

(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 non-compliant 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.

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§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, stock, stock options other than those described in paragraph (b)(3)(ii) of this section, partnership shares, limited liability company memberships, as well as loans, bonds, or other financial instruments that are secured with an entity's property or revenue or a portion of that property or revenue.

(2) An ownership or investment interest in a subsidiary company is neither an ownership or investment interest in the parent company, nor in any other subsidiary of the parent, unless the subsidiary company itself has an ownership or investment interest in the parent or such other subsidiaries. It may, however, be part of an indirect financial relationship.

(3) Ownership and investment interests do not include, among other things—

(i) An interest in an entity that arises from a retirement plan offered by that entity to the physician (or a member of his or her immediate family) through the physician's (or immediate family member's) employment with that entity;

(ii) Stock options and convertible securities received as compensation until the stock options are exercised or the convertible securities are converted to

equity (before this time the stock options or convertible securities are compensation arrangements as defined in paragraph (c) of this section);

(iii) An unsecured loan subordinated to a credit facility (which is a compensation arrangement as defined in paragraph (c) of this section);

(iv) An “under arrangements” contract between a hospital and an entity owned by one or more physicians (or a group of physicians) providing DHS “under arrangements” with the hospital (such a contract is a compensation arrangement as defined in paragraph (c) of this section);

(v) A security interest held by a physician in equipment sold by the physician to a hospital and financed through a loan from the physician to the hospital (such an interest is a compensation arrangement as defined in paragraph (c) of this section);

(vi) A titular ownership or investment interest that excludes the ability or right to receive the financial benefits of ownership or investment, including, but not limited to, the distribution of profits, dividends, proceeds of sale, or similar returns on investment; or

(vii) An interest in an entity that arises from an employee stock ownership plan (ESOP) that is qualified under Internal Revenue Code section 401(a).

(4) An ownership or investment interest that meets an exception set forth in § 411.355 or § 411.356 need not also meet an exception for compensation arrangements set forth in § 411.357 with respect to profit distributions, dividends, or interest payments on secured obligations.

(5)(i) An *indirect ownership or investment interest* exists if—

(A) Between the referring physician (or immediate family member) and the entity furnishing DHS there exists an unbroken chain of any number (but no fewer than one) of persons or entities having ownership or investment interests; and

(B) The entity furnishing DHS has actual knowledge of, or acts in reckless disregard or deliberate ignorance of, the fact that the referring physician (or immediate family member) has some ownership or investment interest (through any number of intermediary

ownership or investment interests) in the entity furnishing the DHS.

(ii) An indirect ownership or investment interest exists even though the entity furnishing DHS does not know, or acts in reckless disregard or deliberate ignorance of, the precise composition of the unbroken chain or the specific terms of the ownership or investment interests that form the links in the chain.

(iii) Notwithstanding anything in this paragraph (b)(5), common ownership or investment in an entity does not, in and of itself, establish an indirect ownership or investment interest by one common owner or investor in another common owner or investor.

(iv) An indirect ownership or investment interest requires an unbroken chain of ownership interests between the referring physician and the entity furnishing DHS such that the referring physician has an indirect ownership or investment interest in the entity furnishing DHS.

(c) *Compensation arrangement.* A compensation arrangement is any arrangement involving remuneration, direct or indirect, between a physician (or a member of a physician’s immediate family) and an entity. An “under arrangements” contract between a hospital and an entity providing DHS “under arrangements” to the hospital creates a compensation arrangement for purposes of these regulations. A compensation arrangement does not include the portion of any business arrangement that consists solely of the remuneration described in section 1877(h)(1)(C) of the Act and in paragraphs (1) through (3) of the definition of the term “remuneration” at § 411.351. (However, any other portion of the arrangement may still constitute a compensation arrangement.)

(1)(i) A direct compensation arrangement 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.

