

TITLE II-D

HEALTH CARE PRACTITIONER REFERRALS

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S 238. Definitions. As used in this title, the following terms shall have the following meanings, unless the context clearly requires otherwise:

1. "Clinical laboratory services" shall mean the microbiological, serological, chemical, hematological, biophysical, cytological or pathological examination of materials derived from the human body, for the purposes of obtaining information for the diagnosis, prevention, or treatment of disease or the assessment of health condition.

2. "Fair market value" shall mean the value in arms length transactions, consistent with the general market value, and, with respect to rentals or leases, the value of rental property for general commercial purposes, not taking into account its intended use, and, in the case of a lease of space, not adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor where the lessor is a potential source of patient referrals to the lessee.

3. "Financial relationship" shall mean an ownership interest, investment interest or compensation arrangement.

4. "General hospital" shall have the same meaning as is set forth in subdivision ten of section twenty-eight hundred one of this chapter.

5. "Group practice" shall mean a group of two or more practitioners organized as a partnership, professional corporation, foundation, not-for-profit corporation, faculty practice plan or similar association; and

(a) in which each practitioner who is a member of the group provides substantially the full range of services which the practitioner routinely provides, including medical care, consultation, diagnosis or treatment, through the joint use of shared office space, facilities, equipment and personnel; and

(b) for which substantially all of the services of the practitioners who are members of the group are provided through the group and are billed in the name of the group and amounts so received are treated as receipts of the group; and

(c) in which the overhead expenses of the income from the practice are distributed in accordance with methods previously determined by members of the group; and

(d) provided, however, in the case of a faculty practice plan associated with a hospital with an approved residency training program in which practitioner members may provide a variety of different specialty services and provide professional services both within and outside the group, as well as perform other tasks such as research, the provisions of paragraphs (a), (b) and (c) of this subdivision shall be applied only with respect to the services provided within the faculty practice plan.

6. "Health care provider" shall mean a practitioner in an individual practice, group practice, partnership, professional corporation or other authorized form of association, a hospital or other health care institution issued an operating certificate pursuant to this chapter or the mental hygiene law, a certified home health agency or a licensed

home care services agency, and any other purveyor of health or health related items or services including but not limited to a clinical laboratory, a physiological laboratory, a pharmacy, a purveyor of x-ray or imaging services, a purveyor of physical therapy services, a purveyor of health or health related supplies, appliances or equipment, or an ambulance service.

7. "Health or health related items or services" shall include, but not be limited to, items and services available under the medical assistance program pursuant to title eleven of article five of the social services law.

8. "Immediate family member" shall include spouse; natural and adoptive parents, children and siblings; stepparents, stepchildren and stepsiblings; fathers-in-law, mothers-in-law, brothers-in-law, sisters-in-law, sons-in-law and daughters-in-law; and grandparents and grandchildren.

9. "Interested investor" shall mean, with respect to a health care provider, an investor who is a practitioner in a position to make or to influence referrals or business to the health care provider, or who is an immediate family member of such an investor.

10. "Investor" shall mean, with respect to a health care provider, a person with a financial relationship with the health care provider, subject to the exceptions provided in paragraph (b) of subdivision three, subdivision four and paragraph (b) of subdivision five of section two hundred thirty-eight-a of this title.

11. "Practitioner" shall mean a licensed or registered physician, dentist, podiatrist, chiropractor, nurse, midwife, physician assistant or specialist assistant, physical therapist, or optometrist.

12. "Rural" shall mean (i) a county with a population of two hundred thousand persons or less, or a town with a population density of one hundred fifty persons or less per square mile; and (ii) other rural areas pursuant to standards promulgated in regulation by the commissioner.

13. "X-ray or imaging services" shall mean diagnostic imaging techniques which shall include but not be limited to the following:

- (a) Conventional x-ray or radiology.
- (b) Fluoroscopy.
- (c) Digital radiography.
- (d) Computed tomography.
- (e) Magnetic resonance imaging.
- (f) Nuclear imaging.
- (g) Ultrasonography.
- (h) Angiography.

14. "Pharmacy services" shall mean the preparing, compounding, preserving or, the dispensing of drugs, medicines and therapeutic devices on the basis of prescriptions or other legal authority.

15. "Radiation therapy services" shall mean the use of high energy x-rays, particles, or radiation materials for the treatment of cancer and other diseases.

16. "Physical therapy services" means physical therapy as defined by section sixty-seven hundred thirty-one of the education law.

