

CRIMINAL LIABILITY FOR FALSE STATEMENTS: 1001 THINGS TO WORRY ABOUT DURING FERC AND CFTC INVESTIGATIONS OF ENERGY COMPANIES AND INDIVIDUALS

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Synopsis: In recent years, the FERC and CFTC have aggressively pursued allegations of fraud and market manipulation under expanded enforcement authority. Agency enforcement action, however, is only part of the regulatory risk that energy companies face. Companies and their employees must also contend with the potential for a referral to the DOJ for criminal investigation and prosecution. This article addresses one aspect of this risk—false statements prosecution arising out of a FERC or CFTC investigation. This is an important subject because a false statements prosecution is a common enforcement tool used by the DOJ. The relative simplicity of the offense makes it an attractive alternative for prosecutors faced with the difficulty of pursuing charges of fraud or manipulation in complex and sophisticated markets.

This article provides an introduction to the federal law governing criminal false statements, with a special emphasis on those aspects most likely to be significant to companies and individuals operating in regulated markets. Its focus is on the False Statements Act, 18 U.S.C. section 1001, and the statute’s use by prosecuting authorities. The basic elements of the statutory offense are outlined along with brief descriptions of their significance in the context of a FERC or CFTC investigation. This article is divided into separate sections addressing the components of a false statement offense, including: (1) federal jurisdiction; (2) written and oral statements covered by the statute; (3) falsity and concealment; (4) materiality; and (5) the meaning of “knowing” and “willful” as used in the context of a section 1001 prosecution. It concludes by summarizing key aspects of the law in the form of suggested points that can (and should) be incorporated into compliance programs for those involved in the regulated energy markets.

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I. INTRODUCTION

There has been a lot of attention paid in recent years to the risk of enforcement actions in the energy markets. Both the Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC) have aggressively pursued allegations of fraud and market manipulation under expanded enforcement authority granted by Congress.¹ The trend toward increased enforcement will likely continue. In its most recent annual report, the FERC's Office of Enforcement emphasized that its renewed priorities for the coming year are to focus on "[f]raud and market manipulation" and conduct "that threatens the transparency of regulated markets."² The CFTC, although responsible for diverse commodity and derivatives markets, has announced that its enforcement efforts will continue to extend to the energy sector.³

Agency action is only one part of the regulatory risk faced by energy companies. Companies operating in regulated markets face the additional concern that allegations of misconduct may attract the scrutiny of criminal prosecutors. In addition to the power to impose or seek financial penalties, both the CFTC and the FERC have the authority to refer matters to the United States Department of Justice (DOJ) for criminal investigation. The CFTC often works closely with the DOJ in conducting investigations that can result in parallel civil and criminal actions.⁴ Criminal referral has also long been part of the FERC's statutory enforcement authority and became more significant with the passage of the Energy Policy Act of 2005, which increased the maximum fines and terms of imprisonment for criminal offenses when based on a referral by the FERC.⁵ Although there have not been criminal prosecutions related to FERC enforcement investigations or actions since the passage of the Act, it would be a mistake not to see warning signs. The most recent annual report by the Office of Enforcement, for example, indicates that an unspecified number of misconduct matters were referred to the DOJ in 2014.⁶

1. See, e.g., OFFICE OF ENFORCEMENT, FERC, 2014 REPORT ON ENFORCEMENT 6, Docket No. AD07-13-008, (Nov. 20, 2014) (indicating that in fiscal year (FY) 2014 staff obtained nearly \$25 million in fines and \$4 million in disgorgement, as well as opening 17 new investigations) [hereinafter 2014 REPORT ON ENFORCEMENT]; see also Press Release, U.S. Commodity Futures Trading Comm'n (CFTC), CFTC Releases Annual Enforcement Results for Fiscal Year 2014 (Nov. 6, 2014), www.cftc.gov/PressRoom/PressReleases/pr7051-14 (indicating that in FY 2014 the CFTC recovered a record \$3.27 billion in monetary sanctions and filed 67 new enforcement actions).

2. 2014 REPORT ON ENFORCEMENT, *supra* note 1, at 2.

3. See, e.g., Timothy Massad, Chairman, CFTC, Remarks before the Natural Gas Roundtable 3 (May 26, 2015) ("While our enforcement activity has focused on financial benchmarks, the policy concerns I want to discuss pertain to benchmarks across the board, including those in the energy industry.").

4. See, e.g., Press Release, CFTC, CFTC Releases Annual Enforcement Results for Fiscal Year 2014 5 ("Approximately 95 percent of the Enforcement Division's major fraud and manipulation cases filed in FY 2014 involved . . . parallel criminal proceeding[s]").

5. See, e.g., Natural Gas Act, 15 U.S.C. § 717s(a) (2011); Natural Gas Policy Act § 504(c), 15 U.S.C. § 3414(c) (2011); Energy Policy Act of 2005 § 314(a)(2), (b)(2), Pub. L. No. 109-58, 119 Stat. 690, 691 (codified as amended at 15 U.S.C. § 3414(c)).

6. Prior to the passage of the Act—during the so-called "Western Energy Crisis"—there were a number of criminal prosecutions arising out of FERC and CFTC investigations into false price reporting to natural gas

This article focuses on one aspect of the risk of criminal liability in the energy markets—the potential for a false statements prosecution arising out of a FERC or CFTC investigation. There are sound reasons to be concerned about this issue. A false statements prosecution can be an attractive option for prosecutors in complex investigations. Uncovering evidence of “market manipulation” is not a simple task for the DOJ, as the relevant statutes and regulations often do not clearly define prohibited behavior and may be difficult to apply. Federal prosecutors also generally lack industry expertise and may therefore be ill-equipped to investigate and assess complex transactions in energy markets. As a result, assembling a fraud or market manipulation case under exacting criminal law standards can be a challenge.

