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¶ 36.01False Statements (18 U.S.C. § 1001)

[1] General Instructions

Instruction 36-1 The Indictment and the Statute

The defendant is charged with knowingly and willfully making false statements to _____, [a department/agency of the United States]. The indictment reads as follows:

[Read Indictment]

You will observe that the indictment charges that the defendant knowingly and willfully (*select appropriate charge:* falsified, concealed, or covered up a material fact, by trick, scheme, or device, or made a materially false, fictitious, or fraudulent statement or representation, or used a false writing or document, knowing the same to contain a materially false, fictitious, or fraudulent statement or entry).

In this case, the government contends that the evidence shows that the defendant [choose one, or in the alternative, more than one theory].

The relevant statute on this subject is *section 1001(a) of Title 18 of the United States Code*. It provides:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

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

(2) makes any materially false, fictitious or fraudulent 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 [guilty of a crime].

Comment

[1] ***Pub. L. No. 104-292, 110 Stat. 3459*** (1996).

Section 1001 was substantially revised by the False Statements Accountability Act of 1996.[1] Prior to that revision, section 1001 provided:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry [is guilty of a crime].

[2] *514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995)*.

[3] *Id. at 715*.

[4] *See United States v. Dean, 55 F.3d 640, 658–59 (D.C. Cir. 1995)*; *see also United States v. Oakar, 111 F.3d 146 (D.C. Cir. 1997)* (House Ethics Committee is not a "department or agency of the United States" after *Hubbard*).

The principal purpose of the 1996 revision was to overrule the result reached by the Supreme Court in *United States v. Hubbard*,[2] which held that the phrase "department or agency of the United States" did not include the judicial branch,[3] and several subsequent decisions of the District of Columbia Circuit holding that *Hubbard* excluded the legislative branch as well.[4] The revision makes clear that section 1001(a) applies generally to all three branches of government and then, in sections 1001(b) and (c), limits the application to the judicial branch and legislative branch as follows:

> (b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
>
> (c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

[5] *See* ***United States v. Ali, 68 F.3d 1468, 1475 (2d Cir. 1995)*** (overruling prior Second Circuit authority holding that materiality element applied only to first clause of section 1001); *United States v. Steele, 933 F.2d 1313, 1318 (6th Cir. 1991)* (holding materiality requirement applicable to all three clauses of section 1001 in order "to exclude trivial falsehoods from the purview of the statute").

The 1996 Act also makes explicit that materiality is an element of all three offenses proscribed by section 1001, an issue that had previously been questioned in the courts of appeals.[5]

It is extremely important to delineate the theory under which the prosecution is proceeding, because the elements may vary depending upon the portion of the statute being used. The statute, both before and after the 1996 amendments, contains three operative clauses. The first concerns one who "falsifies, conceals, or covers up by any trick, scheme or device," the second concerns one who makes a "false, fictitious or fraudulent statement or representation," and the third concerns one who makes false writings and knows the writing contains any "false, fictitious or fraudulent statement." The charges, therefore, have been divided into three sections to enable the reader to focus on the particular instructions suggested for the offense charged in the indictment.

Instruction 36-2 The Purpose of the Statute[1]

[1] Adapted from the charge of Judge Weinfeld in *United States v. Corr*, 543 F.2d 1042 (2d Cir. 1976).

The purpose of § 1001 is to protect the authorized functions of the various governmental departments from any type of misleading or deceptive practice and from the adverse consequences that might result from such deceptive practices.

To establish a violation of § 1001, it is necessary for the government to prove certain essential elements—which I will soon describe for you—beyond a reasonable doubt. However, I want to point out now that it is not necessary for the government to prove that the government agency was, in fact, misled as a result of the defendant's action. It does not matter that the agency was not misled, or even that it knew of the misleading or deceptive act, should you find that the act occurred. These circumstances would not excuse or justify a concealment undertaken, or a false, fictitious or fraudulent statement made, or a false writing or document submitted, willfully and knowingly about a matter within the jurisdiction of the government of the United States. (*If applicable:* The statute covers actions by government employees as well as by private individuals.)

Authority

Second Circuit: *United States v. Shanks, 608 F.2d 73 (2d Cir. 1979)*.

Eighth Circuit: *United States v. Estus, 544 F.2d 934 (8th Cir. 1976)*.

Comment

[2] *See, e.g.*, *United States v. Wright, 988 F.2d 1036, 1038–39 (10th Cir. 1993)* (section 1001 applies to false statement to state agency that was primary regulator of water quality under EPA regulations); *United States v. Murphy, 935 F.2d 899, 900 n.1 (7th Cir. 1991)* (fraudulent statements made to obtain benefits from program administered by the Illinois Department of Public Aid were "within the jurisdiction" of the United States Department of Health and Human Services due to regulatory oversight and provision of funding).

[3] *United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983)*.

A false statement may fall within section 1001 even when it is not directly submitted to a federal agency, and even when the federal agency's role is limited to financial support of a program that the agency does not directly administer. In such cases, the necessary link between deception of the non

federal agency and effect on the federal agency is provided by the federal agency's retention of the ultimate authority to see that the federal funds are properly spent.[2] Furthermore, since it is the existence of federal supervisory authority that is important, not necessarily its exercise, it does not matter that the early discovery of the fraud kept the information from actually reaching the federal government.[3]

[2] Falsified, Concealed or Covered Up

Instruction 36-3 Elements of the Offense

In order to prove the defendant guilty of the crime charged, the government must prove beyond a reasonable doubt:

First, that on or about the date specified in the indictment, the defendant falsified (*or* concealed *or* covered up) a material fact;

Second, that the fact falsified (*or* concealed *or* covered up) was material;

Third, that defendant did so by trick, scheme or device;

Fourth, that defendant acted knowingly and willfully; and

Fifth, that the falsification, concealment or coverup was with respect to a matter within the jurisdiction of the government of the United States (*if applicable:* or that federal funds were involved).

Authority

Seventh Circuit: *United States v. Moore, 446 F.3d 671 (7th Cir. 2006)*.

Comment

[1] ***Pub. L. No. 104-292, 110 Stat. 3459*** (1996).

[2] *See* Comment to Instruction 36-8, below.

The False Statements Accountability Act of 1996,[1] designated the "falsified, concealed or covered up" provision as section 1001(a)(1). The only substantive change to this offense by the Act was to clarify

that section 1001 applies to representations made to any of the three branches of government, with certain express limitations.[2]

The Eighth Circuit covers the same subject matter in four parts:

One, the defendant knowingly and intentionally [falsified] [concealed] (describe material fact falsified or concealed) as charged;

Two, the defendant did so by use of a [trick] [scheme] [device], that is, a course of action intended to deceive others;

Three, the fact was material to the (name of federal agency); and

[3] Eighth Circuit Model Criminal Jury Instruction 6.18.1001A.

Four, the material fact was about a matter within the jurisdiction of (name of federal agency).[3]

The Seventh Circuit's instruction, also in four parts, states in simple, active language:

> [T]he government must prove each of the [four] following elements beyond a reasonable doubt:
>
> 1. The defendant [concealed; covered up] a fact by trick, scheme or device; and
>
> 2. The fact was material; and
>
> 3. The defendant acted knowingly and willfully; and

[4] Seventh Circuit Pattern Criminal Jury Instruction to *18 U.S.C. § 1001* Concealing A Material Fact—Elements.

> 4. The defendant [concealed; covered up] the material fact in a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the government of the United States.[4]

Instruction 36-4 First Element—Falsified, Concealed or Covered Up a Fact

The first element the government must prove beyond a reasonable doubt is that the defendant falsified (*or* concealed *or* covered up) a fact. These words almost define themselves. To "falsify" means to make an untrue statement that is untrue at the time made and is known to be untrue at the time made. To "conceal" means to withhold from another. It requires some act to prevent detection of some fact the defendant was required to reveal. To "cover up" means to hide from another.

Authority

United States Supreme Court: *United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)*.

Sixth Circuit: *United States v. Gibson, 409 F.3d 325 (6th Cir. 2005)*.

Comment

[1] *United States v. Calhoon, 97 F.3d 518, 526 (11th Cir. 1996)*; *United States v. St. Michael's Credit Union, 880 F.2d 579, 589 (1st Cir. 1989)* (if indictment charges only concealment through a trick, scheme or device, it is reversible error to omit instructing jury on affirmative act requirement, notwithstanding that there was sufficient evidence to convict under false statement theory); *United States v. Rigdon, 874 F.2d 774, 779 (11th Cir. 1989)*; *United States v. Shannon, 836 F.2d 1125, 1129–30 (8th Cir. 1988)*.

The proof needed of "concealment" or "covering up" differs from that needed for making a "false statement." Concealment of a material fact requires more than mere nondisclosure. It requires proof of an affirmative act that actively conceals a material fact.[1]

[2] *See, e.g.*, *United States v. Mubayyid, 658 F.3d 35, 70 (1st Cir. 2011)*; *United States v. Safavian, 528 F.3d 957, 964 (D.C. Cir. 2008)* (reversing conviction); *United States v. Moore, 446 F.3d 671, 677 (7th Cir. 2006)*; *United States v. Stewart, 433 F.3d 273, 318 (2d Cir. 2006)*; *United States v. Gibson, 409 F.3d 325, 332–33 (6th Cir. 2005)*; *United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994)*; *United States v. Farm & Home Savings Ass'n, 932 F.2d 1256, 1261 (8th Cir. 1991)*; *United States v. Robinson, 832 F.2d 1165, 1166 (9th Cir. 1987)*; *United States v. Mattox, 689 F.2d 531, 532–33 (5th Cir. 1982)*. *See also United States v. Harra, 985 F.3d 196, 213 (3d Cir. 2021)*, **quoting Treatise** (In a prosecution under § 1001(a)(2), court stated: "a conviction for concealing material facts in violation of *18 U.S.C. § 1001(a)(1)* … cannot stand absent fair notice of the legal duty to make the particular disclosure"; citing *United States v. Safavian, 528 F.3d 957, 964–65 (D.C. Cir. 2008)*.

[3] *See, e.g.*, *United States v. Mubayyid, 658 F.3d 35, 70 (1st Cir. 2011)* (IRS form regarding charitable organizations); *United States v. Safavian, 528 F.3d 957, 964 (D.C. Cir. 2008)* (reversing conviction); *United States v. Moore, 446 F.3d 671, 678 (7th Cir. 2006)* (HUD form contract); *United States v. Calhoon, 97 F.3d 518, 526 (11th Cir. 1996)*; *United States v. DeRosa, 783 F.2d 1401, 1407 (9th Cir. 1986)*; *see also United States v. Edwards, 869 F. 3d 490 (7th Cir. 2017)* (declaration on forms and questionnaires related to employment application with United States Customs and Border Protection).

[4] *United States v. DeRosa, 783 F.2d 1401, 1407 (9th Cir. 1986)* (Whether defendant had legal duty to disclose is question of

law for court); *United States v. Poarch, 878 F.2d 1355, 1359 (11th Cir. 1989)*; *United States v. Zalman, 870 F.2d 1047, 1055 (6th Cir. 1989)*. *But see* *United States v. Moore, 446 F.3d 671, 680 (7th Cir. 2006)* (approving jury instruction without discussion of whether issue should have been submitted to jury at all); *cf.* *United States v. Blackley, 167 F.3d 543, 550–51 (D.C. Cir. 1999)* (questioning whether existence of legal duty to disclose is a question for the jury or the court, but holding that failure to instruct on this issue was harmless error).

[5] *United States v. Menendez, 137 F. Supp. 3d 688, 701 (D.N.J. 2015)* (at trial, government would have to prove gift was of sufficient value to be reportable).

There must be a legal duty to disclose to the government the material facts allegedly concealed.[2] This generally requires that the government show some statute, regulation or form that requires disclosure.[3] The courts appear to be in agreement that the question of whether there was a legal duty to disclose the fact is a preliminary question of law for the court that should not be submitted to the jury.[4] But where a U.S. senator was alleged to have failed to report a gift, whether the gift was a thing of value that the law required to be reported was a question of fact for the jury.[5]

Instruction 36-5 Second Element—Materiality

The second element the government must prove beyond a reasonable doubt is that the fact falsified (*or* concealed *or* covered up) was material.

A fact is material if it was capable of influencing the government's decisions or activities. However, proof of actual reliance on the statement by the government is not required.

Authority

United States Supreme Court: *United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)*.

First Circuit: *United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013)*.

Second Circuit: *United States v. Adekanbi, 675 F.3d 178 (2d Cir. 2012)*.

Third Circuit: *United States v. Moyer, 674 F.3d 192 (3d Cir.)*, *cert. denied*, *568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012)*.