(ii) Except as provided in paragraph (c)(3)(ii)(C) of this section, a physician is deemed to “stand in the shoes” of his or her physician organization and

have a direct compensation arrangement with an entity furnishing DHS if—

(A) The only intervening entity between the physician and the entity furnishing DHS is his or her physician organization; and

(B) The physician has an ownership or investment interest in the physician organization.

(iii) A physician (other than a physician described in paragraph (c)(1)(ii)(B) of this section) is permitted to “stand in the shoes” of his or her physician organization and have a direct compensation arrangement with an entity furnishing DHS if the only intervening entity between the physician and the entity furnishing DHS is his or her physician organization.

(2) An *indirect compensation arrangement* exists if all of the conditions of paragraphs (c)(2)(i) through (iii) of this section exist:

(i) Between the referring physician (or a member of his or her immediate family) and the entity furnishing DHS there exists an unbroken chain of any number (but not fewer than one) of persons or entities that have financial relationships (as defined in paragraph (a) of this section) between them (that is, each link in the chain has either an ownership or investment interest or a compensation arrangement with the preceding link).

(ii)(A)(1) The referring physician (or immediate family member) receives aggregate compensation from the person or entity in the chain with which the physician (or immediate family member) has a direct financial relationship that varies with the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS; and

(2) The amount of compensation that the physician (or immediate family member) receives per individual unit—

(i) Is not fair market value for items or services actually provided;

(ii) Could increase as the number or value of the physician’s referrals to the entity furnishing DHS increases, or could decrease as the number or value of the physician’s referrals to the entity decreases;

(iii) Could increase as the amount or value of the other business generated

by the physician for the entity furnishing DHS increases, or could decrease as the amount or value of the other business generated by the physician for the entity furnishing DHS decreases; or

(iv) Is payment for the lease of office space or equipment or for the use of premises or equipment.

(B) For purposes of applying paragraph (c)(2)(ii)(A)(2) of this section, the individual unit is:

(1) Item, if the physician (or immediately family member) is compensated solely per item provided.

(2) Service, if the physician (or immediate family member) is compensated solely per service provided, which includes arrangements where the “service” provided includes both items and services.

(3) Time, if the conditions of paragraph (c)(2)(ii)(B)(1) or (2) of this section are not met.

(C) If the financial relationship between the physician (or immediate family member) and the person or entity in the chain with which the referring physician (or immediate family member) has a direct financial relationship is an ownership or investment interest, the nonownership or noninvestment interest closest to the referring physician (or immediate family member) is used to determine whether the aggregate compensation varies with the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS and whether the amount of compensation that the physician (or immediate family member) receives per individual unit meets the conditions in paragraph (c)(2)(ii)(A)(2) of this section. (For example, if a referring physician has an ownership interest in company A, which owns company B, which has a compensation arrangement with company C, which has a compensation arrangement with entity D that furnishes DHS, we would look to the aggregate compensation between company B and company C for purposes of this paragraph (c)(2)(ii).

(iii) The entity furnishing DHS has actual knowledge of, or acts in reckless disregard or deliberate ignorance of, the fact that the referring physician (or immediate family member) receives

aggregate compensation that varies with the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS.

(iv)(A) For purposes of paragraph (c)(2)(i) of this section, except as provided in paragraph (c)(3)(ii)(C) of this section, a physician is deemed to “stand in the shoes” of his or her physician organization if the physician has an ownership or investment interest in the physician organization.

(B) For purposes of paragraph (c)(2)(i) of this section, a physician (other than a physician described in paragraph (c)(2)(iv)(A) of this section) is permitted to “stand in the shoes” of his or her physician organization.

(3)(i) For purposes of paragraphs (c)(1)(ii) and (c)(2)(iv) of this section, a physician who “stands in the shoes” of his or her physician organization is deemed to have the same compensation arrangements (with the same parties and on the same terms) as the physician organization. When applying the exceptions in §§ 411.355 and 411.357 to arrangements in which a physician stands in the shoes of his or her physician organization, the “parties to the arrangements” are considered to be—

(A) With respect to a signature requirement, the physician organization and any physician who “stands in the shoes” of the physician organization as required under paragraph (c)(1)(ii) or (c)(2)(iv)(A) of this section; and

(B) With respect to all other requirements of the exception, including the relevant referrals and other business generated between the parties, the entity furnishing DHS and the physician organization (including all members, employees, and independent contractor physicians).

