Changes to Stark Law Special Compensation Rules for Group Practices Go into Effect on January 1, 2022

The final rules regarding special compensation under **42 U.S.C. § 1395nn**, the Physician Self-Referral or Stark Law, go into effect on January 1, 2022 and will require many physician group practices to modify their compensation methodologies, specifically the pooling and distribution of profits for the provision **designated health services** ("DHS").

Under the **current regulations**, a physician in a group practice that relies on the in-office ancillary services exception can be paid a share of overall group profits, so long as that share is determined in a way that is not "directly related to the volume or value of referrals of DHS by the physician." The same is true of productivity bonuses based on services that a physician has performed. "A physician in the group practice may be paid a productivity bonus based on services that he or she has personally performed, or services 'incident to' such personally performed services, or both, provided that the bonus is not determined in any manner that is directly related to the volume or value of referrals of DHS by the physician (except that the bonus may directly relate to the volume or value of DHS referrals by the physician if the referrals are for services 'incident to' the physician's personally performed services)."

This provision had previously been interpreted to allow "split pool" profit-sharing plans that create pools of DHS-derived profits for different services, in which only certain physicians benefit from certain profit pools.

Effective January 1, 2022, split pooling is no longer permitted. In the **final regulation**, which modifies the special compensation rules under 42 C.F.R. §411.352(i), CMS clarifies that "if a group practice wishes to pay shares of overall profits to any of its physicians, it must first aggregate: (1) The entire profits from the entire group; or (2) the entire profits from any component of the group that consists of at least five physicians. Once aggregated, the group practice may choose to retain some of the profits or distribute all of the profits through shares of overall profits paid to its physicians." Therefore, although a group practice may employ different profit distribution methods for the provision of DHS for each component of the group practice that consists of five or more physicians, the group practice must employ the same method for distributing overall profits to every physician within such a component. It is important to note that although CMS limited the general definition of DHS to "only DHS payable in whole or in part by Medicare" in § 411.351, "overall profits" for the purpose of the special compensation rules for group practices continues to include "the group's entire profits derived from DHS payable to Medicare or Medicaid."

Group practices that currently employ the split pool compensation structure for physicians and rely on the in-office ancillary services exception will need to modify their compensation structures to

comply with this clarification.