

# **US Sentencing Guidelines & Draft OIG Supplemental Compliance Program Guidance for Hospitals**

**Presented by  
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HFMA Meeting  
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# AGENDA

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- Introduction
- US Sentencing Guidelines
- OIG Draft Supplemental Compliance Guidance for Hospitals
- Questions and Answers

# Interesting Facts

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- Office of Inspector General (OIG) Semiannual Report
  - Recovered \$23 Billion in FY 2003
  - Increase of \$1 Billion over FY 2002
  - 3275 Exclusions in FY 2003



# US Sentencing Guidelines

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- Amendments to US Sentencing Guidelines
  - United States Sentencing Commission
    - <http://www.ussc.gov/>
  - Ad Hoc Advisory Group Report (10/7/03)
    - <http://www.ussc.gov/corp/advgrp.htm>
  - April 30, 2004 Amendments Submitted to Congress
    - <http://www.ussc.gov/2004guid/2004cong.pdf>
- Effective November 1, 2004

# US Sentencing Guidelines

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- Why do Healthcare Organizations Care?
  - Generally govern all sentences for criminal convictions
  - Chapter 8 – Sentencing of Organizations
  - Mitigating Factors
    - Effective Compliance and Ethics Program
    - Self-Reporting, Cooperation and Acceptance of Responsibility

# US Sentencing Guidelines

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- How they work
  - Fines, Disgorgement and Probation
  - Base Fine
  - Culpability Score
    - Start at 5 then add for bad things and subtract for good (compliance program and cooperation)

# Culpability Score

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<b>Culpability Score</b>	<b>Minimum Multiplier</b>	<b>Maximum Multiplier</b>
10 or more	2.0	4.0
9	1.8	3.6
8	1.6	3.2
7	1.4	2.8
6	1.2	2.4
5	1	2.0
4	0.8	1.6
3	0.6	1.2
2	0.4	0.80
1	0.2	0.40
0 or less	0.05	0.20

# US Sentencing Guidelines

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- If Organization had an “effective” compliance and ethics program, then subtract 3 points unless:
  - Organization unreasonably delayed reporting the offense after becoming aware of it;
  - “high level personnel” participated in, condoned, or were willfully ignorant of the criminal conduct



# US Sentencing Guidelines

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- Self-Reporting, Cooperation and Acceptance of Responsibility
  - Minus 5 if prompt, full disclosure and cooperation not in face of threat of investigation or disclosure
  - Minus 3 if full cooperation and clear acceptance of responsibility
  - Minus 1 if clear acceptance of responsibility

# US Sentencing Guidelines

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- Effective Compliance and Ethics Program
- What Changed
  - New Focus and emphasis on organization compliance
    - Moved from comment to its own section
  - More Detailed – twice as long with its own comment now

# Effective Compliance Program

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- Highlights

- ◆ Emphasis on role of “governing authority” and “high level personnel”
- ◆ High level personnel shall “ensure” organization has effective program
- ◆ Adequate resources, appropriate authority and direct access
- ◆ Effective training for boards, administration, management and employees
- ◆ Monitoring and auditing, period evaluations of effectiveness and known anonymous system for report

# Effective Compliance Program

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- Other factors to consider include:
  - whether organization is following applicable industry standards and governmental regulations
  - Size of the organization
  - Similar (past) misconduct
- New interplay with OIG Compliance Guidance
- Formal acknowledgment of Sarbanes-Oxley

# Self-Reporting & Cooperation

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- **New Comment:**

“Waiver of attorney-client privilege and of work product protections is not a prerequisite to [reduction for cooperation] unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”
- **Importance of Comment**
  - Government wants you to disclose
  - Litigation Dilemma

# • OIG Draft Supplemental Compliance Program Guidance for Hospitals

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- For all things OIG see:  
<http://oig.hhs.gov/>
- Published June 8, 2004
  - <http://oig.hhs.gov/authorities/docs/04/060804hospitaldraftsuppCPGFR.pdf>
- Draft form (comments were due in June)
- Intended to emphasize risk areas since 1998 initial hospital guidance