Fourth Circuit: *United States v. Hamilton, 699 F.3d 356 (4th Cir. 2012)* *United States v. Garcia-Ochoa, 607 F.3d 371 (4th Cir. 2010)*.

Fifth Circuit: *United States v. Moore, 708 F.3d 639 (5th Cir. 2013)*; *United States v. Abrahem, 678 F.3d 370 (5th Cir. 2012)*.

Sixth Circuit: *United States v. Siemaszko, 612 F.3d 450 (6th Cir. 2010)*.

Seventh Circuit: *United States v. Lupton, 620 F.3d 790 (7th Cir. 2010)*; *United States v. Turner, 551 F.3d 657 (7th Cir. 2008)*.

Eighth Circuit: *United States v. Causevic, 636 F.3d 998 (8th Cir. 2011)*.

Ninth Circuit: *United States v. King, 735 F.3d 1098 (9th Cir. 2013)*; *United States v. Peterson, 538 F.3d 1064 (9th Cir. 2008)*.

Tenth Circuit: *United States v. Schulte, 741 F.3d 1141 (10th Cir. 2014)*.

Eleventh Circuit: *United States v. House, 684 F.3d 1173 (11th Cir. 2012)*; *United States v. Boffil-Rivera, 607 F.3d 736 (11th Cir. 2010)*.

District of Columbia Circuit: *United States v. Verrusio, 762 F.3d 1 (D.C. Cir. 2014)*; *United States v. Stadd, 636 F.3d 630 (D.C. Cir. 2011)*.

Comment

[1] *515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)*.

[2] *Compare* *United States v. Arcadipane, 41 F.3d 1 (1st Cir. 1994)* (materiality is preliminary question for the court), *with* *United States v. Gaudin, 28 F.3d 943 (9th Cir. 1994)* (en banc), *aff'd*, *515 U.S. 506 (1995)* (materiality must be submitted to the jury).

[3] *515 U.S. at 522–23*.

[4] *Id. at 523–24* (Rehnquist, J., concurring).

[5] *See, e.g.*, *United States v. Daily, 921 F.2d 994, 1006 (10th Cir. 1990)*.

[6] *United States v. Abadi, 706 F.2d 178, 180 n.2 (6th Cir. 1983)*.

[7] *United States v. King, 735 F.3d 1098, 1107 (9th Cir. 2013)*; *United States v. Russell, 728 F.3d 23, 33 (1st Cir. 2013)*; *United States v. Boffil-Rivera, 607 F.3d 736, 741 (11th Cir. 2010)*; *United States v. Beaver, 515 F.3d 730, 740 (7th Cir. 2008)*;

United States v. Edwards, 303 F.3d 606, 637 (5th Cir. 2002); United States v. Turner, 189 F.3d 712, 722 (8th Cir. 1999); *see also* United States v. Dedhia, 134 F.3d 802, 806–09 (6th Cir. 1998) (instruction on materiality is required, but failure to instruct was not plain error given overwhelming evidence on this issue); United States v. Schleibaum, 130 F.3d 947, 949 (10th Cir. 1997) (same).

This element requires the jury to find that the falsified fact was material. Prior to the Supreme Court's decision in *United States v. Gaudin*,[1] eleven of the twelve circuits had held that materiality was a preliminary question of law for the court.[2] In *Gaudin*, the Supreme Court held that if materiality is an element of the crime, then it must be submitted to the jury.[3] Unfortunately, the Court did not specifically address the question of whether materiality is an element of a section 1001 violation,[4] an issue that has also divided the lower courts. Prior to *Gaudin*, some courts had held that materiality was an element of the crime subject to an exception to the rule that all elements must be submitted to the jury,[5] a view repudiated in *Gaudin*, while others had held that materiality is not an element, but rather a "judicially-related limitation to insure the reasonable application of the statute."[6] This division was without practical effect, however, since with the exception of the Ninth Circuit, courts on both sides of the issue were reserving the decision for the trial court, and disagreeing only on why this should be so. The courts that have addressed this issue after *Gaudin* have all held that it is an element to be submitted to the jury.[7]

[8] 515 U.S. at 509 (quoting Kungys v. United States, 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988)).

[9] United States v. Peterson, 538 F.3d 1064, 1071–72 (9th Cir. 2008) (use of "could have influenced" was not plain error, but "capable of influencing" is preferred); *see* Ninth Circuit Model Criminal Jury Instruction 8.73.

[10] United States v. Benton, 890 F.3d 697, 712 (8th Cir. 2018) (citing United States v. Wintermute, 443 F.3d 993, 1001 (8th Cir. 2006)); United States v. Verrusio, 762 F.3d 1, 20 (D.C. Cir. 2014); United States v. Schulte, 741 F.3d 1141, 1155 (10th Cir. 2014); United States v. King, 735 F.3d 1098, 1108 (9th Cir. 2013); United States v. Mehanna, 735 F.3d 32, 54–55 (1st Cir. 2013); United States v. Moore, 708 F.3d 639, 649 (5th Cir. 2013); United States v. Hamilton, 699 F.3d 356, 362 (4th Cir. 2012); United States v. House, 684 F.3d 1173, 1203 (11th Cir. 2012); United States v. Moyer, 674 F.3d 192, 244 (3d Cir.),

cert. denied, ***568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012)***; *United States v. Causevic, 636 F.3d 998, 1005 (8th Cir. 2011)*; *United States v. Lupton, 620 F.3d 790, 806 (7th Cir. 2010)*; *United States v. Siemaszko, 612 F.3d 450, 470 (6th Cir. 2010)*.

[11] Committee Comment to the Seventh Circuit's Pattern Criminal Jury Instruction for *18 U.S.C. § 1001* Department or Agency.

The courts agree that the test for materiality is whether the statement had "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed."[8] Note that the Ninth Circuit pattern instruction previously used the simpler phrase "could have influenced," but the instruction was modified after the court of appeals indicated a preference for the "capable of influencing" formulation.[9] As the recommended instruction correctly states, actual reliance on the statement is not required.[10] Not only is it of no consequence whether the government was actually deceived, but also it is not required that the government suffered monetary loss.[11]

[12] *United States v. Milton, 8 F.3d 39, 45–46 (D.C. Cir. 1993)*.

[13] *See, e.g*, *United States v. Milton, 8 F.3d 39, 45–46 (D.C. Cir. 1993)*; *United States v. Gahagan, 881 F.2d 1380 (6th Cir. 1989)*; *United States v. Race, 632 F.2d 1114, 1120 (4th Cir. 1980)*; *United States v. Vesaas, 586 F.2d 101, 104 (8th Cir. 1978)*; *United States v. Lozano, 511 F.2d 1, 5 (7th Cir. 1975)*; *United States v. Diogo, 320 F.2d 898, 902–03 (2d Cir. 1963)*.

[14] *Compare* *United States v. Lozano, 511 F.2d 1, 5 (7th Cir. 1975)* (positive response was literally true under applicable state law), *and* *United States v. Diogo, 320 F.2d 898, 902–03 (2d Cir. 1963)* (same), *with* *United States v. Zalman, 870 F.2d 1047 (6th Cir. 1989)* (positive response was not literally true under applicable federal law).

The government must prove beyond a reasonable doubt that the defendant "falsified" a material fact. The question of the truth or falsity of the defendant's statements is a question of fact for the jury.[12] The courts are in agreement that the "literal truth" of the statement is a complete defense to the charge since it negates a finding of falsity.[13] One question that has troubled the courts in this respect is that of sham marriages—marriages entered into for the sole purpose of allowing a foreign national to gain permanent residence in the United States. While such marriages may be legal and enforceable for the

purposes of the state in which the applicant was married, they are not for the purposes of the immigration laws. Thus, the courts have split with respect to whether a positive response to the question "Are you married?" on an immigration form is literally true or not.[14]

[15] *United States v. Sampson, 898 F. 3d 287, 305–06 (2d Cir. 2018)*.

Where an agent asked a defendant whether he recognized a document (a copy of a check register page) and the defendant answered that he did not, the court found that the defendant's answer might have been literally true in isolation (he had not seen that photocopy), but in the context of the other questions, it was at the least misleading, if not false. The defendant did not merely answer that he had not seen a document similar to the photocopy he was shown, but said that it was not familiar to him or resemble any document he had previously seen. Thus, a literally truthful statement can still be a violation of the statute.[15]

Instruction 36-6 Third Element—Trick, Scheme, or Device

The third element the government must prove beyond a reasonable doubt is that the defendant falsified (*or* concealed *or* covered up) by trick, scheme or device. This language is almost self explanatory. A scheme is a plan for the accomplishment of an object. A trick or device is a deceptive act or strategy calculated to deceive other persons.

(*If applicable:* The government contends that the so called trick, scheme, or device employed by the defendant was [insert description].)

Whether defendant's behavior amounted to a trick, scheme, or device is a question for you, as finders of the facts to decide. It is the government's burden with respect to this element to prove beyond a reasonable doubt that the defendant falsified (*or* concealed *or* covered up) a material fact by trick, scheme or device.

Authority

Fifth Circuit: *United States v. Ford, 797 F.2d 1329 (5th Cir. 1986)*; *United States v. London, 550 F.2d 206 (5th Cir. 1977)*.

Comment

[1] United States v. London, 550 F.2d 206, 213 (5th Cir. 1977); *see* United States v. Aarons, 718 F.2d 188, 191 (6th Cir. 1983) (some affirmative conduct or overt act designed to aid in the success of the venture is required for conviction for aiding and abetting section 1001).

[2] 550 F.2d at 214; *see also* United States v. Ford, 797 F.2d 1329, 1334 (5th Cir. 1986) (defendant's actions constituted more than just a failure to disclose material facts under the "conceal or cover up" clause of section 1001).

[3] 874 F.2d 774 (11th Cir. 1989).

[4] Id. at 779.

This element requires "an affirmative act by which means a material fact is concealed."[1] Mere nondisclosure of a material fact does not constitute a trick, scheme or device. "The latter clause of § 1001 requires the government to prove something more—that the material fact was affirmatively concealed by ruse or artifice, by scheme or device."[2] For example, in *United States v. Rigdon*,[3] the defendant was convicted of two counts of concealing a material fact by a trick, scheme or device for two separate currency transactions for which he failed to file currency transaction reports. In that case, the Eleventh Circuit upheld only one conviction, ruling with respect to the second transaction that the defendant employed no device, but rather merely spent the cash he received, so the government had failed to prove an affirmative act.[4]

[5] 550 F.2d 206 (5th Cir. 1977).

[6] Id. at 213.

In *United States v. London*,[5] the Fifth Circuit reversed a district court's dismissal of an indictment in which the government failed to specify the precise trick, scheme or device allegedly used. The court held that the government should have the opportunity to prove at trial that the defendants' failure to disclose the existence of second mortgages or property securing a Rural Housing loan was not merely a passive nondisclosure, but was rather the result of affirmative acts to conceal material facts by a trick, scheme or device. The court suggested that a jury could find a trick, scheme or device if the

government demonstrated that the defendants "induced the purchasers of their homes to make false statements regarding material facts in applications for Rural Housing loans, and [defendants] independently sought to prevent the government from finding out the falsity of such statements … ."[6]

[7] *69 F. Supp. 562 (S.D. Cal. 1946)*.

[8] *Id. at 563*.

[9] *537 F.2d 187 (5th Cir. 1976)*.

[10] *Id. at 194–95*.

[11] *894 F.2d 708 (5th Cir. 1990)*.

[12] *Id. at 711–12*.

In *United States v. White*,[7] the court held that under a predecessor statute to section 1001, it was sufficient to sustain any indictment if it charged that the defendants had devised a trick to conceal and cover up a material fact. There, the indictment charged that the defendants concealed the whereabouts of Mexican aliens illegally in the United States by "placing said Mexican aliens in a closed and covered van, by locking the door of said van, by transporting said alien in said closed and locked van in the night-time."[8] The court found that such activity was sufficient to charge a trick, scheme or device under the statute. Similarly, in *United States v. Markham*,[9] the court held that the evidence established a trick, scheme or device where the defendant concealed and covered up the identity of the true inventor of a building process by causing a patent application to be filed in the names of two persons who were not the true inventors and by filing other misleading statements intended to cover up the fact that these two persons were not the true inventors.[10] Finally, in *United States v. Gardner*,[11] the Fifth Circuit went further and held that the defendant, an importer of automobiles, concealed information by trick, scheme or device by not disclosing the owner of the imported vehicles when applying for a one-time personal exemption from applicable air pollution emission standards. The court upheld the

conviction even though the EPA form used to apply for the exemption did not require disclosure of the vehicle owner.[12]

[13] *932 F.2d 1256 (8th Cir. 1991)*.

