

Hall, Render, Killian, Heath & Lyman is a full service health law firm with offices in Indiana, Kentucky, Michigan and Wisconsin. Since the firm was founded by William S. Hall in 1967, Hall Render has focused its practice primarily in the area of health law and is now recognized as one of the nation's preeminent health law firms serving clients in multiple states. For more information about the firm please visit us at [www.hallrender.com](http://www.hallrender.com).

#### Office Locations

##### Indiana Offices

###### *Downtown*

One American Square  
Suite 2000  
Indianapolis, IN 46282  
(317) 633-4884  
Contact: Gregg Wallander

###### *North Office*

8402 Harcourt Road  
Suite 820  
Indianapolis, IN 46260  
(317) 871-6222  
Contact: James R. Willey

##### Kentucky Office

614 West Main Street  
Suite 4000  
Louisville, KY 40202  
(502) 568-1890  
Contact: Rene R. Savarise

##### Michigan Offices

Columbia Center, Suite 315  
201 West Big Beaver Road  
Troy, MI 48084  
(248) 740-7505  
Contact: Kimberly J. Commins

###### *Lansing Office*

110 W. Michigan Avenue  
12th Floor  
Lansing, MI 48933  
(517) 703-8640  
Contact: Brian F. Bauer

##### Wisconsin Office

111 East Kilbourn Avenue  
Suite 1300  
Milwaukee, WI 53202  
(414) 721-0442  
Contact: Scott J. Geboy

#### Contact Us

[hallrender@hallrender.com](mailto:hallrender@hallrender.com)

## CMS Issues Much-Anticipated Stark III Final Rule

The long-awaited "Phase III" of the final Stark law regulations was issued yesterday, August 27, 2007, by CMS to be published in the Federal Register on September 5, 2007. It will be effective 90 days after publication. The regulations and related commentary are currently available on the CMS website at: <http://www.cms.hhs.gov/PhysicianSelfReferral/Downloads/CMS-1810-F.pdf>.

Phase III finalizes and responds to public comments regarding the Phase II final rule published on March 26, 2004, which set forth the self-referral prohibition and applicable definitions, interpreted various statutory exceptions to the prohibition, and created additional regulatory exceptions for physician arrangements that CMS considers do not pose a risk of federal health care program or patient abuse.

This Phase III is distinguished from the recently published CY2008 Physician Fee Schedule, which proposed Stark regulation changes that are subject to comment and review. With Phase III, CMS advises that it has reduced the regulatory burden on the health care industry through the interpretation of statutory exceptions and modification of existing exceptions.

More specifically, Phase III and related commentary includes the following:

Modifies the definition of "fair market value" to remove the fair market value safe harbor. While fair market value will remain an integral part of many exceptions, providers will no longer be able to establish fair market value by use of the two existing methodologies based on survey data.

Defines ownership and investment interests to exclude "under arrangements" contracts between hospitals and entities owned by physicians.

Indicates that while definition of "entity" will stay the same, CMS will continue to examine arrangements involving referrals by physician-owners of leasing, staffing, and similar entities that furnish items and services to DHS entities (i.e., "under arrangements") in order to determine the best approach in dealing with potential abuse.

Seeks to clarify the nexus between a physician group practice and independent contractor for the purpose of the physician services and in-office ancillary services exceptions. Clarifies that these exceptions do not extend to services performed by independent contractors in non-group practice facilities.

Permits the physician repayment of any excess nonmonetary compensation within the same calendar year so as to deem such compensation within applicable limits and permits an annual medical staff appreciation event.

Expands the exception for retention payments by permitting (under certain circumstances) retention payments in the absence of a written recruitment offer, adding flexibility for retention payments to physicians who serve underserved areas and populations, and by allowing rural health clinics to make retention payments.

Adds a "stand in the shoes" provision to the rules applicable to direct and indirect

compensation arrangements in order to remove an unintended consequence for indirect compensation arrangements. The new “stand in the shoes” provision is intended to treat compensation arrangements between the furnishing entity and group practices as if the arrangements are with the group’s referring physicians. Arrangements prohibited by this addition that are in place prior to Phase III publication are grandfathered in for the original or current renewal term of the arrangements.

Revises certain security interests held by physicians in property sold or loaned to hospitals as compensation and not ownership arrangements in the hospital.

Clarifies that bona fide amendments to existing arrangements that are unrelated to volume or value will still be considered "set in advance" and will not affect what is commonly referred to as the one year rule.

Comments that common per-use fee arrangements are unlikely to satisfy the supervision requirements of the in-office ancillary services exception and may implicate the Anti-kickback Statute.

Confirms that meeting the in-office ancillary services exception is not necessary if the rural provider ownership/investment exception for a group is met.

Verifies that compliance with Stark rules in no way alters a provider's obligation to reimbursement, coverage, and reassignment rules such as purchased diagnostic tests, incident-to rules, reassignment, etc.

Emphasizes risk of fraud and abuse noncompliance in recruitment arrangements where group practice indemnifies a recruited physician from any real liability of repayment if the physician fails to fulfill his or her obligations.

Provides flexibility to the recruitment exception by permitting an alternative to the "actual, additional incremental expenses" restriction. This alternative allows no more than 20% per capita allocation in circumstances where a recruited physician is replacing a deceased, retiring, or relocating group member in an underserved area. CMS also clarifies in commentary that the recruitment exception may allow a group to impose patient and employee non-solicitation prohibitions on a recruited physician and other types of reasonable practice restrictions, including certain payments of losses or liquidated damages, although an outright restrictive covenant on practicing in the community would still be prohibited.

We will be reviewing and providing a more comprehensive summary in the near future.

If you need additional information about this information please contact your regular Hall Render attorney or:

Gregg Wallander at (317) 977-1431 or [gwally@HallRender.com](mailto:gwally@HallRender.com)

Erin Abraham at (317) 977-1470 or [eabraham@hallrender.com](mailto:eabraham@hallrender.com)

Brian Betner at (317) 977-1466 or [bbetner@hallrender.com](mailto:bbetner@hallrender.com)

*This publication is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader must consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.*