(ii) The provisions of paragraphs (c)(1)(ii) and (c)(2)(iv)(A) of this section—

(A) Need not apply during the original term or current renewal term of an arrangement that satisfied the requirements of § 411.357(p) as of September 5, 2007 (see 42 CFR parts 400–413, revised as of October 1, 2007);

(B) Do not apply to an arrangement that satisfies the requirements of § 411.355(e); and

(C) Do not apply to a physician whose ownership or investment interest is titular only. A titular ownership or investment interest is an ownership or investment interest that excludes the ability or right to receive the financial benefits of ownership or investment, including, but not limited to, the distribution of profits, dividends, proceeds of sale, or similar returns on investment.

(iii) An arrangement structured to comply with an exception in § 411.357 (other than § 411.357(p)), but which would otherwise qualify as an indirect compensation arrangement under this paragraph as of August 19, 2008, need not be restructured to satisfy the requirements of § 411.357(p) until the expiration of the original term or current renewal term of the arrangement.

(4)(i) *Exceptions applicable to indirect compensation arrangements—General.* Except as provided in this paragraph (c)(4) of this section, only the exceptions at §§ 411.355 and 411.357(p) are applicable to indirect compensation arrangements.

(ii) *Special rule for indirect compensation arrangements involving a MCO or IPA and a referring physician.* Only the exceptions at §§ 411.355, 411.357(n), and 411.357(p) are applicable in the case of an indirect compensation arrangement in which the entity furnishing DHS described in paragraph (c)(2)(i) of this section is a MCO or IPA.

(iii) *Special rule for indirect compensation arrangements involving value-based arrangements.* When an unbroken chain described in paragraph (c)(2)(i) of this section includes a value-based arrangement (as defined at § 411.351) to which the physician (or the physician organization in whose shoes the physician stands under this paragraph) is a direct party—

(A) Only the exceptions at §§ 411.355, 411.357(p), and 411.357(aa) are applicable to the indirect compensation arrangement if the entity furnishing DHS is not a MCO or IPA; and

(B) Only the exceptions at §§ 411.355, 411.357(n), 411.357(p), and 411.357(aa) are applicable to the indirect compensation arrangement if the entity furnishing DHS is a MCO or IPA.

(d) *Special rules on compensation.* The following special rules apply only to

compensation under section 1877 of the Act and subpart J of this part:

(1) *Set in advance.* (i) Compensation is deemed to be “set in advance” if the aggregate compensation, a time-based or per-unit of service-based (whether per-use or per-service) amount, or a specific formula for calculating the compensation is set out in writing before the furnishing of the items, services, office space, or equipment for which the compensation is to be paid. The formula for determining the compensation must be set forth in sufficient detail so that it can be objectively verified.

(ii) Notwithstanding paragraph (d)(1)(i) of this section, compensation (or a formula for determining the compensation) may be modified at any time during the course of a compensation arrangement and satisfy the requirement that it is “set in advance” if all of the following conditions are met:

(A) All requirements of an applicable exception in §§411.355 through 411.357 are met on the effective date of the modified compensation (or the formula for determining the modified compensation).

(B) The modified compensation (or the formula for determining the modified compensation) is determined before the furnishing of the items, services, office space, or equipment for which the modified compensation is to be paid.

(C) Before the furnishing of the items, services, office space, or equipment for which the modified compensation is to be paid, the formula for the modified compensation is set forth in writing in sufficient detail so that it can be objectively verified. Paragraph (e)(4) of this section does not apply for purposes of this paragraph (d)(1)(ii)(C).