[14] *Id. at 1261–62*.

In *United States v. Farm Home Savings Ass'n*,[13] the Eighth Circuit upheld the conviction of customer-defendants who aided and abetted banks in a scheme to structure deposits and thereby conceal information from the government, which otherwise would have required the filing of currency transaction reports.[14]

Instruction 36-7 Fourth Element—Knowing and Willful Conduct

The fourth element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly and willfully.

An act is done knowingly if it is done purposely and voluntarily, as opposed to mistakenly or accidentally.

An act is done willfully if it is done with an intention to do something the law forbids, a bad purpose to disobey the law (*if concealment is charged add:* with specific intent to fail to do something the law requires to be done.)

Authority

Second Circuit: *United States v. Whab, 355 F.3d 155 (2d Cir. 2004)*; *United States v. West, 666 F.2d 16 (2d Cir. 1981)*.

Third Circuit: *United States v. Moyer, 674 F.3d 192 (3d Cir.)*, *cert. denied*, *568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012)*; *United States v. Starnes, 583 F.3d 196 (3d Cir. 2009)*.

Fourth Circuit: *United States v. Miller, 658 F.2d 235 (4th Cir. 1981)*.

Fifth Circuit: *United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990)*; *United States v. Whittington, 783 F.2d 1210 (5th Cir. 1986)*.

Seventh Circuit: *United States v. Dick, 744 F.2d 546 (7th Cir. 1984)*.

Eighth Circuit: *United States v. Hildebrandt, 961 F.2d 116 (8th Cir. 1992)*; *United States v. Ribaste, 905 F.2d 1140 (8th Cir. 1990)*.

Ninth Circuit: *United States v. Tatoyan, 474 F.3d 1174 (9th Cir. 2007)*; *United States v. Pacheco, 912 F.2d 297 (9th Cir. 1990)*.

Tenth Circuit: *United States v. Irwin, 654 F.2d 671 (10th Cir. 1981)*.

Eleventh Circuit: *United States v. Belcher, 927 F.2d 1182 (11th Cir. 1991)*.

Comment

[1] *United States v. Milton, 602 F.2d 231, 233 n.6 (9th Cir. 1979)*; *see also* *United States v. Ribaste, 905 F.2d 1140, 1143 (6th Cir. 1990)*.

[2] *United States v. Curran, 20 F.3d 560, 569–70 (3d Cir. 1994)* (reversing conviction where court stated incorrectly that defendant had legal duty to disclose information allegedly concealed); *United States v. Irwin, 654 F.2d 671, 678–79 (10th Cir. 1981)*.

The government is required to prove that the defendant acted both knowingly and willfully. "Knowingly" is added "to insure that no one will be convicted for an act done, or for an omission or failure to act, because of mistake, accident or other innocent reason."[1] If concealment of a material fact is charged, there should be added to this element an instruction that the defendant must have knowingly and willfully failed to do something that the law requires to be done.[2]

[3] Seventh Circuit Pattern Criminal Jury Instruction *18 U.S.C. § 1001* Willfully—Definition. The Committee Comment points out that in the Seventh Circuit's instruction for 1001, the same element also requires "knowing" conduct and that this means that there is overlap between the two concepts as they are used in § 1001.

[4] *United States v. Daughtry, 48 F.3d 829, 830–31 (4th Cir.)*, *judgment vacated on other grounds*, ***516 U.S. 984 (1995)***.

[5] *United States v. Gonsalves, 435 F.3d 64, 72 (1st Cir. 2006)*; *see* *United States v. Newell, 658 F.3d 1, 15 (1st Cir. 2011)* (quoting *Gonsalves* on this point).

[6] *United States v. Starnes, 583 F.3d 196, 211–12 (3d Cir. 2009)*; *United States v. Whab, 355 F.3d 155, 159–62 (2d Cir. 2004)*; *see* *United States v. Brandt, 546 F.3d 912, 916 (9th Cir. 2008)* (citing *Whab* with approval but holding that evidence was

sufficient even under higher standard). *But cf.* Ratzlaf v. United States, 510 U.S. 135, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) (requiring proof of violation of a "known legal duty" in cases involving structuring of currency transactions).

Instruction 36-7 defines willfulness as requiring an intention to do something the law forbids. The Seventh Circuit similarly defines willfully for all purposes under U.S.C. § 1001 with "A person acts willfully if he acts voluntarily and intentionally, and with the intent to do something illegal."[3] The Fourth Circuit has held that the recommended language is not necessary, and has approved an instruction stating that "[a]n act is done willfully if it is done deliberately and intentionally as contrasted with accidentally, carelessly or unintentionally."[4] Similarly, the First Circuit has approved a charge defining willfulness as acting with knowledge or with "reckless disregard for the truth with a conscious purpose to avoid learning the truth."[5] Neither of these instructions is recommended because they are both indistinguishable from the definition of knowingly, and so do not increase the level of scienter sufficiently to comply with the use in the statute of the phrase "knowingly and willfully." The text instruction does so, while not raising willfulness to the level of requiring actual knowledge of the content of section 1001.[6]

[7] Committee Comments to Eighth Circuit Model Criminal Jury Instruction 6.18.100A.

The Eighth Circuit instruction drafters comment that although the statute requires a defendant to act "willfully," they recommend not using that word in jury instructions, except in certain cases.[7] Yet, the Eighth Circuit did not think the district court abused its discretion when it used the following instruction:

[8] *United States v. Benton, 890 F.3d 697, 715 (8th Cir. 2018)*.

> A person acts willfully if he acts knowingly, purposely, and with the intent to do something the law forbids. That is, a person acts willfully when they act with the purpose to disobey or to disregard the law. A person need not be aware of the specific law or rule that his conduct may be violating, but he must act with the intent to do something that he knows the law forbids.[8]

[9] *See* United States v. Lupton, 620 F.3d 790, 806 (7th Cir. 2010).

The willfulness element does not require the government to prove that the underlying conduct about which the defendant made representations was unlawful.[9]

[10] *See, e.g.*, United States v. Siemaszko, 612 F.3d 450, 485–87 (6th Cir. 2010); United States v. St. Michael's Credit Union, 880 F.2d 579, 584 (1st Cir. 1989); United States v. Maniego, 710 F.2d 24, 28 (2d Cir. 1983); United States v. Petullo, 709 F.2d 1178, 1181 (7th Cir. 1983); United States v. Schaffer, 600 F.2d 1120, 1121–22 (5th Cir. 1979).

There is substantial authority in section 1001 cases for including a conscious avoidance charge with respect to the knowledge element.[10] However, since the government must prove that the defendant acted both knowingly and willfully, the instruction should make clear that the defendant's deliberate disregard of the truth can satisfy only the former and not the latter. The conscious avoidance charge is discussed at length in Instruction 3A-2, *above*.

[11] United States v. Megwa, 656 Fed. Appx. 674, 678–79 (5th Cir. 2016); United States v. Delgado, 668 F.3d 219, 227 (5th Cir. 2012) (citations omitted).

District courts are permitted to instruct the jury on deliberate ignorance only when a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate indifference. The evidence at trial must raise two inferences: (1) the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and (2) the defendant purposely contrived to avoid learning of the illegal conduct.[11]

[12] United States v. Eglash, 640 Fed. Appx. 644, 646 (9th Cir. 2016). *But see* Harris v. United States, 2017 U.S. Dist. LEXIS 127302 (C.D. Cal. Aug. 9, 2017).

Where the district court properly instructed the jury that an intent to defraud is an intent to deceive or cheat and that the jury may determine whether the defendant had an honest, good faith belief in the truth of the alleged specified misrepresentations in determining whether he acted with intent to defraud, the appellate court held that the district court had not committed plain error even though the court had not instructed the jury that good faith is a complete defense to intent to defraud.[12]

[13] 658 F.2d 235 (4th Cir. 1981).

[14] United States v. Johnson, 730 F.2d 683, 686 (11th Cir. 1984); United States v. Miller, 658 F.2d 235, 238 (4th Cir. 1981).

The recommended instruction may require additional language when the defendant raises the defense of good faith reliance on counsel or other expert advice. In *United States v. Miller*,[13] defendant maintained that he had relied on the advice of a government official in reporting his income to the South Carolina employment security commission, and requested the following charge: "It is a defense that defendant signed the forms in reliance on expert advice. The reliance defense to be effective must establish good faith reliance on an expert coupled with full disclosure to that expert."[14]

[15] Id. at 237–38.

The trial court instructed the jury that the government must prove that defendant acted both willfully and knowingly, stressing that defendant could not be convicted for acts done through mistake, accident or other innocent reasons. The court of appeals held that this was not sufficient, and that the trial judge should have charged the jury specifically on the defense of reliance on expert advice along the lines requested by defendant.[15]

[16] United States v. Johnson, 730 F.2d 683, 687 n.3 (11th Cir. 1984) (if the defendant claims to have "relied on [an expert's] advice in lying about [his] criminal record, such a claim would clearly be outside of the 'good faith' prong of the expert advice defense"); United States v. Smith, 523 F.2d 771 (5th Cir. 1975).

[17] United States v. Baldwin, 307 F.2d 577, 579 (7th Cir. 1962).

Proof that the defendant had knowledge contrary to the conclusions of his expert may defeat the defense.[16] Therefore, the jury should be instructed that if the defendant had knowledge contrary to the expert's advice, the defendant would not have relied in good faith on the expert. The jury should also be instructed that good faith reliance on an attorney's advice cannot be a defense "unless you find that the defendant made a full disclosure of all the facts to his attorney" or other expert.[17]

[18] 666 F.2d 16 (2d Cir. 1981).

[19] Id. at 19–20.

If the defendant presents evidence of his authority to sign someone else's name, the court must instruct

the jury that it was the government's burden to prove that the defendant was not authorized to sign that person's name. In *United States v. West*,[18] the Second Circuit held that once the defendant raised the issue of authority to sign documents submitted to the government in his wife's name he was entitled to have a properly instructed jury consider his defense.[19]

[20] United States v. Ajoku, 584 F. App'x 824 (9th Cir. 2014) (citing *United States v. Bryan, 524 U.S. 184 (1989)*). After *Ajoku* at least two unpublished Ninth Circuit opinions concluded that *Ajoku*'s holding disturbed only *18 U.S.C. § 1035*'s elements and not *18 U.S.C. § 1001*'s elements. *See* United States v. Eglash, 640 F. App'x 644, 646 (9th Cir. 2016); United States v. Mazzeo, 592 F. App'x 559, 562 (9th Cir. 2015). Although neither controlled the court's decision in *Harris v. United States, 2017 U.S. Dist. LEXIS 127302, at *18 n.5 (C.D. Cal. Aug. 9, 2017)*, that court held that, based on *Ajoku*, *Bryan*, the government's concession, and district courts' subsequent adoption of the model Ninth Circuit instruction 8.73, the elements of § 1001 appear to now be well settled in the Ninth Circuit and to follow the second *Ajoku* decision.

[21] Ninth Circuit Model Criminal Jury Instruction 8.73 (updated 12/2016).

[22] *Harris v. United States, 2017 U.S. Dist. LEXIS 127302, at *15–*18 (C.D. Cal. Aug. 9, 2017)*; *see also* United States v. Snyder, 658 F. App'x 859, 862–63 (9th Cir. 2016) (redetermination application for SSI benefits he signed required the applicant to affirm that he understood it was a crime to knowingly lie or misrepresent the truth).

In a case involving *18 U.S.C. § 1035*, the Ninth Circuit held that to establish willful violation of the statute the government must prove that the defendant acted with knowledge that his conduct was unlawful.[20] In light of that case, the Ninth Circuit has modified its model jury instruction for *18 U.S.C. § 1001* to require proof that "the defendant acted willfully; that is, the defendant acted deliberately and with knowledge both that the statement was untrue and that his or her conduct was unlawful."[21] The government has similarly conceded that a conviction for violation of *18 U.S.C. § 1001* requires proof that the defendant knew his or her conduct to be unlawful.[22]

Instruction 36-8 Fifth Element—Matter Within the Jurisdiction of the United States Government

The fifth element that the government must establish beyond a reasonable doubt is that the document (*or* statement *or* concealment) be used (*or* made *or* undertaken) with regard to a matter within the jurisdiction of the government of the United States. (*If applicable:* I charge you that the [name of department] is a department of the United States government.)

There is no requirement that the document be actually directed to or given to [name of department]. All that is necessary is that you find that it was contemplated that the document was to be used in a matter that was within the jurisdiction of the government of the United States (*if applicable:* or that federal funds were involved). To be within the jurisdiction of the government of the United States means that the statement must concern an authorized function of that department or agency.

