June 20, 2017

Seema Verma
Administrator, Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
Hubert H. Humphrey Building, Room 445-G
200 Independence Avenue SW
Washington, DC 20201

Re: Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2018, SNF Value-Based Purchasing Program, SNF Quality Reporting Program, Survey Team Composition, and Proposal to Correct the Performance Period for the NHSN HCP Influenza Vaccination Immunization Reporting Measure in the ESRD QIP for PY 2020. **CMS-1679-P**

*Submitted Electronically via http://www.regulations.gov on June 20, 2017*

Dear Administrator Verma:

On behalf of the 25 undersigned organizations, we sincerely appreciate the opportunity to comment on the proposed rule titled, *Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2018, SNF Value-Based Purchasing Program, SNF Quality Reporting Program, Survey Team Composition, and Proposal to Correct the Performance Period for the NHSN HCP Influenza Vaccination Immunization Reporting Measure in the ESRD QIP for PY 2020.*

The undersigned organizations are members of a broad coalition of beneficiary and provider advocacy groups who are dedicated to preserving Medicare beneficiaries' access to necessary skilled nursing care following a hospital stay, regardless of whether that stay was classified as inpatient or outpatient observation. Under current law, a Medicare beneficiary must spend at least three days as a hospital *inpatient* for Medicare to cover a subsequent stay in a skilled nursing center (known as the "SNF 3-day rule"). Each year thousands of beneficiaries are unable to access their skilled nursing benefit because of the administrative classification of their hospital stay, even if the stay is deemed medically necessary, and even if the stay spans three days or more[1].

In Section VIII of the proposed rule, titled *Request for Information on CMS Flexibilities and Efficiencies,* CMS has solicited ideas for regulatory, subregulatory, policy, practice, and procedural changes to eliminate unnecessary burdens for providers and patients. Below, we offer CMS a clear pathway to resolve this problem through the issuance of subregulatory guidance, an approach that would not require the promulgation of new regulations. We also provide a legal argument showing that CMS already has the authority needed to implement the solution.

[1] Department of Health and Human Services Office of the Inspector General, *Vulnerabilities Remain Under Medicare's 2-Midnight Hospital Policy,* OEI-02-15-00050 (December 2016), available at: https://oig.hhs.gov/oei/reports/oei-02-15-00020.pdf.

**CMS Has Legal Authority to Define Inpatient Care**

A 2008 decision of the Second Circuit Court of Appeals confirms that the Secretary of Health and Human Services (HHS) has authority under the Medicare statute to count the time a patient spends in the hospital, regardless of inpatient or outpatient classification, toward satisfying the SNF 3-day rule for Medicare coverage of the SNF stay[2]. In its decision, the Court recognized that neither the statute nor regulations define the word "inpatient," and that the Secretary defined "inpatient" in the Medicare Benefit Policy Manual as occurring after a formal physician order for admission. Although the Court upheld the Secretary's position in litigation, as a matter of *Chevron* deference, it acknowledged that the Secretary has the authority to change the interpretation of "inpatient" to include time spent in observation as an outpatient:

> [W]e note that the Medicare statute does not unambiguously require the construction we have adopted. If CMS were to promulgate a different definition of inpatient in the exercise of its authority to make rules carrying the force of law, that definition would be eligible for *Chevron* deference notwithstanding our holding today. [3]

**CMS Already Has Set Precedents for Defining "Inpatient" for Purposes of Satisfying the SNF 3-day Rule**

CMS already allows certain hospital stays to count in qualifying a patient for Part A-covered care in a SNF, even when the hospital stay itself is not a Part A-covered hospital stay. We provide two examples:

1. In the context of hospice services, CMS has recognized that "general inpatient care" in a hospital, although "not equivalent to a hospital level of care under the Medicare hospital benefit," nevertheless qualifies a hospice beneficiary for Part A-covered SNF services[4]; and
2. A three-day stay in a foreign hospital may qualify a beneficiary for Part A SNF coverage if the foreign hospital is qualified as an "emergency hospital."[5]

The argument for counting days spent as an outpatient under observation for purposes of satisfying the SNF 3-day rule is far stronger than either of the above examples, since CMS acknowledges that care in the hospital is indistinguishable whether the patient is formally admitted as an inpatient or called an outpatient.

