

treatment – and the Rule nowhere addresses a course of conduct comprised of a series of reportable treatments.

The tests commonly used to determine the proper unit of prosecution are: (1) commonality of proof and (2) legislative intent. The first test simply involves the determination of whether each offense requires proof of an additional fact that the other does not. See United States v. Blockburger, 284 U.S. 299 (1931); United States v. Albrecht, 273 U.S. 1 (1927). The second test concerns legislative intent -- here, determining whether HISA intended to prohibit each individual act or, alternatively, a course of conduct comprised of a series of acts. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952); Ebeling v. Morgan, 237 U.S. 625 (1915).

Application of these tests to the August 23, 2024 Notice of Violation confirms that the Notice failed to state a cognizable charge. This is so because each of the “approximately” 3,951 treatments plainly require proof of facts (i.e., nature of treatment and identity of the Covered horse) different from all the remaining charged treatments. It also is so because, inter alia, HISA Rule 2251(b) expressly requires “portal” reporting “within 24 hours after such examination or treatment ...” This 24-hour reporting requirement clearly evinces an intent to prohibit each individual act – *not* a course of conduct composed of a series of acts.

Here, the Notice of Violation charged Dr. Galvin with a series of treatments he purportedly failed to enter into HISA's "portal" over the course of 15 months. But HISA Rule 2251 does not create a continuing offense, and each individual data entry failure therefore needed to be charged in a separate count.

Notably, HISA had fair warning that its Notice of Violation was defective and failed to state a cognizable offense. See In the Matter of HIWU v. Dr. Scott Shell, JAMS Case No. 1501000708 (June 11, 2024) ("Dr. Shell"). In Dr. Shell, HIWU charged veterinarian Scott Shell with administering a banned substance 228 times to 37 covered horses. In each instance, Dr. Shell reported those treatments in HISA's portal. As to each of those treatments, HIWU sought the same \$25,000 fine and two year suspension. The arbitrator emphatically rejected that bid:

since there was more than one Administration, and since multiple Covered Horses were involved, **the Agency did not have the discretion to treat multiple violations for the same Banned Substances as a single violation.** Were the Arbitrator to impose such a sanction it would not be an accurate reflection of the unique circumstances of this case and would be disproportionate and excessive.

HIWU v. Dr. Shell, Amended Final Decision, dated June 11, 2024, at 36 (emphasis added). See also

Finally, HISA's Notice of Violation issued pursuant to HISA Rule 8200(d). That Rule provides, in relevant part, that any such notice "*shall ... [s]pecify with reasonable particularity the factual basis of the Authority's belief that the provision*

has been violated[.]” Rule 8200(d)(1)(ii) (italics added). The Notice here alleged only that Dr. Galvin “failed to report approximately 3,951 treatments administered to 497 Covered Horses between January 1, 2023 and March 7, 2024.” Because the Notice of Violation did not include the identities of Covered horses purportedly treated and the dates of such treatments, the Notice did not meet Rule 8200(d)’s specificity requirement, and it failed to spell out the elements of the charged offense. For both reasons, the Notice of Violation did not comport with well-settled principles of Due Process notice and meaningful opportunity to respond.

In sum, the single count that aggregated 3,864 unfiled treatments failed to state a cognizable violation of HISA Rule 2251(b).

ARGUMENT

THE INTERNAL ADJUDICATION PANEL LACKED JURISDICTION BECAUSE THE NOTICE OF VIOLATION FAILED TO CHARGE A COGNIZABLE OFFENSE

A jurisdictional defect exists when the charging instrument alleges conduct that does not constitute an offense because it falls outside of the sweep of the charged statute. “The problem [with such defect] is not that the government failed to allege a fact or an element that would have made the indictment’s criminal charge complete. Instead, ‘it is that the Government affirmatively alleged a specific course of conduct that is outside of the reach of the [statute charged].’” United States v. Brown, 752 F.3d 1344, 1352 (11th Cir. 2014) (quoting United States v. Peter, 310