It is not necessary for the government to prove that the defendant had actual knowledge that the false statement was to be used in a matter that was within the jurisdiction of the government of the United States. It is sufficient to satisfy this element if you find that the false statement was made with regard to a matter within the jurisdiction of the government of the United States.

Authority

United States Supreme Court: *United States v. Yermian, 468 U.S. 63, 104 S. Ct. 2936, 82 L. Ed. 2d 53 (1984)*; *United States v. Rodgers, 466 U.S. 475, 104 S. Ct. 1942, 80 L. Ed. 2d 492 (1984)*.

Second Circuit: *United States v. Masterpol, 940 F.2d 760 (2d Cir. 1991)*; *United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991)*.

Third Circuit: *United States v. Starnes, 583 F.3d 196 (3d Cir. 2009)*.

Fourth Circuit: *United States v. Jackson, 608 F.3d 193 (4th Cir. 2010)*, *cert. denied*, *562 U.S. 1178 (2011)*.

Fifth Circuit: *United States v. Taylor, 582 F.3d 558 (5th Cir. 2009)*; *United States v. Baker, 626 F.2d 512 (5th Cir. 1980)*.

Sixth Circuit: *United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)*.

Seventh Circuit: *United States v. Murphy, 935 F.2d 899, 900 (7th Cir. 1991)*; *United States v. Stanford, 589 F.2d 285 (7th Cir. 1978)*.

Ninth Circuit: *United States v. King, 660 F.3d 1071 (9th Cir. 2011)*, *cert. denied*, *567 U.S. 905, 132 S. Ct. 2740, 183 L. Ed. 2d 615 (2012)*; *United States v. Atalig, 502 F.3d 1063 (9th Cir. 2007)*.

Tenth Circuit: *United States v. Wright, 988 F.2d 1036 (10th Cir. 1993)*.

Comment

[1] *See* *United States v. Hubbard, 514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995)*.

[2] ***Pub. L. No. 104-292, 110 Stat. 3459*** (1996).

[3] The Notes on Use of Eighth Circuit Model Criminal Jury Instruction 6.18.1001A contradict this statement. Note 5 states:

> The statutory requirement that the matter be "within the jurisdiction" of any branch of the United States appears to be an element of the offense. Traditionally, this issue was treated as a question of law for the court. *Terry v. United States, 131 F.2d 40, 44 (8th Cir. 1942)* (decided under 18 U.S.C. § 80, a predecessor to §§ 287 and 1001). However, the logic applied in *United States v. Gaudin* to the issue of "materiality," may similarly apply to the issue of agency jurisdiction. Accordingly, the Committee recommends that this element be submitted to the jury.
>
> However, the Committee believes that whether an entity is in fact part of a branch of the federal government need not be determined by the jury, but is a question of law which should be found by the court, on the record, before submitting the case to the jury. *United States v. Gould, 536 F.2d 216 (8th Cir. 1976)* (if the court reaches a "conclusion through an exercise in statutory interpretation" about a particular issue, the conclusion is a legislative fact that need not be submitted to the jury).

Traditionally, the courts have regarded the determination whether a particular body is an agency or department of the United States as a question of law, and the determination whether a statement concerned a matter within the jurisdiction of that department or agency to be a question of fact for the jury.[1] The False Statements Accountability Act of 1996[2] redefined the government bodies to which section 1001 applies, but retained the "matter within the jurisdiction" language without amendment, so it appears that this division of labor will continue with respect to the revised provision.[3]

[4] *See* *United States v. Bramblett, 348 U.S. 503, 509, 75 S. Ct. 504, 99 L. Ed. 594 (1955)* (the phrase "department or agency" was "meant to describe the executive, legislative, and judicial branches of the Government").

[5] *See, e.g.*, *United States v. Wood, 6 F.3d 692, 694–95 (10th Cir. 1993)*; *United States v. Masterpol, 940 F.2d 760, 764–66 (2d Cir. 1991)*; *United States v. Holmes, 840 F.2d 246, 248 (4th Cir. 1988)*; *United States v. Mayer, 775 F.2d 1387, 1390 (9th Cir. 1985)*; *United States v. Abrahams, 604 F.2d 386, 393 (5th Cir. 1979)*. *But see* *United States v. Hubbard, 16 F.3d 694, 700–02 (6th Cir. 1994)*, *rev'd in part*, *514 U.S. 695 (1995)* (rejecting exception).

[6] *United States v. Hubbard, 514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995)*.

[7] *Hubbard, 514 U.S. at 715*.

[8] *See United States v. Dean, 55 F.3d 640, 658–59 (D.C. Cir. 1995)*; *see also United States v. Oakar, 111 F.3d 146, 151–56 (D.C. Cir. 1997)* (House Ethics Committee is not a "department or agency of the United States" after *Hubbard*).

Until 1995, the courts had treated the phrase "department or agency of the United States" to include all three branches of government.[4] This was subject only to the so-called "adjudicative exception," which held that section 1001 did not apply to statements made to courts acting in their adjudicative function (to which the perjury statute would apply).[5] In 1995, in *United States v. Hubbard*,[6] the Supreme Court overruled this precedent, holding that the term "department or agency" did not apply to the courts at all, and suggesting in broader language that the phrase is limited to the Executive Branch of the federal government.[7] The District of Columbia Circuit soon confirmed this broad reading of *Hubbard*, holding that section 1001 did not apply to false statements made to Congress.[8]

The 1996 Act overruled the result in *Hubbard* and the District of Columbia Circuit cases, making explicit in section 1001(a) that the provision applies to all three branches of government, but then excepting in subsections (b) and (c) some statements made to the judicial and legislative branches as follows:

> (b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
>
> (c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—
>
> > (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
> >
> > (2) any investigation or review, conducted pursuant to the authority of any committee,

subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

[9] United States v. Espy, 145 F.3d 1369, 1373–74 (D.C. Cir. 1998).

Note that the District of Columbia has held that the Executive Office of the President is not an agency within the meaning of section 1001 because it has no definable "jurisdiction."[9]

[10] *See, e.g.*, United States v. Wood, 6 F.3d 692, 694–95 (10th Cir. 1993); United States v. Masterpol, 940 F.2d 760, 764–66 (2d Cir. 1991).

[11] *See* United States v. Vreeland, 684 F.3d 653, 662 (6th Cir.), *cert. denied*, ***568 U.S. 994, 133 S. Ct. 565, 184 L. Ed. 2d 367 (2012)***; United States v. Manning, 526 F.3d 611, 614 (10th Cir. 2008); *see also* United States v. Horvath, 492 F.3d 1075 (9th Cir. 2007) (holding that statement to probation officer is within adjudicatory exception without stating that this is question of law for the court).

[12] *Compare* United States v. Vreeland, 684 F.3d 653, 662–666 (6th Cir.), *cert. denied*, ***568 U.S. 994, 133 S. Ct. 565, 184 L. Ed. 2d 367 (2012)*** (false statement to probation officer supervising defendant's pretrial release *is not* within adjudicative exception), *and* United States v. Manning, 526 F.3d 611, 619 (10th Cir. 2008) (false statement to probation officer in presentence interview *is not* within adjudicative exception), *with* United States v. Horvath, 492 F.3d 1075, 1076–82 (9th Cir. 2007) (false statement to probation officer in presentence interview *is* within adjudicative exception).

Prior to the 1996 Act, the courts had treated the determination whether the adjudicative exception is applicable as a question of law for the court to decide.[10] As the Act was intended only to reverse the conclusion in *Hubbard*, and subsection (b) merely revitalizes the adjudicative exception, creating a statutory standard to replace the judge-made standard that preceded it, the first few courts to address the statute have agreed that these raise a preliminary question for the court as opposed to an element of the offense.[11] However, those courts have disagreed as to whether statements to a federal probation officer fall within the exception.[12]

[13] United States v. Rodgers, 466 U.S. 475, 104 S. Ct. 1942, 80 L. Ed. 2d 492 (1984).

[14] Rodgers, 466 U.S. at 479.

[15] *See, e.g.*, United States v. King, 660 F.3d 1071 (9th Cir. 2011), *cert. denied*, ***567 U.S. 905, 132 S. Ct. 2740, 183 L. Ed. 2d***

615 (2012) (false statement to state agriculture department concerning possible violations of federal Safe Drinking Water Act); *United States v. Jackson, 608 F.3d 193, 196–97 (4th Cir. 2010)*, *cert. denied*, ***562 U.S. 1178 (2011)*** (false timesheets submitted to defendant's employer who later submitted them to federal agency under service contract); *United States v. Starnes, 583 F.3d 196, 208 (3d Cir. 2009)* (statement to local housing authority concerning project funded by HUD); *United States v. Taylor, 582 F.3d 558, 563–64 (5th Cir. 2009)* (statement to state agency to receive hurricane aid benefits funded by FEMA); *United States v. Lutz, 154 F.3d 581, 587 (6th Cir. 1998)* (submission of false HUD loan applications to lender); *United States v. Ross, 77 F.3d 1525 (7th Cir. 1996)* (statement to private association responsible for determining eligibility for federal educational grants); *United States v. Davis, 8 F.3d 923, 929 (2d Cir. 1993)* (statement made to state correctional facility that had contract to house federal prisoners); *United States v. Wright, 988 F.2d 1036, 1038–39 (10th Cir. 1993)* (statement made to state agency responsible for monitoring environmental standards).

In *United States v. Rodgers*,[13] the Supreme Court defined the term "jurisdiction" to mean "the power to exercise authority in a particular situation" so that a "matter within the jurisdiction of a department or agency" must concern an "authorized function of an agency or department [rather than] matters peripheral to the business of that body."[14] There is no requirement that the false statement be directly submitted to the federal agency, as long as it is shown that the false statements were made with respect to a matter within the jurisdiction of that agency.[15] This generally requires that either federal money or federal oversight of the program be involved, although there are some factual situations discussed below that test this statement.

[16] *See, e.g.*, *United States v. King, 660 F.3d 1071 (9th Cir. 2011)*, *cert. denied*, ***567 U.S. 905, 132 S. Ct. 2740, 183 L. Ed. 2d 615 (2012)*** (false statement to state agriculture department concerning possible violations of federal Safe Drinking Water Act); *United States v. White, 270 F.3d 356, 363–64 (6th Cir. 2001)* (statement to state agency responsible for monitoring federal drinking water standards); *United States v. Wright, 988 F.2d 1036, 1038–39 (10th Cir. 1993)* (statement made to state agency responsible for monitoring federal environmental standards).

[17] *See, e.g.*, *United States v. Oren, 893 F.2d 1057, 1064–65 (9th Cir. 1990)* (false statement made to non-profit organization in connection with purchase of land over which Park Service had potential jurisdiction); *United States v. Gibson, 881 F.2d 318, 322–23 (6th Cir. 1989)* (statements made to mining company that mined land owned by TVA).

[18] *United States v. Facchini, 832 F.2d 1159, 1161 (9th Cir. 1987)*; *see, e.g.*, *United States v. Milton, 8 F.3d 39, 46 (D.C. Cir. 1993)* (information requested by EEOC with respect to settlement involving back pay awards).

[19] United States v. Smith, 519 F. App'x 853, 858–59 (5th Cir. 2013).

It is not required that federal funds be involved as long as the false statement relates to a matter over which the federal agency has substantial oversight. Thus, a false statement made to a state agency concerning a matter closely regulated by the federal government clearly falls within the proscriptions of § 1001.[16] Similarly, a false statement that affects the management of federal lands or property violates section 1001 even though no actual expenditure of federal funds is involved.[17] And, when the federal government "has statutory authority to gain access to information, that information is within the jurisdiction of a federal agency for purposes of § 1001."[18] Where the defendant had altered data on a computer that related to the driving records of certain commercial driver's license holders and those records were within the jurisdiction of the Federal Motor Carrier Safety Administration, he violated § 1001.[19]

[20] *See* *United States v. Shafer, 199 F.3d 826, 828–29 (6th Cir. 1999)* (statements made to state agency in respect to project funded by federal government). *But see* *United States v. Blankenship, 382 F.3d 1110, 1136-37 (11th Cir. 2004)* (federal government could exercise no authority over construction of highway even though most of the funds for the project were federal funds).

[21] *United States v. Baker, 626 F.2d 512, 514 n.5 (5th Cir. 1980)*.

Conversely, it is not required that the federal government exercise substantial oversight over a program that distributes federal funds if the statement is made with respect to an expenditure of those federal funds.[20] As the Fifth Circuit has stated, "the necessary link between deception of the non-federal agency and effect on the federal agency is provided by the federal agency's retention of the ultimate authority to see that the federal funds are properly spent."[21]

[22] *See* *United States v. Holmes, 111 F.3d 463, 465–66 (6th Cir. 1997)*; *United States v. Facchini, 874 F.2d 638, 642 (9th Cir. 1989)* (en banc).

