Healthcare Fundraising and The Law

Craig White, JD, CHC
VP, Corporate Compliance & Integrity, Internal Audit, and Government Affairs
September 9, 2011
Fundraising and Compliance

• HIPAA
  – Fundraising
  – Marketing
• Physician Interaction Laws
  – Stark Law
  – Anti-Kickback Statute
What Does HIPAA Stand For?
Health Insurance Portability and Accountability Act
HIPAA Background

• HIPAA has been around since 1996
• Original purpose of law
  – Allow people to take their coverage with them
• What it has morphed into
  – Nightmare for the healthcare community because of all the Protected Healthcare Information (PHI) regulations
HIPAA Background

- First regulations issued in 2003
- Additional HIPAA regulations in American Recovery and Reinvestment Act of 2009 (stimulus bill)
- Even more regs in the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH)
- Notice of Proposed Rule Making (NPRM) from HHS-OCR on July 8, 2010
  - Final regs not issued yet
What is PHI?

- Protected Health Information (PHI) is any piece of information that can link a patient to a diagnosis, treatment, physician or service.
- PHI can be used for the purposes of treatment, hospital operations, payment, or if required by law.
- Team members can only use the minimum necessary amount of PHI to do their jobs.
What Information Can We Use?

- Under current law, “a covered entity may use, or disclose to a business associate or to an institutionally related foundation, the following protected health information for the purpose of raising funds for its own benefit”, without written authorization:
  
  - Demographic information relating to an individual; and,
  
  - Dates of health care provided to an individual
Demographic Information

• Not defined in the statute
• Patient’s name, age (not date of birth), and gender
• Patient’s address and other contact information (listed phone numbers)
• Patient’s health insurance status (whether the patient has health insurance or not)
Demographic Information

- Can filter out patient information to avoid sending unintended solicitations
  - For example, a list of potential donors can be requested that excludes pediatric or psychiatric patients. But, you cannot request a list that only includes heart patients or cancer patients.
  - Filtering is only permissible as long as the purpose is not to produce mailing lists that are based on the patient's illness, treatment or services received.
Expansion of Demographic Information

• Under the proposed regulations, HHS is considering allowing foundations to expand the information that can be used for fundraising to include:
  – **Department of Service**
  – **Outcomes**

• Not law yet, but AHP has made a strong case for adding it
  • Currently, still limited to demographic information
What about External Fundraisers?

• The PHI you can use as a foundation, an external fundraiser can use as long as:
  – You have a written contract
  – You have a Business Associate Agreement
  – External fundraiser agrees to use the PHI only for the Foundation’s fundraising activities
What Information Can’t We Use?

- Information concerning the patient’s diagnoses, treatments, and services provided cannot be used in fundraising.
- Patients may not be targeted for specific fundraising efforts based on their diagnosis or treatments unless the patient has authorized the fundraisers to do so—in writing.
Use of PHI if Authorized by Patient

• The use of more than limited PHI for fundraising purposes requires written authorization from the patient

• More than limited PHI means: diagnoses, treatments, caregivers’ names, location of services, involvement in research, etc.

- Hospital Foundation “DO NOT CALL” list
  - Patients should have the option to opt-out of being solicited for foundation fundraising activities
- Notice of Privacy Practices (NPP)
- Foundation Fundraising Materials

- Notice of Privacy Practices (NPP)
  - If you use PHI (demographic information, dates of service) for fundraising, must put a statement in NPP
  - Under current law, there does not need to be an opt-out provision in the NPP
  - Under the proposed regs, an opt-out provision must be added to the NPP
Self Regional’s NPP

HOW WE MAY USE, ACCESS, OR DISCLOSE YOUR PROTECTED HEALTH INFORMATION (PHI)

Fundraising: To communicate with you to raise funds to support health care services and educational programs we provide to the community. If you do not want to be contacted for fundraising efforts, please notify Jack Schwartz, Executive Director, Self Regional Healthcare Foundation, 1325 Spring Street, Greenwood, SC 29646 in writing, by email at jschwartz@selfregional.org, or by Phone (864-725-5142).

*Last sentence not required by law currently, but would be required under the proposed regs.

- **Fundraising Materials**
  - Must have a method for individuals to opt-out of receiving further fundraising materials on every piece you send out
  - Many foundations take the “make ‘em work for it” approach (i.e., write a letter), which is okay under the current law
  - Proposed regs would require methods that “do not cause undue burden or more than nominal cost”
    - Specifically states that mailing a letter is “undue burden”
    - Toll-free phone number, email
If you do not want to be contacted for fundraising efforts, please notify Jack Schwartz, Executive Director, Self Regional Healthcare Foundation, 1325 Spring Street, Greenwood, SC 29646 in writing, by email at (jschwartz@selfregional.org), or by Phone (864-725-5142).

• How careful do you have to be?
  – Current law says the covered entity must make “reasonable efforts” to ensure the opt-outers don’t get future fundraising communications
  – Proposed regs say an opt out is really a revocation of authority to send information and the foundation must “ensure” that the opt out is honored
    • Much tougher standard
    • Have to keep a log
HIPAA and Marketing

• Covered entities must obtain authorization before using a patient's protected health information (PHI) for marketing purposes
Foundation-Physician Agreements

• Leases
  – Office space
  – Equipment

• Gifts to Physicians

• Dinners/Banquets
Anti-Kickback Statute

• Forbids knowing and willing soliciting, receiving, offers or pays any remuneration
  – In return for referring an individual to a person for the furnishing of any item or service payable under Federal health care programs
  – In return for purchasing, leasing, ordering, or arranging of any good, facility, service or item payable under Federal health care programs
Stark Law

• An arrangement between an entity and a physician/group must meet the following conditions:
  – Compensation/payment must be set in advance, consistent with fair market value, and not take into account the volume of referrals
  – In writing signed by both parties in advance, and covers only identifiable items or services, all of which are specified in the agreement
  – Specifies a timeframe for the arrangement, and can contain a termination clause
Questions?

Craig White
Vice President, Corporate Compliance & Integrity
(864) 725-5046
cwhite@selfregional.org