KILPATRICK TOWNSEND

Insights: Alerts

Health Care's Expanding Landscape of Criminal Anti-Bribery Enforcement

May 12, 2022

Written by **Clay C. Wheeler** and **Callie S. Thomas**

Two months ago, in federal district court in Ft. Lauderdale, Jonathan and Daniel Markovich were sentenced to respective terms of imprisonment of 188 months and 97 months. The brothers had been convicted by a jury in late 2021 in a case arising out of a variety of billing, prescribing, and referral practices tied to two Florida substance-abuse treatment facilities. According to the charging documents in the case, at least three different types of bribes or kickbacks occurred related to those health care facilities: (1) bribes paid to patients, including money, gift cards, controlled substances, and airline tickets, for the purpose of gaining patients for the facilities; (2) bribes paid to patient recruiters, for the same purpose; and (3) a bribe received by Jonathan Markovich, identified as the CEO of both health care facilities, in exchange for referring patient urine samples to an outside laboratory for testing.[1]

Despite these features of the government's case, the government did not seek or obtain a conviction under the best-known anti-bribery statute concerning health care, the Anti-Kickback Statute. The Anti-Kickback Statute was presumably disregarded because the health care services at issue had generally been paid for by private insurers, rather than by a government health program such as Medicaid; the Anti-Kickback Statute only addresses bribery harming a "Federal health care program." [2]

Federal prosecutors were nonetheless able to charge and convict the Markovich brothers in connection with this bribery activity. To do so, the government used a criminal statute that had only been put on the books in 2018, the Eliminating Kickbacks in Recovery Act ("EKRA"). The government's successful use of EKRA in the *Markovich* case highlights how criminal anti-bribery enforcement in health care looks different now than it did even five years ago. Below, we discuss four key federal criminal statutes directed at anti-bribery that have been used to police corrupt payments in the provision of health care services and goods. We also provide examples of cases, like the *Markovich* case, where these tools have been successfully used by federal prosecutors. As a conclusion, we describe steps companies and executives in this sector can take now to avoid a face-to-face encounter with these statutes as a criminal defendant.

A. The Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b))

Section 1320a-7b(b) of Title 42, also known as the Anti-Kickback Statute or "AKS", which became law in 1972, prohibits the payment or receipt of "any remuneration" in exchange for the referral of a patient to a health care

provider or for the purchase of a health care good or service.[3] Each criminal charge under the statute carries a potential penalty of 10 years' imprisonment, and a potential fine of $250,000 for an individual defendant and $500,000 for a corporate one.[4] However, as noted above, the scope of the Anti-Kickback Statute is limited to health care that is paid for by a "Federal health care program." Thus, prosecutors' application of the AKS generally requires that federal health care dollars have been at risk.[5]

The AKS is unusual among federal criminal statutes in that it incorporates a series of detailed exceptions or "safe harbors," each of which describes a type of conduct considered lawful for purposes of the statute. Several of these exceptions are found in the statute itself. For example, there is an exception in the statute for "any amount paid by an employer to an employee . . . for employment in the provision of covered [health care] items or services."[6] Thus, providers may provide their *bona fide* employees with compensation, even incentive-based compensation, without running afoul of the AKS.[7] The statute itself contains 11 different safe harbors, and 37 safe harbors, plus sub-parts, are found in the accompanying regulation.[8]

In the health care context, the AKS is by far the best-known of the statutes discussed here, and continues to play an important role in criminal prosecutions. For example, in December 2021, a jury found Vincent Marchetti, Jr. guilty of conspiring to violate the AKS.[9] Marchetti and others had been charged for their roles in a scheme in which "distributors" were paid for referring genetic testing to laboratories in California. [10] The laboratories then billed Medicare (as well as private insurance companies) for the tests.[11] According to the government, over $28 million in bribes were exchanged by the participants.[12]

B. The Eliminating Kickbacks in Recovery Act (18 U.S.C. § 220)

Used in the *Markovich* case, EKRA is the latest criminal statute designed to target bribery in the health care sector. Passed in 2018, EKRA prohibits the payment or receipt of "any remuneration" in exchange for referring "a patient or patronage" to any of three specific types of health care providers: (1) a substance abuse recovery home; (2) a substance abuse clinical treatment center; or (3) a clinical testing laboratory.[13] The potential criminal penalties are the same as those for the AKS, including a potential 10-year sentence for each charge.

