



CMS Quotes related to UR

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Outpatient Services and the 2-Midnight Rule

Let's let CMS tell it in their own words:

- From the 2021 OPPS Final Rule (85 Fed. Reg. 86114), “B. Medical Review of Certain Inpatient Hospital Admissions...”

...for purposes of determining whether the **2-Midnight benchmark is met** and, therefore, whether an inpatient admission is appropriate for Medicare Part A payment, we consider the physician's expectation including **the total time spent receiving hospital care**—not only the expected duration of care after inpatient admission, but also any time the beneficiary has spent (before inpatient admission) receiving **outpatient services, such as observation services, treatments in the emergency department, and procedures** provided in the operating room or other treatment area.



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Outpatient Services and the 2-Midnight Rule

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- From the 2021 OPPS Final Rule (85 Fed. Reg. 86114), "B. Medical Review of Certain Inpatient Hospital Admissions..."

...while the *time the beneficiary spent as an outpatient* before the admission order is written is not considered inpatient time, it *is considered during the medical review* process for purposes of determining whether the *2-Midnight benchmark* was met. Pg. 742 of the display copy.

...because *time spent as an outpatient should be considered* in determining whether there was a reasonable expectation that the *hospital care* would span 2 or more midnights.

Outpatient Services and the 2-Midnight Rule

But this has been CMS' message from the start

...if the beneficiary has already *passed 1 midnight as an outpatient observation patient* or in routine recovery following outpatient surgery, the physician should consider the 2-midnight benchmark met if he or she expects the beneficiary to *require an additional midnight in the hospital*. This means that the decision to admit becomes easier as the time approaches the second midnight, and beneficiaries in medically necessary hospitalizations *should not pass a second midnight prior to the admission order being written*. (FY2014 IPPS Final Rule, 78 Fed. Reg. 50946)

...Because we expect that this revision *should virtually eliminate the use of extended observation*, we also anticipate it will concurrently limit beneficiary cost-sharing for outpatient services. (FY2014 IPPS Final Rule, 78 Fed. Reg. 50946)

Outpatient Services and the 2-Midnight Rule

But what about an inpatient level of care, doesn't the patient need to meet inpatient level of care?

...we **do not refer to "level of care"** in guidance regarding hospital inpatient admission decisions. Rather, we have consistently provided physicians with the aforementioned **time-based admission framework** to effectuate appropriate inpatient hospital admission decisions. (FY2014 IPPS Final Rule, 78 Fed. Reg. 50945)

...the beneficiary's required **"level of care" is not part of the guidance regarding hospital inpatient admission** decisions. Rather, we provide physicians with a 2-midnight admission framework to effectuate appropriate inpatient hospital admission decisions. (FY2014 IPPS Final Rule, 78 Fed. Reg. 50947)

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Elimination of the IPO List

Comments from the rule

...It is **not CMS' policy to require** services that are removed from the IPO list to only be performed in the **outpatient** setting. Instead, we aim to offer providers enhanced **flexibility and choice** in determining the safest, most efficient setting of care for Medicare beneficiaries...(CY2021 OPPS Final Rule, 85 Fed. Reg. 86087)

...It is a **misinterpretation** of CMS payment policy for providers to create policies or guidelines that establish the **outpatient setting as the baseline or default site of service** for a procedure based on...the elimination of the IPO list. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86087)

...In prior rulemaking, we have stated that regardless of how a procedure is classified for purposes of payment, we expect that in every case the **surgeon and the hospital will assess the risk** of a procedure or service to the individual patient, taking site of service into account, and will **act in that patient's best interests**. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86092-93)

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Elimination of the IPO List

And patients needing SNF care? Don't they need three nights as an inpatient?

... we would expect that Medicare beneficiaries who are identified as appropriate candidates to receive a surgical procedure in the **outpatient setting** instead of being admitted as an inpatient, **would not be expected to require SNF care** following surgery. Instead, we expect that many of these beneficiaries would be **appropriate for discharge to home** (with outpatient therapy) or **home health care**. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86089)

Important – do not apply an outpatient presumption, admit patients with expectation of two midnight stay

- To prevent impact on three-night stay SNF requirement
- For application of 2-Midnight Presumption

Elimination of the IPO List

Comments from the rule

...Similar to other services that have been removed from the IPO list in previous years, **we expect that the volume of services** currently being performed in the inpatient setting that can be appropriately performed in the outpatient setting **will gradually shift** as physicians and providers gain experience furnishing these services to the appropriate Medicare beneficiaries in the HOPD. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86089)

And what does *this* mean?

