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Compliance with Health Care Fraud and Abuse Rules - An Overview

Although other federal and state rules may also apply (e.g., environmental law, public health rules, informed consent rules, corporate practice of medicine in some states, etc.), the biggest areas of concern for legal compliance relating to the health care industry for a physician are:

1. **Antikickback Statute and Related Restrictions.** The Big Issue: Knowing and Willful Payment for Referrals. The Antikickback statute is a federal law (the Medicare Fraud and Abuse Amendments of 1977; 42 USC § 1320a-7b), but there are similar state laws, too, some of which may be more restrictive on certain matters; the state laws may relate directly to the medical profession or those who provided goods or services to the profession or patients (e.g., hearing aid sellers) or may be under general commercial bribery laws (or both). See, e.g., UCA § 26-20-4 (Utah False Claims Act, antikickback provision; note that it applies to any "medical benefit program" administered by the state, including state as well as federally funded programs).

a. Prohibition and Consequences. Prohibits knowing and willful payment or solicitation of remuneration to induce a referral of a patient for items or services for which payment may be made, in whole or in part, by a federal program such as, typically, Medicare or Medicaid. A person need not have actual knowledge of the law or specific intent to commit a violation of the statute. 42 USC § 1320a-7b (h). Also, the government takes the strong view that although kickbacks from commercial payors are not prohibited, if there is a nexus between payments relating to commercial referrals and government funded health care, there could be a disguised kickback relating to the government funded care and thus a violation of the statute. OIG Advisory Op. No. 06-02, at 7 (Mar. 21, 2006).

i. Violation is a felony (e.g., $25,000 or 5 years or both); see *U.S. v. Liss*, 265 F.3d 1220 (11th Cir. 2001) (penalty enhanced under sentencing guidelines for abuse of trust in anti-kickback case).

ii. Civil penalties (e.g., $2,000 per item or service, 2 times amount claimed) as well as criminal sanctions apply.

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iii. Penalties include exclusion from Medicare and Medicaid, and may be obtained without a federal criminal conviction. 42 USC § 1320a-7(a)(1) (state law conviction sufficient for mandatory exclusion), 42 USC § 1320a-7(b)(7) (administrative finding sufficient for permissive exclusion, under a civil preponderance of the evidence standard).

iv. Violation includes offering or paying any remuneration (not limited to kickbacks, bribes, and rebates but includes anything of value) whether overt or covert, direct or indirect, in cash or in kind.

v. Both parties to the agreement are liable.

vi. Any payments to a physician to limit or reduce necessary services are also prohibited.

vii. The knowing and willful state of mind element is broadly interpreted to apply if even one purpose is to induce referrals.

viii. The statute applies to any participating provider (*i.e.*, it is not limited to physicians and their immediate family; thus, it is unlike the Stark self referral rules).

ix. No deduction as a business expense is allowable for income tax purposes with respect to illegal referral fees or other illegal referral remuneration.

b. Safe Harbors. Certain exceptions and safe harbors are provided. If the transaction fits a safe harbor, it is protected; if not, it still might not be a violation but will be scrutinized by regulators. Note the difference between a safe harbor and an exception to the rule: a safe harbor gives protection, but even if the safe harbor does not apply, the conduct may not be a violation; an exception means no violation, but where only exceptions apply (as in the Stark rules described below), outside the exception there is no salvation.

i. Regulations, fraud alerts, and advisory opinions are issued from time to time by the Office of Inspector General ("OIG").

ii. The statute contains, as one of four exceptions, an exception for any amount paid by an employer to an employee who has a bona fide relationship with the employer for the provision of Medicare or Medicaid covered items or services.

iii. Safe harbor regulations have been adopted or proposed by the Office of Inspector General ("OIG") in about 19 areas, including, for example, one for bona fide employment arrangements and one for recruitment incentives to attract physicians to rural areas. The employment safe harbor is tied to the tax definition of employee-employer relationship. Sham transaction or device rules have been adopted to

preclude the use of safe harbors when the substance of the transaction or device is not accurately reflected by the form.

c. ERISA Violations. The Employee Retirement Income Security Act of 1974 covers not just pension and retirement plans but also many welfare benefit plans such as health plans. Federal law prohibits any person involved in administering such a plan from soliciting or receiving or agreeing to receive any kickback, loan, or anything of value with respect to such matters, and also prohibits anyone from offering promising or giving anything of value to such a person. 18 USC § 1954. *U.S. v. Li*, 55 F.3d 325 (7th Cir. 1995) (scheme between dentist and union fund official). See also, 18 USC § 664 (theft from plan).

