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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

New DOJ Stance On False Statements May Bring Sea Change

Law360, New York (June 16, 2014, 10:17 AM ET) -- A conviction for making a false statement to the government (18 U.S.C. § 1001) is a favorite tool of prosecutors. Although conviction under Section 1001 requires that the defendant have made a false statement "knowingly and willfully," in most courts, historically, that element could be satisfied simply by proof that the defendant knew his statement was false. This statute, therefore, has trapped many individuals who believed it important to cooperate with the government and answer questions even if they were unprepared to do so.

Allegedly "false" statements used to form the basis of a prosecution are often made to government officials in contexts where individuals may have no idea of the potential consequences of their statements, such as statements made during execution of a search warrant or in the frequent case where two federal agents show up at someone's door unannounced at dinnertime and start asking questions. In such situations, many individuals are not represented by counsel, are nervous and caught off-guard, and have not had the opportunity to think before speaking.

While some recent cases have highlighted the potential pitfalls of making statements to government agents during an investigation, the U.S. Department of Justice has now made pronouncements in several court filings that suggest that it may limit false statement prosecutions down the road. It remains to be seen exactly how much this new shift will actually change the landscape.

Schulte — A Cautionary Tale

Earlier this year, the Tenth Circuit issued a ruling in United States v. Schulte, 741 F.3d 1141 (10th Cir. 2014) that serves as a cautionary tale regarding the risks that individuals face when they make statements during a government investigation, even if the investigation is otherwise fruitless.

On Jan. 21, 2014, the Tenth Circuit upheld the conviction of John Schulte for making false statements to a federal agent during the execution of a search warrant. Schulte was the CEO of Spectranetics, a developer and manufacturer of laser-based medical equipment. In 2008, Spectranetics became the subject of a U.S. Food and Drug Administration investigation concerned with the company's use of unapproved devices in patients. As a result of the investigation, Schulte and others were indicted on 12 counts, including

conspiracy to defraud the United States. Schulte was ultimately acquitted of all charges except for one: making false statements under Section 1001.

During an interview with an FDA investigator in the course of the search, Schulte asserted he was not involved with bringing foreign devices into the United States and claimed no knowledge of whether employees had provided unapproved devices for testing in human patients. Schulte contacted the government several times to make corrections to his statements in the months following the interview when he found his records contradicted statements to the investigator. However, this argument did not persuade the court. In spite of Schulte's attempt to correct his statement and his acquittal on all other counts, his conviction under Section 1001 still stands.

Acquittal of Underlying Charges Is No Defense

In a similar case, United States v. Phillips, 2013 U.S. Dist. LEXIS 13785 (N.D. Ohio 2013), the defendant, George Phillips, had submitted to a voluntary interview as FBIagents conducted a search of his home. The FBI was investigating Phillips for conspiracy to commit bribery and conspiracy to commit wire fraud. During the interview at his home, he made statements regarding the manner in which he had procured an air conditioning unit and a ticket to a golf tournament. Phillips was charged with public corruption and Section 1001 charges. At trial, he was acquitted of all public corruption charges. However, he was convicted under Section 1001 for the statements he had made during the search and was sentenced to 10 months of imprisonment.

In a motion to vacate his conviction, Phillips argued that his false statements conviction was improperly "premised on conduct for which he was acquitted." Although the district court found Phillips' claims were procedurally barred, the court stated that Phillips would not have been entitled to relief on the merits, explaining that "[i]t is not necessary to prove … that the false statements were made for the purpose of concealing other crimes." It was sufficient that the statements were false and material to the investigation.

Notably, the Phillips court noted, in case law relevant to the Schulte case as well, that Section 1001 has no safe harbor for recantation. See, e.g., United States v. Beaver, 515 F.3d 730, 742 (7th Cir. 2008).

Interpretation of Section 1001 as Covering Exculpatory "Nos"

Given that a false statement conviction can be upheld even where a defendant has been acquitted of the underlying charge, individuals may be inclined to offer merely affirmative or negative responses during government investigations rather than seem uncooperative. However, since the U.S. Supreme Court's 1998 decision in Brogan v. United States, 522 U.S. 398, it has been clear that even a simple denial in response to a federal agent's question can trigger criminal liability under Section 1001.

In Brogan, the Supreme Court nullified the "exculpatory no" doctrine in the context of Section 1001 charges. In that case, James Brogan appealed his conviction for making false statements. Federal agents from the U.S. Department of Labor and Internal Revenue Service interviewed Brogan at his home to investigate whether he had received cash or gifts in his position as a union officer. Brogan falsely

responded, “No.” Even though this statement was simply a denial of guilt, a jury convicted Brogan for both accepting unlawful cash payments from an employer and making false statements under Section 1001. He appealed the decision up to the Supreme Court which ruled that “since it is the very purpose of an investigation to uncover the truth, any falsehood relating to the subject of the investigation perverts that function.”

In her concurrence in judgment in Brogan, Justice Ruth Bader Ginsburg criticized the “sweeping generality” of the statute’s language. Justice Ginsburg was concerned that “an overzealous prosecutor or investigator — aware that a person has committed some suspicious acts, but unable to make a criminal case — [could] create a crime by surprising the suspect, asking about those acts, and receiving a false denial.” For example, the term “willfully” in the statute could include instances where the defendant did not know it was unlawful to make a false statement.

DOJ’s New Pronouncements Regarding Section 1001

It has been more than 15 years since Brogan, but Ginsburg’s critique has now been partially addressed in a series of DOJ briefs recently filed by Solicitor General Donald B. Verrilli Jr. In the government’s brief for United States v. Ajoku, for example, the DOJ acknowledged that the statute should be more narrowly read to mean that “willfully” signifies the defendant “acted with knowledge that his conduct was unlawful.” The DOJ stated even more explicitly in the government’s brief in United States v. Natale, that the “willfully” element of Section 1001 requires “proof that the defendant made a false statement with knowledge that his conduct was unlawful.” (DOJ Brief at 12.)

Conclusion

Although the solicitor general’s new stance on Section 1001 is certainly welcome from the standpoint of the defense bar, and will hopefully lead to a more restrained use of Section 1001, what will the government do in making charging decisions with cases like Schulte and Phillips, where the government may question the strength of its evidence on the underlying charges, but believe it has a chance at a conviction under Section 1001? Will the government’s new interpretation of the willfulness requirement truly signify a sea change? Only time will tell. In the meantime, individuals should still think carefully, and ideally should consult with counsel, before making statements to government officials conducting criminal investigations.

—By Diana K. Lloyd and Emily Aubert, Choate Hall & Stewart LLP

Diana Lloyd co-chairs the government enforcement and compliance practice group and Emily Aubert is an associate at Choate in Boston.