


AN A.S. PRATT PUBLICATION

SEPTEMBER 2017

VOL. 3 • NO. 9



PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



**EDITOR'S NOTE: TAKING CARE OF
HEALTH CARE**

Victoria Prussen Spears

**PROPOSED AMENDMENTS TO VA
ACQUISITION REGULATIONS—WHAT VA
CONTRACTORS NEED TO KNOW**

Sarah S. Wronsky and Lawrence S. Sher

**THE INDEPENDENT PAYMENT ADVISORY
BOARD: DEAD BEFORE IT'S BORN?**

Timothy P. Trysla, Michael H. Park,
and Brian Lee

**PREVENTING OVERPAYMENTS FROM
BECOMING FALSE CLAIMS**

Andrew L. Sparks

**HEALTH CARE FRAUD: A PRIORITY FOR
THE TRUMP ADMINISTRATION AND A
TRAP FOR THE UNWARY**

Michael J. Engle and Kristin J. Jones

IN THE COURTS

Steven A. Meyerowitz

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 3

NUMBER 9

SEPTEMBER 2017

Editor's Note: Taking Care of Health Care

Victoria Prussen Spears

297

Proposed Amendments to VA Acquisition Regulations—What VA Contractors Need to Know

Sarah S. Wronsky and Lawrence S. Sher

299

The Independent Payment Advisory Board: Dead Before It's Born?

Timothy P. Trysla, Michael H. Park, and Brian Lee

305

Preventing Overpayments from Becoming False Claims

Andrew L. Sparks

313

Health Care Fraud: A Priority for the Trump Administration and a Trap for the Unwary

Michael J. Engle and Kristin J. Jones

317

In the Courts

Steven A. Meyerowitz

320

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2017 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

An A.S. Pratt® Publication

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

DARWIN A. HINDMAN III

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter LLP

WALTER A.I. WILSON

Senior Partner, Polsinelli PC

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2017 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

Health Care Fraud: A Priority for the Trump Administration and a Trap for the Unwary

*By Michael J. Engle and Kristin J. Jones**

The health care industry is caught in a tangled web of complex fraud and abuse regulations. Existing laws are intended to combat fraud perpetrated by a few bad actors who take advantage of the system. These system protections can create pitfalls for unsuspecting practitioners, but health care providers are responsible for ensuring compliance with these laws. In this article, the authors provide an overview of four important fraud and abuse laws applicable to health care providers.

The Trump administration recently announced that health care fraud will remain a high priority for the U.S. Department of Justice (“DOJ”). The announcement echoed the DOJ’s focus on continuing to vigorously pursue, investigate and prosecute those who violate health care fraud prohibitions.

Acting Assistant Attorney General Kenneth A. Blanco, addressing the 27th Annual American Bar Association National Institute on Health Care Fraud,¹ stated: “For so many reasons, health care fraud is particularly egregious, and frankly, in my view, despicable. Greed resulting in the deprivation of medical care for those in need is cruelty.” And in many instances, this description is accurate. Some criminals take advantage of vulnerable, helpless people who are in desperate need of medical attention. However, many individuals and organizations that run afoul of the health care fraud and abuse laws are simply unaware that they are participating in arrangements that violate the law.

BACKGROUND

The health care industry is caught in a tangled web of complex fraud and abuse regulations. Both federal and state governments—as well as patients themselves—place enormous trust in health care providers. Existing laws are

* Michael J. Engle is chair of the White-Collar Defense, Internal Investigations & Corporate Compliance Group at Stradley Ronon Stevens & Young, LLP, representing clients in criminal cases, complex white-collar defense matters, internal or parallel investigations, civil litigation matters involving the defense of qui tam/False Claims Act matters, as well as the representation of attorneys and other professionals in disciplinary/licensing matters. Kristin J. Jones is an attorney at the firm providing regulatory, compliance, and reimbursement counsel to health care providers (including hospitals, health systems and physician practices) and insurers. The authors may be reached at mengle@stradley.com and kjones@stradley.com, respectively.

