

The logo for K&L GATES, featuring the text "K&L GATES" in white, uppercase letters on an orange rectangular background. The background of the slide is a blue bokeh pattern.

K&L GATES

HFMA WA-AK Legal Update

Carla DewBerry
925 Fourth Ave., Suite 2900
Seattle, WA 98104-1158
carla.dewberry@klgates.com

SGR (MEDICARE ACCESS AND CHIP REAUTHORIZATION ACT OF 2015)

- Averted a scheduled 21% cut in physician reimbursement

SGR

- Establish a new merit-based incentive payment system (“MIPS”) for Medicare providers

SGR – IMPACT ON SHARED SAVINGS PROGRAMS

- Added a needed exception to the Civil Monetary Penalties Law

CMP law now prohibits payments to physicians for reducing or limiting *medically necessary* services to beneficiaries under that physician's direct care

SGR – IMPACT ON SHARED SAVINGS PROGRAM

The breadth of the prohibition was intentional. As initially enacted by Congress ... the Act prohibited payments by both hospitals and Medicare managed care plans to induce physicians to reduce clinical services. ... [T]he Act was subsequently amended to add a new subsection ... that permitted Medicare managed care plans to implement physician incentive plans, provided ... [they] did not induce the reduction of medically necessary care to individual patients and did not place the physician at substantial financial risk for services not provided by the physician. ... [T]he stark difference in otherwise parallel language reflects a congressional decision to prohibit any payment arrangement between hospitals and physicians that is intended to induce a reduction or limitation in services.

OIG Special Advisory Bulletin: Gainsharing Arrangements and CMPs for Hospital Payments to Physicians to Reduce or Limit Services to Beneficiaries 3 (July 8, 1999).

SGR – IMPACT ON SHARED SAVINGS PROGRAMS

Given the availability of new protections, the OIG stated that “pending further notice ... gainsharing arrangements are not an enforcement priority for OIG unless the arrangement lacks sufficient patient and program safeguards.”

79 Fed. Reg. at 59,730. at n. 15.

MEDICARE

- Advisory Opinion 15-5

Facts:

1. Hospitals would provide discounts of up to 100 percent on Medicare inpatient Part A deductibles
- 2 .Arrangement was open to any accredited, Medicare certified hospital
3. Patient receives \$100 credit towards next renewal premium

Holding: hospital competition not unfairly affect; low risk of fraud or abuse under the Anti-Kickback Statute

TWO MIDNIGHT RULE

No post-payment RAC reviews on the appropriateness of an inpatient admission with admission dates of October 1, 2013 through September 30, 2015, except in the cases of systematic gaming, fraud, abuse or delays in the provision of services

IN-PATIENT VS. OUT PATIENT STATUS (MEDICARE) ROUND 2 PROCESS

- Admission October 1, 2013 - September 30, 2015

Review the discrepancies from the first round validation process and resubmit a revised spreadsheet and Administrative Agreement for CMS validation within two weeks

OFF-PREMISES OT AND PT

- Usually Medicare covered when on premises
- Exceptions – patient’s home
 - patient’s room in a skilled nursing facility, nursing facility, in an ALF, or in an ILF is a covered site
 - services provided in a patient’s room within an ALF or ILF are also considered to be provided in a private residence so the 2-person rule does not apply
- *CMS Letter*, No. S&C: 15-33-OPT, April 3, 2015,

DUODENOSCOPE REPROCESSING

- CMS states –
 - providers are expected to strictly comply with manufacturer guidelines for the cleaning of duodenoscopes as well as adhere to the nationally recognized Multisociety consensus guidelines.
 - CMS expects state surveyors to ask for a copy of the manufacturer's instructions for use of a duodenoscope.

CMS Letter, No. S&C: 15-32 Hospitals, April 3, 2015

ICD 10 (OCTOBER 1, 2015)

Readiness in question:

“unless all industry segments make a dedicated and aggressive effort to move forward with their implementation efforts in the next few months, there will be significant disruption to industry claims processing on Oct. 1, 2015.”

