

## Opposition to the “Two-Midnight” Rule Heating Up

Medicare’s Inpatient Prospective Payment System (IPPS) fiscal year (FY) 2014 final rule, which was issued on August 2, 2013,<sup>1</sup> included a controversial new regulation that will potentially significantly affect healthcare providers and hospitals that are reimbursed through Medicare. The Centers for Medicare and Medicaid Services (CMS) typically reimburses acute-care hospitals for inpatient stays under the IPPS, determining the reimbursement rate based on the patient’s diagnosis and seriousness of the patient’s illness, and the hospital receives one payment for the entire admission, based on the diagnostic-related group (DRG) assigned to the patient’s case upon discharge.<sup>2</sup> The new regulation, named the “two-midnight” rule, has drawn criticism from lawmakers, healthcare industry groups, and healthcare providers. The most recent criticism was memorialized in a U.S. House of Representatives bill, entitled “Two Midnight Rule Delay Act of 2013.”<sup>3</sup>

The new two-midnight rule, which affects roughly 3,400 acute care hospitals and 440 long-term care hospitals, “modifies and clarifies CMS’s longstanding policy” on how inpatient claims should be submitted, and how they will be reviewed by the government.<sup>4</sup> Under the requirement, inpatient services and procedures will generally be reimbursed under Medicare Part A when the provider:

- (1) Expects the patient’s hospital admission to span two days or more; and,
- (2) Admits the patient under that assumption.<sup>5</sup>

As explained more fully in a October 2013 Health Capital Topics article,<sup>6</sup> providers will be reimbursed by Medicare Part B for short hospital stays of less than two nights, and the patient will be admitted under an “observation” status, which charges Medicare beneficiaries a 20% per-service co-payment; this payment does not include post-acute care.<sup>7</sup> In contrast, if a patient is in the hospital for a period of two midnights or more, the provider will be reimbursed at a higher rate, under Medicare Part A.

Compliance with the two-midnight rule will be enforced by Medicare administrative contractors (MAC) and recovery audit contractors (RAC), who will review 10 to 25 inpatient claims per hospital that are less than two nights in duration between October 1, 2013 and March 31, 2014;<sup>8</sup> auditors will not review claims for critical access hospitals.<sup>9</sup> These audits will examine whether the

hospital admission was reasonable and necessary by reviewing the information available to the physician at the time the physician admitted the patient.<sup>10</sup> If RACs or MACs find that the inpatient admission was not reasonable and necessary, those Medicare Part A claims will be denied, and the hospital may instead bill for it under Medicare Part B.<sup>11</sup> CMS will conduct an educational outreach later in 2014 after receiving and analyzing the results of the RAC and MAC preliminary assessments, during which it will discuss with hospitals and providers why certain claims were denied and raise any compliance issues the contractors observed.<sup>12</sup>

Although the two-midnight rule is designed to shorten the number of long observation stays, and eventually increase hospital revenue, opponents have strongly criticized the rule’s effects on both providers and patients. Multiple healthcare industry groups, including the American Hospital Association (AHA) and the American Medical Association (AMA), have expressed disagreement with the rule. The AHA and AMA jointly sent a letter to CMS Administrator Marilyn Tavenner in November 2013 requesting the agency delay enforcement of the two-midnight rule until October 1, 2014.<sup>13</sup> Lawmakers have similarly expressed dissatisfaction with the effects of the rule on Medicare beneficiaries in the form of a letter to Marilyn Tavenner in September of 2013, imploring her to delay the implementation of the two-midnight rule for two months, arguing that the rule will increase out-of-pocket expenses for Medicare patients; 100 Congressmen and women signed the document.<sup>14</sup> Most recently, the U.S. House of Representatives Committee on Ways and Means introduced and referred to committee a bill to “delay the enforcement of the Medicare two-midnight rule for short inpatient hospital stays until the implementation of a new Medicare payment methodology for short inpatient hospital stays, and for other purposes.”<sup>15</sup> The bill seeks a delay of all requirements of the two-midnight rule until October 1, 2014.<sup>16</sup>

CMS previously heeded opponents’ concerns in September 2013 and delayed enforcement of the two-midnight rule until January 1, 2014.<sup>17</sup> From October 1, 2013 to December 31, 2013, the two-midnight rule implementation period, CMS directed MACs and RACs to not review hospital admission claims longer than two nights, although providers and hospitals were still

expected to comply with the rule.<sup>18</sup> It remains to be seen whether this latest effort by Congress to delay the new regulation will convince CMS to further postpone implementation of the two-midnight rule.