¹ <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-kenneth-blanco-criminal-division-speaks-american-bar>.

intended to combat fraud perpetrated by a few bad actors who take advantage of the system. These system protections can create pitfalls for unsuspecting practitioners, but health care providers are responsible for ensuring compliance with these laws.

Here is an overview of four important fraud and abuse laws applicable to health care providers:

THE ANTI-KICKBACK STATUTE

The federal Anti-Kickback Statute prohibits payments for referrals of services payable under federal health care programs like Medicare and Medicaid. In its full scope, the Anti-Kickback Statute is a criminal statute that prohibits the exchange of anything of value in an effort to induce or reward the referral of federal health care program business. The law contains certain “safe harbors,” which describe various practices that are not treated as offenses under the statute even though they potentially implicate the federal Anti-Kickback Statute. Nonetheless, health care providers can still violate the law when implementing seemingly acceptable payment and business practices. For example, in 2010, Rite Aid offered gift cards to patrons who transferred prescriptions, an arrangement that may be permissible in certain circumstances. Rite Aid’s program triggered Anti-Kickback concerns, which Rite Aid ultimately settled for \$3 million. When developing new programs, providers should always consider the Anti-Kickback Statute to ensure that the programs are structured in compliance with the law.

THE STARK LAW

Like the Anti-Kickback Statute, the Stark Law restricts payments for referrals of Medicare or Medicaid patients. The Stark Law specifically governs physician self-referrals, prohibiting physicians from referring patients to a medical practice in which the physician has a financial interest. On its face, the Stark Law prohibits physicians from entering into financial relationships that are acceptable in other industries, such as employment contracts and investment arrangements. These relationships must be carefully structured to comply with the Stark Law’s exceptions, which contain a number of technical requirements that must be satisfied in order to ensure compliance. The Stark Law is a strict liability statute, and as a result, even well-intentioned providers can violate the law. Profit-sharing, productivity bonuses and referrals for in-office ancillary services are fertile grounds for inadvertent noncompliance, as the arrangements must meet all the technical requirements specified in the Stark Law’s exceptions.

THE FALSE CLAIMS ACT

The False Claims Act (“FCA”) makes it illegal to submit false or fraudulent claims to the federal government for payment. The FCA has both a civil and a

criminal component. A provider may violate the civil FCA by submitting claims to Medicare that are inconsistent with Medicare's comprehensive billing guidelines. The civil FCA contains a whistleblower provision that allows a private individual (e.g., a disgruntled employee, a former business partner, a competitor or a dissatisfied patient) to file a lawsuit on behalf of the federal government in exchange for a percentage of the recovery. Under the criminal FCA, a health care provider can go to prison or pay hefty criminal fines for submitting false or fraudulent claims.

STATE FRAUD AND ABUSE LAWS

In addition to federal laws, many states have their own false claims acts, anti-kickback statutes, self-referral prohibitions and more. The state laws may be broader than the federal statutes; consequently, compliance with the federal laws is not sufficient to guarantee compliance with state laws. For example, federal fraud and abuse laws are generally limited to claims payable by federal health care programs, but state laws may extend these laws to state programs, private payor arrangements or self-pay patients.

OTHER COMPLIANCE CONSIDERATIONS

In addition to the fraud and abuse laws addressed above, health care providers should ensure that their programs are in compliance with other laws, such as the Civil Monetary Penalties Law, the prohibition against patient inducements, the Exclusion Statute and more.

To protect health care providers from violating the law, a compliance plan combined with a program to implement, monitor and track compliance is a good starting point. Key personnel should also be trained to recognize and respond to potential fraud and abuse issues. These steps will help reduce the likelihood that the DOJ will have an opportunity to characterize your organization as "despicable" or "greedy" in its next health care fraud announcement.