

# Support the Improving Access to Medicare Coverage Act

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## Medicare beneficiaries are being denied access to Medicare's skilled nursing facility (SNF) benefit because of the way some hospital stays are classified.

Under Medicare law, patients covered by traditional fee-for-service Medicare must have an inpatient stay in a short-term acute care hospital spanning at least three consecutive days (not counting the day of discharge) in order for Medicare to pay for a subsequent stay in a SNF. However, acute care hospitals are increasingly identifying patients as in "observation," an outpatient designation, rather than admitting them as inpatients.

Outpatients may stay for multiple days and nights in hospital beds and receive medical and nursing care, diagnostic tests, treatments, medications, and food, just as inpatients do. However, although the care received by patients in observation status can often be indistinguishable from the medically necessary care received by inpatients, outpatients who need follow-up care do not qualify for Medicare coverage in a SNF. As a result, the Medicare beneficiary ends up being responsible for paying for the SNF stay out-of-pocket, which places an unfair financial burden on the beneficiary through no fault of the beneficiary. Counting observation days toward the Medicare benefit is a common-sense policy that does not affect hospital care but does protect the ability of beneficiaries to receive needed post-acute nursing home care. For these reasons, we support passage of the **Improving Access to Medicare Coverage Act (S. 4137/H.R. 5138)**.

## Hospitals' use of observation status and the amount of time patients spend in observation status are both increasing.

An early study<sup>1</sup> found a 34% increase in the ratio of observation stays to inpatient admissions between 2007 and 2009, leading the researchers to conclude that outpatient observation status was increasingly becoming a substitute for inpatient status. The same study also documented increases in long-stay outpatient status, including an 88% increase in observation stays exceeding 72 hours. A 2013 report by the Department of Health and Human Services Office of Inspector General (OIG)<sup>2</sup> found that in 2012, beneficiaries had 617,702 hospital stays that lasted at least three days, but that did not include three *inpatient* days. The pattern continued. In December 2016, the Inspector General reported<sup>3</sup> that in FY 2014, 748,337 long hospital stays were called outpatient, including 633,148 outpatient stays of three or more days. Between FYs 2013 and 2014, outpatient stays increased by 8.1%, despite implementation of the two-midnight rule that was expected to decrease long outpatient stays.

## Support for counting time spent in observation status toward the three-day prior inpatient stay continues to grow:

- The Inspector General's 2013 report was supportive of counting observation days towards the three-day inpatient stay requirement.
- In September 2013, the Congressionally created Long Term Care Commission recommended that the Centers for Medicare & Medicaid Services (CMS) count time spent in observation status toward meeting the three-day stay requirement.
- In 2015, the Medicare Payment Advisory Commission (MedPAC) explored various policy options for counting time spent in observation toward meeting the SNF 3-day requirement. The Commission unanimously recommended that CMS revise the SNF 3-day rule to allow for up to two outpatient observation days to count toward meeting the requirement, recognizing that beneficiaries are needlessly facing barriers to accessing needed post-acute care.<sup>4</sup>
- Medicare Advantage (MA) plans commonly waive the 3-day rule, creating an MA benefit not available to those in traditional Medicare.

- Recent efforts have focused on eliminating burden and unanticipated/surprise medical bills that are having a significant negative impact on out-of-pocket-costs and the patient-provider relationship. The unexpected financial impact of observation stays is often a surprise medical bill for Medicare beneficiaries.
- During the COVID-19 national public health emergency (PHE), CMS waived the Medicare Part A SNF 3-day stay prior hospitalization requirement, regardless of condition, if a SNF level of care was needed. This had limited impact on SNF admission patterns. Specifically, in the Fiscal Year 2022 SNF PPS Proposed Rule, CMS wrote, “[T]he overwhelming majority of SNF beneficiaries entered into Part A SNF stays in FY 2020 as they would have in any other year; that is, without using a PHE-related waiver, with a prior hospitalization, and without a COVID-19 diagnosis.”<sup>5</sup> This waiver should be made permanent.
- A 2020 study found that Medicare beneficiaries residing in the most disadvantaged neighborhoods, as defined by Area Deprivation Index, are more likely to face repeated observation stays. These same patients are least likely to receive skilled nursing facility services when they need them, often leading to a cycle of repeated hospitalizations.<sup>6</sup>
- The 2019, 2020, and 2021 annual Office of Inspector General Top 25 Unimplemented Recommendations included “CMS should analyze the potential impacts of counting time spent as an outpatient toward the 3-night requirement for skilled nursing facility (SNF) services so that beneficiaries receiving similar hospital care have similar access to these services.”<sup>7</sup>

