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Updated Two-Midnight Rule Released

Over the last several years, improvements in technology and medical practices have allowed many formerly complex or dangerous procedures, which required patients to stay in a hospital, to be performed more simply or safely, thus drawing attention to the distinction between inpatient and outpatient services.[1] In some cases, the difference between inpatient and outpatient services may seem arbitrary, due to the fact that the determining factor between inpatient care and outpatient care is *whether or not a doctor admitted the patient to the hospital*; a patient may stay in a hospital bed overnight but still be considered an outpatient.[2] However, this distinction between inpatient and outpatient care may have a significant impact on both patients and providers, as hospitals typically receive greater payments for inpatient care than outpatient care, even for patients with similar clinical needs.[3] In August of 2013, the *Centers for Medicare and Medicaid Services* (CMS) issued a rule that sought to standardize the classification of Medicare beneficiaries as either inpatients or outpatients, known as the *Two-Midnight Rule*. In November of 2015, after years of criticism from industry providers, CMS published revisions to this rule.[4] This *Health Capital Topics* article will explore the basis of the original *Two-Midnight Rule*, the circumstances leading to the revision of this rule, the recent revisions to the *Two-Midnight Rule*, and the potential impact on providers operating under this rule.

Generally, hospital-based healthcare services may be categorized as either: (1) inpatient care; or, (2) outpatient care. Inpatient care refers to those healthcare services that are furnished to patients who have been admitted by a doctor's order to stay in the hospital, while outpatient care refers to observation services, emergency department services, many diagnostic services, and any other hospital services furnished to patients who have not been admitted to the hospital.[5] In July of 2013, the *Office of the Inspector General* (OIG) published research that showed that a hospital could reap significant financial rewards by strategically admitting (or not admitting) patients based on the revenue potential of the patient's diagnosis, rather than the patient's medical needs. The OIG found that in 2012, Medicare paid an average of $5,142 per inpatient stay lasting one night or fewer (which the report defined as a *short inpatient stay*).[6] Conversely, the OIG found that Medicare paid an average of $1,741 per *observation stay* (i.e., periods in which patients received outpatient care, but often stayed at least one night in the hospital).[7] Further, the OIG found that when patients were treated for the same medical problems, Medicare paid more for *short inpatient stays* than for *observation stays* (for example, Medicare payed an average of approximately $2,000 more for patients with medical back problems when these patients were treated with *short inpatient stays*, rather than *observation stays*).[8]

As discussed in the January 2014 *Health Capital Topics* article entitled "*Opposition to the 'Two-Midnight' Rule Heating Up*," in order to standardize how hospitals classify their patients, CMS issued the final version of the *"two-midnight"* rule in August of 2013, which states:

> *"*[if a] *physician expects to keep the patient in the hospital for only a limited period of time that does not cross 2 midnights, the services are generally inappropriate for inpatient admission and inpatient payment under Medicare Part A…"*[9]

Similarly, the rule states that admission, and the corresponding payment for inpatient services, is appropriate for patients which could be expected to stay in the hospital for a period of time spanning more than two midnights.[10] Amid considerable criticism from hospitals, CMS decided to delay full enforcement of the rule, imposing a moratorium on post-payment patient status reviews for admissions after October 1, 2013.[11] This moratorium, which was recently extended, will expire on December 31, 2015.[12]

As noted above, many industry providers have objected to the *Two-Midnight Rule* since it was proposed, with many complaints centering on two key issues. First, providers have argued that the rule overrides a physician's clinical judgment regarding a patient's treatment plan, forcing physicians to decide whether or not to admit a patient for inpatient hospitalization based on an arbitrary timeline.[13] Second, with the publication of the original *Two-Midnight Rule*, CMS announced that it would reduce inpatient Medicare hospital payments by 0.2%, due to the fact that the new guideline for admission would result in a net shift of patients from inpatient care to outpatient care, thus raising Medicare's inpatient expenditures by approximately $220 million.[14] Hospitals have fought this reduction in court, arguing that they were not provided adequate notice or

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opportunity to comment on the 0.2% cut to Medicare inpatient hospital payments.[15] In September of 2015, a federal judge agreed with hospitals in *Shands Jacksonville Medical Center v. Burwell*, finding that CMS had not allowed for meaningful opportunity to comment, and ordering CMS to re-publish the rule and allow providers an opportunity for further comment.[16]

In November 2015, CMS published the final rule for the *Outpatient Prospective Payment System* for calendar year 2016.[17] Included in this rule were several revisions to the *Two-Midnight Rule* (notably, this final rule did not include the re-publishing of the 0.2% cut to inpatient Medicare hospital payments).[18] First, CMS adjusted the rule such that on a case-by-case basis, based on a physician's judgment of a patient's needs, Medicare may pay for an inpatient admission spanning fewer than two midnights.[19] However, CMS has specifically noted that it *"…will monitor the number of [inpatient admissions that do not span at least one overnight period] and plan[s] to prioritize these types of cases for medical review."*[20]

