

The State of Criminal Justice

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CHAPTER 6

TRUTH AND CONSEQUENCES: HELPING COMPANY EXECUTIVES UNDERSTAND (AND WARD AGAINST) THE EVER-PRESENT THREAT OF FALSE STATEMENTS AND FALSE CERTIFICATIONS

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I. FIRST: THE BASICS

Today's busy executives and compliance officers already have plenty of compliance-related concerns on their collective plates. That said, one of the most basic objectives when dealing with the federal government is to not make any false statements in submissions to the federal government. Although this, on its face, may strike many readers as simultaneously self-evident and a relatively light lift, in practice – and in the context of today's modern (and often transnational) company or organization – ensuring that such statements are, in fact, completely accurate is routinely fraught with danger.

The danger of running afoul of federal criminal proscriptions may be nearer at hand than you think. Consider, by way of example, the certification requirements contained in the 2015 amendments to the Federal Acquisition Regulation (FAR 52.222-50) anti-trafficking provisions (the provisions apply directly to over 300,000 direct contractors, and indirectly to many more sub-contractors at various levels).¹

The final FAR rules, among other things, require the Contracting Officer to certify that, on qualifying contracts: (1) the required anti-trafficking compliance plan has been implemented; and (2) to the best of the contractor's knowledge and belief, neither it nor any of its agents, subcontractors, or their agents is engaged in any trafficking activities (or, if abuses related to any prohibited activities have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions).² Making such a broad certification on an incredibly challenging supply chain compliance issue is inherently challenging. And the Contracting Officer or company that, say, inaccurately or misleading claims a clean bill of supply chain health (either *directly* to the U.S. Government, or *indirectly* to the customer, knowing that the information will ultimately be provided to the U.S. Government), puts him or herself squarely in the Government's false certification sights, should it later emerge that

* Portions of this chapter were adapted with permission from Andrew S. Boutros, T. Markus Funk, et al., *The Compliance Officer's Desk Book* (ABA 2017).

¹ See <http://www.jdsupra.com/legalnews/don-t-let-forced-labor-and-bribery-in-82814/>.

² See generally T. Markus Funk and Hartmann Young, *Significant Questions Remain Regarding Application of Human Trafficking Rules for Federal Contractors*, 10 BLOOMBERG WHITE COLLAR CRIME REP. 799 (Nov. 2, 2015) ("Some six months after the Federal Acquisition Regulation (FAR) Council's final rule regarding human trafficking became effective, significant questions remain regarding the rule's implementation and enforcement."), available at <https://dptax5jbd3l.cloudfront.net/images/content/1/4/v2/146848/Hartmann-and-Funk-BNA-Article-10.02.2015.pdf>.

the company knew of problems (or *should have* known of them), and failed to properly investigate/address them.³

Of course, this is just one for-instance; other analogous examples of the ever-present danger of false statement and false certification abound.

To better understand the government's expectations – and how to ensure that you meet them – we turn to the foundation of the false statement/false certification. In its simplest of terms, it is a crime to knowingly and willfully “lie” to the federal government. That crime is codified in the United States Code in 18 U.S.C. § 1001, in what is commonly referred to as “Section 1001.”⁴ Section 1001 covers express false statements as well as falsifying, concealing, or withholding information from the federal government.⁵ Federal prosecutors may also bring charges under Section 1001 when a person or organization fails to disclose material information on a government form when there is a duty to disclose the information; this type of crime is referred to as a “material omission.”⁶

When federal prosecutors bring charges against individuals and corporations under statutes involving false, fraudulent statements or obstructive conduct, such as, for example, witness tampering,⁷ false declarations before the grand jury,⁸ or destruction, alteration, or falsification of records in federal investigations and bankruptcy,⁹ they often include a charge under Section 1001.¹⁰ As a result, Section 1001 is often understood as a catch-all statute capturing all varieties of knowing and willful false statements and omissions.

From the perspective of the Department of Justice (DOJ), the purpose of Section 1001 is to “prohibit deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies.”¹¹ Section 1001 makes it a crime to provide false statements or entries on any matter within the jurisdiction of the executive, legislative, or judicial branch of the federal government.¹² Both individuals and corporations may be prosecuted for violations of Section 1001.¹³ Because of its ubiquitous and omnipresent nature, it is important for compliance officers and other company officials to have some general familiarity with the contours of liability under Section 1001.

