TABLE OF CONTENTS

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 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.

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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 The ***False Statements Accountability Act*** superseded the Supreme Court's 1995 decision in ***Hubbard v. United States*****,** 514 U.S. 695, 702-03 (1995), which held that the previous version of Section 1001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, 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.

24.02 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 by* ***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, concealment and false representation, and have held that these two distinct offenses require different elements of proof. ***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); ***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." ***Stewart***, 433 F.3d at 319 (discussing ***Diogo***, 320 F.2d at 902, and ***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 than 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 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 facts at the time the defendant allegedly concealed them. ***United States v. Dorey***, 711 F.2d 125, 128 (9th Cir. 1983); ***United States v. Anzalone***, 766 F.2d 676, 683 (1st Cir. 1985). "'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 Section 1001. ***Safavian***, 528 F.3d at 965; ***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 IRS agent during an audit, collections effort, or investigation. *See*, *e.g.*, ***United States v. Fern***, 696 F.2d 1269, 1273-74 (11th Cir. 1983). Section 1001 is generally not used for a false statement on a return because, if the return is signed under the penalties of perjury as required, 26 U.S.C. § 7206(1) is a more appropriate charge under Tax Division policy. *See* Section 12.02, *supra.* 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.

24.03 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 was false or fraudulent;

3. The statement, representation, or document was 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); ***United States v. Siemaszko***, 612 F.3d 450, 462 (6th Cir. 2010); ***United States v. Shafer***, 199 F.3d 826, 828 (6th Cir. 1999); ***United States v. Manning***, 526 F.3d 611, 613 n.1 (10th Cir. 2008); ***United States v. Atalig***, 502 F.3d 1063, 1066-67 (9th Cir. 2007); ***United States v. Hatch***, 434 F.3d 1, 4 (1st Cir. 2006); ***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).

24.04 FALSE STATEMENTS OR REPRESENTATIONS

"Statement," as used in Section 1001, has been interpreted broadly. 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 Second Circuit rejected the "contention that Section 1001 does not apply to oral statements" because of "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 is no requirement that the statement be made 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)).

In ***Bronston v. United States***, 409 U.S. 352 (1973), 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." ***Id.*** at 353 (emphasis added). However, the Supreme Court also said, ***id.*** 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.

The courts of appeal have applied the ***Bronston*** literal truth defense to Section 1001 prosecutions. *See, e.g.,* ***United States v. Good***, 326 F.3d 589, 592 (4th Cir. 2003) (reversing Section 1001 conviction where defendant gave literally true answer that she had not been convicted of several enumerated offenses even though she had been convicted of a similar offense). The appellate courts, however, generally construe the defense "narrow[ly]." ***United States v. Smith***, 54 F.4th 755 (4th Cir. 2022) (cleaned up). The defense "applies only where a defendant's allegedly false statements 'were *undisputedly* literally true.'" ***United States v. Sarawi***, 669 F.3d 401, 406 (quoting ***United States v. Thomas***, 612 F.3d 1107, 1115 (9th Cir. 2010)) (collecting cases). And the defense is inapplicable when "the focus is on the ambiguity of the question asked," ***United States v. Boskic***, 545 F.3d 69, 92 (1st Cir. 2008), and when "an answer [is one that] would be true on one construction of an arguably ambiguous question but false on another," ***United States v. Slawik***, 548 F.2d 75, 86 (3d Cir. 1977).

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. ***Id***. at 427. On appeal, the Fifth Circuit rejected the defendants' literal truth defense, holding that whether the letter was true was a question for the jury, which was free 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. Tantchev***, 916 F.3d 645 (7th Cir. 2019) (rejecting literal truth defense where an IRS agent asked the defendant to identify a person in a picture who was, in fact, his sister, and the defendant identified the person using an alias his sister had adopted rather than her real name); ***United States v. Brack***, 747 F.2d 1142, 1150 (7th Cir. 1984) ("the evidence showed that the contract amount was not the result of honest calculation, but was inflated by fraud . . . 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. ***Id***. 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, because "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," the statute "*in and of itself* constitutes a blanket proscription against the making of false statements to federal agencies." The court concluded, "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"); and ***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 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), and ***Cohen v. United States***, 201 F.2d 386 (9th Cir 1953)); ***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 ***Olson***, 751 F.2d at 1127)).

In contrast to the perjury statutes (18 U.S.C. § 1621, *et seq.*), where 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 limits on how the prosecutor may prove the falsity of statements under Section 1001. 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 recognized 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).

[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).

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

To establish a violation of Section 1001, the false statement or representation must 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, "'The 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, for purposes of Section 1001, jurisdiction is not limited to the power to make final or binding determinations. 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 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); ***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 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. Under ***Gaudin***'s broad

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[,]" whether a matter falls within the jurisdiction of an agency of the government for purposes of § 1001 is also 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. ***Id***. at 522-23.