Second, in this final rule, CMS modified how the *Two-Midnight Rule* will be enforced. Originally, CMS relied upon *Medicare Administrative Contractors* to review claims of *short inpatient stays*.[21] Conversely, beginning in 2016, CMS has ruled that *Beneficiary and Family Centered Care Quality Improvement Organizations* (BFCC-QIOs) will review inpatient claims under the revised *Two-Midnight Rule*.[22] In the November 2015 final rule, CMS noted that BFCC-QIOs are authorized by statute to review whether: (1) providers' services are reasonable; (2) providers' services are medically necessary; and, (3) inpatient services could be effectively furnished in an outpatient setting.[23] Further, CMS has stated that BFCC-QIOs will refer providers to CMS's contracted auditors if the BFCC-QIOs identify potentially harmful patterns of practice, e.g., high rates of claims denial after medical review.[24]

Ultimately, some providers are pleased with this revision to the *Two-Midnight Rule*, approving of both the provision for exceptions to the rule based on a physician's judgment and shift in claims reviewing authority to BFCC-QIOs.[25] However, providers have noted that there are still issues to address (e.g., the 0.2% reduction to inpatient Medicare hospital payments), and that the reaction to the rule will depend, in part, on how it is implemented.[26]

1 "Medicare and the Health Care Delivery System" Medicare Payment Advisory Commission, Report to the Congress, June 2015, http://www.medpac.gov/documents/reports/june-2015-report-to-the-congress-medicare-and-the-health-care-delivery-system.pdf?sfvrsn=0 (Accessed 11/25/2015), p. 173.

2 "Find Out if You're an Inpatient or an Outpatient – It Affects What You Pay" Medicare.gov, Centers for Medicare & Medicaid Services, https://www.medicare.gov/what-medicare-covers/part-a/inpatient-or-outpatient.html (Accessed 11/25/2015).

3 MedPAC, June 2015, p. 173.

4 "Health Policy Brief: The Two-Midnight Rule" By Amanda Cassidy, Health Affairs, January 22, 2015, http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_133.pdf (Accessed 12/8/2015), p. 4; "Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Short Inpatient Hospital Stays; Transition for Certain Medicare-Dependent, Small Rural Hospitals Under the Hospital Inpatient Prospective Payment System; Provider Administrative Appeals and Judicial Review" Federal Register Vol. 80, No. 219 (November 13, 2015), p. 70298.

5 CMS, Accessed 11/25/2015.

6 "Memorandum Report: Hospitals' Use of Observation Stays and Short Inpatient stays for Medicare Beneficiaries" by Stuart Wright, Office of Inspector General, July 29, 2013, To Marilyn Tavenner, Centers for Medicare & Medicaid Services, https://oig.hhs.gov/oei/reports/oei-02-12-00040.pdf (Accessed 8/12/2014), p. 12.

7 Ibid, p. 2, 12.

8 Ibid, p. 12-13.

9 "Admissions," 42 CFR §412.3(e)(1) (October 1, 2013).

10 Ibid.

11 Cassidy, January 22, 2015, p. 4.

12 "CMS' Proposed Changes to the Two-Midnight Rule: Partial Restoration of Medical Judgment" By Elizabeth Weeks Leonard, Health Affairs Blog, http://healthaffairs.org/blog/2015/09/01/cms-proposed-changes-to-the-two-midnight-rule-partial-restoration-of-medical-judgment/ (Accessed 11/19/15).

13 "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; Final Rule" Federal Register Vol. 78, No. 160 (August 19, 2013), p. 50945-50946.

14 Ibid, p. 50746.

15 "Judge Tells HHS to Revisit Two-Midnight Rule's Inpatient Pay Cut" By Lisa Schencker, Modern Healthcare, September 22, 2015, http://www.modernhealthcare.com/article/20150922/NEWS/150929959 (Accessed 12/22/2015).

16 Ibid; "Shands Jacksonville Medical Center, et al. v. Sylvia M. Burwell, Secretary, United States Department of Health and Human Services" 2015 WL 5579653 (United States District Court, District of Columbia), Memorandum Opinion, p. 24.

17 Federal Register Vol. 80, No. 219, p. 70298.

18 "OPPS Final Rule Cuts Payment Rate, Modifies Two-Midnight Rule" By Rich Daly, Healthcare Financial Management Association, November 2, 2015, https://www.hfma.org/Content.aspx?id=43306 (Accessed 12/22/2015).

19 "Fact Sheet: Two Midnight Rule" Medicare.gov, Centers for Medicare & Medicaid Services, October 30, 2015, https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-10-30-4.html (Accessed 11/2/2015).

20 Federal Register Vol. 80, No. 219, p. 70545-70546.

21 Ibid.

22 CMS, October 30, 2015.

23 Federal Register Vol. 80, No. 219, p. 70545.

24 CMS, October 30, 2015.

25 "Praise for Two-Midnight Rule Revision, but Pay Cut Grates" By Shannon Firth, MedPage Today, July 7, 2015, http://www.medpagetoday.com/Washington-Watch/Washington-Watch/52471 (Accessed 12/22/2015).

26 Ibid.

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