable to infer that this goal could not be accomplished unless false representations made to the IRS on matters relating to tax liability were among the prohibited statements.

In ***United States v. Bramblett***, the Supreme Court held that the term "department" as used in the version of Section 1001 in effect from 1948 to 1996 referred to all three branches of government. 348 U.S. at 509.[4] In ***Hubbard v. United States***, the Court overruled ***Bramblett***, concluding that "department" referred only to a "component of the Executive Branch." 514 U.S. at 699-703, 715. ***Hubbard*** also held that a court was not an "agency of the United States," as that phrase was used in the then-extant version of Section 1001. 514 U.S. at 715. As noted above, see n.1, *supra*, the ***False Statements Accountability Act of 1996*** superseded ***Hubbard*** and included in Section 1001 all branches of the federal government. Because the executive branch is now explicitly listed under Section 1001, the IRS is necessarily included within the reach of the statute. Moreover, the long history of judicial findings that the IRS is an "agency or department" within the meaning of the prior version of Section 1001 further supports the conclusion that false representations to the IRS fall within the ambit of Section 1001.

The false statement need not be made directly to or even received by the executive, legislative or judicial branch of the government. *See* ***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); ***United States v. Baker***, 626 F.2d 512, 514 & n.5 (5th Cir. 1980); ***United States v. Bass***, 472 F.2d 207, 212 (8th Cir. 1972). 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 into his bank account was guilty of violating Section 1001. ***Gilbert v. United States***, 359 F.2d 285, 287

[4] *Bramblett* was silent on what constituted an "agency" of the United States. 348 U.S. at 509.

(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 320-23 (overstated invoices submitted by private party to Tennessee Valley Authority was a matter within federal jurisdiction); ***United States v. Lawson***, 809 F.2d 1514, 1518 (11th Cir. 1987) (false statements to local housing authority acting as agent for HUD); ***United States v. Green***, 745 F.2d 1205, 1208-09 (9th Cir. 1984) (falsified test reports presented to private firm constructing nuclear power plant regulated by NRC); ***United States v. Petullo***, 709 F.2d 1178, 1180-81 (7th Cir. 1983) (false statements submitted to city administrating federal disaster relief funds); ***United States v. Lewis***, 587 F.2d 854, 857 (6th Cir. 1978) (*per curiam*) (false statement made to state welfare agency receiving federal funds); ***United States v. Kirby***, 587 F.2d 876, 881 (7th Cir. 1978) (false inspection and weight certificates submitted to private party in transaction regulated by Department of Agriculture).

Because the false statements or documents need not actually be received by the executive, legislative or judicial branch, the Tax Division has authorized prosecution under Section 1001 for false claims which have been prepared, but not yet filed with the IRS. This scenario occurs, for example, in electronic filing prosecutions in which the filer has been apprehended either after or at the time of the presentation of a false claim to a tax filing service, but before transmission is effectuated. Because the false claim has not been submitted to the IRS, 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 22.08, *supra*.

24.07 MATERIALITY

The Supreme Court has held that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1995). One of the elements that the government must prove under § 1001 is that the false statement is "'material' to the government inquiry[.]" ***Gaudin***, 515 U.S. at 509; 18 U.S.C. 1001. Thus, materiality under 18 U.S.C. § 1001 is an issue for the jury. ***Gaudin***, 515 U.S. at 522-23.

Although the word "material" was explicitly mentioned in only the first clause of the pre-1997 version of Section 1001, which referred to the falsification or concealment of a material fact, most courts "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) (citations omitted).[5] The present wording of the statute is much more explicit, referring in each subpart to a "material fact" or any "materially false, fictitious, or fraudulent statement or representation." This leaves little room for interpretation and clearly suggests that materiality is an element of all aspects of this offense.[6]

Prior to ***Gaudin***, when the false statements and false documents clauses of §1001 were not explicitly qualified by the word "materially," the Ninth Circuit held that the failure to allege the materiality of the false statement or document was not fatal to an indictment "'when the facts advanced by the pleader warrant the *inference of materiality*.'" ***United States v. Oren***, 893 F.2d 1057, 1063 (9th Cir. 1990) (quoting ***Dear Wing Jung v. United States***, 312 F.2d 73, 75 (9th Cir. 1962)) (emphasis in original). It is unclear whether the Ninth Circuit would consider itself bound by ***Oren*** in light of ***Gaudin***. In any event, the Tax Division strongly recommends that materiality be specifically alleged in any count charging a violation of Section 1001.

