

Legislators Introduce Bill to Address Criticism and Delays of CMS's "Two-Midnight" Rule - Centers for Medicare and Medicaid Services

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A bipartisan duo of senators on March 5, 2014 introduced legislation to respond to the mounting criticism and implementation delays of the **Centers for Medicare and Medicaid Services** (CMS) ["two-midnight" rule regarding hospital inpatient stays for Medicare beneficiaries](#). Under the rule, the duration of two midnights is the threshold to use to determine whether hospital services are payable on an inpatient basis under Medicare. Generally, inpatient stays are entitled to a presumption of reasonableness where a physician expects a Medicare beneficiary to require an inpatient stay that "crosses at least two midnights" and admits the beneficiary to the hospital based upon that expectation. Shorter inpatient stays are not afforded the same presumption.

CMS issued the **two-midnight rule** to take effect on Oct. 1, 2013 but [has twice delayed the rule](#) amid criticism by hospitals and others that the rule is arbitrary and burdensome. Most recently, CMS announced that through Sept. 30, 2014 (i.e., the end of the federal fiscal year) it will limit the sample of claims that Medicare contractors may review for compliance with the rule and for which they may deny payment for noncompliance. Under this interim "probe and educate" policy, contractors may not engage in post-payment review of claims with dates of admission during fiscal year 2014.

Even the limited implementation of the rule has encountered setback. In late February, CMS instructed its contractors to review all claims they denied during the probe and educate period to ensure the denials are consistent with CMS's most recent guidance. To incentivize hospitals to work with contractors during this re-review before initiating the formal claim appeals process, CMS has waived the 120-day timeframe for filing appeals received before Sept. 30, 2014 for claim denials that occurred on or before Jan. 30, 2014.

Building off these delays, the proposed legislation, Senate Bill 2082, titled the [Two-Midnight Rule Coordination and Improvement Act](#), would require the U.S. Department of Health and Human Services (HHS) Secretary to develop "appropriate criteria" for payment of short inpatient stays (i.e., those expected to last less than two midnights) in consultation with hospitals, physicians, Medicare contractors, and other appropriate stakeholders identified by HHS. This consultation would take place as part of the annual notice and comment rulemaking process implementing the Medicare hospital inpatient prospective payment system for fiscal year 2015. Using the criteria that emerge from this consultation, HHS would develop a payment methodology for short inpatient stays.

The legislation would further delay the two-midnight rule so that CMS could not enforce the rule for admissions occurring before Oct. 1, 2014. For admissions after that date, CMS could not enforce the rule before Oct. 1, 2015 or the date on which it implements the criteria for short inpatient stays, whichever occurs earlier. As a result of these delays, Medicare contractors would be unable to deny even a sample of claims, as they may under current policy, for noncompliance with the rule during these periods.

The legislation has already garnered the support of several hospital associations. The American Hospital Association, for example, has championed the bill, describing it as directing CMS to take a “more thoughtful approach by developing a new standard that will provide clarity on whether a patient should be billed as inpatient or outpatient.”

Medicare-participating hospitals will be interested to track Senate Bill 2082 as it works through the legislative process. In the meantime, hospitals should continue to monitor for implementation updates on the two-midnight rule from CMS and assess how CMS’s current guidance on the rule will affect their operations.

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