

2-MIDNIGHT RULE 0.2% IPPS OFFSET GROUP APPEAL

EXECUTIVE SUMMARY

Hall, Render, Killian, Heath & Lyman is forming a group appeal relating to a negative payment adjustment made by CMS and implemented in the Federal Fiscal Year ("FFY") 2014 Final Inpatient Prospective Payment System ("IPPS") rule published August 19, 2013. By this rule, CMS decreased IPPS payments to hospitals by 0.2% to offset claimed increased program costs based on speculation of more IPPS services due to the "2-Midnight Rule," clarifying inpatient admission standards. Any such appeals would have to be filed within 180 days of the August 19, 2013 Federal Register, or February 14, 2014. While negotiations with CMS on this issue with the American Hospital Association ("AHA") and other industry representatives are ongoing, **hospitals that desire to participate in such appeals should contact Keith Barber via email (kbarber@hallrender.com) no later than January 28, 2014.**

DISCUSSION

The Medicare IPPS statute at 42 USC 1395ww(d) provides for IPPS payments with various adjustments and exceptions to them. For example, the wage index adjustment and Disproportionate Share Hospital adjustments are found within this statute. At issue is a catch-all provision at 1395ww(d)(5)(I), which states: "*The Secretary shall provide by regulation for such other exceptions and adjustments to such payment amounts under this subsection as the Secretary deems appropriate.*"

In the 2014 IPPS rule, CMS established the "2-Midnight Rule," clarifying standards for appropriate inpatient admissions. This responded to industry criticism that CMS and its Recovery Audit Contractor ("RAC") auditors were exploiting vague standards for what constitutes criteria for inpatient admission. The "2-Midnight Rule" creates the standard that medically necessary hospital stays that span at least 2 midnights are presumed appropriate for inpatient admission and payment under Medicare Part A. Stays that span less than 2 midnights after formal admission do not receive the benefit of the presumption but still may be appropriate if the physician had a reasonable expectation that the beneficiary would require care in the hospital for at least 2 midnights (the 2-midnight "benchmark").

The CMS actuary estimated that this clarification would cost the program an additional \$220 million as services previously deemed outpatient would be shifted to inpatient. To make up this additional cost for otherwise unaltered services, CMS proposed and then finalized a 0.2% reduction in IPPS payment rates through use of the above quoted catch-all provision for adjusting rates. This represents the Secretary's first use of that catch-all provision in the history of the program.

For a variety of reasons, we believe the CMS actuary's estimate that the clarification of inpatient admission standards would cost the program \$220 million is methodologically flawed. In addition, CMS did not adequately explain its methodology in the proposed rule to allow for a more informed review by providers. CMS's lack of explanation does not satisfy the notice and comment process, which is required by the Administrative Procedures Act.

The AHA agrees that CMS's methodology is probably not accurate and was not adequately explained. The AHA attempted to fix this issue via legislation prior to the end of the year, but the legislative provisions did not pass. Now, the AHA is also appealing this issue through the Provider Reimbursement Review Board ("PRRB"). We have contacted the AHA and expressed a desire to cooperate with their efforts and coordinate our efforts with their own.

A hospital's estimated amount in controversy for this issue is 0.2% of its estimated IPPS payments for FFY 2014.

To preserve appeal rights on this matter, all appeals on this issue must be filed with the PRRB within 180 days of the August 19, 2013 Federal Register, or February 14, 2014. Hall Render can provide you materials and will file appeals for your hospital before the deadline. To request materials, please [click here](#).

If you have questions regarding the group appeal or the "2-Midnight Rule" or would like additional information, please contact:

- Keith Barber at (317) 977-1428 or kbarber@hallrender.com;
- Maureen Griffin at (317) 977-1429 or mgriffin@hallrender.com; or

- Your regular Hall Render attorney.

Please visit the Hall Render Blog at <http://blogs.hallrender.com> for more information on topics related to health care law.