[23] *See* *United States v. Herring, 916 F.2d 1543, 1547 (11th Cir. 1990)*.

[24] *United States v. Facchini, 874 F.2d 638 (9th Cir. 1989)* (en banc).

[25] *Facchini, 874 F.2d at 642*; *see United States v. Holmes, 111 F.3d 463, 465–66 (6th Cir. 1997)* (following *Facchini*); *see also United States v. Ford, 639 F.3d 718, 720–23 (6th Cir. 2011)* (state legislator's failure to disclose to state governmental agencies that he had consulting contract with health care company that received federal funds did not violate section 1001 since the need to report the income existed independent of the fact that federal funds were involved, and the state agencies had no jurisdiction over the federal funds).

[26] *United States v. Herring, 916 F.2d 1543 (9th Cir. 1990)*.

[27] *Herring, 916 F.2d at 1547*.

[28] *United States v. Suggs, 755 F.2d 1538 (11th Cir. 1985)*.

[29] *Suggs, 755 F.2d at 1542*. Note that the Eleventh Circuit has questioned the result in *Herring*, noting that the *Herring* decision ignored previous circuit authority to the contrary. *United States v. Blankenship, 382 F.3d 1110, 1140 n.33 (11th Cir. 2004)*. In *Blankenship*, the court held that the fact that federal highway funds were involved in a construction project did not give the federal Department of Transportation jurisdiction because it had no supervisory authority over the construction. *Blankenship, 382 F.3d at 1136–37*.

However, when federal funds are used to subsidize state administrative functions but not to fund entitlement plans, it is a closer question whether a false statement in connection with an entitlement claim falls within section 1001. For example, the United States Department of Labor provides substantial funds to the states for administrative costs related to unemployment benefits programs and has general oversight over the administration of each state's program, but has no oversight responsibility with respect to individual claims for benefits and no federal funds are used to pay those benefits. In cases involving false statements made by individuals to obtain unemployment compensation, the courts of appeals have split, with the Sixth and Ninth Circuits rejecting the application of section 1001,[22] and the Eleventh Circuit upholding it.[23] In *United States v. Facchini*,[24] the Ninth Circuit reasoned that although the state compensation system was established pursuant to federal approval and received federal funds allocated for use in administering the program, the Secretary of Labor lacked authority to withhold those funds, even if the state paid fraudulent claims. Therefore, the court found that fraudulent claims filed with the state program could not pervert any federal agency function.[25] In contrast, in *United States v. Herring*,[26] the Eleventh Circuit rejected this

narrow view, holding that the state agency's use of federal funds brought it within the purview of section 1001 even though those funds were not distributed to claimants.[27] It should be noted, however, that the *Herring* court relied for authority on *United States v. Suggs*,[28] a case involving falsified travel vouchers that did involve expenditures of federal administrative funds.[29]

[30] *United States v. Pickett, 353 F.3d 62, 67–69 (D.C. Cir. 2004)*. In *Pickett*, shortly after anthrax was mailed to several legislative offices, a Capitol Police officer left some white powder (actually sugar substitute) near an entrance to the U.S. Capitol with a note stating that "this is a Capitol Police training exercise." He was indicted on the theory that the investigation element of section 1001(c)(2) was satisfied by the investigation following the discovery of the powder. The court of appeals rejected that theory and reversed the defendant's conviction. *Pickett, 353 F.3d at 67–69*.

[31] *United States v. McNeil, 362 F.3d 570, 572–74 (9th Cir. 2004)*.

[32] *United States v. Horvath, 492 F.3d 1075, 1077–81 (9th Cir. 2007)* (false statement to probation officer concerning defendant's military service was required to be included in PSR, so it was covered by the judicial exception).

To date there has been little discussion of the legislative and judicial exceptions. With respect to the exceptions concerning the legislative branch, the District of Columbia Circuit has concluded that the false statement must relate to an "investigation or review" in existence at the time of the statement. Thus, the court squarely rejected the argument that the requirement of an "investigation" is satisfied by "the investigation which the false statement occasioned."[30] With respect to the exception for judicial proceedings, the Ninth Circuit has held that a false statement in a financial affidavit seeking appointment of counsel was part of the underlying criminal proceeding and so not prosecutable under section 1001,[31] and that a statement to a probation officer preparing a presentence report qualifies under the exception if the probation officer is required to include the substance of defendant's statement in the report.[32]

[33] *United States v. Yermian, 468 U.S. 63, 104 S. Ct. 2936, 82 L. Ed. 2d 53 (1984)*.

[34] *Compare United States v. Baker, 626 F.2d 512 (5th Cir. 1980)* (knowledge not required), *and United States v. Stanford, 589 F.2d 285 (7th Cir. 1978)* (same), *and United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)* (same), *with United States v.*

Yermian, 708 F.2d 365 (9th Cir. 1983), *rev'd*, *468 U.S. 63 (1984)* (knowledge not required).

[35] *Yermian, 468 U.S. at 75*.

[36] *United States v. Brown, 151 F.3d 476, 484 (6th Cir. 1998)*; *United States v. Wright, 988 F.2d 1036, 1038 (10th Cir. 1993)*; *United States v. Leo, 941 F.2d 181, 190 (3d Cir. 1991)*; *United States v. Bakhtiari, 913 F.2d 1053, 1059–60 (2d Cir. 1990)*; *United States v. Oren, 893 F.2d 1057, 1065 (9th Cir. 1990)*; *United States v. Suggs, 755 F.2d 1538, 1542 (11th Cir. 1985)*.

[37] *United States v. Herring, 916 F.2d 1543, 1546–47 (11th Cir. 1990)* (notice of the federal agency's involvement in a state's program is not an essential element for § 1001 conviction); *United States v. Dick, 744 F.2d 546, 553 (7th Cir. 1984)*.

With the decision of the Supreme Court in *United States v. Yermian*,[33] it is now clear that knowledge of federal involvement will not generally be required as an element of a section 1001 offense. In resolving a split among the circuits on this issue,[34] the Court held that "[b]oth the plain language and the legislative history establish that proof of actual knowledge of federal agency jurisdiction is not required under Section 1001."[35] The appellate courts all have construed *Yermian* to mean that no mental state is required with respect to whether a matter is within the jurisdiction of a federal agency in order to establish a section 1001 violation.[36] The Seventh and Eleventh Circuits have held that knowledge that federal funds were involved is not required.[37]

[38] *Yermian, 468 U.S. at 75 n.4*.

In this regard, care should be taken to recognize that the *Yermian* Court expressly left open whether the government must prove that it was reasonably foreseeable that the false statements were within the jurisdiction of a federal agency.[38] However, the Court's emphatic rejection of any knowledge of federal agency jurisdiction suggests that no such requirement will be imposed.

[3] False, Fictitious or Fraudulent Statements

Instruction 36-9 Elements of the Offense

In order to prove the defendant guilty of the crime charged, the government must establish beyond a reasonable doubt that:

First, on or about the date specified, the defendant made a statement or representation;

Second, that this statement or representation was material;

Third, the statement or representation was false, fictitious or fraudulent;

Fourth, the false, fictitious or fraudulent statement was made knowingly and willfully; and

Fifth, the statement or representation was made in a matter within the jurisdiction of the government of the United States (*or* federal funds were involved).

Authority

Third Circuit: *United States v. Castro, 704 F.3d 125 (3d Cir. 2013)*; *United States v. Moyer, 674 F.3d 192 (3d Cir.)*, *cert. denied*, *568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012)*.

Fifth Circuit: *United States v. Jara-Favela, 686 F.3d 289 (5th Cir. 2012)*; *United States v. Abrahem, 678 F.3d 370 (5th Cir. 2012)*.

Sixth Circuit: *United States v. Geisen, 612 F.3d 471 (6th Cir. 2010)*, *cert. denied*, *563 U.S. 917 (2011)*; *United States v. Siemaszko, 612 F.3d 450 (6th Cir. 2010)*.

Seventh Circuit: *United States v. Beaver, 515 F.3d 730 (7th Cir. 2008)*; *United States v. Ringer, 300 F.3d 788 (7th Cir. 2006)*; Seventh Circuit Pattern Criminal Jury Instruction for *18 U.S.C. § 1001* Making False Statement or Representation—Elements.

Eighth Circuit: *United States v. Olsen, 760 F.3d 825 (8th Cir. 2014)*; *United States v. McKanry, 628 F.3d 1010 (8th Cir.)*, *cert. denied*, *563 U.S. 917 (2011)*.

Ninth Circuit: *United States v. Selby, 557 F.3d 968 (9th Cir. 2009)*; *United States v. Peterson, 538 F.3d 1064, 1073 (9th Cir. 2008)*.

Tenth Circuit: *United States v. Finn, 375 F.3d 1033 (10th Cir. 2004)*.

Eleventh Circuit: *United States v. House, 684 F.3d 1173 (11th Cir. 2012)*; *United States v. Boffil-Rivera, 607 F.3d 736 (11th Cir. 2010)*; Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 36.

Comment

[1] ***Pub. L. No. 104-292, 110 Stat. 3459*** (1996).

[2] *See* Comment to Instruction 36-8, *above*.

[3] *See* ***United States v. Ali, 68 F.3d 1468, 1475 (2d Cir. 1995)*** (overruling prior Second Circuit authority holding that materiality element applied only to first clause of section 1001); *United States v. Steele, 933 F.2d 1313, 1318 (6th Cir. 1991)* (holding materiality requirement applicable to all three clauses of section 1001 in order "to exclude trivial falsehoods from the purview of the statute").

[4] *United States v. Castro, 704 F.3d 125 (3d Cir. 2013)*; *United States v. Jara-Favela, 686 F.3d 289, 301 (5th Cir. 2012)*; *United States v. House, 684 F.3d 1173, 1203 (11th Cir. 2012)*; *United States v. McKanry, 628 F.3d 1010, 1018 (8th Cir.)*, *cert. denied*, ***563 U.S. 927 (2011)***; *United States v. Siemaszko, 612 F.3d 450, 462 (6th Cir. 2010)*; *United States v. Selby, 557 F.3d 968, 977 (9th Cir. 2009)*; *United States v. Beaver, 515 F.3d 730, 740 n.4 (7th Cir. 2008)*; *United States v. Finn, 375 F.3d 1033, 1037 (10th Cir. 2004)*; *see* Eleventh Circuit Pattern Criminal Jury Instructions, Offense Instruction 36; Seventh Circuit Pattern Criminal Jury Instruction for *18 U.S.C. § 1001* Making False Statement or Representation—Elements (The prior Pattern Instruction collapsed elements 1 and 2 into a single element. This instruction separates the making of the statement and its falsity into two separate elements.).

The False Statements Accountability Act of 1996,[1] designated the "false, fictitious or fraudulent statement" provision as section 1001(a)(2). The only substantive change to this offense by the Act was to clarify that section 1001 applies to representations made to any of the three branches of government, with certain express limitations.[2] The Act also made explicit that materiality is an element of this offense, although the courts of appeals agreed on this point even though the language of the pre-Act provision was ambiguous.[3] The recommended formulation is the one most commonly used among the circuits,[4] although there is some variety in the other courts.

[5] *United States v. Coplan, 703 F.3d 46, 78 (2d Cir. 2012)*; *United States v. Oceanpro Industries, Ltd., 674 F.3d 323, 328–29 (4th Cir. 2012)*; *United States v. Moore, 612 F.3d 698, 700 (D.C. Cir. 2010)*. Prior to *Coplan*, *above*, the Second Circuit had on several occasions approved a formulation omitting materiality, but apparently treating it as part of the falsity element; *see, e.g.*, *United States v. Banki, 685 F.3d 99, 117 (2d Cir. 2012)*. In *Coplan*, the court made clear that it considers materiality an element of the offense and that its absence from the formulations in the previous cases "appears to be the result of simple oversight." *703 F.3d at 78 n.33*; *see also United States v. Litvak, 808 F.3d 160, 170 (2d Cir. 2015)* (citing *Coplan*).

The District of Columbia, Second, and Fourth Circuits have approved a formulation combining the first

three elements requiring as one element that defendant "made any materially false, fictitious, or fraudulent statement or representation."[5] As this formulation requires many factual findings in one element, it is likely to confuse the jury and cannot be recommended.

The Fourth Circuit has also approved a formulation joining the first, third, and fifth elements of the recommended instruction as follows:

[6] *United States v. Hamilton, 699 F.3d 356, 362 (4th Cir. 2012)*.