d. Theft and Bribery. There are laws prohibiting theft and bribery of $5,000 or more in connection with federal assistance programs where an organization or state or local agency receives over $10,000 in any one year period. The receipt of Medicare funds through an intermediary qualifies for prosecution, as does solicitation or acceptance of bribes to influence such an organization or agency. 18 USC § 666(a)(1) Kickback schemes may be prosecuted under this provision. *U.S. v. Fischer*, 168 F.3d 1273 (11th Cir. 1999), *aff'd* 529 U.S. 667 (2000) (kickback to hospital CFO for loan from hospital).

e. Foreign Corrupt Practices. Outside the United States, any business purpose for providing anything of value to a broadly defined class of foreign officials (e.g., any employees of governmentally controlled health services) will create potential trouble under the Foreign Corrupt Practices Act, 15 USC § 78 dd-1 *et seq*. *U.S. v. Kay*, 359 F.3d 738 (5th Cir. 2004). See FCPA Opinion Procedure Release No. 08-02 (Dept. of Just. 6/13/08) at http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html.

2. **Stark I, II, and III Self-Referral Prohibitions and Related Restrictions.** The Big Issue: Referrals to entity with which physician or family has financial arrangements. In addition to the Stark rules, similar state laws need to be consulted as well. Some state laws require disclosure of relationships between one making a referral and the one to whom the referral is made, even if Stark rules do not apply. See UCA § 58-67-801.

a. Prohibition and Consequences. The Stark anti-self-referral law prohibits referrals for designated health services where the referring physician or the physician's immediate family has ownership or investment interests or has compensation arrangements with the person or organization providing the services. Ethics in Patient Referrals Act of 1989; 42 USC §§ 1395nn *et seq*.

i. Stark is limited to referrals involving physicians and their immediate families. Physicians also "stand in the shoes" of their practice groups.

ii. Unlike Antikickback law, there is no general intent or state of mind requirement (although "circumventing the law" may be heavily sanctioned).

iii. Sanctions for violation include: no payment for the services (or required refund if paid), penalties up to $15,000 per service, $100,000 per arrangement with a principal purpose of circumventing law, $10,000 per day for reporting failures. Submitting claims trigger sanctions, not the referral itself (unless "circumventing the law" is involved).

iv. The designated health services (DHS) include:

(1) clinical laboratory;

(2) physical therapy;

(3) occupational therapy, speech-language pathology services;

(4) radiology (X ray, MRI, CAT, ultrasound);

(5) radiation therapy and supplies;

(6) furnishing durable medical equipment;

(7) parenteral and enteral nutrients, equipment, and supplies;

(8) prosthetics, orthotics, and prosthetic devices;

(9) home health services;

(10) out-patient prescription drugs;

(11) inpatient and out patient hospital service.

v. Generally, a physician's own service is excepted from the prohibition, so referrals for services personally performed or personally supervised by a physician are not prohibited.

vi. Financial relationships covered by the rules include debt or equity interests in the entity providing services or in an entity that itself has such interests in the entity providing services.

vii. Compensation arrangements may be any payment of remuneration, direct or indirect, in cash or kind. This may, for example, include rent paid by a physician to an otherwise unrelated party. The direction of the compensation (to or from the physician) is of little consequence.

b. Statutory Exceptions. Exceptions to the Stark rules have been provided for such areas as in-office ancillary services of group practices (there are

requirements for same building and physician supervision and restrictions against compensation related to the volume or value of DHS), certain permitted ownership interests, and for certain compensation arrangements including office and equipment rentals with a term of over one year with rent at market rates without reference to referrals, certain minor remuneration, isolated transactions, and market payments by physicians for services furnished by the recipient, etc. Some of the exceptions relate only to ownership interests, some relate only to compensation arrangements, and some relate to both. The exceptions are generally the only way to avoid a violation for conduct otherwise covered. Some examples:

i. Incentives for the recruitment of physicians to relocate to become members of the hospital staff are excepted if, among other things, the physician is not required to refer patients and the incentive is not tied directly or indirectly to the volume or value of any referrals.

ii. Bona fide employment arrangements will be excluded from the ban if:

(1) the employee's services are specified;

(2) all compensation is reasonable even if there are no referrals;

(3) compensation is determined without regard to the value or volume of referrals; productivity bonuses for services personally performed (e.g., hours worked, patients seen, gross billing for services personally rendered) are permitted; incentive payments for ancillary services ordered are very risky.

c. Responsible Officer Prosecution. Prosecution of officers of organizations might be possible under the responsible corporate officer doctrine which allows criminal prosecutions of persons who are in a position to but fail to prevent violations of public welfare laws, even where the officer lacks knowledge of or participation in the violation. See *U.S. v. Dotterweich*, 320 U.S. 277 (1943); *U.S. v. Park*, 421 U.S. 658 (1975) (both cases were under the federal Food, Drug, and Cosmetic Act (FDCA), 21 USC §§ 301 *et seq*. which contains a strict liability provision for misdemeanor misbranding and adulteration violations; note that the Stark law also is a strict liability law. 42 USC § 1393nn; 42 CFR § 411.351 *et seq*.) See also Berman and Donath, *When No Knowledge Can Still Be a Dangerous Thing: The Potential Criminal Liability of Officers and Directors of Healthcare Companies for the Acts of Their Subordinates*, American Health Lawyers Association Business Law and Governance Practice Group, Business Law and Governance, Vol. 1, Issue 1, Dec. 2008.

