

## MEDICAL GROUPS SHOULD PREPARE NOW: CHANGES TO THE STARK LAW'S GROUP PRACTICE RULES ARE COMING

Most of the new changes to the federal Stark and Anti-Kickback Statutes went into effect on January 19, 2021. Since then hospitals, health systems and medical groups nationwide have focused on updating their physician contracting, compensation and compliance programs to align with the new regulations. This alert focuses on specific changes to the Stark "group practice" rules that go into effect on January 1, 2022. Private and system-affiliated group practices should begin to evaluate these changes now so they can ensure compliance by the effective date.

Hall Render attorneys have prepared and will continue to prepare topic-specific alerts related to Stark and Anti-Kickback reform. All of these relevant alerts can be found [here](#). Our landing page will continue to be updated as new alerts are published.

### OVERVIEW OF THE GROUP PRACTICE CHANGES

The Stark group practice rules are very complex and so are the proposed changes. As of January 1, 2022, medical groups that rely on the group practice rules must ensure that any profit sharing and productivity bonus methodologies are structured to align with the newest changes and revisions to the Stark Special Rule for Productivity Bonuses and Profit Shares ("Special Rule") located at 42 CFR § 411.352(i). Most notably, to rely on the Special Rule under the new regulations, a group practice may only aggregate and distribute profits derived from designated health services ("DHS") using one of two options:

1. The group practice must aggregate the group's entire profits derived from all DHS before making any distributions to any of its physicians; or
2. The group practice must aggregate all of the DHS profits within a pod of at least five physicians before making any distributions within the pod.

Again, these rules are very complex. As background, DHS include, but are not limited to: clinical laboratory services, physical therapy, occupational therapy, radiology and other imaging, radiation therapy, DME, outpatient prescription drugs and other ancillary services that may be provided in the group practice setting. What constitutes a DHS is often determined by CPT or HCPCS codes based on a code list published annually by CMS.

### PROHIBITION ON SPLIT POOLING

The updated Special Rule changed the definition of "overall profits" to the following:

Overall profits means the group's entire profits derived from all the designated health services of any component of the group that consists of at least five physicians, which may include all physicians in the group. If there are fewer than five physicians in the group, overall profits means the profits derived from all the designated health services of the group.

With this revised language, CMS sought to make an important clarification that profit sharing is allowed in group practices consisting of fewer than five physicians. The new changes also make clear that "overall profits" means the aggregation of **all** DHS profits for the entire group or a pod of at least five physicians.

If a group practice desires to distribute profits from DHS, the group practice must distribute based on one of two formulas:

- Aggregate **all** of the DHS profits of the **entire** group practice and then distribute those aggregated profits to any physician in the group practice in compliance with the Special Rule; OR
- Aggregate all of the DHS profits of any pods of at least five physicians and then distribute the profits **within the pod** in compliance with the Special Rule.

The implication of these regulatory changes means that group practices can no longer choose to aggregate the DHS profits of a pod of the

group practice and distribute to physicians outside of that specific pod of physicians, and group practices will be prohibited from utilizing “service-by-service” distributions of profits from DHS, which group practices sometimes refer to as “split pooling.” However, CMS did clarify that the methodologies used for the distribution of profits from DHS, and the amount of overall profit from DHS shared by the group practice can vary amongst the different pods of five in the group practice. CMS delayed the effective date of these specific regulatory changes until January 1, 2022, to allow group practices sufficient time to bring the models in line with the new regulations.

## **CMS DISCUSSION OF COMPLIANT “CARE TEAM” PRODUCTIVITY BONUSES**

The “productivity bonus” requirements under the Special Rule remained largely untouched by CMS. However, CMS did discuss whether Stark group practice physicians could receive productivity bonuses based on the services of the physician’s “care team.” To date, this commentary provides the most direct support for innovative team-based compensation methodologies within Stark group practices. CMS noted that “team-based” bonuses can be paid to a physician within a Stark group practice under the following four scenarios: (1) based on services personally performed by the physician; (2) based on services performed by members of the physician’s care team that are not a DHS; (3) based on DHS ordered by the physician and furnished by members of the physician’s care team “incident to” the physician’s services; or (4) the bonus is structured to ensure compensation only *indirectly relates* to the volume or value of the physician’s referrals for the DHS furnished by the members of the physician’s care team. This clarification by the government may cause health care organizations to explore forming a Stark group practice to accelerate their transition to more innovative “care team” compensation models.

## **PROTECTION FOR VALUE-BASED ENTERPRISE PROFITS, NOT REVENUES**

CMS is seeking to encourage group practices to participate in value-based health care delivery. To foster this participation, CMS has added a separate section to the Special Rule that permits the distribution of profits from DHS that are directly attributable to a physician’s participation in a value-based enterprise. We discussed the value-based enterprise framework in our January 12, 2021 alert, found [here](#). CMS declined to extend any value-based protection beyond profits to revenues. In drawing the line at profits, CMS stated that it believed that a group practice’s distribution of revenues to a referring physician rather than profits, which are calculated by deducting the expenses incurred in furnishing the DHS, could induce physicians to make inappropriate referrals of DHS to the group practice.

## **PRACTICAL TAKEAWAYS**

The changes to the group practice rules are coming soon. Private and system-affiliated medical groups should begin to evaluate and consider new options now to ensure their models are in compliance by January 1, 2022.

If you have questions related to these changes or would like assistance with your models, please contact:

- [Joe Wolfe](#) at 414.721.0482 or [jwolfe@hallrender.com](mailto:jwolfe@hallrender.com);
- [Alyssa James](#) at 317.429.3640 or [ajames@hallrender.com](mailto:ajames@hallrender.com);
- [Wes Sylla](#) at 414.721.0917 or [wsylla@hallrender.com](mailto:wsylla@hallrender.com);
- [Megan Culp](#) at 317.429.3644 or [mculp@hallrender.com](mailto:mculp@hallrender.com); or
- Your primary Hall Render contact.

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