Putting together a criminal false statements case, on the other hand, is relatively straightforward. Any DOJ probe into the energy markets will likely arise from a pre-existing agency investigation or enforcement action, and prosecutors will therefore have the benefit of extensive fact-finding and prior witness statements. Prosecutors need only test the veracity of prior testimony to build a criminal case. With the promulgation of market conduct and other rules focused on the accuracy of communications and the dissemination of market information (and related enforcement settlements and actions), both the FERC and CFTC have signaled that misrepresentations pose a serious threat to the public interest in maintaining reliable and competitive energy markets.⁷ The vigorous criminal prosecution of false statements is an effective, and efficient, means to vindicate this public interest.

This article provides a brief primer on false statements for those who may not be otherwise familiar with federal criminal law. It is not intended to be comprehensive and does not address every aspect of a false statements prosecution. Instead, this article concentrates on identifying those aspects of the criminal law in this area that may most likely have significance for individuals or businesses engaged in the regulated energy markets. The hope is that this article can be used as a guide for companies and their employees in order to help them better understand and assess the risk of criminal liability in their business activities.

indices. These prosecutions involved significant legal challenges, lengthy proceedings, and multiple appeals. A number of individual natural gas traders were eventually convicted of criminal charges involving false reporting under the Commodity Exchange Act (CEA), 7 U.S.C. §13(a)(2) (2010) and violations of the federal conspiracy and wire fraud statutes, 18 U.S.C. §§ 371, 1343 (2011). *See, e.g.*, *United States v. Brooks*, 681 F.3d 678 (5th Cir. 2012); *United States v. Valencia*, 600 F.3d 389 (5th Cir. 2010); 2014 REPORT ON ENFORCEMENT, *supra* note 1, at 3. There have also been press reports indicating that the DOJ has initiated criminal probes related to FERC investigations into misconduct in the energy markets. *See e.g.*, Dan Fitzgerald and Devlin Barrett, *J.P. Morgan Faces New Probe on Energy Trades*, WALL ST. J. (Aug. 19, 2013), <http://www.wsj.com/articles/SB10001424127887323608504579023231762407414>.

7. 18 C.F.R. § 35.41 (2009); 17 C.F.R. § 180.1 (2012); *see also* Commodity Enforcement Act (CEA) § 6(c)(2), 7 U.S.C. § 9(2) (2010); CEA § 9(a)(3), 7 U.S.C. § 13(a)(3) (2010) (it is a felony for, among other things, any person knowingly to make, or cause to be made, any statement in any application, report, or document required to be filed under the CEA, or any rule or regulation thereunder); CEA § 9(a)(4), 7 U.S.C. § 13(a)(4) (2010) (it is a felony for any person willfully to falsify, conceal, or cover up by any trick, scheme, or artifice a material fact, make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a registered entity, board of trade, swap data repository, or futures association designated or registered under the CEA acting in furtherance of its official duties under the CEA).

II. THE FALSE STATEMENTS ACT—18 U.S.C. § 1001

There are many federal statutes that criminalize false statements of one form or the other. Some statutes address declarations and testimony given under oath in court proceedings, while others focus on information submitted to specific federal programs.⁸ The most comprehensive and commonly used statute, however, is the False Statements Act, codified in the federal criminal code at Title 18 United States Code, § 1001. The statute provides, in relevant part, that:

[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 fined under this title, imprisoned not more than 5 years....⁹

Section 1001 has sometimes been referred to as a “catch-all” because it applies to any false statement that interferes with the function of a federal agency whether or not a false statement is specifically prohibited by another statute.¹⁰ The False Statements Act was originally adopted during the Civil War as a means to prosecute false claims made to the government and its early provisions were aimed at statements intended to “cheat[] and swindle[] or defraud[]” the United States out of money or other public property.¹¹ The statute has undergone numerous legislative amendments since enactment, however, and its provisions are no longer directed solely at conduct meant to defraud the government.¹² Instead the statute now criminalizes a wide variety of false statements that fall within federal jurisdiction regardless of whether they cause, or are intended to cause, any financial loss to the government.

The broad reach of the statute has made section 1001 a favorite tool of prosecutors, particularly in complex investigations where substantive crimes are

8. See, e.g., 18 U.S.C. § 1621 (2011) (courtroom perjury), 18 U.S.C. 1623 (2011) (false statements to Grand Jury), 18 U.S.C. § 152 (2011) (false statements in bankruptcy); see also 18 U.S.C. § 287 (2011) (false claims to U.S. civil, military, or naval personnel), 18 U.S.C. § 1005 (2011) (Fed. Reserve Bank), 18 U.S.C. § 1014 (2011) (FHA, Farm Credit, Fed. Crop Ins.), 18 U.S.C. § 1027 (2011) (ERISA plan), 18 U.S.C. § 1035 (2011) (health care benefits plan); 20 U.S.C. § 1097 (2011) (federally insured funds); 7 U.S.C. §§ 13(a)(3)-(4) (CFTC).

9. 18 U.S.C. § 1001(a) (2011).

10. See, e.g., *United States v. Kappes*, 936 F.2d 227, 231 (6th Cir. 1991) (“Section 1001 is a catch-all, reaching those false representations that might substantially impair the basic functions entrusted by law to [the particular] agency, but which are not prohibited by other statutes.”) (citation omitted) (internal quotation marks omitted).

11. *United States v. Yermian*, 468 U.S. 63, 70-74 (1984) (reviewing legislative history of statute); *United States v. Cohn*, 270 U.S. 339, 341 (1926).

