

## CMS DELAYS FULL IMPLEMENTATION OF THE 2-MIDNIGHT RULE UNTIL JANUARY 1, 2014

On August 19, 2013, the Centers for Medicare and Medicaid Services ("CMS") published in the Federal Register the 2014 acute care hospital and long-term care hospital inpatient prospective payment system final rule ("Final Rule") effective on October 1, 2013. As part of the Final Rule, CMS formulated a "2-midnight presumption" and a "2-midnight benchmark" (collectively the "2-Midnight Rule") to guide admitting practitioners and review contractors on when it is appropriate to admit a patient as a hospital inpatient.

The 2-midnight benchmark states that if the admitting practitioner admits a Medicare beneficiary as an inpatient with the reasonable expectation that the beneficiary will require care that "crosses 2 midnights," Medicare Part A payment is "generally appropriate," assuming medical record documentation justifies the admission.

Similarly, the 2-midnight presumption provides that a Medicare administrative contractor ("MAC") or review audit contractor ("RAC") auditing a medical record may *presume* that an inpatient hospital admission is reasonable and necessary (and therefore payable under Part A) if a beneficiary's inpatient stay crosses 2 midnights and the beneficiary receives medically necessary services such as a surgical procedure or diagnostic test after the inpatient admission. Conversely, services spanning fewer than 2 midnights and not involving "inpatient-only" services would not receive the benefit of the 2-midnight presumption and would be subject to audit. However, contractors may consider time that the beneficiary was in the hospital receiving outpatient services prior to inpatient admission when determining whether the inpatient stay was reasonable and necessary.<sup>1</sup>

In response to concerns voiced by health care provider stakeholders and members of Congress that CMS has not yet provided adequate guidance to enable hospitals to comply with the 2-Midnight Rule by the October 1, 2013 effective date, CMS has announced a delay in enforcement until January 1, 2014. However, practitioners are still expected to make inpatient admission decisions in accordance with the 2-Midnight Rule beginning on October 1, 2013. A set of frequently asked questions addressing the delay can be found [here](#).

Here is what hospitals need to know about the delay in enforcement:

1. From October 1, 2013 through December 31, 2013, CMS will instruct MACs and RACs **NOT** to review claims spanning greater than 2 midnights after admission, for a determination of whether the inpatient hospital admission and patient status was appropriate. However, if CMS finds evidence of "systematic gaming, abuse or delays in the provision of care in an attempt to surpass the 2-midnight presumption," this could trigger further review.
2. From October 1, 2013 through December 31, 2013, CMS will **NOT** permit RACs to review inpatient admissions of one midnight or less that begin on or after October 1, 2013.
3. From October 1, 2013 through December 31, 2013, MACs and RACs will **NOT** review any claims related to critical access hospitals.
4. CMS will provide clear guidance and training to MACs and RACs so that they understand that when they review the admitting practitioner's expectation that a patient's medically necessary inpatient admission stay will span at least 2 midnights, MACs and RACs should evaluate the admitting practitioner's expectation based on the information available to the practitioner at the time of admission. Presumably, this guidance will steer RACs and MACs away from denying an inpatient admission when the patient leaves the hospital against medical advice before the passage of 2 midnights and other similar situations.
5. In order to give hospitals non-punitive feedback on whether they are applying the 2-midnight benchmark correctly, CMS will instruct the MACs to review a sample of 10 to 25 inpatient hospital claims spanning less than 2 midnights after admission, per hospital. This "probe sample" review will apply to prepayment records so if the MAC determines that an under 2 midnight inpatient admission was not medically necessary, the hospital can rebill the denied inpatient hospital admission under Medicare inpatient Part B. The probe sample review will apply to admissions occurring from October 1, 2013 through December 31, 2013.

6. If a MAC finds no issues with a hospital's probe sample review, it will not conduct any further reviews for that hospital for the remainder of 2013, *unless* there are "significant changes in billing patterns for admission." If a MAC identifies issues, the MAC will conduct education for that hospital and then conduct further follow-up, as needed.
7. CMS hopes to develop helpful guidance and education for provider hospitals by conducting the probe sample reviews.

If you have any questions or would like additional information about this topic, please contact:

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