

that he or she has personally performed, or services “incident to” such personally performed services, that is not directly related to the volume or value of the physician’s referrals (except that the bonus may directly relate to the volume or value of the physician’s referrals if the referrals are for services “incident to” the physician’s personally performed services).

(ii) A productivity bonus must be calculated in a reasonable and verifiable manner. A productivity bonus will be deemed not to relate directly to the volume or value of referrals if one of the following conditions is met:

(A) The productivity bonus is based on the physician’s total patient encounters or the relative value units (RVUs) personally performed by the physician.

(B) The services on which the productivity bonus is based are not designated health services and would not be considered designated health services if they were payable by Medicare.

(C) Revenues derived from designated health services constitute less than 5 percent of the group’s total revenues, and the portion of those revenues distributed to each physician in the group constitutes 5 percent or less of his or her total compensation from the group.

(3) *Value-based enterprise participation.* Notwithstanding paragraph (g) of this section, profits from designated health services that are directly attributable to a physician’s participation in a value-based enterprise, as defined at § 411.351, may be distributed to the participating physician.

(4) *Supporting documentation.* Supporting documentation verifying the method used to calculate the profit share or productivity bonus under paragraphs (i)(1), (2), and (3) of this section, and the resulting amount of compensation, must be made available to the Secretary upon request.

[85 FR 77656, 76682, Dec. 2, 2020]

**§ 411.353 Prohibition on certain referrals by physicians and limitations on billing.**

(a) *Prohibition on referrals.* Except as provided in this subpart, a physician who has a direct or indirect financial relationship with an entity, or who has an immediate family member who has

a direct or indirect financial relationship with the entity, may not make a referral to that entity for the furnishing of DHS for which payment otherwise may be made under Medicare. A physician’s prohibited financial relationship with an entity that furnishes DHS is not imputed to his or her group practice or its members or its staff. However, a referral made by a physician’s group practice, its members, or its staff may be imputed to the physician if the physician directs the group practice, its members, or its staff to make the referral or if the physician controls referrals made by his or her group practice, its members, or its staff.

(b) *Limitations on billing.* An entity that furnishes DHS pursuant to a referral that is prohibited by paragraph (a) of this section may not present or cause to be presented a claim or bill to the Medicare program or to any individual, third party payer, or other entity for the DHS performed pursuant to the prohibited referral.

(c) *Denial of payment for services furnished under a prohibited referral.* (1) Except as provided in paragraph (e) of this section, no Medicare payment may be made for a designated health service that is furnished pursuant to a prohibited referral.

(2) When payment for a designated health service is denied on the basis that the service was furnished pursuant to a prohibited referral, and such payment denial is appealed—

(i) The ultimate burden of proof (burden of persuasion) at each level of appeal is on the entity submitting the claim for payment to establish that the service was not furnished pursuant to a prohibited referral (and not on CMS or its contractors to establish that the service was furnished pursuant to a prohibited referral); and

(ii) The burden of production on each issue at each level of appeal is initially on the claimant, but may shift to CMS or its contractors during the course of the appellate proceeding, depending on the evidence presented by the claimant.

(d) *Refunds.* An entity that collects payment for a designated health service that was performed pursuant to a

prohibited referral must refund all collected amounts on a timely basis, as defined at §1003.110 of this title.

(e) *Exception for certain entities.* Payment may be made to an entity that submits a claim for a designated health service if—

(1) The entity did not have actual knowledge of, and did not act in reckless disregard or deliberate ignorance of, the identity of the physician who made the referral of the designated health service to the entity; and

(2) The claim otherwise complies with all applicable Federal and State laws, rules, and regulations.

(f) *Exception for certain arrangements involving temporary noncompliance.* (1) Except as provided in paragraphs (f)(2) through (4) of this section, an entity may submit a claim or bill and payment may be made to an entity that submits a claim or bill for a designated health service if—

(i) The financial relationship between the entity and the referring physician fully complied with an applicable exception under §411.355, 411.356, or 411.357 for at least 180 consecutive calendar days immediately preceding the date on which the financial relationship became noncompliant with the exception; and

(ii) The financial relationship has fallen out of compliance with the exception for reasons beyond the control of the entity, and the entity promptly takes steps to rectify the noncompliance.

(2) Paragraph (f)(1) of this section applies only to DHS furnished during the period of time it takes the entity to rectify the noncompliance, which must not exceed 90 consecutive calendar days following the date on which the financial relationship became noncompliant with an exception.

(3) Paragraph (f)(1) may be used by an entity only once every 3 years with respect to the same referring physician.

(4) Paragraph (f)(1) does not apply if the exception with which the financial relationship previously complied was §411.357(k) or (m).

(g) [Reserved]

(h) *Special rule for reconciling compensation.* An entity may submit a claim or bill and payment may be made to an entity that submits a claim

or bill for a designated health service if—

(1) No later than 90 consecutive calendar days following the expiration or termination of a compensation arrangement, the entity and the physician (or immediate family member of a physician) that are parties to the compensation arrangement reconcile all discrepancies in payments under the arrangement such that, following the reconciliation, the entire amount of remuneration for items or services has been paid as required under the terms and conditions of the arrangement; and

(2) Except for the discrepancies in payments described in paragraph (h)(1) of this section, the compensation arrangement fully complies with an applicable exception in this subpart.

[85 FR 77656, Dec. 2, 2020, as amended at 88 FR 59328, Aug. 28, 2023]

**§411.354 Financial relationship, compensation, and ownership or investment interest.**

(a) *Financial relationships*—(1) *Financial relationship* means—

(i) A direct or indirect ownership or investment interest (as defined in paragraph (b) of this section) in any entity that furnishes DHS; or

(ii) A direct or indirect compensation arrangement (as defined in paragraph (c) of this section) with an entity that furnishes DHS.

(2) *Types of financial relationships.* (i) A *direct* financial relationship exists if remuneration passes between the referring physician (or a member of his or her immediate family) and the entity furnishing DHS without any intervening persons or entities between the entity furnishing DHS and the referring physician (or a member of his or her immediate family).

(ii) An *indirect* financial relationship exists under the conditions described in paragraphs (b)(5) and (c)(2) of this section.

(b) *Ownership or investment interest.* An ownership or investment interest in the entity may be through equity, debt, or other means, and includes an interest in an entity that holds an ownership or investment interest in any entity that furnishes DHS.

(1) An ownership or investment interest includes, but is not limited to,