> (1) the defendant made a false statement in a matter involving a governmental agency; (2) the defendant acted knowingly or willfully; and (3) the false statement was material to a matter within the jurisdiction of the governmental agency.[6]

[7] Eighth Circuit Model Criminal Jury Instruction 6.18.1001B reads:

> It is a crime to make a [false] [fraudulent] material [representation] [statement] to an agency of the United States or about a matter within the agency's jurisdiction. This crime, as charged in Count of the Indictment, has five elements:
>
> *One*, the defendant knowingly and intentionally made the [statement] [representation] [as charged];
>
> *Two*, that [statement] [representation] was [false] [fraudulent];
>
> *Three*, the [statement] [representation] concerned a material fact;
>
> *Four*, the [statement] [representation] was made about a matter within the jurisdiction of the (name of the federal agency); and
>
> *Five*, the defendant knew it was untrue when [he] [she] made the [statement] [representation].

The Committee Comments to that instruction explain:

> Until recently, the Eighth Circuit Jury Instructions advised using three elements instead of five for false statement. However, Eighth Circuit jurisprudence routinely describes a violation of *18 U.S.C. § 1001* as having five elements which are essentially the same as those set forth above. *See United States v. McCreary, 628 F.3d 1010, 1018 (8th Cir. 2011)*; *United States v. Love, 516 F.3d 683, 688 (8th Cir. 2008)*; *United States v. Rice, 449 F.3d 887, 892 (8th Cir. 2006)*. In the interest of clarity and simplicity, the Committee has now separated two previous single elements which contained multiple essential ideas into distinct elements.

The Eighth Circuit's rule combines the requirement that the defendant knowingly and intentionally

made the statement and then adds in its fifth element that the defendant knew the statement was untrue.[7] The former Ninth Circuit pattern instruction favored a similar formulation, but elaborated on the "materiality" element, indicating what was meant by that term:

> First, the defendant [made a false statement] [used a writing which contained a false statement] in a matter within the jurisdiction of the [government agency or department];
>
> Second, the defendant acted willfully, that is deliberately and with knowledge that the statement was untrue; and

[8] Ninth Circuit Model Criminal Jury Instruction 8.73 (prior version).

> Third, the statement was material to the activities or decisions of the [specify government agency or department]; that is, it has a natural tendency to influence, or was capable of influencing the agency's decisions or activities.[8]

This formulation was not recommended because combining the elements would tend to confuse the issue for the jury. More recently, the Ninth Circuit has revised its instruction and has not only left the elements combined, but also requires proof that the defendant knew both that the statement was untrue and that his or her conduct was unlawful. Thus, it reads:

> First, the defendant [made a false statement] [used a writing that contained a false statement];
>
> Second, the [statement] [writing] was made in a matter within the jurisdiction of the [specify government agency or department];
>
> Third, the defendant acted willfully; that is, the defendant acted deliberately and with knowledge both that the statement was untrue and that his or her conduct was unlawful; and

[9] Ninth Circuit Model Criminal Jury Instruction 8.73.

> Fourth, the [statement] [writing] was material to the activities or decisions of the [specify government agency or department]; that is, it had a natural tendency to influence, or was capable of influencing, the agency's decisions or activities.[9]

[10] *See* *United States v. Finn, 375 F.3d 1033, 1037 (10th Cir. 2004)*.

In addition to approving the recommended formulation,[10] the Tenth Circuit has approved the following formulation treating the scienter element—that defendant acted knowingly and willfully—into two elements, as follows:

> First, the defendant made a false statement or representation to the government, specifically as detailed in Count Two of the Indictment.
>
> Second, the defendant made the statement knowing it was false.
>
> Third, the defendant made the statement willfully, that is deliberately, voluntarily and intentionally.
>
> Fourth, the statement was made in a matter within the jurisdiction of the Executive Branch of the United States.

[11] *United States v. Schulte, 741 F.3d 1141, 1148 (10th Cir. 2014)*; *see* Tenth Circuit Pattern Criminal Jury Instruction 2.46.1.

> And [f]ifth, the statement was material to the United States Food and Drug Administration.[11]

[12] *United States v. Henderson, 893 F.3d 1338 (11th Cir. 2018)* (citing *United States v. Clay, 832 F.3d 1259, at 1305 (11th Cir.2016)* (quoting *United States v. House, 684 F.3d 1173, 1203 (11th Cir. 2012)* (false statement can be material even if decisionmaker actually knew or should have known that it was false or did not actually rely on it.)).

[13] *United States v. Clay, 832 F. 3d 1259 (11th Cir. 2016)*.

[14] *United States v. Clay, 832 F. 3d 1259, 1308–09 (11th Cir. 2016)*.

The Eleventh Circuit states simply that a conviction under § 1001(2)(a) requires (1) that a statement was made; (2) that it was false; (3) that it was material; (4) that it was made with specific intent; and (5) that it was within the jurisdiction of an agency of the United States.[12] Not all of these elements have to be proved with direct evidence. In *Clay*,[13] the defendant was interviewed in his office while other agents continued executing a search warrant outside his office. He was an officer of the company closely involved with reports and submissions that covered services provided by the company and related expenses. Although the defendant argued that simply making statements during the government's raid was not evidence of willfulness, the court found that mens rea elements such as

knowledge or intent may be proved by circumstantial evidence and that there was sufficient evidence to allow a jury to find that he had acted willfully and with the necessary specific criminal intent.[14]

Instruction 36-10 First Element—Statement or Representation

The first element that the government must prove beyond a reasonable doubt is that the defendant made a statement or representation. In this regard, the government need not prove that the defendant physically made or otherwise personally prepared the statement in question. It is sufficient if defendant caused the statement charged in the indictment to have been made. Under this statute, there is no distinction between written and oral statements.

Authority

Fifth Circuit: *United States v. Elashyi, 554 F.3d 480 (5th Cir. 2008)*, *cert. denied*, *558 U.S. 829, 130 S. Ct. 363 (2009)*.

Sixth Circuit: *United States v. McGhee, 87 F.3d 184 (6th Cir. 1996)*.

Comment

[1] *United States v. Beacon Brass Co., 344 U.S. 43, 46, 73 S. Ct. 77, 97 L. Ed. 61 (1952)*; *United States v. Daily, 921 F.2d 994, 999–1000 (10th Cir. 1990)*; *United States v. Johnson, 937 F.2d 392, 396 (8th Cir. 1991)*; ***United States v. McCallum, 788 F.2d 1042, 1046 (5th Cir. 1986)***.

[2] *United States v. Adler, 380 F.2d 917, 922 (2d Cir. 1967)*.

[3] ***United States v. Isaacs, 493 F.2d 1124, 1157 (7th Cir. 1974)***; *United States v. Ratner, 464 F.2d 101, 104–05 (9th Cir. 1972)*; *see United States v. Fries, 781 F.3d 1137, 1140 (9th Cir. 2015)* (Defendant was alleged to have knowingly and willfully made false, fraudulent, and fictitious material statements when he impersonated another individual, called the FBI, and falsely implicated a third person for the use of chemical weapons, when he knew that the third person had no connection to the offense and that he himself was the person responsible).

[4] *United States v. Elashyi, 554 F.3d 480, 497 (5th Cir. 2008)*, *cert. denied*, ***558 U.S. 829 (2009)***.

There is no distinction between oral and written statements under this section.[1] The statement also does

not have to be made under oath.[2] Thus, oral, unsworn and untranscribed statements are sufficient to prove violations of section 1001.[3] The defendant need not personally make the statement as long as he or she caused the statement to be made.[4]

[5] *Compare* United States v. Medina de Perez, 799 F.2d 540 (9th Cir. 1986) (leading case recognizing exception), *with* United States v. Wiener, 96 F.3d 35 (2d Cir. 1996) (rejecting exception).

[6] 522 U.S. 398, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998).

[7] Id. at 404; *see also* United States v. Brandt, 546 F.3d 912, 917–18 (7th Cir. 2008) (trial court properly refused requested instruction linking exculpatory no doctrine to both materiality and scienter elements).

[8] 522 U.S. at 405–06.

For many years, the courts of appeals had been divided over whether there was an exemption from § 1001 for statements that fell within the so-called "exculpatory no" exception, that is, negative and exculpatory responses to questions directed against the subject of a criminal investigation.[5] In *Brogan v. United States*,[6] the Supreme Court settled this dispute, rejecting the exception. The Court held that the broad language of the statute, which refers to "any false statement," did not permit a judicially imposed limitation such as this. The Court noted that the rationale frequently cited by the lower courts that the exception is necessary to protect the *Fifth Amendment* rights of the subject is incorrect as "neither the text nor the spirit of the *Fifth Amendment* confers a privilege to lie."[7] The Court also rejected the argument that the exception is necessary to prevent prosecutorial overreaching, suggesting that this is a legislative argument and not one for the courts.[8]

[9] 514 U.S. 695, 115 S. Ct. 1754, 131 L. Ed. 2d 779 (1995).

[10] *See, e.g.*, United States v. Wood, 6 F.3d 692, 694–95 (10th Cir. 1993); United States v. Masterpol, 940 F.2d 760, 764–66 (2d Cir. 1991); United States v. Holmes, 840 F.2d 246, 248 (4th Cir. 1988); United States v. Mayer, 775 F.2d 1387, 1390 (9th Cir. 1985); United States v. Abrahams, 604 F.2d 386, 393 (5th Cir. 1979). *But see* United States v. Hubbard, 16 F.3d 694, 700–02 (6th Cir. 1994), *rev'd in part*, 514 U.S. 695 (1995) (rejecting exception).

[11] *514 U.S. at 715*.

[12] *Id. at 700 n.3*; *see United States v. Inserra, 34 F.3d 83, 87 (2d Cir. 1994)* (pre-*Hubbard* decision holding that false statements to Probation Office fall within section 1001).

[13] ***Pub. L. No. 104-292, 110 Stat. 3459*** (1996).

[14] *18 U.S.C. § 1001(b)*.

[15] *See* Comment to Instruction 36-8, *above*.

Prior to the Supreme Court's decision in *United States v. Hubbard*,[9] most courts had recognized the so-called "adjudicative exception," which held that section 1001 did not apply to courts acting in their adjudicative function, but did apply to courts acting in their administrative function.[10] *Hubbard* rendered this exception moot by holding that the federal courts were not a "department or agency of the United States,"[11] although there remained some question whether the statute applied to other entities within the judicial branch, such as the Probation Office.[12] The False Statements Accountability Act of 1996[13] revitalized the adjudicative exception by making section 1001 applicable to false statements made to the judicial branch, but making section 1001 inapplicable to "a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding."[14] Traditionally, the courts had treated the exception as a question of law and did not submit it to the jury. It would appear that this practice will continue under the 1996 revision,[15] although it is certainly subject to challenge, so the court may want to consider charging the jury on this issue pending a definitive decision holding that it is not necessary to do so.

[16] *United States v. Stewart, 420 F.3d 1007, 1013–14 (9th Cir. 2005)* (same statement made twice to same FBI agent); *United*

States v. Trent, 949 F.2d 998, 999–1000 (8th Cir. 1991) (same statement made to two different FBI agents).

Finally, multiple convictions under section 1001 may not be based on the same false statement made on separate occasions to representatives of the same federal agency.[16]

Instruction 36-11 Second Element—Materiality

The second element the government must prove beyond a reasonable doubt is that the defendant's statement or representation was material.

A fact is material if it was capable of influencing the government's decisions or activities. However, proof of actual reliance on the statement by the government is not required.

Authority

United States Supreme Court: *United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)*.

Second Circuit: *United States v. Adekanbi, 675 F.3d 178 (2d Cir. 2012)*.

Third Circuit: *United States v. Moyer, 674 F.3d 192 (3d Cir.)*, *cert. denied*, *568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012)*.

Fourth Circuit: *United States v. Hamilton, 699 F.3d 356, 362 (4th Cir. 2012)* *United States v. Garcia-Ochoa, 607 F.3d 371 (4th Cir. 2010)*.

Fifth Circuit: *United States v. Moore, 708 F.3d 639 (5th Cir. 2013)*; *United States v. Abrahem, 678 F.3d 370 (5th Cir. 2012)*.

Sixth Circuit: *United States v. Siemaszko, 612 F.3d 450 (6th Cir. 2010)*.

Seventh Circuit: *United States v. Lupton, 620 F.3d 790 (7th Cir. 2010)*; *United States v. Turner, 551 F.3d 657 (7th Cir. 2008)*.

Eighth Circuit: *United States v. Causevic, 636 F.3d 998 (8th Cir. 2011)*.

Ninth Circuit: *United States v. Peterson, 538 F.3d 1064 (9th Cir. 2008)*.

Tenth Circuit: *United States v. Schulte, 741 F.3d 1141 (10th Cir. 2014)*.

