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NEWSLETTER

"Willfully" Reinterpreted: The Effect of DOJ's Latest Interpretation of False Statement Statutes on Contractors' Mandatory Disclosure Obligations

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The United States Department of Justice (DOJ) has recently shifted course on the interpretation of the term "willfully" in two federal criminal statutes dealing with false statements. DOJ has quietly adopted a defendant-friendly interpretation in a series of recent filings. DOJ's new interpretation will have widespread effects, and may even affect government contractors' obligation to make mandatory disclosures pursuant to the Federal Acquisition Regulation (FAR).

The two criminal statutes directly at issue are 18 U.S.C. § 1001 (false statements) and 18 U.S.C. § 1035 (false statements relating to health care matters). Both statutes prohibit anyone from "knowingly and willfully" making false statements. In the procurement fraud context, though occasionally charged alone, false statement charges are often brought with charges involving the underlying criminal activity about which the false statement is made. Even when other charges are brought, false statement charges are often the only charge for which federal prosecutors are able to win a count of conviction.

In these false statement statutes, the term "knowingly" has generally been held to mean that the defendant must make a statement with knowledge that the statement was false. DOJ long held that the term "willfully" meant "deliberately and with knowledge" and did not require a showing that the defendant knew that lying to the government was illegal. Recently, DOJ has reversed course and stated that the defendant must have acted with knowledge that his

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conduct was unlawful. This is a dramatic change that places a much higher burden on the government.

DOJ did not widely proclaim this interpretation change but rather articulated it in a series of routine briefs before the Supreme Court. In three recent briefs opposing certiorari, DOJ announced that it now views the "willfully" element of Sections 1001 and 1035 as requiring proof that the defendant made a false statement with knowledge that his conduct was false. *See Ajoku v. United States,* No. 13-7264, *Russell v. United States,* No. 13-7357, and *Natale v. United States,* No. 13-744. Interestingly, while all these cases involved convictions solely under Section 1035, DOJ argued that its new interpretation applied to both Sections 1001 and 1035. DOJ explained the rationale for its new interpretation by stating that, interpreting "willfully" to mean "deliberately and with knowledge" would deprive "willfully" of independent effect as the statutes already include a "knowingly" element. This position is one that defense attorneys have long argued.

The seed for DOJ's new interpretation was planted in the Supreme Court's 1998 decision, *Bryan v. United States. Bryan* involved a conviction under the Firearms Owners' Protection Act, which prohibits anyone from "willfully" violating the Act by dealing in firearms without a federal license. In that case, the Court noted that, when used in a criminal context, the term "willfully" generally means that the government must prove that the defendant knew his conduct was in violation of the law.

The most immediate impact of this new interpretation will obviously be felt in criminal charges involving Sections 1001 and 1035. Six circuit courts—the First, Fourth, Fifth, Eight, Ninth, and Tenth—have adopted DOJ's prior interpretation of "willfully" for Section 1001 violations. Defendants in those circuits will have to contend with the precedent, which will take some time to change. In the trial courts, defense attorneys will have to pay particular attention to jury instructions to ensure DOJ's new interpretation is reflected. Even if the trial court does not adopt DOJ's new interpretation of "willfully," defense attorneys must be sure to note their objection to this issue for appeal. Also, when attempting to convince a government prosecutor to decline a prosecution, it will be important to explain this new interpretation and the heightened "willfully" element.

Of particular relevance to government contractors is whether this new interpretation changes mandatory disclosure decisions involving false statements. Pursuant to FAR 52.203-13(b)(3)(i)(A), a government contractor is required to disclose to the agency Inspector General and the contracting officer, whenever the contractor has "credible evidence that a principal, employee, agent or subcontractor committed a violation of any federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code." A violation of the false statement statutes would certainly come within the purview of this requirement and would thus require disclosure.

Whenever a contractor makes an assessment as to whether there is "credible evidence" such that a disclosure is necessary, the contractor must undertake an internal investigation of the allegations and facts. DOJ's new interpretation of "willfully" materially changes an element of the false statement statutes and necessarily impacts any analysis as to whether a false statement statute was violated. While "credible evidence" is a lower standard than what is required for a criminal conviction, a contractor's investigation may reveal that there is no credible evidence that a false statement was made "willfully," as newly interpreted by DOJ.

Although a contractor may nonetheless determine that a disclosure is the most prudent course, DOJ's new interpretation of "willfully" can provide the contractor some comfort in limiting the scope of a borderline disclosure.

If a contractor decides that a disclosure involving a false statement is warranted, the contractor should take the opportunity to inform the inspector general and contracting officer regarding DOJ's new interpretation. By explaining this new interpretation, a contractor can impress upon the inspector general and contracting officer the heightened "willfully" element and the effect this has on securing a criminal conviction under the false statement statutes. This, in turn, may convince the inspector general and contracting officer that no further action is needed.

DOJ's new interpretation of "willfully" in Sections 1001 and 1035 may implicate mandatory disclosure obligations, and government contractors should continue to monitor DOJ's position as it develops. While this new interpretation may limit the obligations and/or liability of government contractors, the best policy is to endeavor to avoid these situations in the first instance through proper training and a robust compliance program.