Workgroup for Electronic Data Interchange (WEDI)
February 2015 ICD-10 Industry Readiness Survey.

CAH – COUNTING BEDS

“Any bed used for inpatient services at any time must be counted when assessing compliance with the 25 inpatient bed limit. Beds used for outpatient services, such as observation services, sleep studies, emergency services, etc. do not count towards the CAH’s 25-bed limit only if they are never used for inpatient services .”

State Operations Manual, Pub. 100-07, Transmittal No. 138, April 7, 2015

CAH – COUNTING BEDS

“Beds used solely for patients receiving observation services are not included in the 25-bed maximum, nor in the calculation of the average annual acute care patient length of stay.”

Id.

MEDICAID ELIGIBLE DAYS – DSH PAYMENTS

- Section 1878 of the Social Security
 - Provider must be "dissatisfied" with the final amount of Medicare reimbursement contained in the NPR as a condition to PRRB jurisdiction
 - providers do not need to meet the dissatisfaction requirement if they can show that, as a practical matter, it was impossible for them to identify and verify these days.

Barberton Hospital v. Blue Cross and Blue Shield Association, PRRB Dec. No. 2015-5 (Mar. 19, 2015)

MEDICAID ELIGIBLE DAYS – DSH PAYMENTS

May 23, 2014, the PRRB published Alert 10

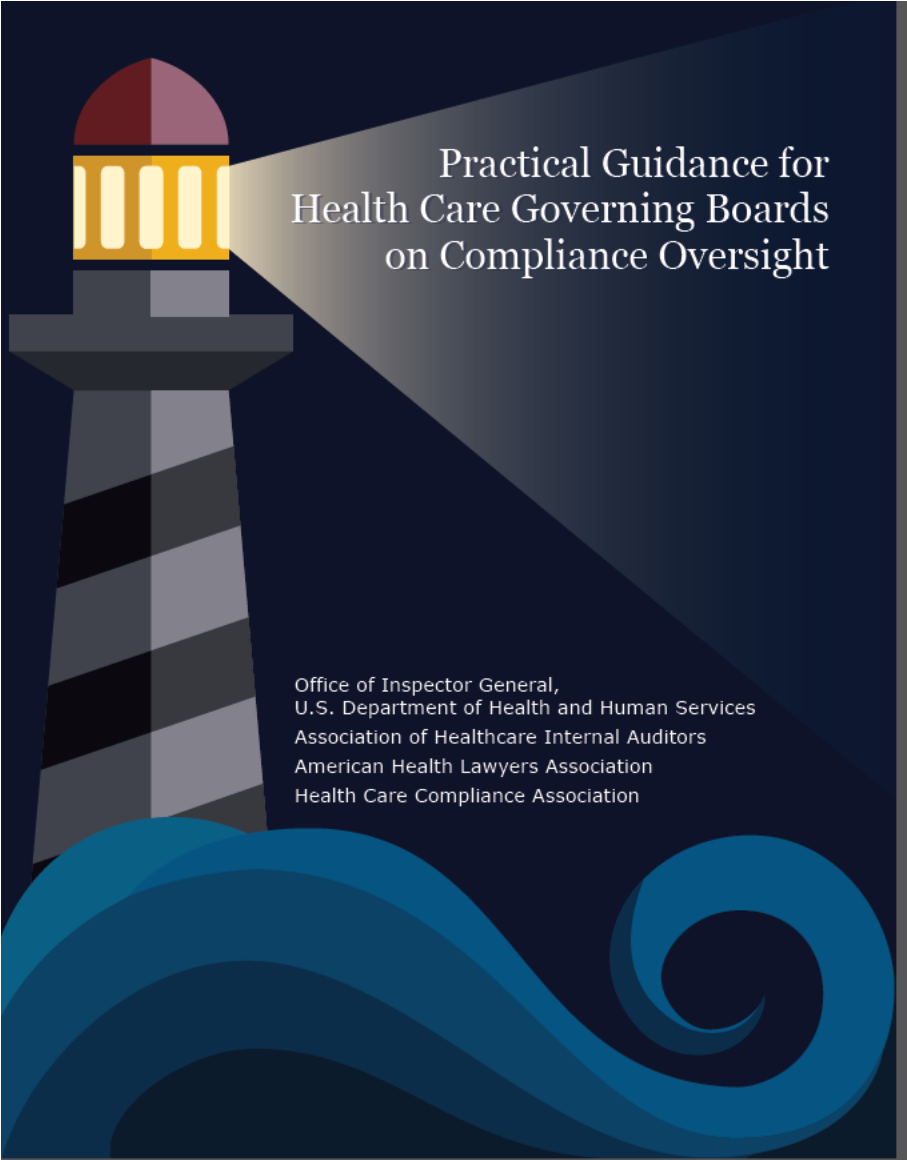
1. why the additional days could not be verified at time of cost report
2. identify the days that were attributable to each reason (aka category by category data)