The first step in the materiality analysis is to ask two "questions of purely historical fact" (1) what statement was made, and (2) what decision was the agency trying to make. ***United States v. Gaudin***, 515 U.S. 506, 509 (1995); ***United States v. Abrahem***, 678 F.3d at 373. The third question is, whether under the appropriate legal standard, the statement was material to the decision the agency was trying to make. ***Abrahem*** at 373.

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 decision-making body to which it was addressed. ***United States v. Neder***,

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[5] Prior to ***Gaudin***, the Second Circuit refused to read a materiality requirement into the second and third clauses of the pre-1996 statute, consistently holding that "materiality is not an element of the offense of making a false statement in violation of § 1001." ***United States v. Elkin***, 731 F.2d 1005, 1009 (2d Cir. 1984) (citing cases); *see also* ***United States v. Bilzerian***, 926 F.2d 1285, 1299 (2d Cir. 1991). In light of ***Gaudin***, the Second Circuit overruled its precedents and held that materiality is an element of any and all charges under § 1001. ***United States v. Mandanici***, 205 F.3d 519, 523 (2d Cir. 2000) (*citing* ***United States v. Ali***, 68 F.3d 1468, 1474-75 (2d Cir. 1995), *amended on denial of rehearing*, 86 F.3d 275 (2d Cir. 1996)).

[6] The Supreme Court did not make specific findings on this issue in ***Gaudin*** because the government conceded that materiality was an element of § 1001. ***Gaudin,*** 515 U.S. at 509.

527 U.S. 1, 16 (1999); ***United States v. Gaudin***, 515 U.S. at 509; ***United States v. Abrahem***, 678 F.3d 370, 373-74 (5th Cir. 2012); ***United States v. Siemaszko***, 612 F.3d 450, 470 (6th Cir. 2010); ***United States v. Robertson***, 324 F.3d 1028, 1030 (8th Cir. 2003) (citing ***Preston v. United States***, 312 F.3d 959, 961 n.3 (8th Cir. 2002)); ***United States v. Baker***, 200 F.3d 558, 561 (8th Cir. 2000); ***United States v. Hutchison***, 22 F.3d 846, 851 (9th Cir. 1992), *abrogated on other grounds by* ***United States v. Wells***, 519 U.S. 482 (1997); ***United States v. Meuli***, 8 F.3d 1481, 1485 (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); ***United States v. Brack***, 747 F.2d 1142, 1150-51 (7th Cir. 1984); ***United States v. Green***, 745 F.2d 1205, 1208 (9th Cir. 1984); ***United States v. Diaz***, 690 F.2d 1352, 1357 (11th Cir. 1982). 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); *see also* ***United States v. Swaim***, 757 F.2d 1530, 1535 (5th Cir. 1985) ("The relevant test of materiality . . . looks to whether the statement had the capacity to impair the functioning of a government agency"); ***United States v. Lichenstein***, 610 F.2d 1272, 1278 (5th Cir. 1980).

It is not essential that the agency or department actually rely on or be influenced by the falsity or concealment. *E.g.*, ***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); ***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); ***United States v. Jones***, 464 F.2d 1118, 1122 (8th Cir. 1973). Accordingly, the United States Court of Appeals for the Tenth Circuit found that false Forms 1099 were material despite the defendant's argument that the amounts claimed "were so ludicrous that no IRS agent would believe them." ***United States v. Parsons***, 967 F.2d 452, 455 (10th Cir. 1992). On the contrary, the court explained, 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.

Id.

