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

Re: Observation Coding / Two Midnight Rule

Dear Secretary Burwell:

I am writing to follow up on our frequent dialogue on the harmful impact of the observation rule, particularly in light of your Department’s recent decision to abolish the Two Midnight rule.

As verified by the Medicare Inspector General’s office, hundreds of thousands of long-term elderly patients in hospitals each year are routinely ensnared by the coverage gap created by observation coding. As you know from our previous conversations, when patients are coded as ‘observation’ after presenting at the hospital, that determination typically costs Medicare beneficiaries thousands of dollars per year out of pocket because medically prescribed orders to go to a Skilled Nursing Facility post-discharge are not covered by Medicare.

As the Inspector General confirmed, observation has disrupted post-discharge care into nursing homes by removing patients from the traditional three day pathway. This is why I continue to work, year after year, with a large coalition of Members of Congress and outside stakeholders to restore the long-established Medicare coverage for discharged patients.

In the past, when my office has engaged with you on this issue, I have asked the Department for help in fixing the unintended, but well documented, consequences of observation determinations. Unfortunately, each time I write to you, I have received responses insisting that the Two Midnight rule was a ‘solution’ to the problem. However, per the most recent CMS proposed rule (CMS 1655 P) published on April 18, 2016, it is clear that the Department now concedes that the Two Midnight rule was ineffective in changing hospital determination behaviors, not to mention the fact that it did nothing to help patients.

Though I am pleased that the Department has recognized that the Two Midnight rule is ineffective, I am frustrated that simply rescinding the rule still fails to provide any relief for patients, or change hospital determination behavior. As such, I would appreciate revisiting past
conversations with you regarding this issue, and would ask for your support of my legislation, the Improving Access to Medicare Coverage Act of 2015 (HR 1571). As you know, this measure would enable observation determinations to be counted toward inpatient stay requirements for the purposes of Medicare coverage for patient discharge into a skilled nursing facility.

As we have discussed, providers attest that the difference between patients coded as inpatient versus observation is nominal – physicians may order the same tests for both inpatients and observation patients, and both may receive the exact same level of care. Therefore, I fail to see why the Department will not support a common sense restoration of the three day rule (whether coded as observation or inpatient) that had been in place for over forty years.

As part of the rule, I note that the Department moved forward with implementation of the Notice Act, which is a well-intentioned measure adding transparency to this confusing process for patients. Many states, such as Connecticut, enacted similar provisions in recent years, and of course I voted in support of passage of the Notice Act. However, as we know in Connecticut, the Notice Act has not solved the barriers created by observation coding for patients with three day stays or longer. Providers and patient advocates in states such as mine, which have had Notice Act requirements, are still reporting huge numbers of coverage problems for Medicare patients.

Once again, I want to applaud the Department for recognizing that the two midnight rule was an ineffective response to the collateral damage created by observation coding for longer stay patients. Our responsibility as legislators and regulators is to improve laws and regulations in order to create a more efficient health care delivery system while also doing our best to protect patients. Hopefully, this new development will provide a ‘fresh look’ by your office at my bill. The bill has tremendous bipartisan support of 118 members of the House and 22 Senators, as well as over 55 front-line provider groups and patient advocacy groups from all across the country.

As always, thank you for your attention to this important matter and I look forward to your response.

Sincerely,

JOE COURTNEY
Member of Congress