12. In 1996 Congress passed the False Statements Accountability Act of 1996 § 2, Pub. L. No. 104-292, 110 Stat. 3459, which amended the statute to include, *inter alia*, an express materiality requirement. In 2004 and 2006 the statute was further amended to increase the maximum term of imprisonment from five years to eight years for false statements related to terrorism offenses or the failure to register as a sex offender. Intelligence Reform and Terrorism Prevention Act of 2004 § 6703(a), Pub. L. No. 108-458, 118 Stat. 3638, 3766; Adam Walsh Child Protection and Safety Act of 2006 § 141(c), Pub. L. 109-248, 120 Stat. 587, 603.

sometimes difficult to prove. As a statute of general application, section 1001 is not limited to specific government programs, agencies, or functions. Indeed, one need only look at the myriad criminal investigations where the statute has been used to recognize its flexibility. Many high profile individuals have been ensnared under section 1001 as part of investigations into a wide variety of crimes, even when (as has frequently been the case) the government is unable to uncover sufficient evidence of the crime it originally set out to investigate. Thus, Martha Stewart was convicted under section 1001 for making false statements during a securities fraud investigation, even though no one ended up being convicted for violations of the securities laws.¹³ Former Illinois governor Rod Blagojevich was convicted under the statute (indeed his only conviction at his first trial) as part of a complex investigation into political corruption.¹⁴ So too was White House aide I. Lewis Libby, convicted of making false statements during an investigation into leaks of classified information, as well as former Olympian Marion Jones, who pled guilty to violating section 1001 in a plea agreement as part of an investigation into the use of steroids in sports.¹⁵ Although the “ever-metastasizing”¹⁶ use of section 1001 has at times generated controversy, it continues to be a weapon of choice for prosecutors in investigations into complex matters such as financial and health care fraud, government contracts, environmental violations, terrorism, and even sex offender registration.

By its terms, section 1001 outlines three broad categories of criminal false statements: (1) using a “trick, scheme, or device” to falsify or conceal a material fact; (2) making a materially “false, fictitious, or fraudulent” statement; and (3) using a “writing or document” knowing it contains materially false, fictitious, or fraudulent information. While there are some distinctions between these offenses, they all share five common elements that must be proven to establish criminal liability:

- federal “jurisdiction;”
- a statement or concealment that is—
- “false,”
- “material,” and
- “knowingly and willfully” made.¹⁷

Each one of these elements will be briefly addressed below.

A. *Federal Jurisdiction*

In order to be a crime under section 1001, the false statement or concealment must occur “within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.”¹⁸ Jurisdiction as it is used in this criminal statute does not have a “narrow or technical meaning.”¹⁹ Instead the term is

13. United States v. Stewart, 433 F.3d 273, 280 (2nd Cir. 2006).

14. United States v. Blagojevich, 794 F.3d 729 (7th Cir. 2015).

15. United States v. Libby, 498 F. Supp. 2d 1 (D.D.C. 2007); United States v. Jones, No. 05-cr-01067-KMK (S.D.N.Y. Jan. 28, 2008) (judgement in a criminal case).

16. United States v. Moore, 612 F.3d 698, 702 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

17. Brogan v. United States, 522 U.S. 399, 400-01 (1998) (describing elements of offense).

18. 18 U.S.C. § 1001(a).

19. United States v. Rodgers, 466 U.S. 475, 480 (1984).

interpreted expansively in order to identify “the factor that makes the false statement an appropriate subject for federal concern.”²⁰

For many participants in the energy markets, federal jurisdiction will not be a significant threshold issue in any criminal investigation. Companies engaged in the interstate sale or transportation of natural gas or electricity, or those trading in energy futures, swaps and options, are already accustomed to extensive oversight by federal agencies. In this context, jurisdiction under section 1001 simply means that the false statement must relate to some matter “confided to the authority of an agency or department.”²¹ Since both the FERC and CFTC explicitly prohibit false statements to the agencies or their staff, there should be little surprise that misrepresentations made during the course of agency proceedings would be within the reach of this criminal statute.²²

The scope of a false statements prosecution, however, can extend beyond matters at issue in an agency proceeding. For example, it is not necessary that an agency have “the power to make final or binding determinations” or “complete control” over the subject matter of the statement in order to satisfy the requisite federal concern; it is sufficient that the subject falls within the agency’s general scope of authority.²³ Additionally, a person need not be aware of federal jurisdiction in order to be guilty of the crime.²⁴ Indeed, there have been a number of successful prosecutions where the false statement was not even made directly to federal officials, let alone as part of an official agency proceeding.²⁵

In order to appreciate just how far the potential jurisdictional reach of section 1001 can extend, it is worth considering a few examples of actual prosecutions. In *United States v. White*, two employees of a county water department in Kentucky were federally convicted under section 1001 for submitting falsified water measurements.²⁶ The employees collected the measurements as part of a state water monitoring program and their falsified reports were submitted to state, not federal, officials. Nonetheless, in affirming the conviction, the court upheld federal jurisdiction because the state had received federal funds to assist in data collection and because the state water agency was subject to federal oversight under the Safe Drinking Water Act.²⁷ As the court explained, although the state was the primary water enforcement authority, there was nonetheless “a federal

20. *Yermian*, 468 U.S. at 68.

21. *Rodgers*, 466 U.S. at 479 (citation omitted).

22. *See, e.g.*, 18 C.F.R. § 35.41(b) (“Seller must provide accurate and factual information and not submit false or misleading information, or omit material information, in any communication with the Commission”). *See also* CEA § 6(c)(2), 7 U.S.C. § 9(2) (“It shall be unlawful for any person to make any false or misleading statement of a material fact to the Commission.”).

23. *Rodgers*, 466 U.S. at 482, 479 (commenting on agency power to make binding determinations); *United States v. Grenier*, 513 F.3d 632, 638 (6th Cir. 2008) (commenting on complete control over subject matter) (citation omitted).

24. *Yermian*, 468 U.S. at 69.

25. *See, e.g.*, *United States v. Green*, 745 F.2d 1205 (9th Cir. 1984) (conviction for false statement to private firms constructing nuclear power plant regulated by Nuclear Regulatory Commission); *United States v. Wolf*, 645 F.2d 23, 25 (10th Cir. 1981) (oil company executive convicted under Section 1001 for sending invoice that falsely certified the grade of oil under federal regulations to a private party).