- 1 "Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Fiscal Year 2014 Rates; Quality Reporting Requirements for Specific Providers; Hospital Conditions of Participation; Payment Policies Related to Patient Status," Federal Register, Vol. 78, No. 160 (August 19, 2013), p. 50496.
- 2 "CMS Finalizes FY 2014 Policy And Payment Changes For Inpatient Stays In Acute-Care And Long-Term Care Hospitals," Centers for Medicare & Medicaid Services, Press Release, August 2, 2013.
- 3 "Two-Midnight Rule 5 Delay Act of 2013," H.R. 3698 (December 11, 2013), p. 1.
- 4 CMS, August 2, 2013.
- 5 *Ibid.*
- 6 "Regulatory and Reimbursement Changes Under the FY 2014 IPPS Final Rule," HC Topics Vol. 6, Issue 10, October 2013.
- 7 "More than 100 House members ask CMS to delay 'two midnight' rule" By Joe Carlson, Modern Healthcare, Sept. 24, 2013, <http://www.modernhealthcare.com/article/20130924/NEWS/309249944> (Accessed 1/14/14).
- 8 "Frequently Asked Questions: 2 Midnight Inpatient Admission Guidance & Patient Status Reviews for Admissions on or after October 1, 2013," Centers for Medicare & Medicaid Services, [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf) (Accessed 1/14/14).
- 9 "10 Things to Know About the Two-Midnight Rule" By Bob Herman, Becker's Hospital Review, November 7, 2013, <http://www.beckershospitalreview.com/racs/-/icd-9-/icd-10/10-things-to-know-about-the-two-midnight-rule.html> (Accessed 1/15/14).

- 10 "Frequently Asked Questions: 2 Midnight Inpatient Admission Guidance & Patient Status Reviews for Admissions on or after October 1, 2013," Centers for Medicare & Medicaid Services, [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf) (Accessed 1/14/14).
- 11 "Frequently Asked Questions: 2 Midnight Inpatient Admission Guidance & Patient Status Reviews for Admissions on or after October 1, 2013," Centers for Medicare & Medicaid Services, [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf) (Accessed 1/14/14).
- 12 *Ibid.*
- 13 "Inpatient admission and review criteria set forth in the FY 2014 Hospital Inpatient Prospective Payment System final rule" By James L. Madara, MD and Rich Umbdenstock, To Marilyn B. Tavenner (November 8, 2013) <http://www.ama-assn.org/resources/doc/washington/two-midnight-suspension-letter-08nov2013.pdf> (Accessed 1/14/14), p. 1.
- 14 "Schwartz Urges Medicare Chief to Delay Flawed Hospital Payment Rule," Allyson Y. Schwarz, Press Release, September 24, 2013, <http://schwartz.house.gov/press-release/schwartz-urges-medicare-chief-delay-flawed-hospital-payment-rule#.UtVUvmTnbbh> (Accessed 1/14/13).
- 15 "Two-Midnight Rule 5 Delay Act of 2013," H.R. 3698 (December 11, 2013), p. 1.
- 16 *Ibid.*, p. 2.
- 17 "CMS Delays Post-Payment Reviews of 2-Midnight Rule," Healthcare Financial Management Association, November 5, 2013, <http://www.hfma.org/Content.aspx?id=20283> (Accessed 1/15/14).
- 18 "Frequently Asked Questions: 2 Midnight Inpatient Admission Guidance & Patient Status Reviews for Admissions on or after October 1, 2013," Centers for Medicare & Medicaid Services, [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf) (Accessed 1/14/14).



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