d. Anti-Markup Prohibitions. Special anti-markup rules apply to limit or eliminate financial incentives to pass on marked-up prices for certain diagnostic tests (other than clinical diagnostic laboratory tests) ordered by a billing physician or other supplier (or a related party) and performed by a physician who does not share a

practice with the billing physician or other supplier, whether the markup relates to the technical or professional component of the price. 42 USC § 1395u(n)(1); 42 CFR § 414.50. The anti-markup rules apply to all such diagnostic tests, not just those which are also subject to the Stark rules. For a violation, the billing physician may be sanctioned under the civil monetary penalties law and may be excluded from the Medicare program and the claim may be a false claim creating civil liability under the civil False Claims Act or potentially even criminal liability under the criminal False Claims Act. There may be similar state laws applicable to payors other than federal programs. See UCA §§ 58-1-501(2)(n) and 58-1-501.5(2) which make marking up anatomic pathology services unprofessional and unlawful conduct. A violation can be a class A misdemeanor under UCA § 58-1-502(1).

3. **False Claims Act and Related Laws**. The Big Issue: knowingly presenting (or causing to be presented) a false claim to a federal health care program. There are also similar state laws which may apply. See UCA §§ 26-20-1 *et seq*. (Utah False Claims Act) and UCA § 76-10-1602(4)(d) (false claim violations are unlawful activities under the Utah pattern of unlawful activity, *i.e*., racketeering, law).

a. False Claims Prohibition and Consequences. In addition to the submission of false claims, the False Claims Act (see 31 USC § 3729) prohibits knowingly making or using a false record or statement to get a false or fraudulent claim paid or approved by the Federal Government or its agents such as a carrier, claims processor, or state Medicaid program.

i. A false claim is one for services or supplies not provided specifically as presented or for which the provider is not entitled to payment. For example,

(1) service or supply never provided or provided but poorly

(2) upcoding to obtain coverage not otherwise available

(3) upcoding to obtain additional reimbursement

(4) claim for services known not to be reasonable or necessary

(5) claim for services by unlicensed person.

ii. Knowingly presenting claim does not require intent to defraud the government; rather it means:

(1) actual knowledge claim is false,

(2) deliberate ignorance of truth or falsity of information, or

(3) reckless disregard of truth or falsity of information.

iii. Deliberate ignorance means deliberately disregarding truth or falsity of information even though provider knows or has notice the information may be false. For example, a violation may arise from ignoring provider update bulletins and not informing staff of changes in Medicare billing guidelines or updating billing system, then submitting a nonreimbursable claim.

iv. Reckless disregard means the provider pays no regard to whether information on a claim is true or false. For example, assigning an untrained office person to billing function without inquiry into the person's knowledge and skill would qualify as reckless disregard.

v. Failing to qualify under the Medicare enrollment rules can create false claims. For example, if a practice hires a physician with unpaid prior medical debt to the program (perhaps after a bankruptcy or dissolution of the physician's earlier practice), the practice the physician joins may be disqualified from the program. 42 CFR § 424.530(a)(6).

vi. The government or a relator in a *qui tam* case may try to use these rules where there is an Antikickback or Stark violation under a theory of misrepresentation of compliance with those laws; this case law development has been codified as to Antikickback violations by the Patient Protection and Affordable Care Act. 42 USC § 1320a-7b(g). Also, the implied certification theory has been upheld by the courts with respect to other sorts of violations. Where a person "makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided." *Universal Health Servs., Inc. v. United States, ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016). The court used what it called a "demanding" materiality standard and did not draw a bright line test, resulting in inconsistency and uncertainty.

vii. The penalty pursuant to 31 USCS § 3729 is a minimum of $5,000 up to $10,000 (as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410; see 28 USC § 2461, note), for each false claim submitted. In 2018 the range was $11,181 to $22,363. Also, the provider may be liable for three times the amount unlawfully claimed.

viii. Private persons may enforce the federal civil false claims act, including deemed violations arising from anti-kickback violations, by suing as *qui tam* relators on behalf of the government, and may personally receive significant awards for doing so. A number of states have their own *qui tam* statutes as well. A *qui tam*

relator may be able to deduct attorney's fees as trade or business expenses. See *Bagley v. U.S.*, 112 AFTR 2d ¶ 2013-5166 (DC CA 2013).