26. *United States v. White*, 270 F.3d 356 (6th Cir. 2001).

27. *Id.* at 363-64.

interest in what reasonably must be considered an official function of the EPA, ensuring safe drinking water for all persons residing in the United States.”²⁸

Another case from a different court illustrates the same broad jurisdictional standard. In *United States v. Taylor*, the defendant was convicted under section 1001 for making false statements in connection with an application to the Mississippi Development Authority (MDA) for disaster relief.²⁹ In this case, jurisdiction under the statute was satisfied because the MDA had received federal funds and was subject to “administrative oversight” by a federal agency regarding how funds were to be spent. In addition, the court held that since the purpose of the statute was to protect federal agencies from potential interference, it was “irrelevant whether defendant knew that his intentionally false statements might eventually influence a federal agency.”³⁰

The expansive jurisdictional reach of section 1001 has a number of implications for participants in energy markets. For one thing, companies must recognize that a statement need not necessarily be expressly covered by existing agency regulations in order to trigger criminal liability. Regulations are often adopted in response to new or specific industry problems and are rarely comprehensive. The FERC’s market behavior rules, for example, prohibit “false and misleading” communications, but are drafted to apply only to “Sellers,” a category limited to sellers with market rate authority in the electricity markets.³¹ Natural gas traders are not covered by these specific rules.³² Other FERC regulations prohibiting market manipulation apply to both natural gas and electricity markets, but as drafted, are directed at “entities,” terminology that literally refers to companies and other organized firms or groups rather than individuals.³³ Although the FERC has recently clarified that its use of the term “entities” is intended to include individuals (and has imposed individual fines on that basis), this interpretation is open to debate as it has not yet been settled in the appellate courts.³⁴ In any event, the point here is that many of the current FERC regulations may not literally apply to individuals operating in the energy markets, but individuals must be mindful that section 1001 may nevertheless apply to them.

It would be a mistake to assume that the absence of regulations governing an individual’s conduct would be a barrier to criminal prosecution under section 1001. In fact, it is a distinguishing characteristic of federal law that criminal

28. *Id.* at 364.

29. *United States v. Taylor*, 582 F.3d 558 (5th Cir. 2009).

30. *Id.* at 562 (citing *United States v. Baker*, 626 F.2d 512, 516 (5th Cir. 1980)).

31. 18 C.F.R. § 35.36(a)(1) (2012) (“Seller means any person that has authorization to or seeks authorization to engage in sales for resale of electric energy, capacity or ancillary services at market-based rates under section 205 of the Federal Power Act.”).

32. Sellers of natural gas are nonetheless subject to penalties for violating natural gas “market manipulation” rules, which can include the making of “untrue statement of a material fact” in connection with the purchase or sale of natural gas or transportation services. 18 C.F.R. § 1c.1 (2011).

33. *See, e.g.*, 18 C.F.R. § 1c.1 (natural gas), § 1c.2 (electricity); *See also Samantar v. Yousuf*, 560 U.S. 305, 315 (2010) (“‘entity’ typically refers to an organization, rather than an individual.”).

34. Order Assessing Civil Penalties, *Maxim Power Corp.*, 151 F.E.R.C. ¶ 61,094 (2015); In ongoing litigation in the Eastern District of California, a federal district court has ruled that the use of the term “entity” in the Federal Power Act § 222, 16 U.S.C. § 824v (2011), does not prevent the FERC from bringing manipulation claims against individuals. *See e.g.*, *FERC v. Barclays Bank*, No. 2:13-cv-2093-TLN-DAD, 2015 WL 2448686, at *20-21 (E.D. Cal. May 19, 2015).

offenses are generally defined to apply to both individuals and companies alike, as both are considered “persons” under the criminal code.³⁵ Thus, while the natural gas trader may avoid the FERC sanction for communicating false or misleading information, he could nonetheless be at risk of a criminal prosecution for the same statements. Moreover, under the long standing federal common law principle of *respondeat superior*, a company can be held criminally responsible for the acts of its employee, as long as the employee was acting within the scope of his employment and intended (at least in part) to benefit the company in some way.³⁶ The employee need not hold any particular level of authority in the company in order for liability to attach, and a company can be held liable even if the employee was seeking personal gain, as long as his actions also benefited his employer.³⁷ Thus, not only could an individual gas trader be prosecuted for a false statement not directly covered by a FERC regulation, so, too, could his employer face criminal charges.

Criminal liability for false statements is also not limited to communications directly with federal agencies and their staff. The CFTC and the FERC have already adopted regulations prohibiting the communication of false or misleading information to specifically identified participants in the energy markets, such as market monitors, price index publishers, and exchanges.³⁸ The CFTC has also adopted a broad anti-manipulation rule that prohibits any “false or misleading or inaccurate report” that can “affect or tend to affect the price of any commodity” in interstate commerce.³⁹ In light of these existing agency regulations, prosecutors would have little difficulty establishing that false statements made to these entities were “within the jurisdiction” of the federal government for purposes of section 1001. More importantly, given the expansive interpretation given to the criminal statute in cases such as *White* and *Taylor*, false statements conveyed to any number of market participants—whether or not they are specifically identified in regulations—could potentially result in federal criminal liability.⁴⁰

The bottom line is that energy companies should recognize that a false statement may only need to be related to a broad federal interest to justify a federal prosecution. This means that even communications with local entities or regulators, or non-governmental or quasi-governmental entities subject to federal regulation, could potentially fall within the ambit of section 1001. In particular, any statement made in connection with a program that receives or administers federal funds, or that is otherwise related to some activity subject to federal

35. 18 U.S.C. § 2510(6) (2011).

36. *See, e.g.,* *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972) (corporation convicted of criminal antitrust offense based on conduct of its agents).