(2) *Unit-based compensation and the volume or value standard.* Unit-based compensation (including time-based or per-unit of service-based compensation) is deemed not to take into account the volume or value of referrals if the compensation is fair market value for items or services actually provided and does not vary during the course of the compensation arrangement in any manner that takes into account referrals of designated health services. This paragraph (d)(2) does not

apply for purposes of paragraphs (d)(5)(i) and (6)(i) of this section.

(3) *Unit-based compensation and the other business generated standard.* Unit-based compensation (including time-based or per-unit of service-based compensation) is deemed not to take into account other business generated between the parties or other business generated by the referring physician if the compensation is fair market value for items and services actually provided and does not vary during the course of the compensation arrangement in any manner that takes into account referrals or other business generated by the referring physician, including private pay health care business (except for services personally performed by the referring physician, which are not considered “other business generated” by the referring physician). This paragraph (d)(3) does not apply for purposes of paragraphs (d)(5)(ii) and (d)(6)(ii) of this section.

(4) *Directed referral requirement.* If a physician’s compensation under a *bona fide* employment relationship, personal service arrangement, or managed care contract is conditioned on the physician’s referrals to a particular provider, practitioner, or supplier, all of the following conditions must be met.

(i) The compensation, or a formula for determining the compensation, is set in advance for the duration of the arrangement. Any changes to the compensation (or the formula for determining the compensation) must be made prospectively.

(ii) The compensation is consistent with the fair market value of the physician’s services.

(iii) The compensation arrangement otherwise satisfies the requirements of an applicable exception at §411.355 or §411.357.

(iv) The compensation arrangement complies with both of the following conditions:

(A) The requirement to make referrals to a particular provider, practitioner, or supplier is set out in writing and signed by the parties.

(B) The requirement to make referrals to a particular provider, practitioner, or supplier does not apply if the

patient expresses a preference for a different provider, practitioner, or supplier; the patient's insurer determines the provider, practitioner, or supplier; or the referral is not in the patient's best medical interests in the physician's judgment.

(v) The required referrals relate solely to the physician's services covered by the scope of the employment, personal service arrangement, or managed care contract, and the referral requirement is reasonably necessary to effectuate the legitimate business purposes of the compensation arrangement. In no event may the physician be required to make referrals that relate to services that are not provided by the physician under the scope of his or her employment, personal service arrangement, or managed care contract.

(vi) Regardless of whether the physician's compensation takes into account the volume or value of referrals by the physician as set forth at paragraph (d)(5)(i) of this section, neither the existence of the compensation arrangement nor the amount of the compensation is contingent on the number or value of the physician's referrals to the particular provider, practitioner, or supplier. The requirement to make referrals to a particular provider, practitioner, or supplier may require that the physician refer an established percentage or ratio of the physician's referrals to a particular provider, practitioner, or supplier.

(5) *Compensation to a physician.* (i) Compensation from an entity furnishing designated health services to a physician (or immediate family member of the physician) takes into account the volume or value of referrals only if the formula used to calculate the physician's (or immediate family member's) compensation includes the physician's referrals to the entity as a variable, resulting in an increase or decrease in the physician's (or immediate family member's) compensation that positively correlates with the number or value of the physician's referrals to the entity.

(ii) Compensation from an entity furnishing designated health services to a physician (or immediate family member of the physician) takes into account the volume or value of other

business generated only if the formula used to calculate the physician's (or immediate family member's) compensation includes other business generated by the physician for the entity as a variable, resulting in an increase or decrease in the physician's (or immediate family member's) compensation that positively correlates with the physician's generation of other business for the entity.

(iii) For purposes of applying this paragraph (d)(5), a positive correlation between two variables exists when one variable decreases as the other variable decreases, or one variable increases as the other variable increases.

(iv) This paragraph (d)(5) does not apply for purposes of applying the special rules in paragraphs (d)(2) and (3) of this section or the exceptions at § 411.357(m), (s), (u), (v), (w), and (bb).

