

# Post-Incident Communication with Regulators

Charlene B. Wright  
Managing Member  
Wright & Associates, PLLC

Society of Corporate Compliance and Ethics  
Utilities & Energy Compliance & Ethics Conference  
February 11, 2019  
Houston, Texas

3302 Canal suite 35, Houston, TX 77003 Tel 713-877-1711 Fax 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

# Rules for Post-Incident Communication with Regulators

3302 Canal St. Suite 35, Houston, TX 77003 Tel 713-877-1711, 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

# Rule 1

**NEVER LIE TO THE  
GOVERNMENT**

3302 Canal St. Suite 35, Houston, TX 77003 Tel 713-877-1711, 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

# What is a lie?

3302 Canal St. Suite 35, Houston, TX 77003 Tel 713-877-1711, 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

# 18 USC 1001, it's not just for Martha Stewart, Michael Flynn, and George Papadopoulos

It is a crime to knowingly and willfully—

- **(1)**falsify, conceal, or cover up by *any* trick, scheme, or device a material fact;
- **(2)**make *any* materially false, fictitious, or fraudulent statement or representation; or
- **(3)**make or uses *any* false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

The lie does not even have to be made directly to an employee of the national government as long as it is "within the jurisdiction" of the federal bureaucracy.

## Broad Interpretation of 18 USC 1001

- A false statement may only need to be related to a broad federal interest to justify a federal prosecution.
- Communications with local entities or regulators, or non-governmental or quasi-governmental entities subject to federal regulation, could fall under Section 1001.
- 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 oversight (such as utility rates, pipeline safety, data collection) could fall under this umbrella.

## No direct federal agency interaction required

- Two employees of a county water department in Kentucky were federally convicted under section 1001 for submitting falsified water measurements.
- The employees collected the measurements as part of a state water monitoring program and their falsified reports were submitted to state officials.

## 18 U.S. Code § 1505 - Obstruction of proceedings before departments, agencies, and committees

- Used to prosecute BP along with several other charges. BP admitted during its guilty plea that a senior executive withheld documents, provided false and misleading information in response to the U.S. House of Representatives' request for flow-rate information, manipulated internal estimates to understate the amount of oil flowing from the well and withheld data that contradicted BP's public estimate of 5,000 barrels of oil per day.

## Rule 2 The regulator is not the enemy

3302 Canal St. Suite 35, Houston, TX 77003 Tel 713-877-1711, 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

Rule 3. The  
regulator is  
not your  
friend.

3302 Canal St. Suite 35, Houston, TX 77003 Tel 713-877-1711, 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

The key to transparency is knowing how and when to share.

Rule 4. Keep communication channels open and clear.

Rule 5. Records are **records**...even if you don't like them.

Rule 6. There is no Pixie Dust.

- If it was not created under privilege, you cannot make it so after the fact.
- This is a corollary to Rule 5. Records are records.

## Rule 7. Get credit for your good work.



## Rule 8. Be accountable and be mindful.

- It's a terrible time, but it's not just your bad day, week, month.
- Incidents leave impacted individuals, families and communities.
- The regulators and the industry are also under attack.
- Be certain of the facts before you blame third parties (may be the case, but get it right)
- Remember that the people you hire to work on your assets are your responsibility related to your regulatory obligations.



Rule 9. Remember you are in it for the long haul.

Litigators sometimes get it wrong.

Why they sometimes miss the point (or only see part of it).

## Litigation Focus

- Origin and cause
  - Foreseeability
  - Defensibility
- Minimizing financial impact

A post-incident investigation limited to this may not prevent recurrence or minimize risk.

## Compliance and Risk Driven Focus adds the following considerations

- Are procedures and practices correct and were they followed?
- Where else on our system could this occur? How do we minimize risk of recurrence?
- Continual Improvement—long term impact on the company and its safety culture
- Are employees empowered to do the right thing?
- How do we maintain a good relationship with our regulators going forward?

Litigators may want to hide the ball.

3302 Canal St. Suite 35, Houston, TX 77003 Tel 713-877-1711, 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

They may want to coach your employees to  
straddle the line.

3302 Canal St. Suite 35, Houston, TX 77003 Tel 713-877-1711, 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

## Preserve your platform of trust

- With regulators
- With internal stakeholders
- With customers
- Don't sacrifice that trust for a perceived short-term advantage

## Sometimes Operations misses the point too

### Top Operations Goals

- Find it
- Fix it
- Restore Service

### Regulators Expectations

- Investigate, analyze and trend failures
- Prevent recurrence
- Document everything

## Lessons learned from post-incident enforcement actions

- Multiple agencies can become involved.
- Civil investigations can lead to criminal enforcement.
- The government can take over if your actions are not prompt and complete.
  - Post-incident recovery through long-term monitoring

## Lessons learned from post-incident enforcement actions

- Financial evidence can be admitted to show knowledge, intent and profit motive.
- Records must be accurate, maintained properly and readily accessible.
- A major penalty does not mean the government will stop looking for more.

## The path from civil to CRIMINAL enforcement is laced with ...

- False (or misleading) statements
- Missing or incorrect records
- Company knowledge (imputed) that regulations and procedures are not being followed
- Bad internal documents and incomplete analyses
- Repeat mistakes
- Public pressure



## Rule 10.

No matter how bad things get,  
never, ever forget Rule 1.

3302 Canal St. Suite 35, Houston, TX 77003 Tel 713-877-1711, 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)

Questions? Comments?

3302 Canal suite 35, Houston, TX 77003 Tel 713-877-1711 Fax 816-877-6334 Email: [cwright@wrightfirm.law](mailto:cwright@wrightfirm.law)

[WWW.WRIGHTFIRM.LAW](http://WWW.WRIGHTFIRM.LAW)