PLACE OF SERVICE MODIFIERS

"PO" - off-campus provider-based departments

- Use on the UB-04
- Voluntary in CY 2015; mandatory on January 1, 2016

-Expect new POS modifier for the CMS-1500 claim form



Practical Guidance for
Health Care Governing Boards
on Compliance Oversight

Office of Inspector General,
U.S. Department of Health and Human Services
Association of Healthcare Internal Auditors
American Health Lawyers Association
Health Care Compliance Association

BOARD GOVERNANCE

- Add Health Care Compliance Expert to the Board
- Separate Compliance Officer and Legal Counsel
- Departments with Key Compliance Functions Regularly Report to the Board

<http://oig.hhs.gov/compliance/compliance-guidance/docs/Practical-Guidance-for-Health-Care-Boards-on-Compliance-Oversight.pdf>

BOARD GOVERNANCE

- Potential Risk Areas
 - referral relationships and arrangements,
 - billing problems (e.g., upcoding, submitting claims for services not rendered and/or medically unnecessary services),
 - privacy breaches, and
 - quality-related events.

BOARD GOVERNANCE

- Potential Risk Areas

Do you have a risk assessment plan?

Is it Board approved?

BOARD GOVERNANCE

- Encouraging Corporate Compliance Culture

Goal: Compliance is “a way of life.”