b. Reporting Overpayments. Under the Affordable Care Act section 6402 (42 USC § 1320a-7k(d)), there is an obligation to disclose and refund Medicare and Medicaid overpayments with the later of 60 days after the overpayment is identified or the date the next applicable cost report is due (presumably this clause applies only if there is such report due). Retaining an overpayment after the deadline is treated as an obligation under the False Claims Act, 31 USC § 3729. Thus, penalties up to $10,000 (or more as adjusted for inflation; as noted above, in 2018 the range was $11,181 to $22,363) plus three times the amount of the government's damages can apply for knowingly concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the government. A separate penalty for each claim resulting in an overpayment could apply. "Knowingly" here means the same as in the False Claims Act.

c. Civil Monetary Penalties Prohibition and Consequences. Also, the Civil Monetary Penalties law (see 42 USC § 1320a-7a) is closely related to the False Claims Act and the Anti-Kickback statute.

i. The Civil Monetary Penalties law prohibits presenting or causing to present a claim for services the provider "knows or should know" were

(1) wrongly coded

(2) not reasonable or necessary

(3) furnished by unlicensed person or not properly supervised by a licensed person

(4) furnished by licensed person who lied or cheated to obtain license

(5) furnished by physician not certified in the specialty in which he or she claims certification, or

(6) furnished by a physician excluded from participation in program to which claim is submitted.

ii. Also, the Civil Monetary Penalties law is violated by

(1) offering remuneration to a Medicare or Medicaid beneficiary where the person knows or should know it is likely to influence beneficiary to obtain benefits from a particular provider, or

(2) contracting with individual or group where the person knows or should know the individual or group is excluded from participation.

iii. Under the Civil Monetary Penalties Law, "know or should know" means to act in deliberate ignorance or in reckless disregard of the truth or falsity of the information.

iv. The Civil Monetary Penalties Law may impose a variety of penalties, including up to $10,000 per item or service or $50,000 (as adjusted for inflation) for each wrongful act or false statement, and up to three times the amount unlawfully claimed, and exclusion from participation in the federal program. The Office of Inspector General takes into account various aggravating and mitigating circumstances in deciding on program exclusion.

d. False Statements Relating to Health Care Matters. For knowingly and willfully falsifying or concealing a material fact or making any material false statement, or using any materially false writing or document (in connection with health care claims whether federal or not), fines, imprisonment for up to five years, or both, may be imposed. 18 USC § 1035. Any public or private plan or contract affecting commerce providing health benefits (for example, private health insurance) is covered by this federal criminal law. State law rules also apply. See UCA § 26-20-3. ERISA covered health plans are also subject to a prohibition on false statements and concealment in connection with plan documents. 18 USC § 1027.

e. Obstruction of Criminal Investigation of Health Care Offenses. Willfully preventing, obstructing, misleading, or delaying, the communication of information or records relating to a violation of a federal health care offense to a criminal investigator, or attempting to do any of these things (described above) may cause the imposition of fines, imprisonment for five years, or both. 18 USC § 1518. See *U.S. v. Franklin-El*, 554 F.3d 903 (10th Cir. 2009), *cert. denied* 129 S.Ct. 2813.

f. General Obstruction of Justice. There are state and federal laws punishing various forms of obstruction of justice. Among other statutes, the Sarbanes-Oxley (SOX) law applies obstruction of justice crimes to private as well as public companies. Under SOX, it is punishable by up to 20 years imprisonment to alter, destroy, conceal, cover up, falsify, or make a "false entry in any record, document . . . with the intent to . . . obstruct or influence the investigation . . . of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter or case." 18 USC § 1519. Also, hindering the communication to a law enforcement officer of information relating to a possible federal offense is punishable with up to 10 years imprisonment. State law obstruction of justice law may also apply. See UCA § 76-8-306.

g. Mail and Wire Fraud. Using mail, private courier, or wire service (e.g., phone, fax, e-mail) in scheme to defraud is a separate crime for each such use. Fines, imprisonment for up to 20 years, or both, may be imposed. This is also often used in connection with prosecuting insurance fraud schemes. See 18 USC §§ 1341, 1343. State communication fraud laws may apply as well. See UCA § 76-10-1801. The federal

Hobbs Act provides for federal jurisdiction over interstate travel or the use of mail to violate or attempt to violate certain state laws, such as bribery which could include a kickback scheme. 18 USC § 1951. The Sarbanes Oxley Act (Title IX) increased the potential prison time for mail or wire fraud to 20 years. The fines can be quite large, up to the greater of $250,000 for an individual or $500,000 for an organization, or of twice the gross gain from the offense. See 18 USC § 3571.