Eleventh Circuit: *United States v. House, 684 F.3d 1173 (11th Cir. 2012)*; *United States v. Boffil-Rivera, 607 F.3d 736 (11th Cir. 2010)*.

District of Columbia Circuit: *United States v. Stadd, 636 F.3d 630 (D.C. Cir. 2011)*; *United States v. Moore, 612 F.3d 698 (D.C. Cir. 2010)*.

Comment

See Comment to Instruction 36-5, *above*.

Instruction 36-12 Third Element—False, Fictitious or Fraudulent Statement

The third element that the government must prove beyond a reasonable doubt is that the statement or representation was false, fictitious or fraudulent. A statement or representation is "false" or "fictitious" if it was untrue when made, and known at the time to be untrue by the person making it or causing it to be made. A statement or representation is "fraudulent" if it was untrue when made and was made or caused to be made with the intent to deceive the government agency to which it was submitted.

If applicable: **If [the government's question] was ambiguous, so that it reasonably could be interpreted in several ways, then the government must prove that defendant's answer was false under any reasonable interpretation of the question.)**

Authority

First Circuit: *United States v. Wu, 711 F.3d 1 (1st Cir. 2013)*; *United States v. Hatch, 434 F.3d 1 (1st Cir. 2006)*.

Third Circuit: *United States v. Harra, 985 F.3d 196 (3d Cir. 2021)*, **quoting Treatise.**

Fifth Circuit: *United States v. Shah, 44 F.3d 285 (5th Cir. 1995)*.

Sixth Circuit: *United States v. McGhee, 87 F.3d 184 (6th Cir. 1996)*.

Ninth Circuit: *United States v. Milton, 602 F.2d 231 (9th Cir. 1979)*.

Tenth Circuit: *United States v. Schulte, 741 F.3d 1141 (10th Cir. 2014)*.

Eleventh Circuit: *United States v. McCarrick, 294 F.3d 1286 (11th Cir. 2002)*.

Comment

[1] *United States v. Castro, 704 F.3d 125 (3d Cir. 2013)* (defendant's statement that he had not received any money from extortion victim was literally true, as money actually came from government sting operation, even though defendant did not

know that at time he made denial); *United States v. Fontenot, 665 F.3d 640, 645–47 (5th Cir. 2011)* (illegal "campaign loan" was not a legal debt, so failure to list it among liabilities in loan application was not a false statement); *United States v. Ahmed, 472 F.3d 427, 431–33 (6th Cir. 2006)* (failure to disclose that defendant had been discharged early from Air Force after having his access to classified information terminated was not literally true response to question on form whether he had left previous job under "unfavorable circumstances"); *United States v. Hatch, 434 F.3d 1, 5–6 (1st Cir. 2006)* (disclosing DWI conviction already known to government employer but not disclosing two subsequent convictions was not literally true answer to question on form concerning prior convictions); *United States v. Good, 326 F.3d 589, 592 (4th Cir. 2003)* (affirming dismissal of indictment on this point); *United States v. Kosth, 257 F.3d 712, 719–20 (7th Cir. 2001)* (defendant did not request "literal truth" instruction, so there was no error in failing to give one).

As with the perjury statutes, the literal truth of the allegedly false statement is a defense to making a false statement in violation of section 1001.[1]

[2] *United States v. Schulte, 741 F.3d 1141, 1153 (10th Cir. 2014)*; *United States v. Hatch, 434 F.3d 1, 6 (1st Cir. 2006)*; *United States v. Anderson, 579 F.2d 455, 460 (8th Cir. 1978)*; *see also* ***United States v. Qing Chang Jiang, 476 F.3d 1026, 1029–30 (9th Cir. 2007)*** (entire exchange between defendant and government agent was ambiguous).

[3] *937 F.2d 392 (8th Cir. 1991)*.

[4] *United States v. Culliton, 300 F.3d 1139, 1141 (9th Cir. 2002)*; ***United States v. Manapat, 928 F.2d 1097, 1102 (11th Cir. 1991)***; *see United States v. Ahmed, 472 F.3d 427, 433 (6th Cir. 2006)* (question on form whether job applicant had left previous job under "unfavorable circumstances" was not fundamentally ambiguous); *United States v. Camper, 384 F.3d 1073, 1075–78 (9th Cir. 2004)* (question on form was slightly ambiguous, but not to extent that it would confuse anyone in defendant's position).

As the optional language in the instruction states, if the defendant's statement was in response to an ambiguous question, the government must negative any reasonable interpretation that would make the defendant's statement factually accurate.[2] In *United States v. Johnson*,[3] the Eighth Circuit held that the defendant could not be charged with the falsity of a certification made to the Air Force that a certain number of damaged windows could be reused when he was simply responding to the Air Force's own directive. It is also a defense that a question asked in an official form was "excessively vague or fundamentally ambiguous."[4]

The Third Circuit held that where there is an ambiguous government reporting requirement, to prove a statement in response to that requirement false:

[5] *United States v. Harra, 985 F.3d 196, 215 (3d Cir. 2021)*, **quoting Treatise.**

> [T]he Government must prove either (a) that its interpretation is the only objectively reasonable interpretation and that, under this interpretation, the defendant's statement was false, or (b) that the defendant's statement was false under each alternative, objectively reasonable interpretation. Put another way, if the Government cannot prove beyond a reasonable doubt that a defendant's statement was false under each objectively reasonable interpretation of an ambiguous reporting requirement, it cannot prove the element of falsity.[5]

[6] *Id. at 217* (quoting Instruction 6:12 with apparent approval).

Furthermore, where there is an ambiguous reporting requirement, the district court must provide the jury with the proper instruction regarding the government's burden of proof regarding falsity.[6]

[7] *44 F.3d 285 (5th Cir. 1995)*.

[8] *Id. at 294* (a promise may be false under section 1001 "if it is made without any present intention of performance and under circumstances such that [the promise] plainly, albeit implicitly, represents the present existence of an intent to perform").

[9] *Id.*; *see also United States v. Blankenship, 382 F.3d 1110, 1130–36 (11th Cir. 2004)* (distinguishing *Shah* on basis that here there were no false promises in the contracts the government alleged were false).

[10] *590 F.3d 93 (2d Cir. 2009)*.

[11] *Id. at 120*.

One question that has presented problems to courts is whether a promise to do or not do something in the future can qualify as a false statement. For example, in *United States v. Shah*,[7] the defendant placed a bid on a government contract promising that he would not disclose the terms of his bid to any competitor. In fact, on the day before he filed the bid he had discussed a bid-rigging scheme with a potential competitor, and a week after the bid was placed did disclose the terms to the competitor. The

Fifth Circuit rejected defendant's argument that a promise to act or not to act in the future can never be false, holding that a promise may be false if it is made without any present intention of keeping it.[8] Here, the fact that the defendant had already attempted to disclose the terms of the bid was circumstantial evidence that he had no intention of keeping the promise, and was, therefore, sufficient to form the basis of a section 1001 conviction.[9] Similarly, in *United States v, Stewart*,[10] the defendant, a criminal defense attorney, was representing an alleged terrorist. Prior to her first meeting with her client, defendant signed a document agreeing to certain security procedures, including a promise to refrain from relaying any messages from her client to the outside world. The Second Circuit affirmed her subsequent section 1001 conviction, holding that the jury could properly have found that at the time defendant agreed to the special procedures, she did not intend to abide by them, and so her agreement to them was knowingly false.[11]

[12] *See* *McNally v. United States, 483 U.S. 350, 358, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987)*.

[13] *See* *United States v. Corsino, 812 F.2d 26, 29 (1st Cir. 1987)*; *United States v. Ramos, 725 F.2d 1322, 1324 (11th Cir. 1984)*; *United States v. Miller, 658 F.2d 235, 237 (4th Cir. 1981)*; *United States v. Lichenstein, 610 F.2d 1272, 1276-77 (5th Cir. 1980)*.

[14] *See* *United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979)*; *United States v. Maher, 582 F.2d 842, 847 (4th Cir. 1978)*.

If the statements are alleged to be fraudulent, the courts of appeals generally require that the jury be required to find "intent to defraud." However, the courts have not defined "intent to defraud" to mean an intent to deprive the victim of money or property as the Supreme Court defined it in the context of the mail fraud statute,[12] but instead have defined it as an intent to deceive the government agency to which the statement was made.[13] This is in keeping with the caselaw discussing *18 U.S.C. § 287*, which prohibits "false, fictitious or fraudulent" claims against the United States.[14]

[15] *United States v. Dooley, 578 F.3d 582, 591–92 (7th Cir. 2009)*; *United States v. Stewart, 433 F.3d 273, 318 (2d Cir. 2006)*; *United States v. Sebaggala, 256 F.3d 59, 64 (1st Cir. 2001)*; *see also* *United States v. McKanry, 628 F.3d 1010, 1018 (8th Cir. 2011)*, *cert. denied*, ***563 U.S. 927 (2011)*** (leaving open question whether recantation defense exists, as defendant attempted to

call postal inspector on several occasions, but never actually spoke to him).

[16] *United States v. Sebaggala, 256 F.3d 59, 64 (1st Cir. 2001)*.

The courts are agreed that it is not a defense that the defendant subsequently recanted the false statement.[15] As the First Circuit explained, the perjury statute, *18 U.S.C. § 1623*, specifically provides for such a defense, and the failure of Congress to include similar language in section 1001 suggests that the legislature intended to omit it.[16]

Instruction 36-13 Fourth Element—Knowing and Willful Conduct

The fourth element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly and willfully.

An act is done knowingly if it is done purposely and voluntarily, as opposed to mistakenly or accidently.

An act is done willfully if it is done with an intention to do something the law forbids, that is, with a bad purpose to disobey the law.

Authority

Second Circuit: *United States v. Whab, 355 F.3d 155 (2d Cir. 2004)*; *United States v. West, 666 F.2d 16 (2d Cir. 1981)*.

Third Circuit: *United States v. Starnes, 583 F.3d 196 (3d Cir. 2009)*; *United States v. Moyer, 674 F.3d 192 (3d Cir.)*, *cert. denied*, *568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012)*.

Fourth Circuit: *United States v. Miller, 658 F.2d 235 (4th Cir. 1981)*.

Fifth Circuit: *United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990)*; *United States v. Whittington, 783 F.2d 1210 (5th Cir. 1986)*.

Seventh Circuit: *United States v. Dick, 744 F.2d 546 (7th Cir. 1984)*.

Eighth Circuit: *United States v. Hildebrandt, 961 F.2d 116 (8th Cir. 1992)*; *United States v. Ribaste, 905 F.2d 1140 (8th Cir. 1990)*.

Ninth Circuit: *United States v. Tatoyan, 474 F.3d 1174 (9th Cir. 2007)*; *United States v. Pacheco, 912 F.2d 297 (9th Cir. 1990)*.

Tenth Circuit: *United States v. Irwin, 654 F.2d 671 (10th Cir. 1981)*.

Eleventh Circuit: *United States v. Belcher, 927 F.2d 1182 (11th Cir. 1991)*.

Comment

See Comment to Instruction 36-7, *above*.

Instruction 36-14 Fifth Element—Matter Within the Jurisdiction of the United States Government

As I have told you, the fifth element with respect to each count is that the statement (*or* representation) be made with regard to a matter within the jurisdiction of the government of the United States. I charge you that the [insert name of department] is a department of the United States government.

There is no requirement that the statement be actually directed to or given to [insert name of department]. All that is necessary is that you find that it was contemplated that the document was to be used in a matter that was within the jurisdiction of the government of the United States (*if applicable:* or that federal funds were involved). To be within the jurisdiction of a department or agency of the United States government means that the statement must concern an authorized function of that department or agency.

(In this regard, it is not necessary for the government to prove that the defendant had actual knowledge that (e.g., the false statement) was to be used in a matter that was within the jurisdiction of the government of the United States. It is sufficient to satisfy this element if you find that the false statement was made with regard to a matter within the jurisdiction of the government of the United States.)

Authority

United States Supreme Court: *United States v. Yermian, 468 U.S. 63, 104 S. Ct. 2936, 82 L. Ed 2d 53 (1984)*; *United States v. Rodgers, 466 U.S. 475, 104 S. Ct. 1942, 1947 80 L. Ed. 2d 492 (1984)*.

First Circuit: *United States v. Notarantonio, 758 F.2d 777 (1st Cir. 1985)*.

Second Circuit: *United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991)*; *United States v. Bakhtiari, 913 F.2d 1053 (2d Cir. 1990)*.

Third Circuit: *United States v. Starnes, 583 F.3d 196 (3d Cir. 2009)*.

Fourth Circuit: *United States v. Jackson, 608 F.3d 193 (4th Cir. 2010)*.

