

**Redline Comparing Existing §411.352(i) (as of November 23, 2020) to
Final §411.352(i) (to be effective January 1, 2022)**

Provided by Dorsey & Whitney LLP

(i) Special ~~rules~~ for profit shares and productivity bonuses ~~and profit shares~~—(1) Overall profits. (1) ~~Notwithstanding paragraph (g) of this section, a~~ physician in the group ~~practice~~ may be paid a share of overall profits ~~of the group, provided that the share is not determined in any manner that is~~ directly related to the volume or value of ~~referrals of DHS by the physician's~~ referrals. ~~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).~~

(ii) (2) Overall profits means the ~~group's entire~~ profits derived from ~~DHS payable by Medicare or Medicaid or the profits derived from DHS payable by Medicare or Medicaid~~all the designated health services of any component of the group ~~practice~~ 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.~~

(iii) Overall profits ~~should~~must be divided in a reasonable and verifiable manner ~~that is not directly related to the volume or value of the physician's referrals of DHS~~. The share of overall profits will be deemed not to ~~relate~~ directly relate to the volume or value of referrals if one of the following conditions is met:

(A) (i) ~~The group's~~Overall profits are divided per capita (for example, per member of the group or per physician in the group).

(B) (ii) ~~Revenues derived from DHS~~Overall profits are distributed based on the distribution of the group ~~practice's~~ revenues attributed to services that are not ~~DHS~~designated health services and would not be considered designated health services if they were payable by ~~any Federal health care program or private payer~~Medicare.

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

(2) Productivity bonuses. (i) Notwithstanding paragraph (g) of this section, a physician in the group may be paid a productivity bonus based on services 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) (3) A productivity bonus must be calculated in a reasonable and verifiable manner ~~that is not directly related to the volume or value of the physician's referrals of DHS~~. A productivity bonus will be deemed not to relate directly to the volume or value of referrals ~~of DHS~~ if one of the following conditions is met:

(A) ~~(i)~~ The productivity bonus is based on the physician's total patient encounters or the relative value units (RVUs) personally performed by the physician. ~~(The methodology for establishing RVUs is set forth in §414.22 of this chapter.)~~

(B) ~~(ii)~~ The services on which the productivity bonus is based ~~on the allocation of the physician's compensation attributable to services that are not DHS~~ are not designated health services and would not be considered designated health services if they were payable by ~~any Federal health care program or private payer~~ Medicare.

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

(3) ~~(4)~~ 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.