h. False Statements in Representations. This is covered by the same criminal act covering Antikickback violations. The violation may, in addition to false statements, consist of

i. concealing any event affecting an individual's initial or continued right to receive a benefit with intent to fraudulently receive the benefit or payment in excess of what is due or authorized;

ii. converting a benefit or payment for use or benefit other than for the person for whom it was intended;

iii. for a fee counseling an individual to dispose of assets in order to become eligible for medical assistance under a state health program (e.g., Medicaid), if disposition results in a period of ineligibility (not now being enforced against lawyers). These sorts of violations could cause fines up to $25,000, imprisonment for five years, or both, and exclusion from the health care program (with the OIG taking into account aggravating and mitigating circumstances).

i. General Criminal and Civil Fraud; Other Crimes. Common law civil fraud and deceit (damage actions) and state criminal fraud law may apply to health care abuse. See, e.g., UCA § 76-6-405 (theft by deception); UCA § 31A-31-103 (insurance fraud). Potential civil remedies could include damages based on equitable disgorgement, unjust enrichment, payment by mistake, and overpayment. Other potentially applicable federal criminal provisions include: 18 USC § 669 (theft, embezzlement, misapplication of funds of health care benefit program); 18 USC § 1347 (health care fraud); 18 USC § 641 (theft, embezzlement, or knowing receipt of things of value of the U.S. or under contract to the U.S.; this can include overbilling Medicare; see *U.S. v. O'Brien*, 14 F.3d 703 (1st Cir. 1994) (overbilling for ambulance service)); 18 USC § 2 (aiding and abetting violations); 18 USC § 982(a)(6) and 21 USC § 853(c) (criminal forfeiture of property used in a health care offense); 18 USC § 371 (conspiracy); 18 USC § 1345 (injunctions and asset freezes prior to indictment); 18 USC § 1956(a)(1) and (2) (money laundering, conducting financial transactions with proceeds of unlawful activity; 18 USC § 982 provides for asset forfeitures for money laundering). There is no lack of federal and state criminal statutes in this area.

j. Racketeering. Under 18 USC §§ 1961-1968, the federal RICO or racketeering act, if there is a pattern (two or more incidents) of racketeering activity in which a person participated as a principal, there can be a racketeering conviction. There a number of predicate acts describing the unlawful activities, and they include health care

offences. See *U.S. v. Kahn*, 53 F.3d 507 (2d Cir. 1995) (physician working for only nine weeks with a clinic convicted). The remedies under RICO are quite broad, providing for fines, imprisonment, asset forfeitures, and asset freezes and also providing for government or private causes of action for treble damages. For the Utah version see also UCA § 76-10-1602(4)(d) (false claim and kickback violations are unlawful activities under the Utah pattern of unlawful activity, *i.e.*, racketeering, law).

k. Criminal Restitution. Restitution may be awarded with respect to a federal criminal violation if there is actual loss. 18 USC §§3663, 3664. See also *U.S. v. Liss*, 256 F.3d 1220 (11th Cir. 2001) (necessity of loss for anti-kickback violation restitution, but not shown in that case). Such loss might be possible to show where a kickback scheme creates a false claim, the payment of which thus creates actual loss to the government. State law violations may also create restitution awards. See UCA §§ 77-38a-101 *et seq*.

4. **Patient Privacy**. The Big Issue: Protection of a patient's identifiable health care information against unauthorized disclosure. The major federal law is the Health Insurance Portability and Accountability Act of 1996, known as HIPAA, 42 USC § 1320d *et seq*. State privacy law may apply as well. See, e.g., UCA §§ 78B-5-618 (patient and third party access to medical records); 26-45-104 (genetic testing privacy); 26-21-25 (patient identity protection). There are, among other provisions under HIPAA, significant reporting requirements, patient consent and authorization requirements, and requirements to have agreements with business associates. HIPAA provides penalties of $100 per violation up to $25,000 (42 USC § 1320d-5), but for knowing violations the penalties can be up to $50,000 with prison for up to a year, or if committed with false pretenses, $100,000 with prison up to 5 years, or if committed with intent to sell information, $250,000 with prison for up to 10 years (42 USC § 1320d-6).

a. Business Associates. Covered entities, which may include physicians and physician practice groups, as well as other care providers, may need to obtain a business associate agreement from others with which they share patient information, such as billing services etc. Such business associates are required to use reasonable safeguards and may be directly liable to the government for their own breaches. See 45 CFR § 164.504(e)(2)(ii)(B).

b. Covered Entity Responsibility. Although the covered entity (health provider) is not generally required to monitor the performance of the business associate, if it knows of a pattern of behavior or an activity or practice that materially violates the business associate agreement and is not cured, the covered entity must take action to terminate the associate or it may itself be in violation. 45 CFR § 164.504(e)(1)(ii) and (iii). It may also have a damaged reputation with the government and with its own patients when its name appears on the HHS (Health and Human Service) wall of shame web site, and it is required to notify its patients of the breach, and with larger breaches of security, to notify news outlets as well. See 45 CFR § 164.402. The entity may need to mitigate the harm done by the breach. 54 CFR § 164.530(f).