37. *See, e.g., In re Hellenic, Inc.*, 252 F.3d 391, 395-97 (5th Cir. 2001) (liability based on scope of employee’s authority rather than his position in the company); *see also* *United States v. Singh*, 518 F.3d 236, 250 (4th Cir. 2008) (“liability arises if the employee or agent has acted for his own benefit as well as that of his employer”).

38. *See, e.g.,* 18 C.F.R. § 35.41(b) (2011) (requiring accurate and truthful communications with “Commission-approved market monitors, Commission-approved regional transmission organizations, Commission-approved independent system operators, or jurisdictional transmission providers”); *see also* 17 C.F.R. § 180.1(a)(4) (making it unlawful to make any misleading or inaccurate report concerning “market information or conditions that affect or tend to affect the price of any commodity in interstate commerce”).

39. 17 C.F.R. § 180.1(a)(4).

40. *White*, 270 F.3d at 356; *Taylor*, 582 F.3d at 558.

oversight (such as data collection or transaction reporting), could be deemed “an appropriate subject for federal concern.”⁴¹

B. *Written and Oral Statements*

Not only is jurisdiction expansive under section 1001, the statute is also drafted in broad terms to capture a wide array of misrepresentations. Indeed, the Supreme Court has explained that section 1001 “covers ‘any’ false statement—that is, a false statement ‘of whatever kind.’”⁴² Simply put, any written or oral statement (and any act of concealment as will be discussed *infra*) can potentially form the basis of a false statements prosecution.⁴³

As to writings, there is no requirement that a written statement be signed, certified, notarized, or meet any other standard of formality, in order to be covered by section 1001.⁴⁴ The statute has been used to prosecute all manner of falsified writings submitted to the government, including invoices, financial records, customs declarations, claim forms, and applications for jobs or services.⁴⁵ Even material submitted during settlement discussions with the government has been the basis for a conviction under section 1001.⁴⁶ And although there must be a sufficient connection to some matter within the “jurisdiction” of the federal agency, it is not necessary that the written statement have been submitted directly to federal officials. For example, when a federal program requires certification or testing by an outside company, it can be a criminal offense to submit false information to that entity.⁴⁷

Companies doing business in interstate energy markets often have significant reporting obligations to the FERC or CFTC. Some of these reporting obligations are routine, others are related to specific transactions, sales, or events. Regardless of the purpose of the report, however, any false statement contained in these submissions could, depending on the circumstances, support a criminal prosecution. So could the submission of false information to private parties, such as market publications, assuming the requisite federal jurisdiction is established.⁴⁸

Prosecutions based on oral false statements are also quite common. Although any statement must be “material” as well as “knowingly” and “willfully” made

41. *Yermian*, 468 U.S. at 68.

42. *Brogan*, 522 U.S. at 400 (emphasis added) (citations omitted).

43. The lone exceptions are statements submitted by a party or its counsel in connection with a judicial proceeding. Section 1001 specifically provides that it 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.” 18 U.S.C. § 1001(b) (2011). *Cf.* Order Suspending Market-Based Rate Authority, *J.P. Morgan Ventures Energy Corp.*, 141 F.E.R.C. ¶ 61,131 (2012) (The FERC suspending company’s market-based authority for six months based on a determination that counsel submitted false or misleading statements to Commission in a public proceeding).

44. *United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952); *United States v. Poindexter*, 951 F.2d 369, 387-88 (D.C. Cir. 1991).

45. *See generally* *Twenty-Ninth Annual Survey of White Collar Crime*, 51 AM. CRIM. L. REV. 1149, 1153-54 (2014) (listing examples of false statements).

46. *United States v. Tracy*, 108 F.3d 473, 477 (2d Cir. 1997).

47. *See, e.g.*, *United States v. Balk*, 706 F.2d 1056 (9th Cir. 1983) (conviction under section 1001 for submitting falsified welding certifications to testing company used by Navy for government contracts).

48. The FERC and CFTC have both issued regulations to address certain types of misleading communications to market publications. *Supra* n.8.

(elements discussed *infra*), virtually any kind of misrepresentation to a federal official can result in prosecution. Unlike the crime of perjury, for example, there is no requirement that the statement be given under oath.⁴⁹ Nor must the statement arise in a formal proceeding like a deposition or agency hearing. Moreover, unlike custodial interrogation, the government need not prove that the statement was voluntary or that it was preceded by warnings about the consequences of misrepresentation. Indeed, even a simple “no” in response to a federal agent’s question in a surprise encounter can, if false, constitute a crime.⁵⁰ This is so even if the agent could not be misled because he was already aware of the true answer to his question.⁵¹

Participants in regulated energy markets are at particular risk from these types of encounters. The FERC and CFTC exercise extensive oversight in energy matters and there is regular interaction and exchanges of information between regulators and companies. The agencies also conduct non-public investigations, and companies and individuals are frequently called upon to submit (in writing or orally) voluminous information as part of the process. Agency investigations often include depositions where company employees are expressly warned that false or misleading responses can be subject to prosecution. But statements are also made in informal settings such as interviews, where agency staff members question company representatives to learn about complex transactions or the reasons for trading patterns. These informal discussions are neither recorded nor reduced to a written transcript, but they are nonetheless well within the ambit of section 1001. Disputes over the accuracy of information can arise, and employees need to be aware that false statements in these situations could very well result in criminal liability.⁵²

The risk of potential criminal liability escalates if a DOJ investigation follows on the heels of an agency investigation. Criminal authorities will scrutinize the documentary record from the agency proceeding and then, at some point, attempt to interview key witnesses. Inconsistencies between the record and the witness’s statements, or inconsistencies between witness statements to the agency and those made to prosecutors, are often evaluated harshly. Indeed, so significant is the risk inherent in providing multiple witness statements, criminal counsel will often advise their clients to invoke their Fifth Amendment privilege rather than submit to additional questioning by prosecutors.