This chapter focuses on the elements of a Section 1001 violation, as well as the interplay between Section 1001 charges and those brought for other substantive crimes. Finally, the chapter explores the ways in which compliance officers and their compliance functions can limit liability under Section 1001.

³ See *id.*

⁴ 18 U.S.C. § 1001.

⁵ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, Ch. 9-42.001 (2015), available at <http://www.usdoj.gov> [hereinafter USAM].

⁶ Skelling Bender, *Criminal Enforcement and Regulatory Compliance for Design Professionals*, ACEC 12 (2006).

⁷ 18 U.S.C. § 1512.

⁸ 18 U.S.C. § 1623.

⁹ 18 U.S.C. § 1519.

¹⁰ See, e.g., *United States v. Sampson*, 2015 WL 2066073, at *1 (E.D.N.Y. May 4, 2015) (charged with embezzlement under 18 U.S.C. § 666, obstruction of justice under 18 U.S.C. § 1503, witness and evidence tampering under 18 U.S.C. § 1512, concealment under 18 U.S.C. § 1519, and false statements under 18 U.S.C. § 1001); *United States v. Camick*, 796 F.3d 1206, 1210 (10th Cir. 2015) (defendant charged with mail fraud, wire fraud, identity theft, and false statements); *United States v. Blagojevich*, 2015 WL 4433687, at *2 (7th Cir. July 21, 2015) (explaining that in his first trial, former Illinois Governor Rod Blagojevich was convicted of violating Section 1001 in connection, but not the substantive crimes, although upon retrial, Blagojevich was convicted of the substantive offenses).

¹¹ USAM at 904.

¹² USAM at 902.

¹³ USAM at 917.

II. PROSECUTION 101: ESTABLISHING SECTION 1001 LIABILITY

To establish a violation of Section 1001 involving false statements, representations, or documents, the government must prove the following:

1. The accused made a statement, representation, or document that is false or fraudulent.
2. The statement, representation, or document is material.
3. The statement, representation, or document was made or used knowingly and willfully.
4. The statement, representation, or document pertained to activity within the jurisdiction of the federal agency to which it was given.¹⁴

As Section 1001 is a criminal offense, the government must prove all elements of the violation beyond a reasonable doubt. We outline important considerations for how federal prosecutors can establish each element of a Section 1001 prosecution. In the process, we aim to provide useful information to executives and compliance officers for on how to avoid violating the statute.

A. First Element: Defining False Statements or Representations

As a threshold matter, to be a crime under Section 1001, the statement or representation in question must be false. False statements are defined broadly and “may be written or oral, sworn or unsworn, voluntarily made in regard to information sought as or required by law, signed or unsigned.”¹⁵ The statute requires the statement to be actually false,¹⁶ but there is no requirement that the false statement be an express statement.¹⁷ As such, an *implied* false statement may also lead to Section 1001 liability.¹⁸

More specifically, an express false statement is a statement, written or oral, that is literally false.¹⁹ For example, claiming wages of X (say, \$100,000) on a tax return when your wages are really X+Y (say, \$250,000) is an express false statement. An implied false statement, on the other hand, is not an oral or written statement that is *literally* false, but instead falsely *implies* compliance with certain statutes, regulations, or government policies.²⁰ For example, an invoice from a government contractor in which the contractor has failed to comply with regulations governing the contract or entry into the program (such as the Federal Acquisition Regulation or Small Business Administration regulations) may produce Section 1001 liability even if the contract itself contains no express false statement of compliance.²¹

¹⁴ U.S. DEP'T OF JUSTICE, 2012 CRIMINAL TAX MANUAL, FALSE STATEMENTS (18 U.S.C. § 1001), 1, *available at* <http://www.justice.gov/tax/foia-library/criminal-tax-manual-title-page-0>; *see also* VIRGINIA KENDALL & T. MARKUS FUNK, CHILD EXPLOITATION AND TRAFFICKING: EXAMINING GLOBAL ENFORCEMENT AND SUPPLY CHAIN CHALLENGES AND US RESPONSES, at 52 (Rowman Littlefield, 2d ed., 2017) (discussing 1001 false statements in the certification context).

¹⁵ USAM at 909, *citing* United States v. Beacon Brass Co., 244 U.S. 43, 46 (1952).