The two most notable aspects of EKRA's statutory language involve the scope of health care funding the statute protects, and the statute's broad application to referrals to clinical labs. Unlike the AKS, the scope of EKRA is not limited to services covered by Federal health care programs. Instead, EKRA applies to protect services covered by any "health care benefit program," a term that is defined to include practically every contractual arrangement for the provision of and payment for health care.[14] Also, while EKRA targets "patient brokering" practices related to substance abuse treatment facilities, it includes corrupt payments for referrals to labs in its scope regardless of whether the referral has any connection to substance abuse treatment. In this way, EKRA likely operates as an all-purpose anti-bribery statute where private-pay lab testing is concerned.

EKRA contains seven statutory safe harbors, but, to date, no regulatory ones. As demonstrated in the *Markovich* case, EKRA is a new and viable option for prosecutors attacking bribery activity around substance abuse

treatment, including payments in exchange for the referral of lab testing. Based on its statutory language, it is also a new tool for prosecuting bribery beyond the context of substance abuse treatment, at least where lab testing is concerned.

C. The Federal Travel Act (18 U.S.C. § 1952) & State Commercial Bribery Laws

At first glance, Section 1952 of United States Code Title 18 would seem to have little application to bribery related to the provision of health care. The criminal statute is titled "Interstate and foreign travel or transportation in aid of racketeering enterprises," and is referred to as the "Travel Act" for short. However, like the Racketeer Influenced and Corrupt Organizations law ("RICO"), the Travel Act is written in a way that permits surprising flexibility in its application.

In the health care context, the most important point is that the Travel Act in essence includes a federal commercial bribery statute. Other than a constitutionally required interstate nexus, a violation of the criminal statute hinges on a finding of an "unlawful activity," a term the statute defines to include "bribery . . . in violation of the laws of the State in which committed . . . ."[15] The U.S. Supreme Court has ruled that "unlawful activity" under the Travel Act therefore includes commercial bribery under state law.[16]

Many state commercial bribery statutes are broad and therefore prosecutor-friendly in that they punish anyone who gives or receives a bribe as part of an effort to influence an employee's performance of his or her duties. [17] Thus, they do not require that government dollars be at risk (like the AKS does), and often do not include limitations involving particular business sectors or specific services within those sectors (like the AKS and EKRA do). On the other hand, state commercial bribery laws are generally under-utilized at the state level, likely because they often carry insufficient potential punishment to justify the resources needed to investigate and prosecute cases.[18]

However, once a state commercial bribery statute is incorporated in a federal Travel Act charge, the picture changes. A federal Travel Act charge is a felony carrying a potential prison term of five years, and a potential fine of $250,000 for an individual defendant and $500,000 for a corporate one.[19] The combination of broad statutory language from the state side and significant penalties from the federal side creates another powerful anti-bribery tool where health care is concerned.

The criminal case *United States v. Beauchamp* is a good example of a health care bribery prosecution employing the Travel Act. In *Beauchamp*, the government successfully prosecuted a multi-million-dollar patient referral scheme involving a physician-owned surgical hospital in Dallas. The government alleged that the hospital had paid millions in kickbacks to health care providers in exchange for referrals.[20]

The government brought charges against numerous physicians and other individuals under both the AKS and the Travel Act. The AKS charges were based on referral payments for patients with federal health coverage, while the Travel Act charges, which incorporated Texas's commercial bribery statute, were presumably based mainly on referral payments for a second category of patients – those with "high-reimbursing out-of-network

private insurance benefits."[21] By definition, and like the government's use of EKRA in the *Markovich* case, the Travel Act allowed the government in *Beauchamp* to charge a category of bribery conduct beyond that falling within the AKS.