# OIG Draft Supplemental Guidance

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- 2 Documents should be taken together
- For Hospitals with existing programs, this may serve as “a benchmark for comparison against which to measure ongoing efforts and as a roadmap for updating or refining their compliance plans”

# OIG Draft Supplemental Guidance

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- Organized into 3 Parts
  - Fraud and Abuse Risk Areas
  - Hospital Compliance Program Effectiveness
  - Self-Reporting



# Fraud & Abuse Risk Areas

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- Preparation & Submission of Claims
  - ◆ Outpatient Procedure Coding (OPPS and APCs)
  - ◆ Admissions and Discharges
  - ◆ Supplemental Payment Considerations
  - ◆ Use of Information Technology

# Fraud & Abuse Risk Areas

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- Referral Laws – Stark
  - “Significant Financial Exposure” unless financial relationships “fit squarely” in an exception
  - 3 Part initial inquiry:
    - Is there a referral from a physician for a DHS?
    - Does the physician (family member) have a financial relationship with the hospital?
    - Does the financial relationship fit within an exception

# Fraud & Abuse Risk Areas

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- Referral Laws – Stark
- OIG warns about:
  - Operational problems that lead to violation, e.g., expired agreements
  - Reporting requirements
  - Documenting FMV determinations
  - Recruiting efforts with Groups

# Fraud & Abuse Risk Areas

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- Referral Laws – Anti-kickback Statute (AKS)
  - May lead to liability under FCA
  - 2 Part Inquiry to identify risk areas:
    - Does the hospital have remunerative relationships with persons/entities that can generate federal business for the hospital?
    - Is one purpose of that remuneration to induce, reward referrals?

# Fraud & Abuse Risk Areas

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- AKS
- 4 Aggravating Factors
  - Does arrangement have potential to interfere with clinical decisions?
  - Does the arrangement have a potential to increase costs to Federal programs or beneficiaries?
  - Does the arrangement have the potential to increase the risk of over or inappropriate utilization?
  - Does the arrangement raise patient safety or quality of care concerns?

# Fraud & Abuse Risk Areas

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- AKS
  - Safeharbors vs. Exceptions
  - Form over Substance
  - Highlight “5” risk areas:
    - Joint Ventures
    - Compensation arrangements with physicians
    - Relationships with other healthcare entities
    - Physician recruiting agreements
    - Discounts
    - Medical Staff Credentialing
    - Malpractice insurance subsidies

# Fraud & Abuse Risk Areas

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- Payments to Limit Services – Gainsharing
- EMTALA
- Substandard care
- HIPAA
- Billing Substantially in Excess of Usual Charges

# Fraud & Abuse Risk Areas

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- Relationships with Beneficiaries
  - Gifts and Gratuities
  - Cost-Sharing Waivers
  - Free Transportation



# Fraud & Abuse Risk Areas

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- Areas of General Interest
  - ◆ Discounts to Uninsured Patients
  - ◆ Preventative Care Services
  - ◆ Professional Courtesy

# Compliance Program Effectiveness

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- Dovetails with Sentencing Guidelines
- Successful Programs General Include:
  - Commitment of board & highest level administration
  - Structures and processes that create effective internal controls
  - Regular self-assessment and enhancement of program

# Compliance Program Effectiveness

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- Two Main Points
  - Code of Conduct
  - Regular review of effectiveness of the 7 program elements
    - Review should be conducted “at least” annually
    - Assess each of the basic elements
    - Overall success including measuring outcomes

# Seven Elements

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- Designation of Compliance Officer & Committee
  - clear mission and is it properly organized?
  - Sufficient resources, training and autonomy?
  - Appropriate relationship w/ general counsel?
  - Direct access to board, President, CEO, legal counsel?
  - Good relationships with key operational departments?
  - Regular reports to management and board?
  - Ad hoc groups to carry out special projects?
  - Active committee with appropriate members?

