

115TH CONGRESS
1ST SESSION

S. 568

To amend title XVIII of the Social Security Act to count a period of receipt of outpatient observation services in a hospital toward satisfying the 3-day inpatient hospital requirement for coverage of skilled nursing facility services under Medicare.

IN THE SENATE OF THE UNITED STATES

MARCH 8, 2017

Mr. BROWN (for himself, Ms. COLLINS, Mr. NELSON, and Mrs. CAPITO) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend title XVIII of the Social Security Act to count a period of receipt of outpatient observation services in a hospital toward satisfying the 3-day inpatient hospital requirement for coverage of skilled nursing facility services under Medicare.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Improving Access to
5 Medicare Coverage Act of 2017”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

1 (1) Medicare requires beneficiaries to be hos-
2 pitalized for medically necessary inpatient hospital
3 care for at least three consecutive days before cov-
4 ering post-hospital care in a skilled nursing facility.

5 (2) Often patients remain under “observation
6 status” in the hospital for several days. These days
7 are not counted toward the 3-day inpatient stay re-
8 quirement because they are considered outpatient
9 days.

10 (3) Hospitals’ use of observation stays has in-
11 creased sharply since 2006. According to the Medi-
12 care Payment Advisory Commission’s March 2014
13 report, outpatient visits, many of which are observa-
14 tion stays, increased 28.5 percent between 2006 and
15 2012, with a simultaneous 12.6-percent decrease in
16 inpatient stays over this same 6-year time period. A
17 study published in Health Affairs found a 34-per-
18 cent increase in the ratio of observation stays to in-
19 patient admissions between 2007 and 2009, leading
20 the researchers to conclude that outpatient observa-
21 tion status was becoming a substitute for inpatient
22 admission. The same study also documented in-
23 creases in long-stay outpatient status, including an
24 88-percent increase in observation stays exceeding
25 72 hours.

1 (4) To health care providers, care provided dur-
2 ing observation is indistinguishable from the care
3 provided to inpatients, with all medically necessary
4 care being provided, regardless of patient status.
5 Beneficiaries are generally not informed of their in-
6 patient or outpatient status and assume that they
7 are inpatients when they are placed in a hospital
8 bed, only to find out that such care was not counted
9 for purposes of satisfying eligibility requirements for
10 medically prescribed Medicare coverage of post-hos-
11 pital care in a skilled nursing facility.

12 (5) Older Americans and people with disabilities
13 who are hospitalized but do not meet the 3-day inpa-
14 tient hospital threshold simply because they were
15 placed in “outpatient observation status” for some
16 or all of their hospital stay (even when their total
17 actual stay exceeds 3 days in the hospital), can face
18 a significant and unexpected financial burden, which
19 can amount to thousands of dollars, for skilled nurs-
20 ing facility care. Among beneficiaries who received
21 care in a skilled nursing facility that Medicare did
22 not cover, average out-of-pocket charges were more
23 than \$10,000 according to the Office of Inspector
24 General.

1 (6) The Centers for Medicare & Medicaid Serv-
2 ices (CMS) attempted to provide hospitals with clar-
3 ity on which patients should be categorized as inpa-
4 tients in its Fiscal Year 2014 inpatient payment
5 rule. However, this rule fails Medicare beneficiaries
6 because it does not address the problem and explic-
7 itly states that days spent in observation do not
8 count for purposes of satisfying the 3-day inpatient
9 stay requirement.

10 (7) Because of CMS' policy, which indicates
11 days under observation do not count towards the 3-
12 day inpatient stay requirement, some patients under
13 observation and their families will continue to face
14 a significant, often insurmountable financial burden
15 if they need skilled nursing care after their hospital
16 stay.

17 (8) The amendment made by this Act would
18 update Medicare policy by deeming patients under
19 observation as inpatients for the purposes of satis-
20 fying the 3-day inpatient stay requirement. Such
21 amendment does not repeal the 3-day inpatient stay
22 requirement, rather it simply expands the Secretary
23 of Health and Human Service's administrative defi-
24 nition of "inpatient" for purposes of the 3-day inpa-
25 tient stay requirement to include time spent under

1 observation. As such, it is not a reprise of the Medi-
2 care Catastrophic Coverage Act of 1988, which re-
3 pealed the 3-day requirement and resulted in
4 “churning” of patients back and forth from non-
5 Medicare payment sources to Medicare. Such
6 amendment simply restores the original objective of
7 the 3-day rule, which was to ensure that Medicare
8 covered skilled nursing facility stays that followed
9 hospital care for patients who stayed in the hospital
10 for 3 days.

11 (9) It is the intent of this Congress, through
12 such amendment, to allow access to skilled nursing
13 care for the population of beneficiaries who meet
14 medical necessity requirements for such care, but
15 who do not satisfy the 3-day inpatient stay require-
16 ment simply because some or all of their time in the
17 acute care hospital is characterized as “outpatient
18 observation status” for billing purposes.

19 (10) It is the understanding of this Congress
20 that the Secretary of Health and Human Services
21 will monitor patterns of behavior to ensure that pro-
22 viders deliver appropriate and needed levels of care.

23 (11) The Office of the Inspector General of the
24 Department of Health and Human Services is sup-
25 portive of counting hospital observation days to-

1 wards the 3-day inpatient stay requirement. In addi-
2 tion, in September 2013, the congressionally estab-
3 lished Commission on Long-Term Care rec-
4 ommended that the Centers for Medicare & Medicaid
5 Services count time spent in observation status to-
6 ward meeting Medicare’s 3-day inpatient stay re-
7 quirement. In addition, in a December 2016 report,
8 the Office of the Inspector General of the Depart-
9 ment of Health and Human Services found that an
10 increased number of Medicare beneficiaries classified
11 as outpatients are paying more for care that is sub-
12 stantively similar and have limited access to skilled
13 nursing facility care due to their patient status.

14 **SEC. 3. COUNTING A PERIOD OF RECEIPT OF OUTPATIENT**
15 **OBSERVATION SERVICES IN A HOSPITAL TO-**
16 **WARD THE 3-DAY INPATIENT HOSPITAL RE-**
17 **QUIREMENT FOR COVERAGE OF SKILLED**
18 **NURSING FACILITY SERVICES UNDER MEDI-**
19 **CARE.**

20 (a) IN GENERAL.—Section 1861(i) of the Social Se-
21 curity Act (42 U.S.C. 1395x(i)) is amended by adding at
22 the end the following: “For purposes of this subsection,
23 an individual receiving outpatient observation services
24 shall be deemed to be an inpatient during such period,
25 and the date such individual ceases receiving such services

1 shall be deemed the hospital discharge date (unless such
2 individual is admitted as a hospital inpatient at the end
3 of such period).”.

4 (b) EFFECTIVE DATE.—The amendment made by
5 subsection (a) shall apply to receipt of outpatient observa-
6 tion services beginning on or after January 1, 2017, but
7 applies to a period of post-hospital extended care services
8 that was completed before the date of the enactment of
9 this Act only if an administrative appeal is or has been
10 made with respect to such services not later than 90 days
11 after the date of the enactment of this Act. Notwith-
12 standing any other provision of law, the Secretary of
13 Health and Human Services may implement such amend-
14 ment through an interim final regulation, program in-
15 struction, or otherwise.

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