

## **Alert** | Health Care & FDA Practice



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### **Physician Group Practices Should Prepare Now for Changes to Productivity Bonuses and Profit-Sharing Requirements under the Stark Law**

Beginning Jan. 1, 2022, the Centers for Medicare and Medicaid Services (CMS) will enforce new Stark Law<sup>1</sup> requirements for physician compensation models in group practices. Group practices that rely on generating revenues through intra-group referrals of “Designated Health Services” (e.g., clinical laboratory services, therapy services, imaging services, outpatient prescription drugs, durable medical equipment, etc.), including for ancillary services billed under the In-Office Ancillary Services exception, should start planning now to ensure that their compensation plans – specifically, their productivity bonuses and profit-sharing plans – will remain in compliance with the Stark Law. The Stark Law is a strict liability statute, meaning even a technical misstep in a compensation plan can make the group’s Designated Health Services (DHS) non-billable under Medicare. Accordingly, it is important that group practices ensure continued compliance when the 2022 requirements become effective.

#### **Key Changes to Profit-Sharing Requirements**

Under the current Stark Law regulations addressing productivity bonuses and profit-sharing plans, a group practice may pay a physician a share of “overall profits” from DHS if the physician’s share is not determined in any manner that is directly related to the volume or value of that physician’s referrals of

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<sup>1</sup> 42 C.F.R. § 411.355(b).

such DHS).<sup>2</sup> Under the current regulatory scheme, “overall profits” are either (1) the group practice’s entire profits derived from DHS payable by Medicare and/or Medicaid; or (2) the profits derived from DHS payable by Medicare and/or Medicaid of any component of the group practice that consists of at least five physicians. The current rule also outlines certain methods of profit-sharing that are deemed as not determined in a manner that is directly related to the value or volume of such referrals and thus allowed (e.g., such profits may be divided per capita among the group practice’s physicians, such as equally per physician or based on full-time equivalency status). Some of these methods, which are sometimes referred to as the “Deeming Provisions” because such methods are deemed to be compliant, refer to “revenues” rather than “profits” when describing the sharing method.

The newly revised rule redefines “overall profits” to mean the profits derived from all the DHS of any component of the group that consists of at least five physicians, which may include all physicians in the group, and changes all references to division of “revenue” in the Deeming Provisions to reference instead division of “profits.” The new rule also now explicitly provides that, if there are fewer than five physicians in the group, “overall profits” means the profits derived from all the DHS of the group. These changes, plus the other changes in the regulations, have several implications:

- Profit sharing methods based on DHS revenues will no longer be permissible and must be modified to use instead DHS profits (i.e., DHS revenues minus associated overhead). This is a significant change that may impact the majority of group practice profit-sharing plans, because a significant number of plans use a revenues method rather than a profits method. This change will also require group practices to determine DHS profits; the government acknowledged that this is a more difficult calculation than determining DHS revenues.<sup>3</sup>

The Deeming Provision that currently allows group practices to divide DHS based on the method used to divide revenues payable by non-federal health care programs is also changing. If this method is utilized, the group practice must exclude from its calculation of non-federal health care program revenues any revenues that would be considered DHS if payable by Medicare. Only if such revenues are excluded from the non-federal health care program revenues sharing calculation may that calculation be used to divide DHS payable by Medicare.

- The new rule changes make it clear that group practices may not divide DHS profits differently by ancillary type. Those profits must be aggregated in the form of DHS “overall profits.”
- Commentary to the final rule makes clear that group practices may still choose to compensate different subsets of physicians (each comprised of at least five physicians) using different distribution formulas, so long as the same methodology is used for each member within the subset.
- References to Medicaid have been removed. Accordingly, the method for dividing DHS profits payable by Medicare may differ from the method for dividing DHS revenues or profits payable by Medicaid. This is also a significant change that will impact the majority of group practice compensation.

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<sup>2</sup> 42 C.F.R. § 411.352(i).

<sup>3</sup> See 85 Fed. Reg. 77682, 77560 (Dec. 2, 2020) (“Although it may be true that it is easier to calculate revenues than to calculate profits, in general, we believe that a group practice’s distribution of revenues to a referring physician rather than profits . . . could serve as an inducement to make additional and potentially inappropriate referrals.”)

Additionally, in connection with broad new regulations relating to value-based enterprises (VBEs), CMS will now permit practices with profits from DHS that are directly attributable to physician participation in a VBE<sup>4</sup> to be distributed directly to the participating physician(s).

### Changes to Productivity Bonuses

The changes to the productivity bonus requirements include mostly semantical changes with no material impact on compliance requirements as of Jan. 1, 2022. CMS reviewed and revised various provisions applicable to productivity bonuses, but these edits, as confirmed by CMS commentary in the rulemaking process, are clerical in nature and “[are] not intended to . . . limit the payment of productivity bonuses currently permissible under the regulations.”

Because revisions to profit-sharing and compensation arrangements can take some time to implement, group practices that may be impacted by these changes, most notably group practices that have profit-sharing plans in place, should consider reviewing such profit-sharing plans in advance of the Jan. 1, 2022, deadline to ensure continued Stark Law compliance.

## Authors

This GT Alert was prepared by:

- **Jim Miles** | +1 303.685.7411 | [milesj@gtlaw.com](mailto:milesj@gtlaw.com)
- **Julie A. Sullivan** | +1 303.685.7412 | [sullivanjul@gtlaw.com](mailto:sullivanjul@gtlaw.com)
- **Loreli Wright** | +1 303.685.7417 | [wrightl@gtlaw.com](mailto:wrightl@gtlaw.com)

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<sup>4</sup> A “value-based enterprise” or “VBE” is defined in the new Stark rules as “two or more VBE participants (1) collaborating to achieve at least one value-based purpose; (2) each of which is a party to a value-based arrangement with the other or at least one other VBE participant in the value-based enterprise; (3) that have an accountable body or person responsible for financial and operational oversight of the value-based enterprise; and (4) that have a governing document that describes the value-based enterprise and how the VBE participants intend to achieve its value-based purpose(s). 42 CFR § 411.357)(aa).