Similarly, the Fifth Circuit found that "[a]ctual influence is not required—a statement can be ignored or never read and still be material—and the statement need not be believed." ***Abrahem***, 678 F.3d at 374, *citing* ***Gaudin*** 515 U.S. at 509. In ***Abrahem***, the defendant attempted to visit Major Hasan, a restricted patient and military prisoner who had been accused of shooting a number of individuals at Fort Hood. After being informed that he was not allowed access to the shooter, the defendant claimed to be Major Hasan's attorney. The defendant was charged and convicted of a violation of § 1001 for claiming to be an attorney in an attempt to gain unauthorized access to Hasan when the defendant knew that he was neither a lawyer nor representing Hasan. The ***Abrahem*** court applied the test outlined in ***Kungys v. United States,*** observing that **"**the 'natural tendency' test is an objective one focused on whether the statement is 'of a type capable of influencing a *reasonable* decision maker.'" ***Abrahem*** at 375, *citing* ***United States v. McBane***, 433 F.3d 344, 351 (3d Cir. 2005). In applying the test, the court focused on "the intrinsic capabilities of the statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." ***Abrahem*** at 375, *citing* ***McBane*** at 352. Accordingly, the ***Abrahem*** court found the defendant's statement to be material.

It is also not required that the false statement be one which the defendant was obligated by statute or regulation to make. *See* ***United States v. Hutchison***, 22 F.3d at 852 (court rejected the argument that false Forms 1099-S were not material because defendant was not required to file them (citing ***United States v. Olson***, 751 F.2d 1126, 1127 (9th Cir. 1985))). Moreover, the federal agency need not actually receive the statement. *See* ***United States v. Hooper***, 596 F.2d 219, 223 (7th Cir. 1979). Simply stated, "[t]he false statement must simply have the capacity to impair or pervert the functioning of a government agency." ***Lichenstein***, 610 F.2d at 1278 (*citations omitted*). Likewise, proof of pecuniary or property loss to the government is not necessary. ***Id***. 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).

24.08 WILLFULNESS

On March 31, 2014, the Department of Justice issued a memorandum to all federal prosecutors providing guidance on the definition of the term "willfully" as used in the statutes 18 U.S.C. § 1001 (false statements) and 18 U.S.C. § 1035 (false statements in connection with health care benefits). Criminal tax attorneys should review this memorandum and follow its guidelines with respect to investigations, jury instructions, plea agreements, and colloquies.

There is a longstanding circuit split over the proper meaning of the term "willfully" as used in Section 1001 (and, by implication, Section 1035, which is based on Section 1001). Some circuits require only that the defendant have made the false statement deliberately and with knowledge that it was false. Others require that the government prove that the defendant have known that his conduct was aware of the "generally unlawful nature of his actions." One circuit requires proof of "intent to deceive."

On March 10, 2014, the Solicitor General filed oppositions to petitions for certiorari in the Supreme Court in two cases in which the Department argued that the term "willfully" in Sections 1001 and 1035 "requires proof that the defendant knew his conduct was unlawful," rather than proof that the defendant acted "deliberately and with knowledge" that his statements were false. This means that the Department will interpret the term "willfully" in the context of Sections 1001 and 1035 "to require that a defendant be aware that the conduct with which he is charged was, in a general sense, prohibited by law. In other words, the defendant must have acted with a 'bad purpose' within the meaning of *Bryan* [*v. United States*, 524 U.S. 184, 192 (1998)]."

Prosecutors should act consistently with the Solicitor General's concession and submit Section 1001 jury instructions equivalent to the following:

The word "willfully" means that the defendant committed the act voluntarily and purposely, and with knowledge that his conduct was, in a general sense, unlawful. That is, the defendant must have acted with a bad purpose to disobey or disregard the law. The government need not prove that the defendant was aware of the specific provision of the law that he is charged with violating or any other specific provision.