The IRS is an "agency or department" for purposes of Section 1001. As noted above, see n.1, *supra*, the ***False Statements Accountability Act of 1996*** superseded the Supreme Court's decision in ***Hubbard v. United States***, that "department" referred only to a "component of the Executive Branch." 514 U.S. at 699-703, 715, and explicitly listed all branches of the federal government in Section 1001. Because the executive branch is listed, the IRS is necessarily included within the reach of the statute. Moreover, there is long history of judicial findings that the IRS is an "agency or department" within the meaning of the prior version of Section 1001, which further supports the conclusion that false representations to the IRS fall within the ambit of Section 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).

The false statement need not be made directly to or even received by the executive, legislative or judicial branch. *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 (9th Cir. 1966). Moreover, false statements made to state, local, or even private entities who 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 to the IRS. 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*.

24.06 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).[4] 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: materiality is an element of all aspects of this offense.[5]

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 the agency was trying to make. ***United States v. Gaudin***, 515 U.S. 506, 509 (1995); ***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***, 678 F.3d at 373.

It is well settled that the 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***, 527 U.S. 1, 16 (1999); ***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*

[4] 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)).

[5] 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.

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). The Ninth Circuit articulated the test for materiality as:

> 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 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 court applied the test outlined in ***Kungys v. United States,*** 485 U.S. 759 (1988), 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***, 678 F.3d 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***, 678 F.3d at 375 (citing ***McBane***, 433 F.3d at 352).

Indeed, 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).

24.07 WILLFULNESS

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). There is a longstanding circuit split over the proper meaning of the term "willfully" as used in 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 was aware of the "generally unlawful nature of his actions." *Compare, e.g.,* ***United States v. Gonsalves***, 435 F.3d 64, 72 (1st Cir. 2006) (requiring only deliberate statement and knowledge of falsity), *with* ***United States v. Starnes***, 583 F.3d 196, 210 (3d Cir. 2009) (requiring knowledge of unlawfulness).

The Department takes the position that the term "willfully" in Section 1001 "requires proof that the defendant knew his conduct was unlawful," rather than proof that the defendant merely acted "deliberately and with knowledge" that his statements were false. *See* Brief for the United States in Opposition to Petition for Writ of Certiorari in ***Russell v. United States***, S. Ct. No. 13-7357, 2014 WL 1571932, at *7-*11 (stating this position with regards to Section 1001 and conceding that decision below improperly applied "deliberately and with knowledge" definition to similar willfulness requirement in 18 U.S.C. § 1035, which proscribes false statements in health care benefit programs).

Under this interpretation, Section 1001 requires proof that a defendant was aware that the conduct with which he is charged was, in a general sense, prohibited by law, but does not require proof that "the defendant knew about the specific provision he is charged with violating or prove that he disregarded a known legal obligation." ***Id.*** at *9 (cleaned up) (quoting ***Bryan v. United States***, 524 U.S. 184, 192 (1998)).[6]

The Department's position derives from the Supreme Court's decision in ***Bryan***[7] that, 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* ***Starnes***, 583 F.3d at 210 (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.").

Prosecutors should act consistently with the Department's position even if circuit law supports a "deliberately and with knowledge" definition of willfulness and submit Section 1001 jury instructions equivalent to the following:

[6] At issue in ***Bryan*** was a statute that penalizes "willfully" violating certain federal firearms statutes. In holding that this Title 18 statute required only "knowledge that the conduct [at issue] is unlawful, the Court stated in dicta that "[i]n certain cases involving violations of the tax laws [under Title 26], we have concluded that the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." 524 U.S. at 194, 196 (citing ***Cheek***, 498 U.S. at 201). That dicta is inconsistent with ***Cheek*** and incorrect. See ***United States v. Covins***, 543 F.3d 456, 458 (8th Cir. 2008) (the government does not have the burden of proving in tax evasion that the defendant was aware of the specific statute making tax evasion illegal); ***United States v. Patridge***, 507 1092, 1093 (7th Cir. 2007) (reaching same conclusion and observing that "[k]knowledge of the law's demands does not depend on knowing the citation any more than ability to watch a program on TV depends on knowing the frequency on which the signal is broadcast").

[7] *See* ***Russell*** Opp., *supra* at *10 ("[T]he government now agrees that the general criminal-law interpretation of 'willfully' articulated in *Bryan* should govern in the context of Sections 1001 and 1035.").