¹⁶ USAM at 912. *See also*, United States v. Diogo, 320 F.2d 898, 905-09 (2d Cir. 1963) (finding that it was literally true that the defendant married).

¹⁷ *See, e.g.*, United States v. Brown, 451 F.3d 476, 485 (2d Cir. 1998) (implied falsity can be a basis for conviction).

¹⁸ *See id.*

¹⁹ *See id.* at 484-85.

²⁰ *See id.*

²¹ *See id.*

Section 1001 liability can also apply to both past and future statements and representations. In *United States v. Shah*, for example, the Fifth Circuit held that under Section 1001, “a promise may amount to a false, fictitious or fraudulent statement if it is made without any present intention of performance and under circumstances such that it plainly, albeit implicitly, represents the present existence of an intent to perform.”²²

B. *Second Element: Materiality*

Section 1001 liability also requires the government to establish the “materiality” of the false statement, representation, or document.²³ To be material, the statement must have “a natural tendency to influence, or be capable of influencing the decision-making body to which it is addressed.”²⁴ Basically that means that the false statement must be the type that matters. Lying about your age on a job application (say because you don’t want to admit your real age) when your age has no bearing on the decision to grant or deny the application is likely an immaterial falsity. In contrast, lying about your education when applying for a position with the FBI or lying about your income when submitting a tax filing is likely material.

Although the false statement or representation in question must be material, Section 1001 does not require the false statement or representation to actually influence the decision-maker; rather, it is sufficient that the statement merely have the *capacity* to influence the government.²⁵ Because materiality is an element of the offense, a jury – not a judge – must find that the charged false statement or representation was material.²⁶ As such, materiality is often proven through live testimony at trial. For example, in a fraud trial involving false declarations made at the border relating to merchandise seeking entry into the United States, the government would likely call a Customs and Border Protection official to testify that the false statement or representation in question is something that the agency cares about and is something that has the capacity to influence the agency’s decision to allow the merchandise to enter the United States or how much taxes, duties, or tariffs would be assessed on the merchandise upon entry.

C. *Third Element: “Knowing” and “Willful”*

Innocent false statements or representations do not offer a basis for a conviction under Section 1001, nor do false statements that arise out of mistakes or confusion. In addition, the DOJ has recently lessened the reach of Section 1001 by clarifying the meaning of “willfulness.” In the U.S. Solicitor General’s brief arguing that the U.S. Supreme Court should not accept an appeal in *Ajoku v. United States* No. 13-7264, the Solicitor General acknowledged that the correct interpretation of “willfully” in Section 1001 implies that a “jury must conclude ‘that [the defendant] acted with knowledge that his conduct was unlawful.’”²⁷ Later, the government reaffirmed this interpretation in the U.S. Solicitor General’s brief in opposition to an appeal in *Natale v. United States*, No. 13-744, filed March 14, 2014. In this brief, the Solicitor General argued that the interpretation of “willfully” required a “specific

²² 44 F.3d 285, 294 (5th Cir. 1995).

²³ See *Kungys v. United States*, 485 U.S. 759, 770 (1988).

²⁴ *Id.*

²⁵ USAM at 909 (citing *Kungys*, 485 U.S. at 770).

²⁶ 115 S. Ct. 2310 (1995).

²⁷ *Id.* at 4–5 (quoting *Bryan v. United States*, 524 U.S. 184 (1998)).

intent to deceive,” and reaffirmed the stance from *Ajoku* that Section 1001 requires proof that the defendant knew his or her conduct was unlawful.²⁸

D. Fourth Element: Jurisdictional Requirement

Section 1001 limits liability to false statements for “matters within the jurisdiction” of the federal government.²⁹ The jurisdictional element is satisfied if the agency receiving the false statement had the power to act on the statement,³⁰ there was an “intended” relationship between the federal government and the false statement,³¹ or the false statement was designed to induce government action.³²

III. PENALTIES: CIVIL AND CRIMINAL FINES AND SENTENCES

In the usual fraud case, Section 1001 calls for punishments ranging from criminal fines to prison terms of up to five years, and up to eight years for offenses involving certain crimes including domestic or international terrorism, sexual abuse, and registry of a sex offender.³³ Title 18, United States Code, Section 3571, which sets maximum fines for criminal defendants, limits fines for Section 1001 violations to \$250,000 for individuals and \$500,000 for corporations.³⁴ As convictions under Section 1001 often involve convictions of other more specific substantive crimes (say, mail fraud, wire fraud, or obstruction, for example), the overall sentencing paradigm will ultimately depend upon the character and severity of the related charges.