This definition derives from *Bryan*, which holds that, in order to establish the "bad purpose" necessary for willfulness in most criminal cases, the government must prove that the defendant "acted with knowledge that his conduct was unlawful." 524 U.S. at 194. This definition is substantially similar to the one adopted by the Third Circuit to prove a violation of Section 1001, *see United States v. Starnes*, 583 F.3d 196, 210 (3d Cir. 2009) (requiring the government to prove "that the defendant acted not merely 'voluntarily,' but with a 'bad purpose,' that is, with knowledge that his conduct was, in some general sense, 'unlawful.'" (quotation marks omitted)), and a leading treatise on criminal jury instructions, *see* 2 Leonard B. Sand et al., Modern Federal Jury Instructions (Criminal) § 37-17 (2007) ("An act is done willfully [under Section 1001] if it is done with an intention to do something the law forbids, a bad purpose to disobey the law.").

CAUTION:
The information below, which has not yet been edited to reflect the Solicitor General's concession (see box above), is superseded to the extent it is inconsistent with that concession.

To establish a Section 1001 violation, the government must prove that the defendant acted knowingly and willfully. *E.g.*, ***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. ***Id***. at 118 (citing ***United States v. Carrier***, 654 F.2d 559, 561 (9th Cir. 1981)). The Second Circuit has recognized that "whether a defendant has 'knowingly and willfully . . . ma[de] any materially false, fictitious or fraudulent statements or representations' under § 1001 is governed by the same legal standards as whether a defendant 'willfully subscribes as true any material matter which he does not believe to be true' in violation of the perjury statute, 18 U.S.C. § 1621." ***United States v. Triumph Capital Group, Inc.***, 237 Fed.Appx. 625, 627-28 (2d Cir. 2007) (citing ***United States v. Mandanici***, 729 F.2d 914, 921 (2d Cir. 1984); ***Bronston v. United States***, 409 U.S. 352, 359-62 (1973)); ***United States v. Stewart***, 433 F.3d 273, 319 (2d Cir. 2006).

The government need not prove an intent to deceive. ***United States v. Yermian***, 468 U.S. 63, 69 (1984); ***United States v. Riccio***, 529 F.3d 40, 46-47 (1st Cir. 2008); ***United States v. Gonsalves***, 435 F.3d 64, 72 (1st Cir. 2006); ***Hildebrandt***, 961 F.2d at 118-19; *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 69-70, 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 8.08, *supra*, and 40.04, *infra*.

24.09 CLAIMED DEFENSES

24.09[1] Generally

Challenging the validity of the underlying reporting requirement in situations in which a person is required by law to provide the United States government with information and furnishes false information in feigned compliance with the statutory requirement does not provide a defense to a charge brought under Section 1001. *See* ***United States v. Knox***, 396 U.S. 77, 79-80 (1969) (*citing* ***Bryson v. United States***, 396 U.S. 64, 68-72 (1969); ***Dennis v. United States***, 384 U.S. 855, 857 (1966)). As the Supreme Court stated in ***Bryson***,

> [o]ur 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.

Bryson v. United States, 396 U.S. at 72 (footnote omitted).

24.09[2] Wrong Statute Charged

Similarly unavailing is the claim that a defendant may not be prosecuted under 18 U.S.C. § 1001 because of the existence of a more specific statute addressing the defendant's conduct. The United States Supreme Court has long recognized that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." ***United States v. Batchelder***, 442 U.S. 114, 123-24 (1979) (citations omitted). "Whether to prosecute

and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." ***Id***. at 124. These principles are particularly relevant in criminal tax cases in which the evidence could support either a misdemeanor charge under 26 U.S.C. § 7207 or a felony charge under 18 U.S.C. § 1001.