49. *Cf. In the Matter of Artem Obolensky*, CFTC Docket No. 14-05 (Jan. 2, 2014), <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfobolenskyorder010214.pdf> (CFTC imposing civil penalties in connection with false statements made to CFTC during an investigation not given under oath); 17 C.F.R. § 11.6(b) (2015).

50. *Brogan*, 522 U.S. at 399-400.

51. *Id.* at 410 (Ginsburg, J., concurring).

52. *See, e.g.,* William S. Scherman, et al., *The FERC Enforcement Process: Time for Structural Due Process and Substantive Reforms*, 35 ENERGY L.J. 101, 147 (2014) (discussing informal exchanges with regulators and the potential for liability arising out of inadvertent false statements).

C. *False Representations and Concealments*

Any statement must be false at the time it was made in order to be a crime, and rarely will there be a prosecution without strong evidence of falsity.⁵³ There are, however, different ways that a falsehood can be established. In some situations it is not simply what is said that creates liability, but rather what is left unspoken. As a result, a statement can be considered false even when the actual facts communicated are accurate, if the effect of the statement as a whole is to mislead investigators. Thus, in *United States v. Stephenson*, a government employee was convicted under section 1001 for telling a federal investigator that he (the employee) had been offered a bribe.⁵⁴ The employee had reached out to the investigator because he became aware that he was being investigated. His report about having been offered the bribe was accurate (as far as it went), but he failed to disclose to the investigator that he had been the one who actually solicited the payment. In these circumstances, the court reviewing the conviction held that what the employee was really attempting to communicate was that “he was an unwilling victim of a bribery scheme,” and as a result, his statements to the investigator were “clearly false.”⁵⁵

Under section 1001, the concealment of a material fact, as well as an affirmative misrepresentation, can constitute a criminal false statement, provided one is operating under some “duty” of disclosure. Most courts hold that this duty of disclosure must arise out of a “statute, government regulation, or form,”⁵⁶ that is, there must be some duty separate and independent from the criminal statute. A minority of courts, however, take a more expansive view and hold that section 1001 *itself* creates the duty of disclosure.⁵⁷ Under this reading, *any* concealment of a material fact is a violation of the statute.

When there is a duty to disclose, any statement or affirmative act of concealment can qualify as a “trick, scheme, or device,” including a report or submission that omits key data.⁵⁸ So, for example, when federal regulations require health care providers to submit cost data on certain required forms, failing to disclose the information can constitute a false statement for purposes of the statute.⁵⁹

The risk of liability from non-disclosure should be of particular concern for companies operating under FERC and CFTC oversight. Both agencies have already adopted regulations expressly prohibiting any omission of “material fact”

53. There are, however, occasional debates over whether a “false promise” can be prosecuted under section 1001. As a general matter, a promise made about future conduct is not covered by the statute *unless* there is sufficient evidence that when the promise was made, the promisor had no intention of performing. *See, e.g., United States v. Shah*, 44 F.3d 285, 294-95 (5th Cir. 1995) (affirming conviction under section 1001 where defendant represented that bids would not be disclosed to competitors but subsequently disclosed them).

54. *United States v. Stephenson*, 895 F.2d 867, 871 (2d Cir. 1990).

55. *Id.* at 874.

56. *United States v. Calhoon*, 97 F.3d 518, 526 (11th Cir. 1996).

57. *See, e.g., United States v. Austin*, 817 F.2d 1352, 1354-55 (9th Cir. 1987) (holding that “the government is not required to prove that the defendant had a duty under some other statute to disclose” and that “[s]ection 1001, by itself, prohibits a person from making fraudulent statements or misrepresentations on any matter within the jurisdiction of a department or agency of the United States.”).

58. *Calhoon*, 97 F.3d at 524 (citing 18 U.S.C. § 1001).

59. *Id.* at 526-27.

in connection with regulated transactions.⁶⁰ Moreover, regulated companies are subject to numerous statutory and regulatory obligations that create duties of disclosure. They are required to file annual and periodic reports with regulators disclosing such things as financial and operational information, customer lists, transaction data, and affiliate transactions. The reports often require certifications or are otherwise subject to rules that mandate full disclosure.⁶¹ In this environment, even in the absence of affirmative misrepresentations, there is an ever-present risk that the failure to disclose key information can result in allegations of criminal conduct.

D. Material Information

Not every misrepresentation or omission of fact is grounds for criminal prosecution. In order to be a crime, by statute the false statement must be “material.” The usual test for materiality is whether the statement or omission has “a natural tendency to influence, or be capable of influencing, the decision of the decision-making body to which it was addressed.”⁶²

Since materiality is determined in the context of specific facts, there is no simple way to catalogue the types of information that will qualify. The purpose of a materiality requirement is simply to avoid criminal liability for insignificant or trivial misrepresentations. What is essential to recognize, however, is that a false statement need only be “capable” of influencing the agency to be material. It is not necessary that the statement *actually* affect an agency’s decision or alter the course of an investigation. If a statement “could have provoked governmental action, it is material regardless of whether the agency actually relied upon it.”⁶³ Thus, the offense is not concerned with “the extent of the agency’s reliance, but rather with the ‘intrinsic capabilities of the false statement itself.’”⁶⁴

To understand this distinction, consider the following example. In *United States v. Moore*, postal authorities in Washington D.C. intercepted a package containing contraband that had been addressed to a fictitious name at an apartment building. To determine the responsible party, the authorities inserted a tracking device in the package and then arranged for delivery, intending to arrest whoever opened the package.⁶⁵ No one was home when an investigator attempted delivery,

60. See, e.g., 18 C.F.R. § 35.41; see also 17 C.F.R. § 180.1.

61. See, e.g., FERC FINANCIAL REPORT: FERC FORM NO. 1: ANNUAL REPORT OF MAJOR ELECTRIC UTILITIES, LICENSEES AND OTHERS AND SUPPLEMENTAL FORM 3-Q: QUARTERLY FINANCIAL REPORT (Rev. 02-04) (requiring certification pursuant to 18 U.S.C. § 1001) (expires Nov. 30, 2016); see also 7 U.S.C. § 13(a)(3) (making it a felony to omit “any material fact required to be stated therein or necessary to make the statements therein not misleading” from any “application, report, or document required to be filed” with the CFTC).

