The Honorable Tom Price
Secretary of Health and Human Services
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

The Honorable Seema Verma
Administrator, Centers for Medicare and Medicaid Services
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: CMS-1679-P

Dear Secretary Price and Administrator Verma,

We write today regarding the impact of the Medicare three-day rule for beneficiaries hospitalized under observation. For these beneficiaries, observation status is a longstanding barrier to appropriate post-hospital care, and is a topic that came up in the course of each of your Senate confirmation hearings. As you know, Medicare law requires that beneficiaries have an inpatient hospital stay of at least three days, not including the day of discharge, in order to qualify for coverage of subsequent post-hospital care in a skilled nursing facility (SNF). However, patients held under “observation status” do not qualify for this benefit and routinely find themselves in a drastic coverage gap because of this outdated policy. There is consensus that patients under observation receive the same standard of care as inpatients; a beneficiary may not know that he or she is not considered an inpatient until a bill for thousands of dollars in SNF charges arrives.

The impact to the patient can be financially devastating, and the prevalence is growing as the use of observation coding rises. A 2013 report from the Office of the Inspector General found that patients hospitalized under observation were fully liable for an average of $10,503 in post-hospital SNF charges. Additionally, hospitals’ use of observation status and the time patients spend under observation are both increasing. A 2016 OIG report found that in FY2014, 748,337 long hospital stays (of three days or more) were considered “outpatient” stays.

We have heard directly from patients who chose to forego necessary care post-hospitalization to avoid unexpected cost that this problem prevented them from adhering to prescribed treatment. Physicians and hospital administrators have confirmed that patients are forced to choose between needed care and their financial future and that many patients who make these cost-influenced decisions are at risk for readmission for more serious complications later.
In an effort to remedy this problem for the hundreds of thousands of Medicare beneficiaries who are held under observation, we introduced the *Improving Access to Medicare Coverage Act of 2017*. Our legislation would count observation stays towards the three-day requirement for post-hospital SNF coverage, restoring the original intent of the Medicare rule. We have gathered wide bipartisan support for this legislation, and the bill is endorsed by a coalition of 33 patient and provider groups.

Although our legislation would solve this problem for the thousands of seniors denied coverage for their stays in SNFs, we believe that the authority presently exists for the Centers for Medicare and Medicaid Services (CMS) to define “inpatient” to include time spent in observation for the purposes of satisfying the SNF 3-day rule. For example, in a 2008 decision of the Second Circuit Court of Appeals, the Court noted that the Medicare statute does not prevent the Secretary of the Department of Health and Human Services from including all time spent in a hospital towards satisfying the SNF 3-day requirement. The court recognized that neither the statute nor the regulation defines the word “inpatient”. In fact, the Secretary defined the term in the Medicare Benefit Policy Manual. Therefore, the authority exists for the Secretary to redefine the term as a matter of *Chevron* deference.

Additionally, other CMS regulations have set precedent for defining “inpatient” differently in order to satisfy the SNF 3-day rule. For example, a stay in a foreign hospital counts towards the 3-day requirement, according to the Medicare Benefit Policy Manual. The same document states that hospice beneficiaries who receive “general inpatient care” may qualify for coverage of SNF services. These examples highlight CMS’s acknowledgement that patient classification is ultimately irrelevant when considering whether the hospital stay satisfies the 3-day rule, and prove the agency’s ability to further revise the definition of “inpatient”.

We were encouraged by your recent comments acknowledging the seriousness of this problem and a willingness to identify opportunities within CMS to address it. As such, we appreciate your consideration of the above arguments for CMS’s authority to act directly to improve beneficiary’s access to medically necessary care. We look forward to your response and to working with you to address this financial barrier to treatment adherence.

Sincerely,

Joe Courtney
Rep. Joe Courtney
Member of Congress

Glenn ‘GT’ Thompson
Member of Congress