

September 1, 2016

The Office of Management and Budget  
Office of Information and Regulatory Affairs  
725 17th Street, NW  
Washington, DC 20503

Re: **CMS-10611; OMB control number 0938-New**, Public Comments for the Medicare Outpatient Observation Notice

Submitted electronically: OIRA\_submission@omb.eop.gov

CMS Desk Officer:

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 on the Medicare Outpatient Observation Notice (MOON) for your consideration, which have been supported by the below signed organizations.

### **MOON**

In proposed rules updating Medicare reimbursement to acute care hospitals,<sup>i</sup> the Centers for Medicare & Medicaid Services (CMS) announced how it will implement the Notice of Observation Treatment and Implication for Care Eligibility Act (NOTICE Act).<sup>ii</sup> 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 appreciates that the draft MOON explains the reason that the patient is an outpatient, not an inpatient, and describes the implications of that status both for cost-sharing in the hospital and for “subsequent eligibility for coverage” in a skilled nursing facility (SNF).<sup>iii</sup>

However, all hospitalized patients whether on observation or other outpatient status, should be treated the same. Legislative history clearly indicates that Congress considered “outpatient” and “outpatient under observation” as interchangeable terms. In the House Report accompanying the legislation, the purpose of the bill is described as to “provide certainty to beneficiaries regarding their status as an outpatient under observation (or any similar status) and not as an inpatient.” (H.Rept. 114- 39, Part I, p. 2) (emphasis added). The summary also states that the legislation

“contains bipartisan policies, promoted by Ways and Means Committee members, that include the:

- Explanation for the reason for beneficiary’s classification as outpatient or inpatient
- Clarification on the implications of that outpatient status for beneficiaries on eligibility for Medicare coverage of items and services as well as cost-sharing requirements.”

The “Need for Legislation” provision in the House Report continues this interchangeable use of terms:

“The NOTICE Act provides certainty to beneficiaries with regard to their classification as an inpatient or outpatient. Without the NOTICE Act, beneficiaries could be subject to costs they did not foresee due to their classification as either an outpatient under observation or an inpatient. By clarifying a beneficiary’s status as either an outpatient under observation (or any similar status) or as an inpatient, the NOTICE Act will provide beneficiaries with accurate, real-time information with respect to their classification, the services and benefits available to them, and the respective cost-sharing requirements they are subject to.” H.Rept. 114-39, p. 3 (emphasis added).

### **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 or 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. Critically, they do not afford the beneficiary placed under observation or outpatient status a mechanism by which to challenge that designation. Like those being discharged from Medicare covered care, hospital patients who are called outpatients should be able to appeal this placement. We urge CMS to establish a way for beneficiaries placed on observation to argue that such placement is inappropriate given their medical needs.

More comprehensive improvement is also possible. 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 MOON. If you have any questions, please don't hesitate to contact Toby Edelman at the Center for Medicare Advocacy at [TEdelman@MedicareAdvocacy.org](mailto:TEdelman@MedicareAdvocacy.org) or Dana Halvorson at the American Health Care Association at [dhalvorson@ahca.org](mailto:dhalvorson@ahca.org).

Sincerely,

**The Aging Life Care Association™**  
**Alliance for Retired Americans**  
**AMDA – The Society for Post-Acute and Long-Term Care Medicine**  
**The American Association of Directors of Nursing Services**  
**American Association of Healthcare Administrative Management**  
**The American Association of Nurse Assessment Coordination**  
**American Health Care Association**  
**Association of Jewish Aging Services**  
**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 Academy of Elder Law Attorneys**  
**National Association for the Support of Long Term Care**  
**National Center for Assisted Living**  
**National Committee to Preserve Social Security and Medicare**  
**National Consumer Voice for Quality Long-Term Care**

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

<sup>ii</sup> 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/>.

<sup>iii</sup> 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.