...and it is equally important to note that providers are **not required to perform services in the outpatient department** as services are eliminated from the IPO list **if they are not ready**. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86092)

Audit Strategy

CMS regarding the exemption:

...Whether a procedure has an exemption or not, does not change what site-of-service is medically necessary or appropriate for an individual beneficiary. **Providers are still expected to bill in compliance with the 2-Midnight rule.** The **exemption** is not from the 2-Midnight rule but from certain medical review procedures and certain **site-of-service claim denials.** (CY2021 OPPS Final Rule, 85 Fed. Reg. 86117)

...The **indefinite exemption** will help hospitals and clinicians become used to the **availability of payment** under both the hospital **inpatient and outpatient** setting for procedures removed from the IPO list. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86120)

Audit Strategy

And don't forget about the 2-Midnight Presumption

...for services removed from the IPO list, **under the 2-Midnight presumption**, inpatient hospital claims with lengths of stay greater than **2 midnights after admission** will be **presumed to be appropriate** for Medicare Part A payment and would **not be the focus of medical review** efforts, absent evidence of systematic gaming, abuse, or delays in the provision of care in an attempt to qualify for the 2-Midnight presumption. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86115)

Translation: inpatient lengths of stay of 2 days or greater are effectively 'exempt' from audit

- This is independent of the list of procedures removed from the inpatient only list and exempt from denial, but not audit

Audit Strategy

In the meantime...

...It will take time for clinical staff and providers to **gain experience** furnishing these services to the appropriate Medicare beneficiaries **in the HOPD** in order to **develop comprehensive patient selection criteria** and other protocols to identify whether a beneficiary can safely have these procedures performed in the outpatient setting. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86088)

AND

...in the future, we plan to provide **information on appropriate site of service selection** to support physicians' decision-making. We note that these considerations will be for **informational or educational purposes** only and will not supersede physicians' medical judgment about whether a procedure should be performed in the inpatient or outpatient hospital setting. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86088)

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Audit Strategy: Standard of Review

After elimination of the IPO list, the standard of review for all procedures will be either:

- Two-midnight benchmark; or
- Case-by-case determination

...We believe...many inpatient admissions for procedures formerly on the IPO list **are likely to meet either the 2-midnight benchmark or the case-by-case exception** to that benchmark mitigates the concerns regarding denial of payment under Medicare Part A for procedures no longer included on the IPO list. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86088)

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Audit Strategy: Standard of Review

So what did CMS have to say about the two-midnight rule?

...We believe that with the elimination of the IPO list, **the 2-Midnight benchmark will remain an important metric** to help guide when Part A payment for inpatient hospital admissions is appropriate. With more services available to be paid in the hospital outpatient setting, it will be **increasingly important for physicians to exercise their clinical judgment** in determining the generally appropriate clinical setting for their patient to receive a procedure... (CY2021 OPPS Final Rule, 85 Fed. Reg. 86115)

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Audit Strategy: Standard of Review

And they reiterated the need to account for outpatient time in the two-midnight benchmark:

...With respect to the 2-Midnight *benchmark*, however, the **starting point** is when the beneficiary begins **receiving hospital care** either as a registered outpatient or after inpatient admission. That is...we consider the **physician's expectation** including the **total time spent receiving hospital care**—not only the expected duration of care after inpatient admission, but also any time the beneficiary has spent (before inpatient admission) receiving **outpatient** services, such as **observation** services, treatments in the **emergency department**, and **procedures** provided in the operating room or other treatment area (CY2021 OPPS Final Rule, 85 Fed. Reg. 86114)

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Audit Strategy: Standard of Review

And what about case-by-case admission

...we allow for case-by-case exceptions to the 2-midnight benchmark, whereby Medicare Part A payment may be made for inpatient admissions where the admitting physician **does not expect** the patient to require hospital care spanning **2 midnights**, if the documentation in the medical record supports the physician's determination that the **patient nonetheless requires inpatient hospital care**. (CY2021 OPPS Final Rule, 85 Fed. Reg. 86087-86088)

So not much in the rule...and we don't know when the 'information on site-of-service' will be published....but in prior guidance on TKA they gave at least one example...

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