Pre-trial, several of the defendants in *Beauchamp* moved to dismiss the Travel Act counts against them, asserting among other things that: (1) Texas' commercial bribery statute had been preempted by the AKS and its safe harbors; (2) Texas' commercial bribery statute was unconstitutionally vague; and (3) the federal prosecutors' use of Texas' commercial bribery statute via the Travel Act violated the principle of federalism because Texas itself had never used the state statute to prosecute health care providers.

The district court rejected each of these arguments. In rejecting the defendants' preemption argument, the district court endorsed the use of the Travel Act and state commercial bribery statutes in the health care setting, noting:

> 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.[22]

The court also explained that the defendants' federalism argument lacked merit because the Travel Act had been specifically designed to incorporate state laws. The court quoted the U.S. Supreme Court in *United States v. Perrin* for the proposition that "[b]ecause [Travel Act] offenses are defined by reference to existing state as well as federal law, it is clear beyond doubt that Congress intended to add a second layer of enforcement supplementing what it found to be inadequate state authority and state enforcement."[23]

The U.S. Department of Justice announced in March of last year that in total 18 people had been convicted in the *Beauchamp* case. In its press release, DOJ highlighted bribes totaling over $40 million, and noted they had been disguised as "consulting fees" or "marketing money."[24] Numerous substantial terms of imprisonment were ordered in the case, including at least eight terms of five years or more, and restitution in the total amount of $82.9 million was ordered as well. DOJ also made the point that the case was "one of the first cases in the nation to use the federal Travel Act to prosecute healthcare fraud."[25]

D. Health Care Anti-Bribery Abroad: The Foreign Corrupt Practices Act (15 U.S.C. § 78dd-1 et seq.)

The AKS, EKRA, and the Travel Act all play prominent roles in current federal anti-bribery efforts pertaining to U.S. health care. A fourth federal anti-bribery statute – the Foreign Corrupt Practices Act – also has a role, a unique one, arising out of its focus on bribery overseas. The FCPA generally prohibits business entities with sufficient ties to the U.S., and associated individuals, from bribing or attempting to bribe foreign officials.[26] A separate FCPA provision requires companies traded publicly in the U.S. to maintain accurate books and records and sufficient internal accounting controls.[27] Fines under the bribery provision can reach $2 million for organizations and $250,000 for individuals, and terms of imprisonment of up to five years per charge for individuals.[28]

The FCPA's application to bribery involving health care was evident in DOJ's simultaneous settlements in 2020 with two subsidiaries of the pharmaceutical company Novartis AG. In the first settlement, DOJ alleged that a subsidiary based in Greece had entered a conspiracy to bribe individuals who were health care providers at state-owned and state-controlled hospitals and clinics in Greece, in violation of the FCPA.[29] Importantly, DOJ deemed a health care provider at one of these facilities a "foreign official" for purposes of the FCPA. [30]

The purpose of the bribery conspiracy, according to DOJ, was to increase sales in Greece of a specific Novartis-branded prescription drug.[31] The bribes took the form of travel expenses to medical conventions, as well as payments disguised as compensation for participating in a patient study.[32]

In the second settlement, DOJ alleged that a former Novartis affiliate had conspired to violate the books and records provision of the FCPA. According to DOJ, the affiliate concealed an arrangement by which a distributor based in Vietnam made corrupt payments to doctors and nurses in Vietnam, many of whom were employees of state-owned and state-controlled hospitals and clinics and therefore also considered "foreign officials." This "consultancy program" rewarded health care providers who had purchased surgical equipment and devices sold by the Novartis affiliate. The Novartis affiliate then partially reimbursed the distributor for the corrupt payments, and concealed these reimbursements on the Novartis affiliate's books and records as "consultancy fees" and as inflated marketing, human resources, or margin reconciliation costs.[33]

Both entities entered into deferred prosecution agreements with DOJ and agreed to pay a combined total of over $233 million in criminal monetary penalties.[34]

E. Conclusion: The Expanding Anti-Bribery Landscape and How to Respond

The above discussion paints an important picture of the expanding anti-bribery enforcement landscape for health care. The last five years have seen the birth of a new criminal anti-bribery statute focused on specific parts of the health care sector (EKRA), along with new and expanded applications of existing anti-bribery statutes (Travel Act, FCPA) to that sector. Further, anti-bribery enforcement using these tools has not replaced, but rather has expanded on, enforcement under the Anti-Kickback Statute. For health care businesses and their employees, what can be done now?