Convictions under Section 1001 themselves call for a preliminary base offense level of six under § 2B1.1(a) of the United States Sentencing Guidelines.³⁵ That said, in the main that base offense level is increased by many other specific factors in the Guidelines, such as monetary loss, bodily harm threatened or incurred, deriving more than \$1 million in gross receipts as a result of the offense, danger caused to soundness of a financial institution, misrepresentation by a defendant as a representative of a particular organization or government agency, or violations of judicial or administrative orders can result in much higher offense levels.³⁶

IV. APPLICATION OF THE STATUTE OF LIMITATIONS

The statute of limitations for any violation of Section 1001 is five years from the date that the false statement or representation is made to, or submitted to, the government.³⁷

²⁸ *Id.* at 5.

²⁹ 18 U.S.C. § 1001(a).

³⁰ *United States v. DiFonzo*, 603 F.2d 1260, 1264 (7th Cir. 1979).

³¹ *United States v. Stanford*, 589 F.2d 285, 297 (7th Cir. 1978).

³² *United States v. Barbato*, 471 F.2d 918, 922 (1st Cir. 1973).

³³ *Lagoy & Phillips*, at 1151.

³⁴ 2012 *Criminal Tax Manual* at 1.

³⁵ *Lagoy & Phillips*, at 1165; *see also U.S. Sentencing Guidelines Manual* § 2B1.1(a) (2015).

³⁶ *Lagoy & Phillips*, at 1165-66.

³⁷ 18 U.S.C. § 3282; *see also United States v. Grenier*, 513 F.3d 632, 635 (6th Cir. 2008).

V. THE RELATED CRIME OF FALSE CERTIFICATION

When prosecutors file substantive charges against a defendant (say, theft of government funds, for example), it is not unusual for prosecutors to include a Section 1001 charge as part of the charging instrument.³⁸ Prosecutors often add 1001 as a “tag-along” charge because the Section 1001 charge may be the easiest conduct to prove to a jury, and may, as a matter of leverage, lead to more plea agreements. The thinking is that, if all else fails, if there is a knowing and willful lie by the defendant that qualifies for prosecution, prosecutors should at least be able to prove that crime, if nothing else. Therefore, it is not unusual to see Section 1001 charged along with other (often more “substantive”) crimes. In this regard, Section 1001 can sometimes be viewed as a prosecutor’s insurance policy for a conviction, and, as such, it may also lead to more plea agreements since defendants may realize that they cannot beat the Section 1001 violation.

For the same reason, Section 1001 can also be used as leverage to convince a target to cooperate with federal authorities if the person has been caught lying to federal agents, for example.³⁹

VI. THINKING BEYOND “1001 LIABILITY”: OTHER TITLE 18 CRIMES

Section 1001 is not the only false certification crime within Title 18 of the United States Code. Title 18, in fact, contains several more specific false statement statutes that criminalize false statements under specific circumstances or relating to specific conduct, such as false statements submitted to federally insured banks⁴⁰ and conduct that obstructs the administration of justice.⁴¹

Obstruction. The obstruction of justice statutes, 18 U.S.C. §§ 1501-21, are often used in conjunction with Section 1001, as false statements given to the government in the course of the investigation or a government function can often also obstruct an investigation.⁴² For example, in the government’s high-profile—but ultimately unsuccessful—prosecution of Laura Stevens, an attorney at GlaxoSmithKline, Ms. Stevens was charged with crimes under both Section 1001 and Section 1512 for false statements allegedly made to the Food & Drug Administration (FDA).⁴³ Although the court ultimately dismissed the case against Ms. Stevens, the case is a demonstrative example of a recent tandem false statement and obstruction prosecution and as such, is discussed in more detail later in this chapter.

