

## The Probe and Educate Process For The Two-Midnight Rule

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*CT Scanner*

On August 2, 2013, the Centers for Medicare and Medicaid Services (“CMS”) released the final rule for the 2014 Medicare Inpatient Prospective Payment System (“IPPS”), effective October 1, 2013.[1] Introduced in the IPPS rule, for the first time, was the controversial “Two-Midnight Rule.” Generally, the Two-Midnight Rule provides that when a patient enters a hospital for a surgical procedure, other than a surgical procedure listed on the inpatient only list (42 C.F.R. §419.22(n)), a diagnostic test, or any other treatment and the physician expects the beneficiary will require medically necessary hospital services for two or more midnights (including inpatient and pre-admission outpatient time), the services are generally appropriate for inpatient admission and inpatient payment under Medicare Part A.[2] If a patient enters the hospital and the physician expects to keep the patient in the hospital for 0-1 midnights, the services are generally inappropriate for inpatient admission and inpatient payment under Medicare Part A.

Since the Two-Midnight Rule became effective, there have been numerous questions regarding the application of the rule, including what information the admitting physician must document to support the expectation of a hospital stay spanning two or more midnights, what factors the physician must take into consideration when making the decision to admit, and how providers should calculate the two-midnights. CMS has published Frequently Asked Questions in response to certain of these questions, but the confusion continues. [3]

### Probe and Educate Review Program

CMS, in an effort, in part, to address the confusion, announced on November 4, 2013, its probe and educate review program pursuant to which Medicare Administrative Contractors (“MACs”) would review, on a prepayment basis, Medicare Part A claims for inpatient hospital admissions spanning less than two midnights with dates of admission between October 1, 2013, through March 31, 2015.[4] MACs and Recovery Auditors are prohibited from reviewing claims for inpatient admissions spanning two or more midnights unless evidence of systematic gaming, abuse or delays in the provision of care in an attempt to qualify for the two-midnight presumption is suspected.[5] As part of the probe and educate review program, Recovery Auditors are prohibited from reviewing claims with dates of admission between October 1, 2013, and March 31, 2015.[6]

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For most acute care hospitals, long term care hospitals and inpatient psychiatric facilities, the probe and educate reviews will involve a prepayment review by MACs of a sample of ten claims (25 claims for large hospitals).[7] Based on the results, the MACs will deny claims that do not comply with the Two-Midnight Rule, conduct educational outreach efforts on a provider-specific basis and repeat the process where necessary.[8] The educational plan for each provider will be based on the assignment of provider concern levels, assigned at the end of the review. [9]

The assignment of a minor concern level is for a provider with a low error rate and no pattern of errors, defined as 0-1 errors out of ten claims or 0-2 errors out of twenty-five claims.[10] For providers assigned a minor concern level, the MAC will cease further reviews for that provider for dates of admission spanning October 2013 through September 2014, unless there are significant changes in billing patterns for admissions.[11] For the claims that are denied, the MACs will educate the provider via a letter indicating the reasons for denial of the inpatient claim.[12]

A moderate-significant concern level is assigned to a provider with a moderate error rate, defined as 2-6 errors out of ten claims or 3-13 errors out of twenty-five claims.[13] For providers assigned a moderate-significant concern level, the MACs will offer the provider 1:1 telephonic education to discuss the reasons for denial, provide pertinent education and reference materials, and answer questions.[14] In addition, the MACs will send a letter to the provider indicating the reasons for the denial.[15] The MACs also will repeat the probe and educate review process of another 10 samples (25 for large hospitals) for dates of admission January through September 2014.[16]

A major concern level is assigned to a provider with a high error rate, defined as seven or more errors out of ten claims or fourteen or more errors out of twenty-five claims.[17] The MACs will offer the provider 1:1 telephonic education, as described above and will send a letter indicating the reasons for the denial.[18] The MACs will repeat the probe and educate review process of another 10 samples (25 for larger hospitals) for dates of admission January through September 2014.[19] If continuing major concerns are identified, the MACs will select 100 claims (for providers with 10 sampled claims) and 250 claims (for providers with 25 sampled claims) for additional review.[20]

Providers may appeal claims that are denied under the probe and educate process. CMS, however, has requested that the MACs re-review all claim denials made during the probe and educate process to ensure that such denials are consistent with the most recent clarifications regarding the Two-Midnight Rule.[21] If upon re-review the MAC determines that the claim should not have been denied, then the MAC may issue payment outside of the appeal process.[22] Claims for which the denial is affirmed following the re-review will be transferred automatically for a redetermination.[23] CMS is urging providers to contact their MAC before filing an appeal to determine whether the MAC has re-reviewed the claim.[24] CMS has stated that they will waive the 120 day timeframe for filing redetermination requests for claim denials under the probe and educate process that occurred before January 30, 2014, provided the redetermination request is received before September 30, 2014.[25]

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### Common Findings Found in Probe and Educate Review Process

The probe and educate review process has identified some common denials, which include: (i) missing or flawed orders for inpatient admission; (ii) admission of patients for a procedure (not on the inpatient-only list) where the medical record did not support the expectation of a stay that would span two or more midnights; (iii) admission of patients for medical conditions where the medical record did not support the expectation of a stay that would span two or more midnights; and (iv) physician attestation statements that the admission would span two or more midnights without medical record documentation support. [26] CMS has not updated its statistics on the number of records reviewed thus far in the probe and educate process or indicated whether they have identified additional examples of common denials. Therefore, it is unclear whether the probe and educate process has improved compliance with the Two-Midnight Rule.