# Seven Elements

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- Policies, Procedures and Standards of Conduct
  - Clearly written, readily available and relevant to day-to-day work?
  - Monitoring of compliance with internal policies and procedures?
  - Risk assessment tool for operational risks that is used regularly?
  - Regular review of regulations to keep risk assessment tool current?
  - Standards of conduct distributed to all staff, board members, offices, managers, **contractors** and medical staff?

# Seven Elements

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- Open lines of communication
  - Culture that encourages open dialogue without fear of reprisal?
  - Availability of anonymous reporting?
  - Well advertised hot line with calls logged and analyzed?
  - Are all reports investigated?
  - Regular reports of investigations to board and departments
  - Use of newsletters or intranet?
  - Active involvement of board to address recurring problems?

# Seven Elements

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- Training and Education
  - Qualified trainers for annual and special training?
  - Contents of training review and updated annually?
  - Does training address investigation results, new regulations and other trends?
  - Has training format been evaluated?
  - Post-training evaluation and testing?

# Seven Elements

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- Training and Education cont'd.
  - Regular training with appropriate resources?
  - Regular board training relating to F&A laws?
  - Documentation of who has completed training?
  - Sanctions for failure to attend training?



# Seven Elements

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- Internal monitoring and auditing
  - Auditing of high risk and volume areas and previous problem areas?
  - Are there unscheduled reviews and availability to respond quickly to new requests?
  - Is there auditing of both billing systems and claims accuracy?
  - Independent coding and auditing personnel? Certifications?
  - Review of systems if error rates are not decreasing?
  - Audit of all billing documentation, including clinical, in support of claims?

# Seven Elements

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- Response to Detected Deficiencies
  - Defined team to quickly evaluate detected deficiencies?
  - Prompt and thorough investigations?
  - Corrective action plans for root causes that are periodically reviewed?
  - Prompt repayment of overpayments?
  - Prompt report of violations of law?

# Seven Elements

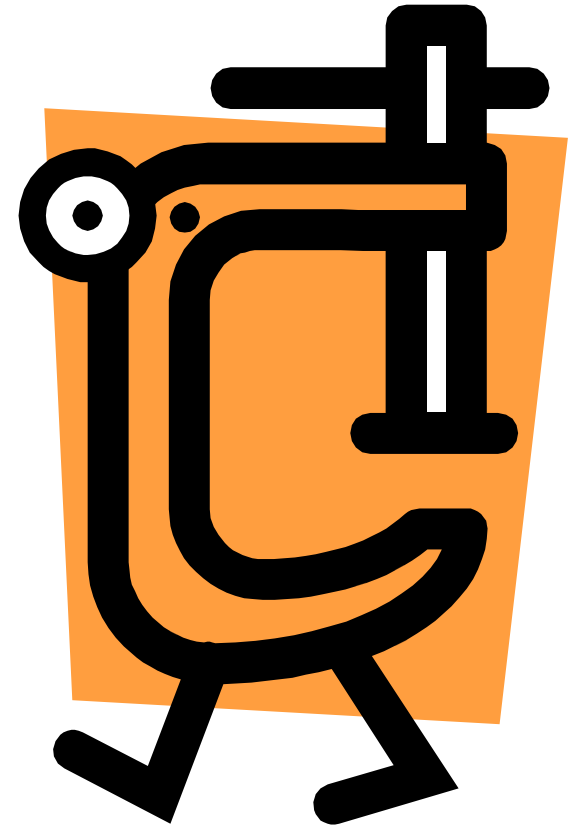
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- Enforcement of Disciplinary Standards
  - Are standards well publicized and readily available to staff?
  - Uniform and consistent enforcement of standards?
  - Are employees, contractors, and medical staff checked at least annually against government sanctions lists?

# Self Reporting

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- Brief Discussion
- OIG will be nice if you self report
  - 60 days
- Description of self-reporting protocol
- Problems



# OIG Guidance - Conclusions

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- Insight into OIG's view of evolving risk areas; helpful criteria to consider in evaluating risks.
- Extensive and helpful references
- Helpful guidance about non-risk areas
- Clear signal of what OIG expects compliance plans to do in order to be effective

# Questions & Answers

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- Thanks for listening!

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