Arrest of Pharma Executive on Federal Kickback Charges Sends Strong Message About DOJ's Initiative on Personal Accountability

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Federal agents recently arrested the former president of an Allergan PLC division on charges of conspiring to pay kickbacks to physicians to induce them to prescribe the company's drugs. On October 28, 2015, a grand jury in Massachusetts indicted Carl Reichel, who served as president of Warner Chilcott's pharmaceutical division between 2009 and 2011, on one count of violating the federal anti-kickback statute. Allergan acquired Warner Chilcott in 2013. The indictment alleges that Reichel designed an elaborate sales and marketing strategy and instructed the sales force he supervised to provide free meals, drinks and bogus "speaker fees" to doctors to encourage them to prescribe Warner Chilcott drugs. The Justice Department also announced last week that two other former sales managers for Allergan's Warner Chilcott unit pleaded guilty in July to charges of conspiracy to commit health fraud and await sentencing. Mr. Reichel pleaded not guilty to the charges.

In a related development, Warner Chilcott agreed to plead guilty to health care fraud and pay $125 million to settle related charges that it ran an elaborate and extravagant scheme to persuade doctors to prescribe its drugs in exchange for kickbacks, including lunches, dinners, drinks and payment for speeches that were never made. The case was brought by two whistleblowers.

Bringing criminal charges against Reichel was a rare move by the Department of Justice (DOJ), which in recent years has focused its prosecutorial efforts on corporate wrongdoing, not individual responsibility, under the False Claims Act. Although the DOJ pursued criminal charges in two recent notorious food contamination cases, it is highly unusual for the Department to bring criminal charges against corporate executives in the context of health care fraud. In 2011, Marc Hermelin, former chief executive of K-V Pharmaceutical Co. was sentenced to 30 days in prison in connection with the company's shipment of painkillers, but that is the last such notable case in recent memory. The DOJ's latest attempt to hold an upper level executive accountable for criminal violations has health care insiders wondering if the indictment signals a new day for the enforcement of federal anti-kickback laws.

It may not be coincidence that the DOJ recently announced a policy to pursue individuals, not just their employers, for criminal violations of federal health care fraud laws. In a speech last week, Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department's Civil Division, emphasized that the DOJ's enforcement efforts are about more than collecting large corporate fines: "Certainly, the most recent development that you may all have read about and that will affect future matters is the department's renewed commitment to ensuring that individuals who engage in fraud schemes and other wrongdoing are held accountable. Pursuing culpable individuals has many effects: it deters other persons from engaging in similar illegal conduct; it addresses the misconduct directly by focusing on the actors who made or executed the decisions within the organization; and it encourages changes in corporate culture." Mizer highlighted the DOJ's commitment to pursuing not just the business involved in fraudulent behavior, but also the people whose decisions and actions caused the misconduct to occur. The DOJ's new policy statement has three components:

1. If a company wants credit for cooperation, it has to identify all individuals involved in the wrongdoing, regardless of the individual's position or seniority in the company.

2. The Department will focus on individuals from the outset of an investigation, on both the criminal and civil sides.
3. The DOJ criminal and civil sides will work in collaboration toward a shared enforcement goal.

We will closely watch these developments in the coming months as the DOJ implements its new policies. In the meantime, with the stakes higher than ever, health care companies and their executives should be more vigilant about compliance with health care fraud laws.

If you have any questions regarding DOJ's new policies, please contact Sam Felker, Joe Whitley, Chuck Jolly or a member of our Government Enforcement & Investigations or FDA group.