Fifth Circuit: *United States v. Taylor, 582 F.3d 558 (5th Cir. 2009)*; *United States v. Baker, 626 F.2d 512 (5th Cir. 1980)*.

Sixth Circuit: *United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)*.

Seventh Circuit: *United States v. Murphy, 935 F.2d 899 (7th Cir. 1991)*; *United States v. Brack, 747 F.2d 1142 (7th Cir. 1984)*.

Ninth Circuit: *United States v. King, 660 F.3d 1071 (9th Cir. 2011)*, *cert. denied*, *567 U.S. 905, 132 S. Ct. 2740, 183 L. Ed. 2d 615 (2012)*; *United States v. Facchini, 874 F.2d 638 (9th Cir. 1989)* (en banc).

Eleventh Circuit: *United States v. Lawson, 809 F.2d 1514 (11th Cir. 1987)*; *United States v. Gafyczk, 847 F.2d 685 (11th Cir. 1987)*.

Comment

See Comment to Instruction 36-8, *above*.

[4] False Writing or Document

Instruction 36-15 Elements of the Offense

In order to prove the defendant guilty of the crime charged, the government must establish beyond a reasonable doubt that:

First, on or about the date specified, the defendant used a writing or document;

Second, the writing or document contained a false, fictitious or fraudulent statement or entry;

Third, that this statement or representation was material;

Fourth, the defendant knew that the writing contained a false, fictitious or fraudulent statement or entry, and knowingly and willfully used said writing or document; and

Fifth, the document or writing was used in a matter within the jurisdiction of the government of United States (*or* federal funds were involved).

Authority

Fifth Circuit: *United States v. London, 550 F.2d 206 (5th Cir. 1976)*.

Sixth Circuit: *United States v. White, 492 F.3d 380 (6th Cir. 2007)*.

Comment

[1] ***Pub. L. No. 104-292, 110 Stat. 3459*** (1996).

[2] *See* Comment to Instruction 36-8, *above*.

[3] *See* ***United States v. Ali, 68 F.3d 1468, 1475 (2d Cir. 1995)*** (overruling prior Second Circuit authority holding that materiality element applied only to first clause of section 1001); *United States v. Steele, 933 F.2d 1313, 1318 (6th Cir. 1991)* (holding materiality requirement applicable to all three clauses of section 1001 in order "to exclude trivial falsehoods from the purview of the statute").

The False Statements Accountability Act of 1996,[1] designated the "false writing or document" provision as section 1001(a)(3). The only substantive change to this offense by the Act was to clarify that section 1001 applies to false writings or documents made to any of the three branches of government, with certain express limitations.[2] The Act also made explicit that materiality is an element of this offense, although the courts of appeals agreed on this point even though the language of the pre-Act provision was ambiguous.[3]

The Fifth Circuit pattern instruction recommends the following instruction:

> *First:* That the defendant made a false statement to _____ [name department or agency of United States government];
>
> *Second:* That the defendant made the statement intentionally, knowing that it was false;
>
> *Third:* That the statement was material, and

[4] Fifth Circuit Pattern Criminal Jury Instruction 2.50.

> *Fourth:* That the defendant made the false statement for the purpose of misleading the _____ [name department or agency].[4]

The Tenth Circuit's instruction contains five elements:

> First: the defendant [made] [used] a false writing or document; specifically, he [as described in indictment];

Second: the defendant knew the [writing] [document] contained a [false] [fictitious] [fraudulent] statement or entry at the time he [made] [used] it;

Third: the defendant acted willfully, that is deliberately, voluntarily and intentionally;

Fourth: the matter involved was within the jurisdiction of the [executive] [legislative] [judicial] branch of the United States, and

[5] Tenth Circuit Criminal Pattern Jury Instruction 2.46.2.

Fifth: the false writing was material to [name government entity].[5]

The Seventh Circuit's version seems to needlessly include the knowing requirement in two of its five elements:

1. The defendant [made; used] a false [writing; document]; and

2. The defendant knew the [writing; document] contained a [false; fictitious; fraudulent] [statement; entry]; and

3. The [false; fictitious; fraudulent] [statement; entry] was material; and

4. The defendant [made; used] the [document; writing] knowingly and willfully; and

[6] Seventh Circuit Pattern Criminal Jury Instruction for *18 U.S.C. § 1001* Making or Using A False Writing or Document—Elements.

5. The defendant [made; used] the [writing; document] in a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the government of the United States.[6]

Instruction 36-16 First Element—Use of a Writing or Document

The first element that the government must prove beyond a reasonable doubt is that the defendant used a writing or document. In this regard, the government need not prove that the defendant personally prepared the writing or document. It is sufficient to satisfy this element if you find that he caused the writing or document charged in the indictment to be used.

Comment

[1] *United States v. Grenier, 513 F.3d 632, 637 (6th Cir. 2008)* (faxing and mailing same document to SEC were not separate violations, and statute of limitations ran from first of these).

[2] *United States v. Miranne, 688 F.2d 980, 986 (5th Cir. 1982)* (forty-two counts were not multiplicitous where same false loan application was used to secure forty-two different loans).

[3] *United States v. Siemaszko, 612 F.3d 450, 469 (6th Cir. 2010)* (multiple counts for submitting false document and later submitting new document summarizing false information in previous document is permissible); *United States v. Guzman, 781 F.2d 428, 432 (5th Cir. 1986)* (counts were not multiplicitous where same false statement was included in two different documents).

Multiple convictions under section 1001 may not be based on the same false document being provided to the same agency in different ways (such as by mailing, faxing, or e-mailing) for the same purpose on multiple occasions.[1] On the other hand, multiple convictions are permissible when the same false document was used on different occasions,[2] or when the same false information was included in different documents.[3]

Instruction 36-17 Second Element—False, Fictitious or Fraudulent Statement

The second element that the government must prove beyond a reasonable doubt is that the writing or document was false, fictitious or fraudulent. A statement or representation is "false" or "fictitious" if it was untrue when made, and known at the time to be untrue by the person making it or causing it to be made. A writing or document is "fraudulent" if it was untrue when made and was made or caused to be made with the intent to deceive the government agency to which it was submitted.

Authority

Ninth Circuit: *United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997)*.

Comment

See Comment to Instruction 36-12, *above*.

Instruction 36-18 Third Element—Materiality

The third element the government must prove beyond a reasonable doubt is that the defendant's statement or representation was material.

A fact is material if it was capable of influencing the government's decisions or activities. However, proof of actual reliance on the statement by the government is not required.

Authority

Second Circuit: *United States v. Adekanbi, 675 F.3d 178 (2d Cir. 2012)*.

Third Circuit: *United States v. Moyer, 674 F.3d 192 (3d Cir.)*, *cert. denied*, *568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012)*.

Fourth Circuit: *United States v. Hamilton, 699 F.3d 356, 362 (4th Cir. 2012)* *United States v. Garcia-Ochoa, 607 F.3d 371 (4th Cir. 2010)*.

Fifth Circuit: *United States v. Moore, 708 F.3d 639 (5th Cir. 2013)*; *United States v. Abrahem, 678 F.3d 370 (5th Cir. 2012)*.

Sixth Circuit: *United States v. Siemaszko, 612 F.3d 450 (6th Cir. 2010)*.

Seventh Circuit: *United States v. Lupton, 620 F.3d 790 (7th Cir. 2010)*; *United States v. Turner, 551 F.3d 657 (7th Cir. 2008)*.

Eighth Circuit: *United States v. Causevic, 636 F.3d 998 (8th Cir. 2011)*.

Ninth Circuit: *United States v. Peterson, 538 F.3d 1064 (9th Cir. 2008)*.

Tenth Circuit: *United States v. Schulte, 741 F.3d 1141 (10th Cir. 2014)*.

Eleventh Circuit: *United States v. House, 684 F.3d 1173 (11th Cir. 2012)*; *United States v. Boffil-Rivera, 607 F.3d 736 (11th Cir. 2010)*.

District of Columbia Circuit: *United States v. Stadd, 636 F.3d 630 (D.C. Cir. 2011)*; *United States v. Moore, 612 F.3d 698 (D.C. Cir. 2010)*.

Comment

See Comment to Instruction 36-5, *above*.

Instruction 36-19 Fourth Element—Knowing and Willful Conduct

The fourth element that the government must prove beyond a reasonable doubt is that the defendant acted knowingly and willfully.

An act is done knowingly if it is done purposely and voluntarily, as opposed to mistakenly or accidentally.

An act is done willfully if it is done with an intention to do something the law forbids, a bad purpose to disobey the law.

Authority

Second Circuit: *United States v. Whab, 355 F.3d 155 (2d Cir. 2004)*; *United States v. West, 666 F.2d 16 (2d Cir. 1981)*.

Third Circuit: *United States v. Moyer, 674 F.3d 192 (3d Cir.)*, *cert. denied*, *568 U.S. 846, 133 S. Ct. 165, 184 L. Ed. 2d 82 (2012)*; *United States v. Starnes, 583 F.3d 196 (3d Cir. 2009)*.

Fourth Circuit: *United States v. Miller, 658 F.2d 235 (4th Cir. 1981)*.

Fifth Circuit: *United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990)*; *United States v. Whittington, 783 F.2d 1210 (5th Cir. 1986)*.

Seventh Circuit: *United States v. Dick, 744 F.2d 546 (7th Cir. 1984)*.

Eighth Circuit: *United States v. Hildebrandt, 961 F.2d 116 (8th Cir. 1992)*; *United States v. Ribaste, 905 F.2d 1140 (8th Cir. 1990)*.

Ninth Circuit: *United States v. Tatoyan, 474 F.3d 1174 (9th Cir. 2007)*; *United States v. Pacheco, 912 F.2d 297 (9th Cir. 1990)*.

Tenth Circuit: *United States v. Irwin, 654 F.2d 671 (10th Cir. 1981)*.

Eleventh Circuit: *United States v. Belcher, 927 F.2d 1182 (11th Cir. 1991)*.

Comment

See Comment to Instruction 36-7, *above*.

Instruction 36-20 Fifth Element—Matter Within the Jurisdiction of the United States Government

As I have told you, the fifth element with respect to each count is that the writing or document be used (or made) with regard to a matter within the jurisdiction of the government of the United States. I charge you that the

[insert name of department] is a department of the United States government.

There is no requirement that the document be actually directed to or given to [insert name of department]. All that is necessary is that you find that it was contemplated that the document was to be used in a matter that was within the jurisdiction of the government of the United States (*if applicable:* or that federal funds were involved). To be within the jurisdiction of a department or agency of the United States government means that the statement must concern an authorized function of that department or agency.

(In this regard, it is not necessary for the government to prove that the defendant had actual knowledge that (e.g., the false statement) was to be used in a matter that was within the jurisdiction of the government of the United States. It is sufficient to satisfy this element if you find that the false statement was made with regard to a matter within the jurisdiction of the government of the United States.)

Authority

United States Supreme Court: *United States v. Yermian, 468 U.S. 63, 104 S. Ct. 2936, 82 L. Ed 2d 53 (1984)*; *United States v. Rodgers, 466 U.S. 475, 104 S. Ct. 1942, 1947 80 L. Ed. 2d 492 (1984)*.

First Circuit: *United States v. Notarantonio, 758 F.2d 777 (1st Cir. 1985)*.

Second Circuit: *United States v. Bilzerian, 926 F.2d 1285 (2d Cir. 1991)*; *United States v. Bakhtiari, 913 F.2d 1053 (2d Cir. 1990)*

Third Circuit: *United States v. Starnes, 583 F.3d 196 (3d Cir. 2009)*.

Fourth Circuit: *United States v. Jackson, 608 F.3d 193 (4th Cir. 2010)*.

Fifth Circuit: *United States v. Taylor, 582 F.3d 558 (5th Cir. 2009)*; *United States v. Baker, 626 F.2d 512 (5th Cir. 1980)*.

Sixth Circuit: *United States v. Lewis, 587 F.2d 854 (6th Cir. 1978)*.

Seventh Circuit: *United States v. Murphy, 935 F.2d 899 (7th Cir. 1991)*; *United States v. Brack, 747 F.2d 1142 (7th Cir. 1984)*.

Ninth Circuit: *United States v. King, 660 F.3d 1071 (9th Cir. 2011)*, *cert denied*, *567 U.S. 905, 132 S. Ct. 2740, 183 L. Ed. 2d 615 (2012)*; *United States v. Facchini, 874 F.2d 638 (9th Cir. 1989)* (en banc).

Eleventh Circuit: *United States v. Lawson, 809 F.2d 1514 (11th Cir. 1987)*; *United States v. Gafyczk, 847 F.2d 685 (11th Cir. 1987)*.

Comment

See Comment to Instruction 36-8, *above*.

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