Perjury. Another similar and related set of statutes, 18 U.S.C. §§ 1621-23, cover false statements made under oath; these laws are known as perjury statutes. They are quite

³⁸ See, e.g., Blagojevich, 2015 WL 4433687, at *2 (where in his first trial, the former Governor of Illinois was only convicted of the Section 1001 charge, with the jury hanging on all other counts, but upon retrial, the defendant was convicted of substantive counts); *United States v. Stewart*, 323 F. Supp. 2d 606 (S.D.N.Y. 2004), *aff’d*, 433 F.3d 273 (2d Cir. 2006); see also John R. Emshwiller & Gary Fields, *For Feds, ‘Lying’ Is a Handy Charge*, WALL ST. J., April 9, 2012; Jessie Lagoy & Eleanor Phillips, *False Statements and False Claims*, 51 AM. CRIM. L. REV. 1149, 1151-52 (2014).

³⁹ Emshwiller & Fields, at 2.

⁴⁰ 18 U.S.C. § 1014.

⁴¹ 18 U.S.C. §§ 1501-21.

⁴² The DOJ itself recognizes the overlap between the statutes in the U.S. ATTORNEY’S MANUAL, ch. 9-69.1000, noting the overlap between Section 1001 and 18 U.S.C. § 1505.

⁴³ *Judge Dismisses Case Against Former GSK Attorney, Citing “Serious Implication” for the Practice of Law*, Rx COMPLIANCE REPORT, 3-4 (May 2011).

similar to Section 1001, although covering only those statements that are made under oath.⁴⁴ As a compliance officer or executive, if you are ever called to testify under oath (whether, say, in court or in a deposition) or otherwise called upon to submit a written statement under oath (such as an affidavit or declaration), you should be aware that your conduct is subject to specific perjury statutes, which can have their own elements and legal framework.

VII. CLOSELY-RELATED, YET DIFFERENT: THE FALSE CLAIMS ACT

The False Claims Act (FCA)⁴⁵ is another false certification law that is similar to Section 1001. In fact, at one time the two were combined under just one statute.⁴⁶ The FCA directly deals with “claims” for payments to and from the United States government, whereas Section 1001 deals with all types of statements and representations made to the government.⁴⁷

The FCA is the government’s primary civil vehicle for combating fraud.⁴⁸ Since 1986, the government has been able to civilly recover over \$35 billion via the FCA, \$9 billion of which was recovered in 2012 and 2013.⁴⁹ Violations under the FCA can be brought by private citizens and often times by whistleblowers.⁵⁰ There are strong incentives in place for whistleblowers to bring suits under the FCA because a whistleblower can receive up to 30% of any ultimate recovery under the statute.⁵¹ In addition to per claim statutory fines, the damages for violations of the FCA are automatically treble.⁵²

The two provisions that are used most often for FCA prosecutions are: (1) the false claims provision under 31 U.S.C. § 3729(a)(1)(A), which creates liability for knowingly presenting a false or fraudulent claim for payment; and (2) the false statement provision under 31 U.S.C. § 3729(a)(1)(B), which creates liability for knowingly making or using a false record or statement material to a false or fraudulent claim for payment.⁵³ Whether civilly or criminally, the FCA can be used in tandem with Section 1001 as liability under one statute if it does not preclude liability under another statute.⁵⁴

VIII. CLOSER TO HOME: LIABILITY FOR COMPLIANCE OFFICERS AND EXECUTIVES

As noted at the outset, individual employees and executives, as well as the companies and organizations they work for, may be charged with violations of Section 1001.⁵⁵ As a result, it is important for compliance officers and general counsels to understand the contours of Section 1001 liability.

⁴⁴ Charles Doyle, *Perjury Under Federal Law: A Brief Overview*, i (Congressional Research Service 2014).

⁴⁵ 31 U.S.C. §§ 3729-33. The FCA also includes a criminal provision, 18 U.S.C. § 287.

⁴⁶ Lagoy & Phillips at 1150.

⁴⁷ 31 U.S.C. §§ 3729-33.

⁴⁸ LORI L. PINES, KRISTEN M. MURPHY & NADYA SALCEDO, *PRACTICAL LAW, UNDERSTANDING THE FALSE CLAIMS ACT 1* (Thompson Reuters 2015).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Pines, Murphy & Salcedo, *Understanding the False Claims Act*, 1.

⁵² *Id.* It should be noted that damages can be reduced by half if the company self-discloses the fraudulent activity.

⁵³ *Id.* at 2.

⁵⁴ Lagoy & Phillips at 1151. *See also* United States v. Dedman, 527 F.3d 577, 603 (6th Cir. 2008) (allowing for convictions under both Section 1001 and the FCA).

