DOJ’s Recent Prosecutions Under the Travel Act: Practical Implications for the Healthcare Industry

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Federal Enforcement of Corrupt Payments

• Anti-Kickback Statute to address corrupt payments
  – Limitation -- applies only to government program referrals

• Travel Act – does not have limits to federal programs
The Travel Act

- Travel Act (18 U.S.C. § 1952)
  - Enacted in 1961 to combat racketeering activity
  - Makes it illegal to travel in or use mail in interstate commerce with the intent to promote or facilitate any “unlawful activity,” which includes bribery as defined by state law
  - Federal prosecutors are using state bribery laws to indict physicians and providers for unlawful referral arrangements

Elements Of Travel Act Offense

1. Interstate Element
   - Mailings
   - Wirings/Use of Wires
   - Travel
   - Note: disagreement as to how integral needs to be
   - Courts are in agreement defendant need not have known about interstate element

2. Intent Element

3. Performance Element
   (Subsequent Overt Act in Furtherance)
State Criminal Laws as Predicates

• In health care context, government uses various state criminal laws as predicates to Travel Act violations.

• In a nutshell, if:
  – State law prohibits certain conduct; and
  – Involves interstate commerce (use of U.S. Postal System)... THEN
    Potential Violation of the Travel Act

Example: Texas Commercial Bribery Statute

(a) For purposes of this section:
   (1) “Beneficiary” means a person for whom a fiduciary is acting.
   (2) “Fiduciary” means:
     ...
     (C) a lawyer, physician, accountant, appraiser, or other professional adviser; or...
     ...
(b) A person who is a fiduciary commits an offense if, without the consent of his beneficiary, he intentionally or knowingly solicits, accepts, or agrees to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary.
Key Aspects of the Travel Act

- Penalties
  - 5 year max for non-violent offenses
  - Fine = maximum of either $250,000 or twice gross gain/loss
- Different than healthcare fraud/kickback offenses
  - No requirement of “fraud” – no need to prove material false statement
  - No federal health care benefit program involvement
- Predicate for 18 USC 371 Conspiracy (Conspiracy to Violate the Travel Act)
- Based on violation of State Law
- Elements of Predicate State Offenses Vary

Recent Prosecutions Using the Travel Act

- BLS, et al. (DNJ)
  - 53 convictions (38 doctors)
- Forest Park Medical Center (NDTX)
  - 18 convictions (7 doctors)
- Operation Spinal Tap (CDCA)
- Insys Physicians (SDNY)
- Surgical Assistance Inc. (EDNY)
- Friedman (CDCA)
Biodiagnostic Laboratory Services (D.N.J.)

- Lab executives and physicians convicted of receiving bribes in exchange for sending blood specimens to BLS in violation of NJ commercial bribery statute.

- Thomas Savino
  - Set up blood-drawing station in office
  - Cash payments, no written agreement, and no separate entrance for BLS into Dr. Savino’s space
BLS Sentences

<table>
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<th>Sales Reps</th>
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<td>– 72 months</td>
<td>– 63 months</td>
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<td>– 43 months</td>
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<td>– 37 months (x8)</td>
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<td>– 24 months</td>
<td>– 33 months</td>
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<td>– 30 months</td>
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<td>– 21 months</td>
<td>– 24 months (x5)</td>
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<td>– 20 months</td>
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Forest Park Medical Center

- Physician-owned hospital
- Opened in Dallas in 2009
- No Medicare or Medicaid reimbursement
- Started out of network with all commercial payors
FPMC Indictment

- Charged bribe payors, bribe recipients, and bribe facilitators
- Conspiracy to pay and receive healthcare bribes and kickbacks
- Violation of Anti-Kickback Statute
- Violation of Travel Act (18 U.S.C. § 1952) and Texas Commercial Bribery Statute
- Money Laundering
FPMC - Denial of Motion to Dismiss Indictment
District Court Order (3:16-CR-516, Dkt. 470)

• Argument: TCBS is preempted by the AKS

• Ruling: “Nothing in the federal Anti-Kickback statute or its regulations indicates that Congress intended the federal Anti-Kickback Statute to be the exclusive means of prosecuting health care fraud—indeed, the long coexistence of the federal statute with parallel state statutes suggests the opposite.”

FPMC – Denial of Motion to Dismiss Indictment

• Argument: Prosecuting health care kickbacks under the Travel Act using the TCBS violates the Constitution due to absence of state enforcement

• Ruling: “[B]ecause commercial bribery coupled with a sufficient interstate nexus is a matter of federal concern, the court concludes that the Travel Act counts do not run afoul of federalism principles.”
Takeaways: Use of the Travel Act for Corrupt Payments

– Offering inducements for patient referrals, even if only commercial or self-pay patients, could still result in criminal liability

– Calls into question “carve-out arrangements” that pay remuneration for only Medicare or Medicaid business

– Even if funds are not paid directly to a physician and are expended on actual marketing services under co-marketing arrangement, government could still find the arrangements problematic if marketing expenses are paid in exchange for referrals
Enforcement Beyond Federal Programs

- Travel Act
- Honest Services Fraud
- Eliminating Kickbacks in Recovery Act ("EKRA")
- Risks of carve outs if federal patients slip through

Future of Federal Enforcement

- Corrupt payment prosecutions no longer limited to cases involving govt. programs
- Impact on Compliance Programs
- Questions remain:
  - Who is covered?
  - Role of safe harbors
Disclaimer

• This Presentation Provides General Legal Information and Should not be Construed as Legal Advice. Persons Wishing Such Advice Should Seek Legal Counsel Concerning Specific Fact Situations that Confront Them.

• Opinions Expressed Herein or Otherwise are Those of the Speakers and do not Necessarily Reflect the Views of the United States Attorney’s Office for the Northern District of Texas or the United States Department of Justice.

QUESTIONS?

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