62. *United States v. Gaudin*, 515 U.S. 506, 509 (1995). Materiality is a different standard from relevance: “‘Material’ when used in respect to evidence is often confused with ‘relevant,’ but the two terms have wholly different meanings. To be ‘relevant’ means to relate to the issue. To be ‘material’ means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material.” *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956) (quoting JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2 (3d ed. 1940)).

63. *United States v. Sebyggala*, 256 F.3d 59, 65 (1st Cir. 2001) (citations omitted).

64. *United States v. King*, 735 F.3d 1098, 1108 (9th Cir. 2013) (quoting *United States v. Serv. Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998)).

65. *Moore*, 612 F.3d at 698, 700.

but when the defendant arrived at the apartment, he claimed to be the boyfriend of the addressee and agreed to sign for the package. Because he signed a false name on a Postal Service delivery form, he was later convicted of making a false statement under section 1001.⁶⁶

On appeal of his conviction, the defendant admitted signing a false name but argued that his doing so was “not capable of influencing the Postal Service.”⁶⁷ He noted that when the investigator “gave him the package and asked him to sign for it, ‘she [the investigator] did not know his name, she did not ask his name, and she did not ask him for identification.’”⁶⁸ Thus, he argued, there was no way the signature could have affected the investigation. The appellate court agreed that the false signature was immaterial to the investigation, but emphasized, “the question of materiality is not to be answered by reference only to the specific circumstances of the case [or investigation] at hand.”⁶⁹ Instead, the court found materiality and affirmed the conviction because one function of the Postal Service is to track packages, and consequently, signing a false name to a delivery form “may adversely affect the ability of the Postal Service to perform its function.”⁷⁰

This materiality standard can also serve to highlight a worrisome aspect of the false statement statute. Criminal liability can arise even when—through no fault of the defendant—a government inquiry ends up being wholly inconclusive. The concern here is that in the absence of provable evidence of wrongdoing, government agents may be inclined to interrogate individuals in the hope of eliciting statements that can be used as a basis for a false statements prosecution. Even Justice Ginsburg on the Supreme Court has called attention to this problem, noting that by enacting section 1001 Congress had, “perhaps unwittingly,” given prosecutors authority “to manufacture crimes.”⁷¹ Although there is no reason to think that the FERC or CFTC engages in such conduct, it is nonetheless at least a theoretical risk in any agency investigation.

E. Knowing and Willful Statements

Although section 1001 has broad application, it is limited to statements that are “knowingly and willfully” made.⁷² In this respect the criminal statute differs significantly from the FERC market behavior rules governing communications which do not, as drafted, contain any express intent requirement.⁷³ The FERC rule, while stopping short of imposing complete strict liability, “forgives false or misleading submissions only if they are made inadvertently despite the filer’s due diligence to avoid such errors.”⁷⁴ CFTC regulations, on the other hand, generally require a showing of *scienter*, that is, that the communication is made “knowing,

66. *Id.* at 699, 700.

67. *Id.* at 701.

68. *Id.*

69. *Id.*

70. *Moore*, 612 F.3d at 702.

71. *Brogan*, 522 U.S. at 408 (Ginsburg, J., concurring).

72. 18 U.S.C. § 1001(a).

73. 18 C.F.R. § 35.41(b) (“Seller must . . . not submit false or misleading information, or omit material information . . . unless Seller exercises due diligence to prevent such occurrences.”).

74. *Kourouma v. FERC*, 723 F.3d 274, 278 (D.C. Cir. 2013).

or acting in reckless disregard of the fact, that such report is false, misleading, or inaccurate.”⁷⁵

The line between a civil violation and a criminal offense in these matters is often hard to distinguish, but a false statement must certainly be intentional in order to be a crime. Section 1001 establishes the element of intent by providing first that the defendant must act “knowingly.” At its most basic level, this term simply means that the defendant must be aware of what he is doing and not act simply through “ignorance, accident or mistake.”⁷⁶ The defendant must also know the statement he is providing is false, although this knowledge can be inferred if he is “willfully blind” to the truth.⁷⁷ In other words, “[i]n the context of the False Statements Act, 18 U.S.C. section 1001, a false statement is made knowingly if defendant demonstrated a reckless disregard of the truth, with a conscious purpose to avoid learning the truth.”⁷⁸

The statute also requires that a person act “willfully” in providing the false statement, although in practical terms, it is not clear that this adds much to the knowledge requirement. The word “willfully” has been characterized by courts as a “chameleon,” a statutory term “of many meanings whose construction is often dependent on the context in which it appears.”⁷⁹ As applied to section 1001, some courts have held that term “means nothing more in this context than that the defendant knew that his statement was false when he made it or—which amounts in law to the same thing—consciously disregarded or averted his eyes from its likely falsity.”⁸⁰ Other courts, however, have interpreted willfully to mean that the defendant must make the statement both with knowledge that it is false *and* with the specific intent to deceive someone.⁸¹ Even under this interpretation, however, it is not necessary to show intent to defraud the government. In other words, there is no requirement that a false statement was made in order to somehow deprive the government of funds or property through deceit.⁸² It is enough simply to show that the person intended to induce false belief in the representation.

Outside the context of the False Statements Act, the term “willfully” has sometimes been interpreted to mean that a person must have an awareness of the illegality of the conduct.⁸³ For example, a person must know he has a legal

75. 17 C.F.R. § 180.1(a)(4).

