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## The New Stark Phase III Regulations: Health Care Contracting Becomes More Complex

### Summary

The Phase III regulations that implement the Stark Law's prohibitions against physician self-referrals are scheduled to be published in the Federal Register on September 5, 2007. These regulations contain a number of very significant changes to the Stark regulatory scheme. Many existing arrangements, currently structured in reliance on the indirect compensation arrangement exception, may have to be revised or unwound. Going forward, most compensation arrangements will have to satisfy the more stringent requirements of a direct compensation exception.

### Full Article

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The long awaited Phase III regulations that implement the Stark Law's prohibitions against physician self-referrals (Phase III) just went on display at the Federal Register (to be published September 5, 2007). The Phase III regulations largely respond to comments submitted on the Phase II regulations, and contain a number of very significant changes to the Stark regulatory scheme.

Phase III is a final rule and will go into effect 90 days from the date of publication; probably about the same time that the additional changes to the Stark regulations that were proposed in the 2008 Physician Fee Schedule will be finalized. The combined impact of these two sets of Stark regulations on health care industry arrangements likely will be dramatic. The Physician Fee Schedule provisions were addressed in a prior [Arent Fox legal update](#). This legal update provides a very brief summary of some of the key Phase III changes.

Our initial review indicates that one of the most significant changes in Phase III involves the Centers for Medicare & Medicaid Services' (CMS) efforts to drastically curtail the use of the indirect compensation arrangement analysis that was developed under the prior Stark regulations. Under Phase III, CMS takes the position that a physician "stands in the shoes" of his or her "physician organization," e.g., the physician's group practice. The practical effect of this interpretation is that CMS has, in effect, turned many arrangements into direct, rather than indirect, compensation arrangements. As a result, it will be necessary to meet the more stringent requirements of one of the Stark Law exceptions applicable to direct compensation arrangements. A large number of existing arrangements are likely to be affected by this revision.

However, Phase III provides significantly more flexibility in connection with a number of exceptions, including those for:

- Physician recruitment;
- Physician retention; and
- Intra-family rural referrals.

There are more modest expansions in the exceptions for:

- Personal services arrangements;

- Non-monetary compensation;
- Compliance training; and
- Professional courtesy.

Several exceptions are made somewhat more restrictive through the incorporation of additional criteria, such as the exceptions for:

- Academic medical centers; and
- Charitable donations.

The Fair Market Value Exception is expanded to cover compensation from a physician to an entity (as well as compensation from an entity to a physician). Unfortunately, the net effect is virtually to eliminate the possibility of using the more flexible Exception for Payments by a Physician, since that exception can only be used when no other exception specifically addresses the items or services at issue.

Phase III also contains various other modifications, clarifications and commentary on the Stark regulations related to issues such as productivity bonuses and profit sharing, "incident to" services, personal services arrangements, radiology, rural areas, and percentage compensation.

We will have a more detailed analysis of Phase III available shortly. In the interim, if you have questions or need additional information on these issues, please contact:

[Linda A. Baumann](mailto:linda.baumann@arentfox.com)  
202.857.6239  
[baumann.linda@arentfox.com](mailto:baumann.linda@arentfox.com)