The word "willfully" means that the defendant committed the act voluntarily and purposely, and with knowledge that his or her 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 or she is charged with violating or any other specific provision.[8]

The circuit courts have also divided over whether Section 1001 willfulness also requires proof of an "intent to deceive." The Fifth, Sixth, and Eleventh Circuits have held that it does, but most circuits have concluded it does not. *Compare* ***United States v. Geisen***, 612 F.3d 471, 488 (6th Cir. 2010), ***United States v. Shah***, 44 F.3d 285, 289 (5th Cir. 1995), and ***United States v. Dothard***, 666 F.2d 498, 503 (11th Cir. 1982), *with, e.g.,* ***Gonsalves***, 435 F.3d at 72; ***United States v. Leo***, 941 F.2d 181, 200 (3d Cir. 1991); ***United States v. Sparks***, 67 F.3d 1145, 1152 (4th Cir. 1995); ***Hildebrandt***, 961 F.2d at 118-119; ***United States v. Vaughn***, 797 F.2d 1485, 1490 (9th Cir. 1986); ***Walker v. United States***, 192 F.2d 47, 49 (10th Cir. 1951). The Department's position is that the majority view rejecting an "intent to deceive" requirement is correct. *See* Brief for the United States in Opposition to Petition for Writ of Certiorari in ***Natale v. United States***, S. Ct. No. 13-744, 2014 WL 1018796, at *6-*15 (arguing that an "intent to deceive" definition is inconsistent with the ***Bryan*** definition of "willfulness"). The government need not prove that the defendant had actual knowledge that the statements made were within federal agency jurisdiction. ***United States v. Yermian***, 468 U.S. 63, 69-70, 73 (1984) ("the statutory language makes clear that Congress did not intend the terms "knowingly and willfully" to establish the standard of culpability for the jurisdictional element of § 1001"). 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).

Additional resources regarding Section 1001 willfulness are available for Department prosecutors. For discussion of willfulness in Title 26 offenses, *see*, *e.g.*, Sections 8.08, *supra*, and 40.04, *infra*.

[8] In contrast, "willfulness" for Title 26 offenses is defined as a voluntary, intentional violation of a known legal duty; there is no requirement of finding a "bad purpose" or "evil motive" beyond a specific intent to violate the law. ***United States v. Pomponio***, 429 U.S. 10 (1976).

24.08 CLAIMED DEFENSES

24.08[1] Generally

Challenging the validity of the underlying reporting requirement in situations in which a person is required by law to provide the government with information and furnishes false information in feigned compliance with the statutory requirement is no defense to a Section 1001 charge. *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).

24.08[2] Wrong Statute Charged

Similarly unavailing is the claim that a defendant may not be prosecuted under 18 U.S.C. § 1001 because a more specific statute addressing the defendant's conduct exists. The 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 false statements 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 "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).

24.08[3] Variance

In Section 1001 indictments, it is important to allege the specific false statements made, rather than a summary or paraphrase, which might lead to a variance at trial. 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 of making a false statement to the FBI. 501 F.2d at 945. The defendant had sworn out a detailed complaint, alleging that two 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 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 faulted the indictment for using "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." ***Id.*** at 948. This left the defendant 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." ***Id.*** And it left the government free to "pick and choose previously unspecified bits and pieces of the statement" to support its "conclusory restatement." The defendant is thus faced with proving that he did not say any of the material utterances in the actual statement (or that they were true) while facing "the threat that without regard to specifics the gist of the entire statement may be viewed as conforming to the indictment's charge." ***Id.*** at 948-49. The Fifth Circuit concluded, "An indictment which leaves in this dilemma a defendant who has given a lengthy and detailed statement is outside the allowable range of variance." ***Id.*** at 949. The result in ***Lambert*** highlights the need, when drafting Section 1001 charges, to reference the precise false statements the defendant made and not to utilize generic language or a summary.

24.08[4] Exculpatory No Doctrine

Prior to 1996, some 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. This prevented the government from prosecuting individuals who had, without more, provided negative responses to questions during 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.

24.09 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 (cleaned up). Venue in a Section 1001 prosecution lies where the false statement was made, or 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 another 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)).

There is a circuit split as to whether venue exists not only in the district in which the false statement was made, but also another district where the false statement could affect the government's investigation. Three courts of appeals have adopted an effects-based test for determining venue for Section 1001 offenses. *See* ***United States v. Ringer***, 300 F.3d 788 (7th Cir. 2002); ***United States v. Coplan***, 703 F.3d 46 (2d Cir. 2012); ***United States v. Oceanpro Industries, Ltd.***, 674 F.3d 323 (4th Cir. 2012). These courts concluded

that, because "the essential conduct constituting the offense inherently references the effects of that conduct," ***Oceanpro***, 674 F.3d at 329, venue is proper where the effects of the false statements may be felt, such as where the relevant investigation or official proceeding is located. Three courts of appeals have reached the opposite conclusion, rejecting an effects-based test. *See* ***United States v. Fortenberry***, 89 F.4th 702 (9th Cir. 2023); ***United States v. Smith***, 641 F.3d 1200 (10th Cir. 2011); ***United States v. John***, 477 F. App'x. 570, 572 (11th Cir. 2012) (unpub.). Stating that venue "turns on the action by the defendant that is essential to the offense, and where the specific action took place," the ***Fortenberry*** court found that "the false statement offense is complete when the statement is made. It does not depend on subsequent events or circumstances, or whether the recipient of the false statement was in fact affected by it in any way." 89 F.4th at 707.

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. 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.

24.10 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 limitations period 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).