

## MEDICARE ADVANTAGE PLANS MUST FOLLOW THE TWO-MIDNIGHT RULE

The Centers for Medicare and Medicaid Services (“CMS”) Medicare Advantage final rule for 2024 (“Final Rule”) clarified that Medicare Advantage plans must adhere to the “two-midnight rule” when making coverage determinations for inpatient services. However, CMS also stated that care spanning two midnights is not “presumed” appropriate for an inpatient level of care under Medicare Advantage, as it is under traditional Medicare Part A. In other words, Medicare Advantage plans are still free to audit claims in accordance with their contracts with providers, meaning that the two-midnight rule may not be as helpful to hospitals under Medicare Advantage as it is under traditional Medicare.

### BACKGROUND

Originally published in 2013 and amended in 2016, the two-midnight rule provides that inpatient services are generally payable under Medicare Part A if a physician expects a patient to require medically necessary inpatient hospital care that spans at least two midnights. Further, [CMS guidance](#) to Medicare Administrative Contractors (“MACs”) directs MACs to presume that inpatient stays that last for two or more midnights are reasonable and necessary for purposes of Part A payment. Because of this presumption, MACs should not be routinely auditing solely for patient status or denying claims for patient status under traditional Medicare for inpatient stays that last beyond the second midnight of the admission.

Prior to the Final Rule, the two-midnight rule did not explicitly apply to Medicare Advantage plans, only to traditional Medicare. Although the Final Rule does require Medicare Advantage plans to follow the two-midnight rule for purposes of inpatient admission decisions, CMS declined to impose the auditing presumption on Medicare Advantage plans. In other words, a Medicare Advantage plan does not have to presume that an inpatient stay spanning at least two midnights is medically necessary as an inpatient service, and the plan remains free to review that claim, as permitted by the plan’s contract with the hospital.

The Final Rule went into effect on June 5, 2023, and can be found [here](#).

### SPECIFIC CHANGES

The Final Rule addresses concerns raised by providers and patients that some Medicare Advantage plans are denying services that would have been covered by traditional Medicare, thereby violating [Section 1852 of the Social Security Act](#) (codified at [42 U.S.C. 1395w-22\(a\)](#)). In addressing inpatient admissions specifically, CMS stated:

[U]nder [42 C.F.R.] [§ 422.101\(b\)\(2\)](#), [a Medicare Advantage] plan must provide coverage, by furnishing, arranging for, or paying for an inpatient admission when, based on consideration of complex medical factors documented in the medical record, the admitting physician expects the patient to require hospital care that crosses two-midnights ([§ 412.3\(d\)\(1\)](#), the “two-midnight benchmark”); when an admitting physician does not expect the patient to require care that crosses two-midnights, but determines, based on complex medical factors documented in the medical record that inpatient care is nonetheless necessary ([§ 412.3\(d\)\(3\)](#), the “case-by-case exception”); and when inpatient admission is for a surgical procedure specified by Medicare as inpatient only ([§ 412.3\(d\)\(2\)](#)).

The Final Rule also states that Medicare Advantage plans have the ability and the discretion to audit inpatient admissions to confirm that two or more midnights of hospital care were medically necessary. In other words, a Medicare Advantage plan does not have to presume that claims meeting the requirements of the two-midnight rule are appropriate for payment. However, the Final Rule does require that, when auditing inpatient claims, Medicare Advantage plans must make the clinical criteria they use to determine medical necessity available in a “publicly accessible way.”

### PRACTICAL TAKEAWAYS

- Under the Final Rule, Medicare Advantage plans must cover any inpatient admission that falls within the two-midnight rule, the case-by-case exception or the Medicare inpatient-only list.
- Medicare Advantage plans can still audit claims for inpatient care lasting more than two midnights. The contract between the hospital and the Medicare Advantage plan will govern those audit rights. Therefore, providers should ensure that their documentation practices

continue to adequately support the medical necessity of inpatient services.

- The Final Rule provides hospitals with a strong argument that inpatient care that lasts at least two midnights should be paid under Medicare Advantage, as it would have been under traditional Medicare Part A.

If you have any questions regarding these changes or other aspects of the Final Rule, please contact:

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