F.3d 709, 715 (11th Cir. 2002)). See also United States v. Izurieta, 710 F.3d 1176, 1184 (11th Cir. 2013) (holding indictment jurisdictionally defective because it “d[id] not charge a crime”); United States v. Meacham, 626 F.2d 503, 510 (5th Cir. 1980) (holding indictment was jurisdictionally defective because it charged “a nonoffense”); United States v. Moore, 954 F.3d 1322, 1334 (11th Cir. 2020) (“when the indictment ... fails to charge a crime, the district court lacks jurisdiction”).

Notably, in United States v. Cotton, 535 U.S. 625 (2002), the Supreme Court pronounced that “a defective indictment” does not “deprive[] a court of jurisdiction.” Id. at 631. The indictment in that case was challenged on grounds of an omitted *element*, viz., a failure to allege drug quantities as required under the intervening authority of Apprendi v. New Jersey, 530 U.S. 466 (2000).

Because the Cotton defect concerned a missing element of a cognizable offense, the Circuit Courts now are “split on the proper interpretation of Cotton.” United States v. Muresanu, 951 F.3d 833 (7th Cir. 2020). More specifically,

[t]he Eleventh Circuit reads the Court’s holding as limited to defective indictments that omit necessary allegations but nonetheless charge *some* crime. United States v. McIntosh, 704 F.3d 894, 901-03 (11th Cir. 2013). On this view, the rule announced in Cotton does not apply if an indictment fails to allege any federal crime at all. Id. The Fifth and Tenth Circuits read Cotton more broadly, applying it even when an indictment fails to state an offense; on this view, defects in an indictment – of whatever kind – are not jurisdictional. United States v. De Vaughn, 694 F.3d 1141, 1148-49 (10th Cir. 2012); United States v. Cothran, 302 F.3d 279, 283 (5th Cir. 2002).

Muresanu, 951 F.3d at 838; id. at 839 (“defects in an indictment do not deprive the court of subject-matter jurisdiction, and this is so even when the defect is a failure to state a federal offense”). See also United States v. Aquart, 92 F.4th 77, 90 (2d Cir. 2024) (rejecting Eleventh Circuit’s “narrower reading of Cotton,” and interpreting Cotton to mean that “challenges to indictments on the basis that the alleged conduct does not constitute an offense under the charged statute are ... *non-jurisdictional challenges*”) (quoting United States v. Rubin, 743 F.3d 31, 37 (2d Cir. 2014)) (italics added).

Irrespective of the foregoing split of authority, two additional factors support the conclusion that the August 23, 2024 Notice of Violation was jurisdictionally defective: First, the Notice of Violation was defective under HISA’s own precedents. See In the Matter of HIWU v. Dr. Scott Shell, JAMS Case No. 1501000708 (June 11, 2024) (“... the Agency did not have the discretion to treat [228 violations involving 37 covered horses] as a single violation”). If, as held, HIWU “did not have ... *discretion*” to charge hundreds of violations as a single violation, it is difficult to understand how HISA had *jurisdiction* to charge thousands of alleged violations as a single violation. Second, The August 23, 2024 Notice of Violation also was impermissibly duplicitous and, therefore, violative of Dr. Galvin’s Fifth Amendment’s Due Process rights. See United States v. Studivant, 244 F.32d 71, 75

(2d Cir. 2001) (an indictment is impermissibly duplicitous if it combines two or more distinct violations into one count and the defendant thereby is prejudiced).

CONCLUSION

For the foregoing reasons HISA failed to charge a cognizable violation of Rule 2251 and the Internal Adjudication Panel therefore lacked jurisdiction to adjudicate the charge. The IAP's finding of a violation on that charge therefore should be vacated and the charge dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Trade Commission Rules of Practice 4.2(c) and 4.4(b), a copy of the foregoing Statement is being served on January 2, 2026, via Administrative E-File System and by emailing a copy to:

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