S 238-a. Prohibition of financial arrangements and referrals. 1. (a) A practitioner authorized to order clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services may not make a referral for such services to a health care provider authorized to provide such services where such practitioner or immediate family member of such practitioner has a financial relationship with such health care provider.

(b) A health care provider or a referring practitioner may not present or cause to be presented to any individual or third party payor or other entity a claim, bill, or other demand for payment for clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services furnished pursuant to a referral prohibited by this subdivision.

2. Subdivision one of this section shall not apply in any of the following cases:

(a) practitioners' services - in the case of practitioners' services provided personally by, or under the supervision of, another practitioner in the same group practice as the referring practitioner;

(b) in-office ancillary services - in the case of health or health related items or services (i) that are furnished personally by the referring practitioner, personally by a practitioner who is a member of the same group practice as the referring practitioner, or personally by individuals who are employed by such practitioner or group practice and who are supervised by the practitioner or by another practitioner in the group practice; and in a building in which the referring practitioner, or another practitioner who is a member of the same group practice, furnishes practitioners' services unrelated to the furnishing of such items or services, or in the case of a referring practitioner who is a member of a group practice, in another building which is used by the group practice for the centralized provision of such items or services of the group; and (ii) that are billed by the practitioner performing or supervising the services, by a group practice of which such practitioner is a member, or by an entity that is wholly owned by such practitioner or such group practice;

(c) in the case of health or health related items or services furnished to subscribers of a health maintenance organization operating pursuant to article forty-three of the insurance law or article forty-four of this chapter, participants in a managed care program operating pursuant to section three hundred sixty-four-j of the social services law or persons enrolled in a prepaid health services plan authorized by law;

(d) in the case of a referral for inpatient hospital services, including services by hospital staff practitioners provided in the hospital;

(e) in the case of a referral of a hospital inpatient, outpatient or emergency services patient for clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services provided by the hospital, including services by hospital staff practitioners provided in the hospital;

(f) in the case of a financial relationship with a general hospital if the financial relationship does not relate specifically to the provision of clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services for which the referral was made; and (g) in the case of any other financial relationship which the public health council determines and specifies in regulations, subject to approval by the commissioner, does not pose a substantial risk of payor or patient abuse in relation to patient benefits consistent, to the extent practicable, with financial relationships specified in regulations adopted pursuant to federal law applicable to reimbursement pursuant to title XVIII of the federal social security act (medicare) for clinical laboratory services provided to beneficiaries of title XVIII of the federal social security act (medicare).

3. For the purposes of this section, an ownership interest or an

investment interest:

(a) may be through equity, debt or other means; but
(b) shall not include ownership of investment securities, including shares or bonds, debentures, notes or other debt instruments, which were purchased on terms generally available to the public and which are in a corporation that is listed for trading on the New York stock exchange or on the American stock exchange, or is a national market system security traded under an automated interdealer quotation system operated by the national association of securities dealers, and had, at the end of the corporation's most recent fiscal year, total assets exceeding one hundred million dollars or to the extent such ownership would be permitted by federal law or regulation if the services rendered were clinical laboratory services provided to beneficiaries of title XVIII of the federal social security act (medicare).

4. An ownership interest or an investment interest shall not be subject to subdivision one of this section if:

(a) the health care provider authorized to provide clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services is in a rural area and the referring practitioner or the patient is in such rural area; or
(b) the clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services are provided by a general hospital, the referring practitioner is authorized to perform services at such general hospital and the ownership or investment interest is in the general hospital itself and not merely in a subdivision thereof; or (c) the clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services are provided by an ambulatory surgical center issued an operating certificate pursuant to article twenty-eight of this chapter in conjunction with a surgical procedure performed by the referring practitioner at the ambulatory surgical center;

(d) and if each practitioner who is an interested investor in a health care provider within a category specified in paragraph (a), (b) or (c) of this subdivision and who makes a referral of a patient to such health care provider discloses to the patient, in a brief and reasonable form and manner specified in regulations proposed by the commissioner after consultation with representatives of consumer and physician organizations and adopted by the public health council, subject to approval by the commissioner, the practitioner's, or family member's ownership interest or investment interest in the health care provider and the patient's right to utilize a specifically identified alternative health care provider if any such alternative is reasonably available.

5. (a) For the purposes of this section, a compensation arrangement means any arrangement involving any remuneration between a practitioner, or immediate family member, and a health care provider. The term remuneration includes any remuneration, directly or indirectly, overtly or covertly, in cash or in kind.