5. **Payment Reporting**. The Big Issue: Disclosing payments by manufacturers and others to physicians. Although the reporting requirements generally are on manufacturers and group purchasing organizations, the information reported will be of concern to affected physicians.

a. Reporting. Under the Physician Payments Sunshine Act which is part of the Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act), the manufacturers of pharmaceuticals, devices, and other medical products, and group purchasing organizations (GPOs) need to report information about their financial ties to physicians and teaching hospitals to the Centers for Medicare & Medicaid Services (CMS). 42 USC § 1320a-7h(a)(1)(A). The agency will then publish the information on the Internet. The reports include payments by manufactures of a covered drug, device, biological, or medical supply to physicians including such things as payments or transfers of value, for example in cash or stock, whether for consulting, food, or travel, and include ownership or investment interests by physicians in manufacturers and group purchasing organizations.

b. Penalties. Manufacturers and applicable GPOs are subject to civil monetary penalties for failing to comply. If a manufacturer or a GPO fails to submit the required information, then it will be subject to a civil monetary penalty of at least $1,000, but no more than $10,000, for each payment or other transfer of value, or ownership or investment interest not reported as required. The maximum total penalty with respect to each annual submission for failure to report is $150,000. For a knowing failure to submit required information in a timely manner, a penalty will apply of at least $10,000, but no more than $100,000, for each payment or other transfer of value, or ownership or investment interest not reported as required. The maximum total penalty with respect to each annual submission for a knowing failure to report is $1,000,000. These rules generally preempt state law, except where the state rules require reporting of information that the federal statute does not require or require reporting of information for public health purposes. 42 USC § 1320a-7h(d)(3)(B). Thus, state law still has a function here.

6. **Anti-Trust Violations**. The Big Issue: unfair competition and monopoly market power. There are a number of federal and state antitrust laws which could affect a physician. See, e.g., Sherman Act (15 USC § 1 *et seq*.), Clayton Act (particularly 15 USC § 13(a) (this section of the Clayton Act is known as the Robinson Patman Act) § 14 and § 18), Federal Trade Commission Act (15 USC § 45(a)(1) *et seq*.); Utah Antitrust Act UCA § 76-10-911 *et seq*. They are designed to prevent damaging reductions in competition through such things as price fixing, market division, and deals which may reduce competition through the creation or maintenance of excessive market power. Physicians faced with reduced reimbursements for services have been tempted to band together with competitors or to enter into questionable transactions.

a. Types of Violation. Price setting agreements, exclusive dealing arrangements, acquisitions of practices, mergers, joint purchasing arrangements, and similar arrangements all carry antitrust implications. Some, like blatant price fixing are

per se illegal (*Arizona v. Maricopa County Medical Soc*., 457 U.S. 332, (1982); *Virginia Excelsior Mills, Inc v. F T C*, 256 F.2d 538 (4th Cir. 1958) (joint selling agency *per se* unlawful)), but other types of arrangements are analyzed under a rule of reason and may take considerable economic analysis but an effect on competition is required. See, e.g., *Tarabishi v. McAlester Regional Hosp*., 951 F.2d 1558 (10th Cir. 1991) (termination of privileges did not affect competition, only the physician); *Singh v. Memorial Medical Center, Inc*., 536 F. Supp. 2d 1244 (D.N.M. 2008) (where there is no injury to competition, there is no violation of the antitrust laws).

b. Sanctions. Violations may be pursued by the government or by competitors. In some cases, treble damages may be available to private plaintiffs. See, e.g., § 4(a) of the Clayton Act, 15 USC § 15(a) (Appendix A2) (treble damages and attorney's fees are mandatory); UCA § 76-10-919. See *Hydrolevel Corp. v. American Soc. of Mechanical Engineers, Inc*., 635 F.2d 118 (2d Cir. 1980), *aff'd*, 456 U.S. 556 (1982) (damages are trebled before subtracting any amounts paid in settlement by others). There is no right of contribution by one defendant paying damages from other defendants. The government may enjoin violations, and so may private parties. Some activities also may be criminally prosecuted. See, e.g., Sherman Act §§ 1 and 2 which may be prosecuted criminally as well as civilly; such criminal violations are felonies, punishable in the case of a corporation, by a fine of not more than $10 million; and in the case of an individual, by incarceration for not more than three years and a fine of not more than $350,000. See also, UCA § 76-10-920.

