Am I in the Hospital or Not?
Why Hospitals are ‘Observing’—Not Admitting—Patients

Linda E. Fishman
Alliance for Health Reform
December 6, 2013

The Two-Midnight Rule: Patient Status

• “Two-midnight” rule
  - CMS’s attempt to clarify the definition of observation
  - Increase in observation days and inpatient appeals
  - Increase in CERT rate for short inpatient stays
  - Request from hospital field for clarity on inpatient review

• “Benchmark:” whether a hospital gets inpatient payment for a claim
  - Physician had reasonable and supportable expectation of two-midnight stay

• “Presumption:” whether Medicare review contractors can review a claim
  - Presume a claim spanning two-midnights is a reasonable/necessary admission
Positive Aspects of the Rule

Directs Medicare Review Contractors to:

• Apply “two-midnight” presumption
• For purposes of two-midnight benchmark, “start the clock” from the time the first outpatient service is delivered, including observation time and emergency services
• Consider physician judgment and a patient’s complex medical factors (co-morbidities, history, risk of adverse event)
• Limit contractors’ review to information available to admitting practitioner at time of a patient’s admission

The Two-Midnight Rule: Patient Status

CMS Payment Adjustment:

• CMS estimates a net shift of 40,000 cases to the more expensive inpatient setting

• Result: prospective cut of 0.2 percentage point ($220 million) to offset additional inpatient spending

• AHA disagrees with this analysis
**AHA Position**

- Only limited guidance from CMS
- **Need time to operationalize**
  - Educate providers and contractors
  - Change/update internal systems & procedures to ensure compliance
  - Update existing electronic medical records systems to comply with new physician order & certification requirements
  - Alter work flow processes

**AHA Position (continued)**

**Delay Enforcement:**
- Currently a partial enforcement delay until April 1, 2014
- Need additional 6 months (Sept. 30, 2014)

**Payment Solution:**
- Payment for patients who require an intense level of services but stay in the hospital only a short time or less than two midnights
Amicus Brief: The Two-Midnight Rule

- **April 2012:** AHA submitted amicus brief in case filed by the Center for Medicare Advocacy and the National Senior Citizens Law Center
- **Purpose:** to provide background and context
- Hospitals and physicians caught in a “tug of war” between beneficiaries and the government
  - Criticism from patients and CMS over perceived use of observation status versus
  - Penalties from auditors/prosecutors; loss of reimbursement, monetary damages

The Two-Midnight Rule

**Next Steps**

- Regulatory
- Legislative
- Legal
Am I in the Hospital or Not?
Why Hospitals are ‘Observing’—Not Admitting—Patients

Linda E. Fishman
Alliance for Health Reform
December 6, 2013