⁵⁵ 19 C.J.S. § 815.

Example: The Prosecutions of Laura Stevens and Christi Sulzbach

In 2010, Laura Stevens, an attorney in the General Counsel's office at the pharmaceutical manufacturer GlaxoSmithKline (GSK), was personally charged with four counts of making false statements to the FDA under Section 1001.⁵⁶ The government alleged that conclusions made in three different 2003 letters to the FDA as well as a statement regarding the payments to attendees at speaker programs constituted false statements.⁵⁷ In addition to being charged under Section 1001, Ms. Stevens was charged with one count of concealment under 18 U.S.C. § 1512 as well as obstruction of a proceeding under 18 U.S.C. § 1519.⁵⁸

In 2007, Christi Sulzbach, attorney for Tenet Healthcare, was charged with violations of the FCA.⁵⁹ The charges stemmed from a sworn declaration that Ms. Sulzbach had submitted certifying that Tenet was in compliance with applicable federal healthcare statutes and programs.⁶⁰ The case against Ms. Sulzbach was unique in that she was being prosecuted as an individual for fraud that a corporate predecessor to Tenet had committed; Ms. Sulzbach herself had no role in the agreements that violated the FCA.⁶¹ Though the case was ultimately dismissed, it demonstrates the potential for individuals to be prosecuted under the FCA.

The cases against Ms. Stevens and Ms. Sulzbach illustrate the willingness of the government to use Section 1001 and related false certification statutes to prosecute company officials who, although they may not have been directly involved in the underlying fraud or misconduct itself, they hold positions of trust and compliance – gatekeepers, so to speak.

IX. EVER-PRESENT IN THE PROSECUTORIAL TOOL BELT TO OVERCOME PRIVILEGE ARGUMENTS IN 1001 CASES: THE CRIME-FRAUD EXCEPTION

It is axiomatic that the attorney-client privilege protects communications between clients and their attorneys when those communications are for the purpose of obtaining or rendering legal advice. But as much as the attorney-client privilege can protect confidential client communications, prosecutors can, as was the case with Ms. Stevens, use the crime-fraud exception to obtain access to important, sensitive documents and evidence that can be used to bring Section 1001 charges.

Ms. Stevens' prosecution raised an interesting question regarding the reach of the crime-fraud exception to the attorney-client privilege. Under the crime-fraud exception, communications between attorneys and their clients are not privileged if the attorney is consulted in furtherance of continuing or contemplated crimes or frauds.⁶² The exception thus allows the government to gain access to what may originally have been thought to be

⁵⁶ Rx Compliance Report at 1.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 4.

⁵⁹ Janice A. Anderson & Ryan M. McAteer, *Compliance Officers and Personal Liability: Are You Covered?*, COVERAGE TODAY 28 (Mar. 2014).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Dana M. McSherry, *Privilege Defenders Beware: The Low Showing Required for Application of Crime-Fraud Exception to Attorney-Client Privilege*, BLOOMBERG BNA, 1 (2013).

privileged attorney-client materials.⁶³ In order for the privilege not to attach, the government must prove:

1. The client was engaged in, or was planning, criminal or fraudulent activity when the attorney-client communication took place; and
2. The communications were intended to facilitate or conceal the criminal or fraudulent activity.⁶⁴

Although the elements of the crime-fraud exception may be well defined across the circuits, the necessary level of proof that the government must establish to invoke the exception is not uniform across the federal circuits. In this regard, the circuits are split into three different groups, all of which require the government to meet different levels of proof to satisfy the crime-fraud exception.

The First, Second, Third, Sixth, and Ninth Circuits all subscribe to a “reasonable basis” or “probable cause” standard that requires “there . . . be probable cause or a reasonable basis to suspect or believe that the client was committing or intending to commit a crime or fraud and that the attorney-client communications were used in furtherance of the alleged crime or fraud.”⁶⁵ In contrast, the D.C., Fourth, and Eleventh Circuits all require “a showing of evidence that, if believed by a trier of fact, would establish that some violation was ongoing or about to be committed and that the attorney-client communications were used in furtherance of that scheme.”⁶⁶ Finally, the Fifth and Seventh Circuits require “evidence sufficient to compel the party asserting the privilege to come forward with an explanation for the evidence offered against the privilege.”⁶⁷

X. DEFENSE IS THE BEST OFFENSE: BASIC STEPS TO LIMIT FALSE STATEMENT/CERTIFICATION LIABILITY

Although Section 1001 may be a favorite tool for prosecutors ferreting out corporate malfeasance, compliance functions can take affirmative preventive steps to limit liability under the statute (that is, to ensure that their statements and certifications are, in fact, accurate).