76. See, e.g., NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS 5.6 (2014) (Knowingly—Defined) [hereinafter 9TH CIR. MODEL CRIMINAL JURY INSTRUCTIONS].

77. *Yermian*, 468 U.S. at 64; “Willful blindness,” sometimes termed “deliberate ignorance,” is usually defined to mean that someone (1) was aware of a high probability of illegal conduct but (2) purposely avoided learning about it. See, e.g., *United States v. Elashyi*, 554 F.3d 480, 504 (5th Cir. 2008) (prosecution for false statements and export violations).

78. *United States v. London*, 66 F.3d 1227, 1241-42 (1st Cir. 1995) (citing *United States v. White*, 765 F.2d 1469, 1482 (11th Cir.1985); *United States v. Evans*, 559 F.2d 244, 246 (5th Cir.1977)).

79. *United States v. Marshall*, 753 F.3d 341, 345 (1st Cir. 2014) (citing *Bryan v. United States*, 524 U.S. 184, 191 (1998)).

80. *United States v. Gonsalves*, 435 F.3d 64, 72 (1st Cir. 2006).

81. *Shah*, 44 F.3d at 289.

82. *Yermian*, 468 U.S. at 69.

83. See, e.g., *Cheek v. United States*, 498 U.S. 192, 201 (1991) (tax evasion); *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (financial anti-structuring laws).

obligation to pay taxes before he can be convicted of tax evasion.⁸⁴ Recently the issue has arisen as to whether this same standard should apply to prosecutions under section 1001, requiring proof that a defendant knew it was unlawful to make a false statement. The DOJ, which has always resisted any such standard, seems to have changed its position on this issue, and it is now prepared to accept that awareness of illegality should be a requirement of prosecution.⁸⁵ If courts adopt this new standard,⁸⁶ then it would at least provide an opportunity for defendants to claim that they did not realize they could be prosecuted for false statements. Although this may be of some utility in cases where the statement is only indirectly transmitted to the government, it is unlikely to provide a safe-harbor in agency investigations where regulations expressly require truthful communications. Moreover, to the extent that FERC and CFTC representatives are not already doing so, they could simply inform witnesses at the outset of any questioning that any knowing misrepresentation may result in criminal charges.

Although these intent standards may appear to set a high bar, the reality is that intent is seldom an obstacle to conviction. Juries are permitted to infer knowledge and intent from all the circumstances of the case.⁸⁷ They are also entitled to make credibility determinations, and once a statement has been shown to be both false and material, it can be difficult to persuade a jury that it was nonetheless unintentional.⁸⁸ This will likely be true for companies and individuals operating in regulated energy markets, since they are already on notice of standards of conduct that, in many respects, mirror the elements of the criminal statute. Regulated entities also generally have staff dedicated to compliance issues and have the ability to seek clarification from the agency when a request for information seems ambiguous. Under these circumstances, a jury tasked with deciding whether a misrepresentation was intentional may well be skeptical (or even hostile) to claims that materially false information was only mistakenly communicated.

84. *Cheek*, 498 U.S. at 201-02.

85. Tony Mauro, *DOJ's Quiet Concession*, THE NAT'L L.J. (May 12, 2014), <http://www.nationallawjournal.com/id=1202654724066/DOJs-Quiet-Concession?slreturn=20150827191047>.

86. The Ninth Circuit has already adopted this standard into its most recent model criminal jury instructions. See, 9TH CIR. MODEL CRIMINAL JURY INSTRUCTIONS, *supra* note 76, at 8.73 cmt. (False Statement to Government Agency) ("The requirement that the defendant knew that his or her conduct was unlawful is based on the Supreme Court's decision vacating and remanding the Ninth Circuit's decision in *United States v. Ajoku*, 718 F.3d 882 (9th Cir. 2013), after the Solicitor General confessed error. *Ajoku v. United States*, 134 S.Ct. 1872 (Mem.) (U.S. April 21, 2014).").

87. See, e.g., *United States v. Gafyczk*, 847 F.2d 685, 692 (11th Cir. 1988) (affirming section 1001 conviction because jury entitled to infer from circumstances that defendant acted knowingly and willfully).

88. See, e.g., *Sebagala*, 256 F.3d 59, 63 (1st Cir. 2001) (rejecting claim that defendant "misunderstood" questions on customs form regarding amount of "monetary instruments" in his possession).

III. CONCLUDING CONSIDERATIONS

The False Statements Act provides prosecutors with a powerful tool to combat and punish misrepresentations, and both individuals and companies operating in regulated markets should be aware of its sweeping provisions. Given heightened enforcement in the energy markets, there are certain key aspects of the law that should be taken into consideration as part of risk assessment:

- The risk of criminal liability for false statements can be present in any agency investigation, even those that fail to uncover evidence of fraud or market manipulation.
- There are no “off-the-record” communications with agencies or their staff. Any false statement made to a government official, whether formal or informal, can be prosecuted by criminal authorities.
- Any false statement concerning a matter that falls within the scope of an agency’s jurisdiction—whether made to an agency or a private party—can be grounds for criminal prosecution.
- Failing to disclose key information can be as dangerous as misrepresenting facts.
- FERC or CFTC regulations do not define the scope of criminal exposure. Even if communications are not expressly covered by an agency regulation, or are not addressed to a particular individual or entity, any person can still run afoul of the criminal false statements statute.
- Both companies and their employees can be prosecuted criminally for making false statements, and both can be subject to liability for the same false statement.

A company’s best protection against the threat of criminal prosecution remains with its internal compliance program, including policies, manuals, training and audits. Energy companies should adopt—and then rigorously implement—comprehensive programs that require compliance with market rules, including guarding against the transmission or dissemination of any potentially inaccurate information. The potential risk of criminal liability for false statements should be incorporated into every company’s compliance training.