Furthermore, CMS already has clarified that a beneficiary stay spanning at least three days does not actually need to be Medicare-covered in order for it to satisfy the SNF 3-day rule. In describing why a beneficiary continues to be eligible for Part A SNF coverage after a hospital withdraws its Part A claim and resubmits it as a Part B claim instead, CMS wrote:

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[2] *Estate of Landers v. Leavitt,* 545 F.3d 98 (2nd Cir. 2008).
[3] *Ibid.*
[4] Medicare Benefit Policy Manual, Chapter 9, §40.1.5, accessed at: http://www.cms.gov/Regulations-and-Guidance/Manuals/Downloads/bp102c09.pdf.
[5] Medicare Benefit Policy Manual, Chapter 8, §20.1.1, accessed at: http://www.cms.gov/Regulations-and-Guidance/Manuals/Downloads/bp102c08.pdf.

> …the 3-day inpatient hospital stay which qualifies a beneficiary for 'posthospital' SNF benefits need not actually be Medicare-covered, as long as it is medically necessary. In addition, the status of the beneficiaries themselves does not change from inpatient to outpatient under the Part B inpatient billing policy. Therefore, even if the admission itself is determined to be not medically necessary under the policy, the beneficiary would still be considered a hospital inpatient for the duration of the stay, which, if it occurs for the appropriate duration, would comprise a 'qualifying' hospital stay for SNF benefit purposes so long as the care provided during the stay meets the broad definition of medical necessity.[6]

CMS concludes that a patient's receiving "medically necessary" care in the hospital, *not* the classification of the care as "inpatient," is the key factor for determining the patient's eligibility for Part A SNF coverage.

**Conclusion**

Both the Second Circuit and CMS have recognized CMS's authority to define "inpatient" care for purposes of satisfying the SNF 3-day rule, and CMS has exercised this authority in certain areas of the Medicare program. CMS could do so here as well, and issue subregulatory guidance in the form of an update to the Medicare Benefit Policy Manual, clarifying that any time a patient spends in the hospital, regardless of whether the stay is administratively classified as inpatient, outpatient, or outpatient observation counts toward satisfying the SNF 3-day rule for purposes of ensuring Medicare coverage of a subsequent, medically necessary SNF stay.

The undersigned organizations urge CMS to take action on this very serious problem and eliminate a confusing policy barrier that each year needlessly prevents thousands of Medicare beneficiaries from accessing their benefit to SNF care. Thank you for allowing us to submit our comments on this proposed rule. Please do not hesitate to reach out to James Michel at the American Health Care Association at (202)898-2809 or jmichel@AHCA.org, or any of the undersigned organizations if you have questions on this comment or matter.

Sincerely,

- AAHAM – American Association of Healthcare Administrative Management
- AANAC – American Association of Nurse Assessment Coordination
- AARP
- ACMA – American Case Management Association
- Aging Life Care Association
- AHCA – American Health Care Association
- Alliance for Retired Americans
- AMA – American Medical Association
- AMDA – The Society for Post-Acute and Long-Term Care Medicine
- Association of Jewish Aging Services
- Center for Medicare Advocacy

[6] 78 Federal Register 50495, 50921 (August 19, 2013).

- The Hartford Institute for Geriatric Nursing
- The Jewish Federations of North America
- Justice in Aging
- LeadingAge
- LSA – Lutheran Services in America
- Medicare Rights Center
- NAELA – National Academy of Elder Law Attorneys, Inc.
- NASL – National Association for the Support of Long Term Care
- NCAL – National Center for Assisted Living
- NCHC – National Coalition on Health Care
- National Committee to Preserve Social Security & Medicare
- The National Consumer Voice for Quality Long-Term Care
- SHM – Society of Hospital Medicine
- Special Needs Alliance