In ***United States v. Fern***, 696 F.2d 1269 (11th Cir. 1983), the defendant argued that the enactment of 26 U.S.C. § 7207 rendered Section 1001 inapplicable to a situation involving false statements made to the IRS. *See* Section 16.00, *supra*, for a discussion of 26 U.S.C. § 7207. 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; *see also* ***United States v. Parsons***, 967 F.2d 452, 456 (10th Cir. 1992) ("we agree with the Eleventh Circuit that the existence of section 7207 does not preclude prosecution under 18 U.S.C. § 1001" (citing ***Fern***)). A similar argument was raised by the defendant in ***United States v. Greenberg***, 268 F.2d 120, 121 (2d Cir. 1959), who was charged under 18 U.S.C. 1001 with aiding and abetting the submission of false payroll reports to the U.S. Navy. That defendant argued on appeal "that the acts charged and proved did not constitute a violation of Title 18 U.S.C.A. § 1001," asserting that "the payroll statements were subject to prosecution only under Title 18 U.S.C.A. 1621 instead of § 1001." 268 F.2d at 122. Rejecting the argument, the Second Circuit 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 ha[s] the authority to decide under which statute the offenses here [are] to be prosecuted." ***Greenberg***, 268 F.2d at 122; *see also* ***United States v. Bilzerian***, 926 F.2d 1285, 1299-1301 (2d Cir. 1991) (false statements in informational reports filed with the SEC under §32(a) of the Exchange Act, 15 U.S.C. § 78ff, can be prosecuted as false statements under § 1001); *but see* ***United States v. D'Amato***, 507 F.2d 26, 28-29 (2d Cir. 1974) (Section 1001 does not apply to a false statement made in a private civil action, a context in which the government is only involved by way of a court deciding a matter in which neither the government nor its agencies is involved).

24.09[3] Variance

Although not every variance is fatal, *see* ***Berger v. United States***, 295 U.S. 78, 82 (1935), when a comparison of the evidence with the charged conduct differs to such an extent that the defendant does not have sufficient notice to prepare a defense or is not protected from re-prosecution for the same offense, the variance is fatal, and the indictment will be dismissed. *See* ***United States v. Lambert***, 501 F.2d 943, 947-48 (5th Cir. 1974), *abrogated on other grounds by* ***United States v. Rodriguez-Rios***, 14 F.3d 1040, 1050 (5th Cir. 1994). In ***Lambert***, the defendant was convicted under 18 U.S.C. § 1001 for making a false statement to the FBI. 501 F.2d at 945. The defendant had gone to the FBI to swear out a detailed complaint, alleging that two Tampa, Florida police officers had "physically mistreated him." The defendant's complaint also stated his "'feeling' that his civil rights had been violated because the two officers, in plain clothes, had arrested him for no reason." ***Id***. The indictment charging a violation of 18 U.S.C. § 1001 alleged, "Fred Lambert stated and represented that he had been severely beaten and subjected to illegal and unnecessary punishment by two members of the Tampa Police Department, Tampa, Florida, in violation of his Civil Rights." ***Id***. at 947. The government acknowledged that there was a variance between the charge and proof, and that in fact, the defendant had not stated "that he had been 'severely beaten' or that he had been 'subjected to illegal and unnecessary punishment.'"

On appeal, the Fifth Circuit found the variance fatal. The court concluded:

> The trouble with the indictment was not vagueness and generality in what it said but its use of facially specific terms which, as it developed at trial, were not intended to be that at all, but to be generalized recharacterizations of what the draftsman considered to be the substance of all or of parts of what it would try to prove the defendant had said. In this situation a defendant is left to guess what part or parts of the statement placed in evidence the government will rely upon, or whether it will rely on overall tenor. The prosecution is free at trial, in offering evidence and arguing to the jury, to pick and choose previously unspecified bits and pieces of the statement that it considers arguably relevant to its conclusory restatement. The safe defense for such a defendant -- with respect to every arguably material utterance in the actual statement that is also arguably relevant to the indictment's conclusory language -- is to prove that he did not utter it or that it was true. Even then he faces the threat that without regard to specifics the gist of the entire statement may be viewed as conforming to the indictment's charge. An indictment which leaves in this

> dilemma a defendant who has given a lengthy and detailed statement is outside the allowable range of variance.

501 F.2d at 948-49. The result in ***Lambert*** highlights the need, when drafting charges, to reference the precise false statements the defendant made and not to utilize generic language or a summary.