(b) For the purposes of this section a compensation arrangement shall not include:

(i) payments made for the rental or lease of office space, if (A) there is a written agreement, signed by the parties, for the rental or lease of the space, which agreement specifies the space covered by the agreement and dedicated for the use of the lessee, provides for a term of rental or lease of at least one year, provides for a payment on a periodic basis of an amount that is consistent with fair market value,

provides for an amount of aggregate payments that does not vary, directly or indirectly, based on the volume or value of any referrals of business between the parties, and would be considered to be commercially reasonable even if no referrals were made between the parties; or (B) in the case of rental or lease of office space in which a practitioner who is an interested investor, or an interested investor who is an immediate family member of the practitioner, has an ownership or investment interest, the office space is in the same building as the building in which the practitioner or group practice of which the practitioner is a member has a practice;

(ii) an arrangement between a general hospital and a practitioner, or immediate family member, for the employment of the practitioner, or immediate family member, or for the provision of administrative services, if the arrangement is for identifiable services, the amount of remuneration under the arrangement is consistent with the fair market value of the services, the remuneration is not determined in a manner that takes into account, directly or indirectly, the volume or value of any referrals by the referring practitioner and such remuneration is provided pursuant to an agreement which would be commercially reasonable even if no referrals were made to the general hospital;

(iii) an arrangement between a health care provider other than a general hospital and a practitioner if (A) the arrangement is for specific identifiable services as the medical director or as a member of a medical advisory board at the provider, for specific identifiable practitioner services to be furnished to an individual receiving hospice care payable as hospice care, for specific practitioners' services furnished to a non-profit blood center, or for specific identifiable administrative services, other than direct patient care services, but only under exceptional circumstances; and (B) the amount of remuneration under the arrangement is consistent with the fair market value of the services, the remuneration is not determined in a manner that takes into account, directly or indirectly, the volume or value of any referrals by the referring practitioner and such remuneration is provided pursuant to an agreement which would be commercially reasonable even if no referrals were made;

(iv) remuneration which is provided by a general hospital to a practitioner to induce the practitioner to relocate to the geographic area served by the general hospital in order to be a member of the medical staff of the general hospital if the practitioner is not required to refer patients to the hospital and the amount of the remuneration under the arrangement is not determined in a manner that takes into account directly or indirectly the volume or value of any referrals by the referring practitioner;

(v) an isolated financial transaction, such as a one-time sale of property, if the amount of remuneration under the arrangement is consistent with the fair market value, the remuneration is not determined in a manner that takes into account, directly or indirectly, the volume or value of any referrals by the referring practitioner and such remuneration is provided pursuant to an agreement which would be commercially reasonable even if no referrals were made;

(vi) a compensation arrangement involving payment by a group practice of the salary of a practitioner member of the group practice;

(vii) and provided that any arrangement specified in subparagraphs (i) through (vi) of this paragraph meets such other requirements as the public health council may impose by regulation, subject to approval by the commissioner, as needed to protect against payor or patient abuse

consistent with requirements imposed by regulations adopted pursuant to federal law applicable to reimbursement pursuant to title XVIII of the federal social security act (medicare) for clinical laboratory services provided to beneficiaries of title XVIII of the federal social security act (medicare);

(viii) an arrangement between a health care provider and an immediate family member of a practitioner for the employment of the immediate family member which the commissioner determines on application by the parties does not pose a substantial risk of payor or patient abuse in relation to patient benefits subject to such requirements as the commissioner shall determine necessary to protect the public interest, and which for a clinical laboratory that provides services to beneficiaries to title XVIII of the federal social security act (medicare) qualifies for an exception from the prohibitions on such compensation arrangements for purposes of reimbursement of clinical laboratory services pursuant to title XVIII of the federal social security act (medicare). Such application shall be in a form and content specified by the commissioner after consultation with representatives of consumer and physician organizations. The commissioner shall make such determination within sixty days of receipt of a complete application.

6. For the purposes of this title:

(a) in the case of clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services, the request by a practitioner for such services, including the request by a practitioner for a consultation with another practitioner, and any test or procedure ordered by, or to be performed by or under the supervision of that other practitioner, shall constitute a referral by a referring practitioner; and

(b) in the case of clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services, the request or establishment of a plan of care by a practitioner which includes the provision of clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services shall constitute a referral by a referring practitioner;

(c) provided further, however, that the following shall not constitute a referral by a referring practitioner:

(i) a request by a practitioner for practitioners' services consisting solely of professional services to be furnished personally by that practitioner, or under that practitioner's supervision;

(ii) a request by a pathologist for clinical diagnostic laboratory tests and pathological examination services, if such services are furnished by or under the supervision of such pathologist pursuant to a consultation requested by another practitioner; and

(iii) a request by a radiologist for diagnostic x-ray or imaging services, if such services are furnished by or under the supervision of such radiologist pursuant to a consultation requested by another practitioner.

7. If a referring practitioner or a health care provider furnishing clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services or any other person or entity collects any amounts that were billed in violation of this section, such referring practitioner and health care provider and other person or entity shall be jointly and severally liable to the payor for any amounts so collected.

8. Each health care provider furnishing clinical laboratory services,

pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services shall submit such information as reasonably may be required by the department for purposes of this title.

9. Subdivision one of this section shall apply to an arrangement or scheme, such as a cross-referral arrangement, which the practitioner or health care provider knows or should know has a principal purpose of assuring referrals by the practitioner for clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services to a particular health care provider which, if the practitioner directly made referrals to such health care provider, would be in violation of subdivision one of this section.

10. The public health council shall adopt rules and regulations, subject to approval by the commissioner, necessary to effectuate the provisions and purposes of this title.

S 238-b. Provider requests for payment. Each request for payment or bill submitted by a health care provider for clinical laboratory, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services for which the provider knows or has reason to believe that there has been a referral by a referring practitioner who is an interested investor in the health care provider shall identify the referring practitioner by name and by professional license number or any appropriate program provider number. The provisions of this section shall not apply to requests for payment or bills the content of which are regulated solely by federal law or regulation and to services excluded pursuant to paragraph (a), (b), (c), (d) or (e) of subdivision two of section two hundred thirty-eight-a of this title from the prohibitions of subdivision one of section two hundred thirty-eight-a of this title.

S 238-c. Provider reporting requirements. Each health care provider providing clinical laboratory, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services shall report to the commissioner in writing every two years information concerning the provider's ownership arrangements, including the health or health related items or services provided by the provider and the names and professional license numbers or any appropriate program provider numbers of practitioners with an ownership or investment interest in the provider, or whose immediate relatives have such an ownership or investment. The information required to be reported to the commissioner pursuant to this section to the extent practicable shall be consistent with the information required pursuant to federal law and regulations to be reported to the secretary of health and human services for health care providers providing items or services to beneficiaries of title XVIII of the federal social security act (medicare). The commissioner shall consult with the commissioner of social services to avoid duplication of reporting requirements for health care providers that participate in the medical assistance program pursuant to title eleven of article five of the social services law.

S 238-d. Practitioner disclosure requirements. 1. With respect to referrals not prohibited pursuant to this title, and except as provided in subdivision three of this section, a practitioner may not make a referral to a health care provider for the furnishing of any health or health related items or services where such practitioner or immediate family member of such practitioner has any of the following financial relationships without disclosing to the patient such financial

relationship:

(a) an ownership or investment interest, as defined in subdivision three of section two hundred thirty-eight-a of this title, with such health care provider; or

(b) a compensation arrangement, as defined in subdivision five of section two hundred thirty-eight-a of this title, with such health care provider which is in excess of fair market value or which provides for compensation that varies directly or indirectly based on the volume or value of any referrals of business between the parties.

2. The disclosure shall provide notice of any such financial relationship and shall also inform the patient of his or her right to utilize a specifically identified alternative health care provider if any such alternative is reasonably available, and shall be provided in a brief and reasonable form and manner specified in regulations proposed by the commissioner in consultation with consumer and physician organizations and adopted by the public health council, subject to approval by the commissioner.

3. Disclosure pursuant to this section shall not be required for a referral for the furnishing of any health or health related items or services under circumstances for which a referral of clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services would not be prohibited pursuant to section two hundred thirty-eight-a of this title, provided that any disclosure required by section two hundred thirty-eight-a of this title remains applicable.

S 238-e. Study of referrals by practitioners. 1. The commissioner may conduct a study of the ownership of or financial interests in health care providers by referring practitioners. Such study shall investigate:

(a) the types of such ownership arrangements and types of services offered under such arrangements; (b) the effect of such arrangements on the utilization of health or health related items and services; and © the effect of such arrangements on independent providers of similar services.

2. For the purposes of the study authorized by this section, the commissioner is authorized to request and any health care provider or practitioner shall provide, such information regarding those matters which the commissioner is authorized to study pursuant to subdivision one of this section in such form as may be prescribed by the commissioner.

3. Patient and practitioner identifying information collected pursuant to this section shall be confidential and not subject to disclosure.