7. **Other Consequences**. Other unfortunate consequences beyond typical criminal responsibility and civil liability may attend a violation of applicable law.

a. Deportation. At least some crimes (e.g., fraud) can lead to the deportation of foreign nationals under 8 USC § 1101(a)(43)(M)(i) and 8 USC § 1227(a)(2)(A)(iii).

b. No Indemnity. A physician will not be fully covered by indemnity agreements or insurance against all areas of exposure. There are limits on such things as what sorts of claims or conduct is covered, when the coverage starts to pay, and when the coverage can be ended. Taking the Fifth Amendment privilege against self-incrimination could eliminate significant indemnity or insurance coverages. There is no indemnity allowed for reckless, willful, or criminal conduct (*Globus v. Law Research Serv., Inc*., 418 F.2d 1276, 1288 (2d Cir. 1969)) and counterclaims for indemnification are barred under the False Claims Act (*Mortgages, Inc. v. U.S. District Court for District of Nevada*, 934 F.2d 209 (9th Cir. 1990)). See also corporate and other organizational codes such as 8 Del. C. § 145(a); *Hermelin v. K-V Pharm. Co.*, 54 A.3d 1093, 1094 (Del. Ch. 2012) (Delaware statute prohibits a corporation from indemnifying a corporate official who was not successful in the underlying criminal proceeding and has acted, essentially, in bad faith); see UCA § 16-10a-901 *et seq*. (corporations); UCA § 48-2c-1801 *et seq*. (limited liability companies under pre-2014 law), and UCA § 48-3a-408 (limited liability companies under 2014 law).

c. Bankruptcy. Liability of a company for fraud against the government may well not be dischargeable after a bankruptcy Chapter 11 plan is confirmed, and this includes False Claims Act liabilities to relators bringing *qui tam* actions under that Act. Bankruptcy Code 11 USC §§ 1141(d)(6)(A); 523(a)(2)(A) and (B). Nondischargeability may apply to settlements of such claims as well. See *U.S. v. Spicer*, 155 BR 795 (Bnkr. DDC 1993), *aff'd* 57 F.3d 1152 (DC Cir.1994). Fraud, fiduciary defalcation, and certain other kinds of misconduct liabilities are not dischargeable by individuals in bankruptcy. Bankruptcy Code 11 USC § 523.

d. Licensing, and Related Matters. License revocations for unprofessional conduct by state licensing officials may follow a fraud or abuse case or a criminal case. A license revocation in one jurisdiction can lead to reciprocal revocations in other jurisdictions. Hospital and other privileges may be lost. Ethics and other discipline may apply and may need to be reported to a national data bank.

e. Injunctions and Asset Freezes. Injunctions against violations and asset freezes may be sought by the government prior to indictment and the restraining order may be granted without bond. See 18 USC § 1345 (injunctions against fraud against the United States and to restrain disposition of property; aimed at banking and health care violations). The standard may not be as high as in other cases to obtain the order. See *U. S. v. Fang*, 937 F. Supp. 1186, 1197 (D. Md. 1996) (the court, in freezing half the assets of a physician in this health care fraud case, found that the "reasonable probability" standard of conventional preliminary injunction analysis equated with "probable cause"). See also other fraud injunction provisions: 18 USC §§ 1341 to 1360; 18 USC § 287; 18 USC § 371; 18 USC § 1001. State law asset freezes may apply as well. See UCA § 77-38a-601.

f. Tax Issues. Violations of the health care laws can create tax issues, too.

i. Criminal fines or civil penalties imposed to enforce the law (as compared to those for other purposes, such as to obtain prompt compliance or provide a remedy for third party expense) are not tax deductible. 26 USC § 162(f); 26 CFR § 1.162-21; *Com'r v. Heininger*, 320 US 467 (1943); *Southern Pacific Transp. Co. v. Com'r*, 75 TC 497 (1980). The line between a nondeductible penalty and a deductible compensatory payment in a governmental settlement can be close, and can be affected by the structure of the settlement. See CCA 201308027. Also, only one-third of an antitrust treble-damage judgment is deductible. 26 USC § 162(g).

ii. On the other hand, depending on circumstances, any indemnities that may be available might be taxable to the recipient (26 USC § 61; at least to the extent the amounts reimbursed would not otherwise be deductible by the recipient) and may be deductible by the company paying them (26 USC § 162). See also *Larchfield Corp. v. U.S.*, 373 F2d 159 (2d Cir. 1966) (payment to a director under a corporate indemnity was deductible to the corporation as a compensatory fringe benefit, even

though director could not have deducted all the defense cost payments individually if he had paid them; this implies potential taxability to the director of the portion the director could not otherwise deduct).

iii. Wrongfully received funds are no less taxable when received just because they are later recovered or must be repaid. Treas. Reg §1.61-14. There might be an adjustment (e.g., deduction or capitalization) at the time of repayment. See, e.g., IRC § 1341(a)(1).