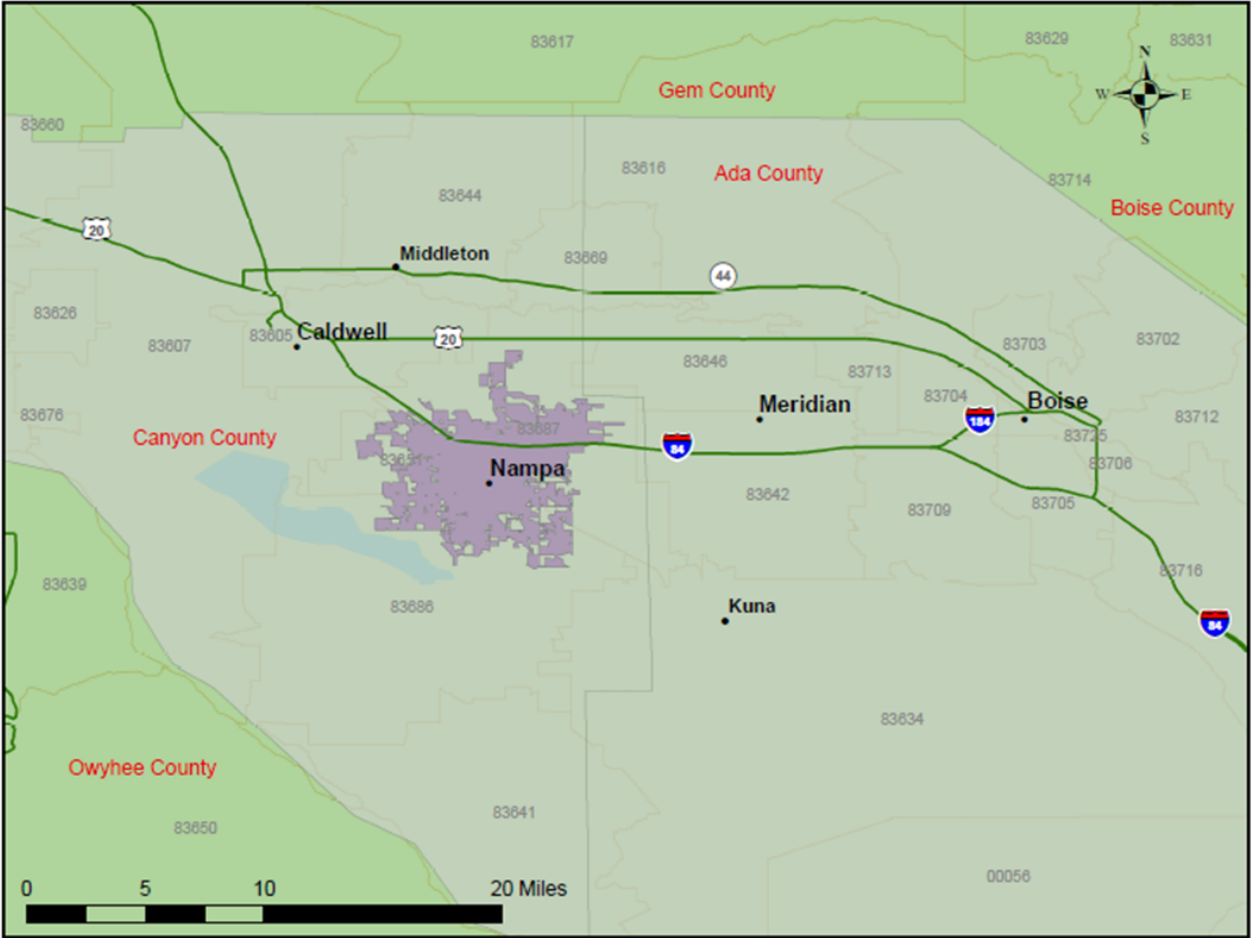
<http://oig.hhs.gov/compliance/compliance-guidance/docs/Practical-Guidance-for-Health-Care-Boards-on-Compliance-Oversight.pdf>

ANTI-TRUST (GOVERNMENT WINS)

A federal judge ordered an unwinding of the acquisition of the Saltzer physicians by Idaho's St. Luke's Health System

The Saltzer physicians were allowed to retain their \$9 million practice buyout payment from the hospital.

NEW ANTITRUST APPROACH



NEW ANTITRUST APPROACH

- Look at impact on the buyers
- In many health care situations, insurance companies are the buyer

HOSPITAL - FTC/DOJ DISPUTE

- Work shop entitled “Examining Health Care Competition”

“many speakers at the workshop evidenced hostility to hospitals.”

Letter dated March 16, 2015 from AHA, AAMC, CHA, CHA, Federation of American Hospitals to FTC and DOJ, see <https://www.ftc.gov/news-events/events-calendar/2015/02/examining-health-care-competition>

HOSPITAL – FTC/DOJ DISPUTE

“Even in framing the presentation, for example, the speaker characterized hospitals as being motivated simply by “leverage” against health insurers and increases in Medicare payments, while overlooking quality and key reasons for hospital collaboration and consolidation.”

Id.

“Hardly any mention of even indisputable benefits, such as rescuing failing hospitals and improving the quality of services at hospitals with a low census or lack of capital to fund improvements to equipment.

Id.

FTC AND DOJ RESPONSE

We, too, regret that several of your members chose not to participate in the February workshop...

Hospital associations ... [including you] were among the first organizations whose perspective we sought. ... We reached out to 14 hospital systems ... [u]nfortunately, many of your members and the parties you recommended declined to speak with us or to participate in the workshop ...

FTC AND DOJ RESPONSE

- HFMA participated in both the provider consolidation and provider network design panels.

FTC- DOJ

Conclusion: Things can't be too tense between the hospital associations and the FTC/DOJ.

Proof: They vented by letter and not email.

K&L GATES