### Conclusion

Many hoped that given the difficulties and confusion surrounding the Two-Midnight Rule, it would be eliminated in the 2015 IPPS. It appears, however, that the rule will continue in effect after the 2015 IPPS is released. The proposed 2015 IPPS rule did not include any changes to the Two-Midnight Rule, nor did it provide any further guidance to address many of the confusing aspects of the rule. [27] CMS did, however, request public comment on exceptions to the Two-Midnight Rule and alternative payment policies for short inpatient stays to supplement the Two-Midnight Rule.[28] It will be interesting to see when the 2015 IPPS is released in August whether an alternative payment policy for short stays is introduced and, if so, whether it will have any impact on the Two-Midnight Rule. In the interim, it is imperative that hospitals continue to comply with the Two-Midnight Rule.

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[1] See Medicare Inpatient Prospective Payment System, Final Rule, 78 Fed. Reg. 50496-51040 (August 19, 2014).

[2] 42. C.F.R. 412.3(e)(1).

[3] See CMS Frequently Asked Questions, 2 Midnight Inpatient Admission Guidance & Patient Status Reviews for Admissions on or after October 1, 2013, available at: [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf).

[4] Statement of Sean Cavanaugh, Deputy Administrator and Director, CMS on Medicare Payment Policy on Short Hospital Stays before the U.S. House Committee on Ways and Means, Subcommittee on Health, May 20, 2014, available at: [http://waysandmeans.house.gov/uploadedfiles/052014\\_cavanaugh\\_testimony\\_final\\_hl.pdf](http://waysandmeans.house.gov/uploadedfiles/052014_cavanaugh_testimony_final_hl.pdf).

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[5] Id.

[6] Protecting Access to Medicare Act of 2014.

[7] Selecting Hospital Claims for Patient Status Reviews: Admissions On or After October 1, 2013, available at: <http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/SelectingHospitalClaimsforAdmissionsonorafterOctober1st2013forReviewForWebPostingCLEAN.pdf>.

[8] Id.

[9] MLN Matters, SE1403, Probe & Educate Medical Review Strategy: Probe Reviews of Inpatient Hospital Claims and Corresponding Provider Outreach and Education, available at: <http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/SE1403.pdf>.

[10] Id.

[11] CMS FAQs, Two-Midnight Inpatient Admissions Guidance and Patient Status Reviews for Admissions After October 1, 2013 (updated March 11, 2014), available at: [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf).

[12] MLN Matters, SE1403, Probe & Educate Medical Review Strategy: Probe Reviews of Inpatient Hospital Claims and Corresponding Provider Outreach and Education, available at: <http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/SE1403.pdf>.

[13] Id.

[14] CMS FAQs, Two-Midnight Inpatient Admissions Guidance and Patient Status Reviews for Admissions After October 1, 2013 (updated March 11, 2014), available at: [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf).

[15] MLN Matters, SE1403, Probe & Educate Medical Review Strategy: Probe Reviews of Inpatient Hospital Claims and Corresponding Provider Outreach and Education, available at: <http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/SE1403.pdf>.

[16] CMS FAQs, Two-Midnight Inpatient Admissions Guidance and Patient Status Reviews for Admissions After October 1, 2013 (updated March 11, 2014), available at: [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf).

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[17] MLN Matters, SE1403, Probe & Educate Medical Review Strategy: Probe Reviews of Inpatient Hospital Claims and Corresponding Provider Outreach and Education, available at: <http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNMattersArticles/Downloads/SE1403.pdf>.

[18] CMS FAQs, Two-Midnight Inpatient Admissions Guidance and Patient Status Reviews for Admissions After October 1, 2013 (updated March 11, 2014), available at: [http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting\\_110413-v2-CLEAN.pdf](http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/QAsforWebsitePosting_110413-v2-CLEAN.pdf).

[19] Id.

[20] Id.

[21] CMS Inpatient Hospital Reviews (updated May 12, 2014), available at: <http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/InpatientHospitalReviews.html>.

[22] Id.

[23] Id.

[24] Id.

[25] Id.

[26] Medicare Inpatient Hospital Probe and Educate Status Update (February 24, 2014), available at: <http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/Downloads/UpdateOnProbeEducateProcessForPosting02242014.pdf>.

[27] Medicare Inpatient Prospective Payment System, Proposed Rule, 79 Fed. Reg. 27978-28384, 28169 (May 15, 2014).

[28] Id.

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