



# WHITE COLLAR ALERT

## APRIL 2012

### Lie and Face Jail Time, Says the Department of Justice

Even if you don't follow baseball, you probably know the recent saga involving former baseball pitching great Roger "the Rocket" Clemens. His story again highlights the dangers that come from allegedly lying to federal authorities. On August 19, 2010, Clemens was indicted for allegedly making false statements to a Congressional panel concerning his use of performance enhancing substances. Among the charges is a federal statute which makes it a crime to knowingly lie in any matter falling within the federal government's jurisdiction. Due to prosecutorial missteps, the judge declared the Government's first attempt to prosecute Clemens a mistrial. After a nine month delay, the Clemens retrial is under way – providing a fresh reminder that there are harsh criminal penalties for lying to the feds.

Increasingly, criminal charges associated with lying aren't just found in high profile cases, or as an add-on to an indictment containing a slew of more severe charges. Ordinary citizens can face prosecution – and potential incarceration – on a single charge of making false statements. Further illustrating the dangers associated with lying to the Government, the *Wall Street Journal* recently published an article describing the ordeal of a marine biologist who became entangled in federal charges after a whale-watching expedition.<sup>1</sup> When a boat captain on the marine biologist's boat "whistled" at a humpback whale that approached the boat, federal regulators opened a whale harassment investigation. During the course of the investigation, the investigators surmised that the marine biologist was lying about the full circumstances of the incident. Even though no whale harassment-related charges were ever brought, the marine biologist was charged with lying to federal authorities, and has been in a legal wrangle with the Government for the past five years.

The lesson from these examples is that in communications with regulators, law enforcement authorities and government employees, even a brief statement or a signature on a routine document poses greater risks today than in the past, and should be undertaken with the utmost care.

### The Law

Under the federal false statements law, 18. U.S.C. § 1001 ("Section 1001"), it is a crime to knowingly make a material false statement in a matter within the purview of federal jurisdiction. A statement is deemed material as long as it has the potential to influence the decision-maker interpreting the statement.

Even more alarming, the false statement does not have to be directed at a federal official. Statements or signatures on documents routinely submitted to the government and statements made to private employers who later submit the information to the government all fall within the scope of Section 1001's scrutiny. As long as you know the statement you are making is false at the time you make it, there is the potential that criminal charges will be brought.

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<sup>1</sup> See <http://online.wsj.com/article/SB10001424052702303299604577328102223038294.html>.



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### How This Affects You

This rule poses a hazard for individuals and businesses that interact with government officials routinely or, of course, under less friendly circumstances. For example, a junior accountant at a brokerage firm could suddenly receive a seemingly harmless phone call from an SEC staff member with a few brief questions. An executive assistant at a hedge fund could be greeted by a federal investigator asking about the location of certain documents or the whereabouts of certain executives. An employee of a proprietary trading shop could be visited at home or approached on the street by an FBI agent with basic questions seeking quick, on-the-spot responses. A lie in any of these scenarios creates serious criminal exposure. Criminal liability can attach even though the encounter was not in court or at a government office, seemed informal in nature, the individual never swore to tell the truth, and the Government agents were not actually misled by the statement.

Direct contact, however, is not the only way an individual may face scrutiny under Section 1001. For example, a back-office employee of a registered investment adviser who files reports with the firm's treasurer and signs off on those reports could face criminal liability if a false statement is made and is subsequently submitted to the firm's regulators as part of a regulatory filing. The same liability is applied to documents that may not require periodic filing, but are signed, and ultimately turned over, to a federal regulator during a surprise audit or enforcement investigation. Indeed, there are numerous circumstances that may fall within the scope of Section 1001.

### How to Protect Yourself

There are several pointers to keep in mind to avoid being swept up in false statement charges. You must view *any* interaction with federal or state authorities, friendly or not, as a calling for complete honesty. Consider any questions asked of you very carefully. Depending on the circumstances, often the best course is to seek counsel *before* answering questions posed to you by government officials.

Politely inform the law enforcement agent or government official of your intent to confer with counsel prior to answering any questions. Counsel will work with you to analyze whether it is in your interest to speak with the government. If you determine to answer questions, counsel will prepare you for the session so the underlying facts are clear in your mind, and your answers clearly express your recollection.

In the workplace, remain vigilant and fully aware of your responsibilities and the potential consequences you face when signing and submitting documents up the corporate ladder. Treat your signature as something more important than a rudimentary requirement.

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