24.09[4] Exculpatory No Doctrine

Prior to 1996, a number of courts of appeals had created an exception to prosecution under Section 1001. The central feature of this exception, commonly referred to as the "exculpatory no" doctrine, was that "a simple denial of guilt" to a government investigator did not come within the ambit of Section 1001, thereby preventing the government from prosecuting individuals who had, without more, provided negative responses to questions put to them in the course of a federal criminal investigation. *See* ***Brogan v. United States***, 522 U.S. 398, 401 (1998) (*citations omitted*). The Supreme Court rejected this doctrine in ***Brogan***, stating that "the plain language of § 1001 admits of no exception for an 'exculpatory no.'" 522 U.S. at 408. Accordingly, the "exculpatory no" doctrine no longer constitutes a valid defense to a prosecution under 18 U.S.C. § 1001. *See also* ***United States v. Brandt***, 546 F.3d (7th Cir. 2008) (the "exculpatory no" doctrine provides no valid defense to liability under § 1001).

24.10 VENUE

"Venue is proper only where the acts constituting the offense -- the crime's 'essential conduct elements' -- took place." ***United States v. Ramirez***, 420 F.3d 134, 138-39 (2d Cir. 2005) (*citing* ***United States v. Rodriguez-Moreno***, 526 U.S. 275, 279 (1999)). "When a crime consists of a single, non-continuing act, the proper venue is clear: The crime 'is "committed" in the district where the act is performed.'" ***United States v. Ramirez***, 420 F.3d at 139 (quoting ***United States v. Beech-Nut Nutrition Corp.***, 871 F.2d 1181, 1188 (2d Cir. 1989)). 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. *See* ***United States v. Simpson***, 995 F.2d 109, 112 (7th Cir. 1993); ***United States v. Barsanti***, 943 F.2d 428, 434-35 (4th Cir. 1991); ***United States v. Bilzerian***, 926 F.2d 1285, 1301 (2d Cir. 1991); ***United States v. Mendel***, 746 F.2d 155, 165 (2d Cir. 1985); ***United States v. Herberman***, 583 F.2d 222, 225-27 (5th Cir. 1978).

"[W]here 'the acts constituting the crime and the nature of the crime charged implicate more than one location,' . . . venue is properly laid in any of the districts where an essential conduct element of the crime took place." ***United States v. Ramirez***, 420 F.3d at 139 (quoting ***United States v. Reed***, 773 F.2d 477, 480 (2d Cir. 1985)). The general venue statute, 18 U.S.C. § 3237(a), provides that any offense "begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Thus, in the case of a scheme, venue should lie in any district where any overt act in furtherance of the scheme occurred. Similarly, when a defendant prepares, presents, submits or files a false statement or document in one jurisdiction and that false statement or document is audited or processed in another jurisdiction and ultimately acted or relied upon by a federal agency in yet a different jurisdiction, the offense may have "begun" in the first jurisdiction, but was not completed until the false statement was processed. ***United States v. Ramirez***, 420 F.3d at 142 (citing ***United States v. Candella***, 487 F.2d 1223, 1228 (2d Cir. 1973)). Thus, the Second Circuit has concluded that an offense under Section 1001 is by its nature a continuing offense for venue purposes, which may be prosecuted in the jurisdiction in which the false statement or document was prepared or presented, in which it was audited or processed, or in which it was acted or relied upon by the federal government. ***Ramirez***, 420 F.3d at 142; *see also* ***United States v. Blecker***, 657 F.2d 629, 632-33 (4th Cir. 1981) (offenses under Section 1001 continuing offenses for venue purposes).

In a case in which the false statements were forged endorsements on tax refund checks, the Ninth Circuit 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); *cf.* ***Travis v. United States***, 364 U.S. 631, 635-37 (1961) (venue was proper only in district where 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, 766-67 (D.C. Cir. 1980) (determining that ***Travis*** was limited to its facts).

Venue need only be established by a preponderance of the evidence, and not by proof beyond a reasonable doubt. Moreover, such proof can be by circumstantial evidence alone; direct evidence is not required. *See* ***United States v. Wuagneux***, 683 F.2d 1343, 1356-57 (11th Cir. 1982). Venue is discussed in further detail in Chapter 6.

24.11 STATUTE OF LIMITATIONS

The statute of limitations for prosecutions under Section 1001 is five years. *See* 18 U.S.C. § 3282; Chapter 7, *supra*. 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); ***United States v. Smith***, 740 F.2d 734, 736 (9th Cir. 1984).