The Department of Justice provides an important answer with its public guidance regarding corporate compliance programs. While intended to apply generally across different types of businesses (unlike HHS OIG guidance), the principles expressed by DOJ are excellent guideposts. In a case of potential misconduct, the health of a company's compliance program is of utmost importance to DOJ, and a healthy compliance program can be credited by DOJ even if bribery-related misconduct has occurred.[35] DOJ assesses the health of a corporate compliance program by asking three broad questions:

- Is the program well-designed?
- Is it being applied earnestly and in good faith?
- Does it work?[36]

DOJ's methodology suggests specific steps that can be taken now in light of the expanding landscape of criminal anti-bribery enforcement where health care is concerned. Here are three basic first steps:

First, make sure the risk assessment driving your compliance program includes a recognition of these anti-bribery statutes and the boundaries of each. This includes, for example, recognizing the extent to which your services and/or products are covered by federal health care programs, understanding the commercial bribery statutes in the states in which you operate, and highlighting for further attention all direct or indirect contact overseas with anyone who might be deemed a "foreign official."

Second, take a close look at the channels in your organization through which suspected misconduct, including bribery-related misconduct, can be reported. This includes ensuring that your whistleblower system is well-publicized and is functioning properly.

Third, evaluate the extent to which your compliance program has been adapted, improved, and re-tested based on internal lessons-learned or external events. DOJ emphasizes that "[o]ne hallmark of an effective compliance program is its capacity to improve and evolve."[37]

These are just some of the specific actions that can be taken now in light of health care's expanding anti-bribery landscape. There is little doubt efforts like these are sound investments, especially when the risks associated with complacency are considered.

Footnotes

---

[1] *See, e.g.*, Indictment, *United States of America v. Markovich, et al.*, Case No. 21-cr-60020-WPD (S.D. Fla.). The terms "bribe" and "kickback" are broad, and their definitions often overlap, so for the purposes of this discussion we use the term "bribe" here to mean any corrupt *quid pro quo* payment, including what would commonly be referred to a kickback.

[2] 42 U.S.C. § 1320a-7b(b). The statute generally defines a "Federal health care program" as a plan or program providing health benefits and that is either funded directly by the U.S. government or indirectly by the U.S. government via a state. 42 U.S.C. § 1320a-7b(f).

[3] 42 U.S.C. § 1320a-7b(b).

[4] 42 U.S.C. § 1320a-7b(b)(1) & (b)(2); 18 U.S.C. § 3571. A defendant can alternatively receive a fine of "not more than the greater of twice the [defendant's] gross gain or twice the gross loss [to victims]." 18 U.S.C. § 3571. Also, an AKS conviction can lead to exclusion from the Federal health care program. *See* 42 U.S.C. § 1320a-7.

[5] It is important to note that a violation of the Anti-Kickback Statute will almost certainly also result in a false or fraudulent claim under the civil False Claims Act, *see* 42 U.S.C. § 1320a-7b(g), and that the False Claim Act includes significant financial incentives for whistleblowers or *qui tam* plaintiffs to bring civil cases under that statute, *see* 31 U.S.C. § 3730(d).

[6] 42 U.S.C. § 1320a-7b(b)(3)(B). There is a corresponding federal regulation. *See* 42 C.F.R. § 1001.952(i).

[7] *See Carrel v. AIDS Healthcare Foundation*, 898 F.3d 1267, 1272-75 (11th Cir. 2018).

[8] 42 C.F.R. § 1001.952.

[9] See California Man Convicted of Federal Violations in Health Care Kickback Scheme (Dec. 16, 2021), https://www.justice.gov/usao-edtx/pr/california-man-convicted-federal-violations-health-care-kickback-scheme (last accessed May 6, 2022). Mr. Marchetti is currently awaiting sentencing.

