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CMS SURREPTITIOUSLY PROPOSES TO AMEND THE TWO-MIDNIGHT RULE BEFORE THE FOURTH OF JULY WEEKEND

Like an episode of *The West Wing*, the Centers for Medicare & Medicaid Services (CMS) followed the venerable tradition of announcing "bad news" before the start of a long holiday weekend. On June 29 we predicted, in our Triage Health Law Blog, that the Medicare Payment Advisory Commission's (MedPAC) June Report would be the final straw to pressure CMS to amend its controversial Two-Midnight Rule.

Two days later, on July 1, CMS succumbed to that pressure by proposing changes to the Rule in the CY 2016 OPPS proposed rule.[1] CMS proposed to allow hospitals, "on a case-by-case basis," to receive Part A reimbursement for patients whose stay is expected to last less than two midnights. The following factors would be considered in determining whether a patient stay of less than two midnights qualified for Part A reimbursement:

1. The severity of the signs and symptoms exhibited by the patient;
2. The medical predictability of something adverse happening to the patient; and
3. The need for diagnostic studies that are typically outpatient services.

CMS also proposed that Quality Improvement Organization (QIO) contractors, rather than Medicare Administrative Contractors (MACs) or Recovery Audit Contractors (RACs), conduct reviews of short inpatient stays. QIOs would refer claim denials to MACs for payment adjustments. Provider appeals of denied claims would be covered under the provisions of 42 USC § 1395ff. In addition, providers with consistently high denial rates would be referred to RACs for further claims auditing.

Despite these proposed changes to the Rule, CMS declined to reconsider its 0.2% reduction to the IPPS standardized amount that it instituted during the FY 2014 IPPS rulemaking to offset the effects of the Rule. Specifically, CMS estimated that as a result of the new policy, 40,000 net new patient encounters of more than two midnights would shift from being reimbursed on an outpatient basis to an inpatient basis. Put another way, CMS somehow calculated that **increasing** the minimum expected inpatient stay from one to two midnights would also **increase** the number of inpatients. Several hospitals and trade associations are challenging CMS's "fuzzy math" in federal court; as a result, we recommend that all providers preserve their appeal rights by protesting, at a minimum, the 0.2% reduction to the standardized amount in their cost reports. We also recommend that providers protest any reimbursement amounts lost as a result of complying with the Rule.

A refresher on the cost report appeals process for both self-disallowance and late NPRs is available here. **As we discussed last week, it is not too late to challenge the 0.2% reduction for FY 2014**, and doing so now on a cost report can be viewed as a cost-effective call option to challenge the Rule after pending cases have been resolved.

Lastly, if you are interested in submitting comments on the **proposed changes** to the Two-Midnight Rule, CMS will accept comments until 5 p.m. EDT on August 31, 2015. The Final Rule is expected to be issued around November 1.

Contacts

Michi M. Tsuda
T +1 303 894 6158
E michi.tsuda@squirepb.com

Mimi H. Brouillette
T +1 303 894 6157
E mimi.brouillette@squirepb.com

Sven C. Collins
T +1 303 894 6370
E sven.collins@squirepb.com

Bryna S. Hummel
T +1 646 557 5182
E bryna.hummel@squirepb.com

Stephen P. Nash
T +1 303 894 6173
E stephen.nash@squirepb.com

Robert D. Nauman
T +1 614 365 2721
E robert.nauman@squirepb.com

Peter A. Pavarini
T +1 614 365 2712
E peter.pavarini@squirepb.com

1. The Fact Sheet for the Rule is available here.

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