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Client Alert: Stark Law Changes for Group Practices

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On December 2, 2020, the Center for Medicare and Medicaid Services (CMS) issued final regulations revising and clarifying regulations, which govern physician referrals for designated health services, commonly known as the "Stark Regulations." While the new regulations and revisions add important exceptions applicable to value-based arrangements and relationships, they also revise existing Stark Regulations that govern compensation methodologies of group practices. These changes become effective on January 1, 2022. Medical group practices need to review and, if necessary, revise their compensation plans in advance of this date, as the Stark Regulations require that the methodology for calculating compensation in group practices must be set in advance of the income being earned and the expenses incurred—in other words prospectively.

In order to satisfy the In Office Ancillary Services Exception, which allows medical group practices to order and bill for Designated Health Services (DHS), such as lab, imaging, physical therapy, and certain other ancillary services, the medical group must meet certain regulatory requirements, which include restrictions on the allocation of profits from the DHS. The Stark Regulations do not permit the group practices to distribute the DHS profits in ways that are directly tied to who ordered the DHS. For example, a group practice cannot allocate profits from its imaging services to the doctor who ordered the imaging, but rather by some other method. Often groups split DHS profits on a prorata basis or based on personal professional productivity (excluding any revenues from the provision of DHS or DHS encounters). These indirect methods of allocation of DHS profits are permitted by the Stark Regulations. Nonetheless, the Stark Regulations applicable to the compensation plans were not clear in several respects and these regulations attempt to clear up those questions.

CMS in the Final Regulation clarifies that the group practice must allocate profits not revenues. The Stark Regulations previously used the words "revenues" and "profits" somewhat interchangeably, and this created both confusion and opportunity for groups developing their compensation plans. It is now clear that the groups must calculate and allocate profit, not revenue, of DHS taking into account the expenses relative to the generation of DHS revenues.

Furthermore, group practices are limited in the manner that the practice segregates and distribute profits of different DHS service lines. Because the Stark Regulations did not forbid the segregation of the various DHS service lines, some group practices elected to distribute the profits from the various DHS service lines using one methodology (and perhaps to a subset of physicians in the practice that were responsible for ordering those DHS) and other DHS revenues, according to a different methodology and perhaps to a different subset of physicians in the group. For example a practice of 10 doctors, five physiatrists, and five orthopedic surgeons in a group that provides imaging services, including advanced imaging, physical therapy, and limited Durable Medical Equipment (DME) might have distributed the DME profits per capita, the physical therapy profits according to volume of non-DHS patient encounters, and the advanced imaging profits based on profitability (measured by non-DHS revenue) of the doctors professional services. This will not be permissible after January 1, 2022. The same method must be used for all profits of all DHS service lines. All of the revenue and expenses from all DHS service lines must be aggregated and one methodology for distributing the aggregate profits must be used for the group practice (or for any component of the group of at least five physicians).

The regulations also clarify that the allocation of DHS profits may not be based on the physicians' ordering of designated health services that are provided to non-Medicare patients. For example, if there are three doctors in a group practice, and one doctor orders 50 percent of the imaging services provided to non-Medicare patients of the practice, and the other two doctors each order 25 percent of the imaging services provided to the non-Medicare patients of the practice, these percentages may not be used to allocate the imaging services provided to Medicare patients.

Nevertheless, the existing Stark Regulations permit group practices to segregate and allocate DHS profits generated by a pod of at least five physicians. The revisions to the Stark Regulations expressly permit using differing methodologies for allocating profits for the different subgroups. Thus, one group of five physicians may choose to allocate profits per capita, and the other group of five may allocate the profits of their DHS referrals by patient encounters (excluding DHS encounters).

Finally, there are a few helpful, additional clarifications – such as the medical group or group of five may create eligibility rules for earning a bonus. CMS also confirmed that the doctors could continue to earn profitability bonuses for "incident to" services. CMS notes that if the group practice consists of fewer than five doctors, the group may still allocate the DHS profits, so long as it does so using compliant methodology.

Now is the time for group practices to review their compensation plans and methodologies to ensure Stark compliance in order to implement a plan effective January 1, 2022.

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