[10] *See* First Superseding Indictment, *United States of America v. Lamb, et al.*, Case No. 5:19-cr-00025-RWS (E.D. Tex.).

[11] *See id*.

[12] *See* California Man Convicted of Federal Violations in Health Care Kickback Scheme (Dec. 16, 2021), https://www.justice.gov/usao-edtx/pr/california-man-convicted-federal-violations-health-care-kickback-scheme (last accessed May 6, 2022).

[13] *See* 18 U.S.C. § 220(a) & (e); 42 U.S.C. § 263a.

[14] 18 U.S.C. § 24(b). Importantly, however, EKRA states that it "does not apply to conduct that is prohibited" by the AKS. 18 U.S.C. § 220(d).

[15] 18 U.S.C. § 1952(b).

[16] *Perrin v. United States*, 444 U.S. 37, 50 (1979).

[17] *See, e.g.*, N.C. Gen. Stat. § 14-353.

[18] For example, North Carolina's commercial bribery law, N.C. Gen. Stat. § 14-353, is a Class 2 misdemeanor, punishable by 1 to 60 days in jail. See Misdemeanor Punishment Chart, https://www.nccourts.gov/assets/documents/publications/MisdChart_12_01_95.pdf?hxAOyi0UCOiivXKQWTTHXYwx.9oTaERW (last accessed May 6, 2022).

[19] 42 U.S.C. § 1320a-7b(b)(1) & (b)(2); 18 U.S.C. § 3571. A defendant can alternatively receive a fine of "not more than the greater of twice the [defendant's] gross gain or twice the gross loss [to victims]." 18 U.S.C. § 3571. Also, an AKS conviction can lead to exclusion from the Federal health care program. *See* 42 U.S.C. § 1320a-7.

[20] *See* Superseding Indictment, ¶ 2, *United States of America v. Beauchamp, et al.*, Case No. 3:16-cr-00516-JJZ (N.D. Tex.).

[21] *Id*.

[22] Memorandum Opinion and Order dated September 20, 2017, Case No. 3:16-cr-00516-JJZ, at 25.

[23] *Id*. at 37.

[24] 14 Defendants Sentenced to 74+ Years in Forest Park Healthcare Fraud (Mar. 19, 2021), https://www.justice.gov/usao-ndtx/pr/14-defendants-sentenced-74-years-forest-park-healthcare-fraud (last accessed May 6, 2022).

[25] *Id*.

[26] *See* 15 U.S.C. § 78dd-1.

[27] 15 U.S.C. § 78m(b).

[28] 15 U.S.C. § 78ff(c)(2)(A).

[29] *See* Criminal Information filed June 25, 2020, *United States of America v. Novartis Hellas S.A.C.I.*, Case No. 2:20-cr-00538 (D. N.J.).

[30] *See id*.

[31] *See id*.

[32] *See id*.

[33] *See* Criminal Information filed June 25, 2020, *United States of America v. Alcon PTE Ltd*, Case No. 2:20-cr-00539 (D. N.J.).

[34] *See* Novartis AG and Subsidiaries to Pay $345 Million to Resolve Foreign Corrupt Practices Act Cases (Jun. 25, 2020), https://www.justice.gov/usao-nj/pr/novartis-ag-and-subsidiaries-pay-345-million-resolve-foreign-corrupt-practices-act-cases (last accessed May 6, 2022).

[35] *See* United States Department of Justice, *Evaluation of Corporate Compliance Programs* at 14 (June 2020) ("[T]he existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense."), https://www.justice.gov/criminal-fraud/page/file/937501/download.

[36] *See* Evaluation of Corporate Compliance Programs at 2.

[37] *Id*. at 15.

Related People

Clay C. Wheeler

Partner

Raleigh, NC

t 919.420.1717

cwheeler@kilpatricktownsend.com

Callie S. Thomas

Government Enforcement & Investigations Attorney

Raleigh, NC

t 919.420.1820

callie.thomas@kilpatricktownsend.com