iv. Violating the Antikickback (42 USC § 1320(a)-7b(a) and (b)) or Stark Self-referral (42 USC § 1395nn) fraud and abuse rules or other unlawful conduct may destroy a nonprofit health care system's tax exemption, as well as give rise to potentially massive penalties and disqualification from Medicare and Medicaid-type, federally-funded programs. GCM39862 (11/22/91).

g. Contract invalidity. Illegal contracts are not enforceable. Those violating the health care laws may be found unenforceable. See *Polk County, Tex. v. Peters*, 800 F. Supp. 1451 (E.D.Tex.1992).

h. Evidentiary Privilege Issues. Evidentiary privileges will be affected by illegal conduct. Key examples include:

i. The crime-fraud exception may eliminate the attorney client privilege where an attorney's advice is sought to enable or conceal conduct the client should know is unlawful. § 82 Restatement (Third) of the Law Governing Lawyers. The crime-fraud exception may apply where the lawyer was not aware of the crime or fraud. *In re Grand Jury Proceedings*, 604 F.2d 798 (3d Cir. 1979); *U. S. v. Chen*, 99 F.3d 1495 (9th Cir. 1996). A privilege lost in one arena could mean disclosure of potentially damaging information to others in other arenas, with consequent increased risks of civil or criminal liability or other adverse impacts.

ii. Taking the Fifth Amendment privilege against self-incrimination in a civil matter may give rise to adverse inferences in the case. *Baxter v. Palmigiano*, 425 U.S. 308, 318–19; *S.E.C. v. Thomas*, 116 F.R.D. 230, 234 (D. Utah 1987) (drawing an adverse inference even from a party's legitimate assertions of the privilege against self-incrimination in a civil case does not render assertion of the privilege unconstitutionally costly). The privilege against self incrimination will not be effective to prevent corporate or other organizational records from being disclosed because organizations do not enjoy the privilege. Even a records custodian claiming the privilege personally who is also the corporation's sole shareholder, officer and employee, can be compelled to produce the records. *Amato v. U. S.*, 450 F.3d 46 (1st Cir. 2006) (one person incorporated chiropractic practice); *Braswell v. U.S.*, 487 U.S. 99 (1988).

i. General Contract Issues. Many acquirers of practices, and many practices, health systems, or other groups hiring physicians require warranties against violations of law; thus any violations will also cause contract breach issues (e.g.,

termination for cause and damages) and will potentially expand the class of persons who may have civil fraud claims. Valuable payor contracts and employment opportunities may be lost.

j. Counsel. A client who is doing something illegal risks the loss of legal counsel and possible disclosure of the wrongdoing.

i. A lawyer may not counsel a client to engage in, or assist a client to engage in, conduct the lawyer knows is criminal or fraudulent. Counsel may, however, discuss legal consequences and assist in determining the validity, scope, and meaning of the law. Utah Rules of Professional Conduct Rule 1.2(d). The defrauded person need not be a party to the transaction (Rule 1.2, Comment 12). The forbidden fraud is conduct that is fraudulent under substantive or procedural law and has a purpose to deceive. Rule 1.0(e). Nor may counsel engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). The lawyer must withdraw where the representation will result in a violation of the law. Rule 1.16(a).

ii. The usual rules of confidentiality will not apply where the lawyer's services have been used to further a crime or fraud; rather, the lawyer may reveal information to prevent a crime or fraud reasonably certain to result in substantial financial or property injury or to mitigate such injury. Rule 1.6.

iii. In representing organizations, the lawyer must report wrongdoing up the chain of command (Rule 1.13(b)) and if a clear violation of law is not corrected, may disclose information where the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, if and to the extent the lawyer reasonably believes disclosure is necessary to prevent substantial injury to the organization. Rule 1.13(c). It is not necessary, under the organizational representation rules, that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. Comment 6 to Rule 1.13. A discharged lawyer who reasonably believes the discharge was because of the lawyer's actions taken as prescribed by the organizational representation rule, or who withdraws in circumstances that require or permit the lawyer to take action under the rule must proceed as the lawyer reasonably believes necessary to ensure that the organization's highest authority is informed of the lawyer's discharge or withdrawal. Comment 8 to Rule 1.13.

iv. Counsel will generally be well aware that lawyers have been prosecuted where their clients misbehaved. *U.S. v. Anderson*, no.s 98-20030-01 through 07 (D. Kan. 1999). Although in the *Anderson* case the lawyers were dismissed from the case by the trial judge, the doctors and others accused were convicted and the convictions were upheld on appeal. See *U.S. v. LaHue*, 261 F.3d 993 (10th Cir. 2001), *U.S. v. McClatchey*, 217 F.3d 823 (10th Cir. 2000) (convictions upheld) and *U.S. v. McClatchey*, 316 F.3d 1122 (10th Cir. 2003) (reversing a downward sentencing adjustment).