(6) *Compensation from a physician.* (i) Compensation from a physician (or immediate family member of the physician) to an entity furnishing designated health services takes into account the volume or value of referrals only if the formula used to calculate the entity's compensation includes the physician's referrals to the entity as a variable, resulting in an increase or decrease in the entity's compensation that negatively correlates with the number or value of the physician's referrals to the entity.

(ii) Compensation from a physician (or immediate family member of the physician) to an entity furnishing designated health services takes into account the volume or value of other business generated only if the formula used to calculate the entity's compensation includes other business generated by the physician for the entity as a variable, resulting in an increase or decrease in the entity's compensation that negatively correlates with the physician's generation of other business for the entity.

(iii) For purposes of applying this paragraph (d)(6), a negative correlation between two variables exists when one variable increases as the other variable decreases, or when one variable decreases as the other variable increases.

(iv) This paragraph (d)(6) does not apply for purposes of applying the special rules in paragraphs (d)(2) and (3) of

this section or the exceptions at § 411.357(m), (s), (u), (v), (w), and (bb).

(e) *Special rule on compensation arrangements*—(1) *Application*. This paragraph (e) applies only to compensation arrangements as defined in section 1877 of the Act and this subpart.

(2) *Writing requirement*. In the case of any requirement in this subpart for a compensation arrangement to be in writing, such requirement may be satisfied by a collection of documents, including contemporaneous documents evidencing the course of conduct between the parties.

(3) *Signature requirement*. In the case of any signature requirement in this subpart, such requirement may be satisfied by an electronic or other signature that is valid under applicable Federal or State law.

(4) *Special rule on writing and signature requirements*. In the case of any requirement in this subpart for a compensation arrangement to be in writing and signed by the parties, the writing requirement or the signature requirement is satisfied if—

(i) The compensation arrangement between the entity and the physician fully complies with an applicable exception in this subpart except with respect to the writing or signature requirement of the exception; and

(ii) The parties obtain the required writing(s) or signature(s) within 90 consecutive calendar days immediately following the date on which the compensation arrangement became non-compliant with the requirements of the applicable exception (that is, the date on which the writing(s) or signature(s) were required under the applicable exception but the parties had not yet obtained them).

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§ 411.355 General exceptions to the referral prohibition related to both ownership/investment and compensation.

The prohibition on referrals set forth in § 411.353 does not apply to the following types of services:

(a) *Physician services*. (1) Physician services as defined at § 410.20(a) of this chapter that are furnished—

(i) Personally by another physician who is a member of the referring physician's group practice or is a physician in the same group practice (as defined at § 411.351) as the referring physician; or

(ii) Under the supervision of another physician who is a member of the referring physician's group practice or is a physician in the same group practice (as defined at § 411.351) as the referring physician, provided that the supervision complies with all other applicable Medicare payment and coverage rules for the physician services.

(2) For purposes of this paragraph (a), "physician services" include only those "incident to" services (as defined at § 411.351) that are physician services under § 410.20(a) of this chapter.

(b) *In-office ancillary services*. Services (including certain items of durable medical equipment (DME), as defined in paragraph (b)(4) of this section, and infusion pumps that are DME (including external ambulatory infusion pumps), but excluding all other DME and parenteral and enteral nutrients, equipment, and supplies (such as infusion pumps used for PEN)), that meet the following conditions:

(1) *Individual who furnishes the service*. They are furnished personally by one of the following individuals:

(i) The referring physician.

(ii) A physician who is a member of the same group practice as the referring physician.

(iii) An individual who is supervised by the referring physician or, if the referring physician is in a group practice, by another physician in the group practice, provided that the supervision complies with all other applicable Medicare payment and coverage rules for the services.

(2) *Location where service is furnished*. They are furnished in one of the following locations:

(i) The same building (as defined at § 411.351), but not necessarily in the same space or part of the building, in which all of the conditions of paragraph (b)(2)(i)(A), (b)(2)(i)(B), or (b)(2)(i)(C) of this section are satisfied: