§ 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.