First, company compliance and legal department personnel can and should conduct regular and careful audits of paperwork, electronic filings, personnel, and any other potential source of false statements to develop a record of compliance.⁶⁸ In addition, high-risk areas of government focus (such as financial statements or tax filings) can be prioritized as deserving additional attention and maximum precision.⁶⁹ Quick and effective response protocols to any potential problems also should be implemented and documented.⁷⁰ Finally, companies should use advanced technologies, such as updated record-keeping systems, to avoid errors that can

⁶³ *Id.*

⁶⁴ *Id.* (internal citations omitted).

⁶⁵ McSherry at 2 (internal citations omitted).

⁶⁶ *Id.* (citing *In re Grand Jury*, 705 F.3d 133, 152 (3d Cir. 2012)).

⁶⁷ *Id.* (citing *In re Grand Jury*, 705 F.3d at 152).

⁶⁸ ANTHONY ALEXIS, RICHARD BULGER & MICHAEL VOLKOV, ENVIRONMENTAL CRIMES: INCREASED ENFORCEMENT IN 2011, at 23 (Mayer Brown 2011), available at https://www.mayerbrown.com/public_docs/Environmental_Crime_Enforcement2.pdf.

⁶⁹ *Id.*

⁷⁰ *Id.*

be viewed as false statements.⁷¹ All of these steps may negate the element of “knowledge” or “willfulness” (or otherwise demonstrate good faith efforts) in the event of Section 1001 investigation, or, even worse, prosecution.

In addition, the compliance function can limit individual and corporate exposure under Section 1001 when they can demonstrate that the disputed actions in question were the result of a good faith reliance on an expert after full disclosure of all relevant facts to that expert.⁷² In this regard, for example, if an individual within the corporation relies on the work of a tax accountant who is given all relevant, truthful financial information, it will be exceedingly difficult for prosecutors to bring – and highly unlikely that prosecutors will want to bring – a prosecution under Section 1001 since, at a minimum, the requisite criminal state of mind will almost certainly be lacking.

XI. LIMITING LIABILITY FOR OTHER FALSE CERTIFICATIONS

Another way for companies to limit their liability for other false certification crimes is through strong compliance programs.⁷³ Often, prosecutors (criminally) and plaintiffs (civilly) will use a defendant’s weak or nonexistent compliance program to support the argument that the defendant acted with deliberate ignorance or a reckless disregard for the unlawful conduct.⁷⁴ A strong compliance program can provide powerful evidence to show the company’s lack of intent to commit a false certification crime.⁷⁵

XII. AND IN ANY EVENT . . . THE IMPORTANCE OF DIRECTORS’ AND OFFICERS’ LIABILITY INSURANCE

Because compliance officers and other company personnel may be subject to Section 1001 prosecutions, the availability of company directors and officers (D&O) liability insurance policies are an important consideration worthy of attention. Such policies can offer varying degrees of coverage when such an individual is subjected to prosecution. Some coverage is triggered when an employee submits an indemnification claim to her employer corporation and the corporation cannot financially meet its indemnification obligations due to insolvency. Because of the differing nature of the D&O insurance claims, it is beneficial for compliance officers to understand if they are covered under their company’s policy, and if so, exactly what types of claims are covered.

In addition, insurance policies can also prove valuable to a company facing liability for the actions of its employees, including when the company is obligated to indemnify an employee charged with a violation within the scope of his or her employment.

XIII. PARTING THOUGHTS

Criminal liability is not always limited to those situations in which an express falsehood is delivered to the federal government in written or oral form. Omissions,

⁷¹ *Id.*

⁷² See *United States v. Smith*, 523 F.2d 771, 778 (5th Cir. 1975).

⁷³ *Pines, Murphy & Salcedo* at 6.

⁷⁴ *Id.*

⁷⁵ *Id.*

concealments, or other implied false certifications may also lead to liability. Strong compliance programs (and counsel capable of practically and effectively designing or implementing them) may decrease the risk of false certifications and mitigate the risk of prosecution or harsh penalties.