

# ***ADVISORY***

## **FROM THE COMMITTEE ON WAYS AND MEANS SUBCOMMITTEE ON HEALTH**

FOR IMMEDIATE RELEASE

CONTACT: (202) 225-3625

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### **Chairman Brady Announces Hearing on Current Hospital Issues in the Medicare Program**

*Emphasis on the Medicare two-midnights policy, short inpatient stays,  
outpatient observation stays, auditing and appeals*

House Ways and Means Health Subcommittee Chairman Kevin Brady (R-TX) today announced that the Subcommittee on Health will hold a hearing on current hospital issues in the Medicare program, with an emphasis on the Centers for Medicare and Medicaid Services (CMS) two-midnights policy, short inpatient stays, outpatient observation stays, auditing and appeals. **The hearing will take place on Tuesday, May 20, 2014, in 1100 Longworth House Office Building, beginning at 9:30 A.M.**

In view of the limited time available to hear from the witnesses, oral testimony at this hearing will be from the invited witnesses only. However, any individual or organization not scheduled for an appearance may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

#### **BACKGROUND:**

On an annual basis, CMS updates Medicare reimbursement for hospitals through two distinct regulatory proposals—the inpatient prospective payment system (IPPS) and the outpatient prospective payment system (OPPS). In the fiscal year 2014 IPPS final regulation, CMS implemented a new policy commonly referred to as “two-midnights.” If a Medicare beneficiary is treated in a hospital for a minimum of two-midnights, the hospital stay is deemed “generally reasonable and necessary” as an inpatient stay. However, if a beneficiary is treated for less than two-midnights (so-called short stays), it is not assumed that the inpatient stay is reasonable and necessary.

In part, CMS established the two-midnights standard because “hospital errors are identified more frequently for shorter lengths of stay.” The majority of improper hospital payments pertain to these short stays, which CMS believes “are due to inappropriate patient status—that is, the services furnished were reasonable and necessary, but should

have been furnished on a hospital outpatient, rather than hospital inpatient, basis.” Under the auspices of CMS’ belief regarding the potential “inappropriateness” of billing status, the Recovery Audit Contractors (RACs) have been auditing short stays. Congress authorized CMS to implement the RAC program—first as a pilot in the Medicare Modernization Act in 2003 and later as a full program in the Tax Relief and Health Act in 2006.

Prior to implementation of the two-midnights standard, RACs were denying short stays at high rates. Many hospitals assert that these RAC denials were in error and have appealed nearly all RAC short stay denials. In its administration of the first two levels of appeal, CMS has upheld a vast majority of the RAC denials. However, hospitals have found success in achieving reversal of the denials during the third level of appeal—Medicare Administrative Law Judges (ALJs). The influx of hospital cases at the ALJ level is the greatest contributor to the three-year backlog of cases. Beginning on October 1, 2013, CMS placed a moratorium on RAC audits on most hospital claims related to medical necessity in an attempt to stem the backlog of audits and appeals. With the passage of P.L. 113-93, the Protecting Access to Medicare Act of 2014, Congress further codified this moratorium through March 31, 2015, in order to provide more time to find a solution to these issues.

Further exacerbating the problems caused by the implementation and delay of the two-midnight policy, at the beginning of the year, the Obama Administration “temporarily suspended the assignment of most new requests for an ALJ hearing. In just under two years, the [appeals] backlog has grown from pending appeals involving 92,000 claims for services and entitlement to appeals involving over 460,000 claims for services entitlement, and the receipt level of new appeals is continuing to rise.”

In addition to major increases in RAC audits and a backlog in Medicare appeals, the utilization of outpatient observation services has also dramatically increased. Some policy experts have connected the increase in observation stays to the unintended consequence of hospitals attempting to avert RAC audits. The Medicare Payment Advisory Commission (MedPAC) has found that observation cases (those with a combination of inpatient status and observation status) increased nearly 60 percent from 2009 to 2012—the period just prior to CMS’ implementation of the two-midnights standard. Regarding the growth in observation cases, CMS has stated that the two-midnights policy is meant “to reduce the frequency of extended observation care when it may be inappropriately furnished.”

Importantly, short stays are not the only area of concern when addressing RAC audits, appeals and an increase in observation stays. For example, there are a number of durable medical equipment and prosthetic/orthotic cases that are also held up at the ALJ appeal level. Proposals to change the appeals process would likely have an effect on the entire Medicare program and must be carefully considered to ensure a positive outcome for all Medicare stakeholders.

In announcing the hearing, Chairman Brady stated, **“There are a number of problems associated with short hospital stays, and the way hospitals are audited. The Ways and Means Committee fought hard to ensure that patients are getting the care they need, and that Medicare is properly paying hospitals for the care they provide. While we were able to provide some relief last March, it was only a temporary fix. We must work on a permanent solution. We don’t want providers unnecessarily looking over their shoulders for auditors. We want hospitals to be accurately reimbursed so that they can focus all of their time on providing the right type of care for patients.”**

#### **FOCUS OF THE HEARING:**

The hearing will touch on all current issues relevant to hospitals in the Medicare program and specifically focus on the current incentives around short inpatient stays and the unintended consequences of those incentives such as auditing by RACs, a massive backlog of Medicare appeals and excessive growth of outpatient observation stays.

#### **DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:**

Please Note: Any person(s) and/or organization(s) wishing to submit for the hearing record must follow the appropriate link on the hearing page of the Committee website and complete the informational forms. From the Committee homepage, <http://waysandmeans.house.gov>, select “Hearings.” Select the hearing for which you would like to submit, and click on the link entitled, “Click here to provide a submission for the record.” Once you have followed the online instructions, submit all requested information. ATTACH your submission as a Word document, in compliance with the formatting requirements listed below, **by the close of business on Tuesday, June 3, 2014**. Finally, please note that due to the change in House mail policy, the U.S. Capitol Police will refuse sealed-package deliveries to all House Office Buildings. For questions, or if you encounter technical problems, please call (202) 225-1721 or (202) 225-3625.

#### **FORMATTING REQUIREMENTS:**

The Committee relies on electronic submissions for printing the official hearing record. As always, submissions will be included in the record according to the discretion of the Committee. The Committee will not alter the content of your submission, but we reserve the right to format it according to our guidelines. Any submission provided to the Committee by a witness, any supplementary materials submitted for the printed record, and any written comments in response to a request for written comments must conform to the guidelines listed below. Any submission or supplementary item not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All submissions and supplementary materials must be provided in Word format and **MUST NOT** exceed a total of 10 pages, including attachments. Witnesses and submitters

are advised that the Committee relies on electronic submissions for printing the official hearing record.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. All submissions must include a list of all clients, persons and/or organizations on whose behalf the witness appears. A supplemental sheet must accompany each submission listing the name, company, address, telephone, and fax numbers of each witness.

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202-225-1721 or 202-226-3411 TTD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Note: All Committee advisories and news releases are available on the World Wide Web at <http://www.waysandmeans.house.gov/>.