

June 17, 2016

Andrew M. Slavitt
Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Room 445-G, Hubert H. Humphrey Building
200 Independence Ave., S.W.
Washington, D.C. 20201

Re: **CMS-1655-P**, Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Proposed Policy Changes and Fiscal Year 2017 Rates; Quality Reporting Requirements for Specific Providers; Graduate Medical Education; Hospital Notification Procedures Applicable to Beneficiaries Receiving Observation Services; and Technical Changes Relating to Costs to Organizations and Medicare Cost Reports

Submitted electronically: <http://www.regulations.gov>

Dear Mr. Slavitt and CMS Colleagues:

The Observation Stays Coalition is a group of close to 30 national organizations representing a variety of health care professionals and advocates focused on addressing the issue of Medicare beneficiaries being denied access to skilled nursing center care due to observation stays. The Coalition would like to provide the following comments for your consideration, which have been supported by the below signed organizations.

NOTICE Act

In proposed rules updating Medicare reimbursement to acute care hospitals,ⁱ the Centers for Medicare & Medicaid Services (CMS) announces how it will implement the Notice of Observation Treatment and Implication for Care Eligibility Act (NOTICE Act).ⁱⁱ Effective August 6, 2016, the NOTICE Act requires that hospitals provide written and oral notice, within 36 hours, to patients who are in observation or other outpatient status for more than 24 hours. The Coalition feels strongly that the notice must explain the reason that the patient is an outpatient, not an inpatient, and describe the implications of that status both for cost-sharing in the hospital and for “subsequent eligibility for coverage” in a skilled nursing facility (SNF).ⁱⁱⁱ CMS also must assure that the new standardized notice, the Medicare Outpatient Observation Notice (MOON), is considered valid only if given to a patient who is able to understand it or to a person with legal authority to accept the notice on the patient’s behalf. The MOON should be written in plain language and provided to all outpatients with a long stay, whether such stay is classified as observation or not. Finally, hospitalized patients who are called outpatients should be able to appeal to Medicare their placement on observation or other outpatient status.

Observation Stays Issue

Medicare beneficiaries are being denied access to Medicare's SNF benefit because acute care hospitals are increasingly classifying their patients as outpatients receiving observation services, rather than admitting them as inpatients. Patients are called outpatients despite the fact that they may stay for many days and nights in hospital beds and receive medical and nursing care, diagnostic tests, treatments, medications, and food, just as they would if they were inpatients. Under the Medicare statute, however, patients must have an inpatient hospital stay of three or more consecutive days, not counting the day of discharge, in order to meet Medicare criteria for coverage of post-acute care in a SNF. As a result, although the care received by patients in observation status is the same as the care received by inpatients, outpatients who need follow-up care in a SNF do not qualify for Medicare coverage. Hospital stays classified as observation, regardless of their length and the type or number of services provided, are considered outpatient. These hospital stays do not currently qualify patients for Medicare-covered care in a SNF; only inpatient time counts.

Both the NOTICE Act and the two-midnight rule reflect recognition of the problem of observation status for Medicare patients, but they are not sufficient to address the impact on SNF eligibility for beneficiaries in observation. The Observation Stays Coalition has endorsed legislation introduced this Congress with bipartisan support that would create a full and permanent solution. The Improving Access to Medicare Coverage Act of 2015 (H.R.1571/S.843), introduced by Representatives Joe Courtney (D-CT) and Joe Heck (R-NV) and Senators Sherrod Brown (D-OH), Susan Collins (R-ME), Bill Nelson (D-FL), and Shelley Moore Capito (R-WV) would help Medicare beneficiaries who are hospitalized in observation by requiring that time spent in observation be counted towards meeting the three-day prior inpatient stay.

While fully supporting the legislation, the Coalition notes that CMS has authority under existing law to count all time spent by a patient in the hospital for purposes of qualifying for Part A coverage in a SNF. CMS policy created observation status and CMS action could adjust or rescind it.

Conclusion

Thank you for the opportunity to submit comments on the proposed NOTICE Act and the MOON. If you have any questions, please don't hesitate to contact Toby Edelman at the Center for Medicare Advocacy at TEdelman@MedicareAdvocacy.org or Dana Halvorson at the American Health Care Association at dhalvorson@ahca.org.

Sincerely,

**Aging Life Care Association™
Alliance for Retired Americans
American Association of Healthcare Administrative Management
American Association of Post Acute Care Nursing
American Health Care Association
Association of Jewish Aging Services
AMDA-The Society for Post-Acute and Long-Term Care Medicine
Center for Medicare Advocacy**

Coalition of Geriatric Nursing Organizations
The Hartford Institute for Geriatric Nursing
The Jewish Federations of North America
Justice in Aging
LeadingAge
Lutheran Services in America
Medicare Rights Center
National Association for the Support of Long Term Care (NASL)
National Center for Assisted Living
National Committee to Preserve Social Security and Medicare
National Consumer Voice for Quality Long-Term Care
Special Needs Alliance

ⁱ 81 Fed. Reg. 24945 (Apr. 27, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-04-27/pdf/2016-09120.pdf>.

ⁱⁱ Pub. L. 114-42. The NOTICE Act was signed by President Obama on August 6, 2015. *See* Center for Medicare Advocacy, “Observation Status: The NOTICE Act Will Soon Be Law,” (CMA Alert, Aug. 6, 2015), <http://www.medicareadvocacy.org/observation-status-the-notice-act-will-soon-be-law/>.

ⁱⁱⁱ The “subsequent eligibility” is actually non-eligibility. Medicare Part A pays for a resident’s stay in a SNF only if the resident spent at least three days as an *inpatient* in the hospital.