### **Recent efforts to address the problem of observation status have fallen far short of a comprehensive fix.**

**The NOTICE Act (P.L. 114 - 42), while a step in the right direction, does not go far enough to ensure patients have access to needed post-acute care services.**

Since March 8, 2017, the NOTICE Act has required hospitals to inform patients who are receiving outpatient observation services for more than 24 hours that they are outpatients, not inpatients. Hospitals must use the Medicare Outpatient Observation Notice (MOON) and provide an oral explanation. While receiving notice informs patients of their status, the law – although a positive step forward – does not give patients hearing rights or count the time in the hospital for purposes of SNF coverage.

**The Improving Access to Medicare Coverage Act of 2023 (S. 4137/H.R. 5138) counts the time Medicare beneficiaries spend in observation toward the three-day stay requirement, so that Medicare patients who spend three days in a hospital, regardless of inpatient/observation designation, are able to access post-acute care in a SNF when they need it.**

As mentioned earlier, legislation was re-introduced this Congress with bipartisan support that would create a full and permanent solution. **The Improving Access to Medicare Coverage Act (S. 4137/H.R. 5138)**, sponsored by Senators Sherrod Brown (D-OH), Susan Collins (R-ME), and Sheldon Whitehouse (D-RI), and Representatives Joe Courtney (D-CT), Glenn ‘GT’ Thompson (R-PA), Suzan DelBene (D-WA), and Ron Estes (R-KS), 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.

This bill has always enjoyed bipartisan support, but concern over feared cost has stalled its enactment. Importantly, new data from the Center for Medicare & Medicaid Innovation Accountable Care Organizations (ACOs) that waived the 3-day stay rule provides critical new information. These waivers allowed ACO patients to enter a SNF directly from home or following a hospital stay that did not meet the 3-day stay requirement. Only 3-5% of all ACO SNF stays were so-called waiver stays, with the majority of those stays being direct-from-home SNF admissions.<sup>8</sup> **The ACO experience demonstrates that SNF utilization following non-qualifying hospitalizations is exceedingly low, meaning cost to the Medicare program would also be low.**

<sup>1</sup> Zhanlian Feng, Brad Wright and Vincent Mor, Sharp Rise In Medicare Enrollees Being Held In Hospitals For Observation Raises Concerns About Causes And Consequences, *Health Affairs*, 31, no. 6 (2012):1251-1259.

<sup>2</sup> Department of Health and Human Services Office of Inspector General (OIG), July 2013 Report OEI-02-12-00040. Available at: <https://oig.hhs.gov/oei/reports/oei-02-12-00040.asp>.

<sup>3</sup> Department of Health and Human Services Office of Inspector General (OIG), December 2016 Report OEI-02-15-00020. Available at: <https://oig.hhs.gov/oei/reports/oei-02-15-00020.pdf>.

<sup>4</sup> Medicare Payment Advisory Commission (MedPAC), June 2015 Report to Congress.

<sup>5</sup> 71 Fed. Reg. 19954, 19986 (Apr. 15, 2021)

<sup>6</sup> Ann M. Sheehy, MD, MS, et al, “Thirty-Day Re-observation, Chronic Re-observation, and Neighborhood Disadvantage” *Mayo Clinic Proceedings*, Vol. 95, Issue 12, pp. 2644-2654 (Dec. 1, 2020).

<sup>7</sup> Office of Inspector General. Top 25 Unimplemented Recommendations, 2021. Available at: <https://oig.hhs.gov/documents/top-unimplemented-recommendations/1097/compendium2021.pdf>.

<sup>8</sup> Center for Medicare & Medicaid Innovation. Skilled Nursing Facility 3-day Waiver: Analysis of Use in ACOs 2014 to 2019. Available at: <https://innovation.cms.gov/data-and-reports/2023/snf-waiver-summary>.