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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 413, 419, and 489

[CMS–1159–F3]

RIN 0938–AL35

Medicare Program; Prospective Payment System for Hospital Outpatient Services; Delay in Effective Date of Calendar Year 2002 Payment Rates and the Pro Rata Reduction on Transitional Pass-Through Payments

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule; delay of effective date.

SUMMARY: This document delays the effective date of the payment rates announced for Medicare hospital outpatient services paid under the prospective payment system for calendar year 2002. These rates were announced in a November 30, 2001 final rule (66 FR 59856). In addition, this document delays the effective date of the uniform reduction to be applied to each of the transitional pass-through payments for CY 2002. Certain provisions of the November 30, 2001 rule, as discussed in the **SUPPLEMENTARY INFORMATION** section, are not delayed.

DATES: The effective date of the amendments to 42 CFR published at 66 FR 59856 (November 30, 2001) remains January 1, 2002, except that the effective date for § 419.32(b)(1)(iii) is delayed indefinitely. Also, the effective date for § 419.62(d), added at 66 FR 55865, published on November 2, 2001, is delayed indefinitely. The effective date of the payment rates announced for Medicare hospital outpatient services paid under the prospective payment system for calendar year 2002, published in the preamble and addenda of the November 30, 2001 final rule, and the uniform reduction to be applied to each of the transitional pass-through payments for CY 2002, published in the preamble and addenda of the November 30, 2001 final rule, is delayed until no later than April 1, 2002. These rates were announced in a November 30, 2001 final rule (66 FR 59856). We will publish a document in the **Federal Register** announcing the new effective date for the rates and for § 419.32(b)(1)(iii) and § 419.62(d).

FOR FURTHER INFORMATION CONTACT: James L. Hart, (410) 786–0378.

SUPPLEMENTARY INFORMATION:

Availability of Copies and Electronic Access

Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 or by faxing to (202) 512–2250. The cost for each copy is $9. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**.

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I. Background

On November 30, 2001, we published a final rule announcing the final ambulatory payment classification (APC) groups, relative weights, and payment rates under the hospital outpatient prospective payment system (OPPS) for calendar year 2002 (66 FR 59856). As discussed in detail in that document, in setting the APC relative weights, we incorporated 75 percent of the estimated costs for devices eligible for transitional pass-through payments in 2002 into the costs of the APC groups associated with the use of the devices (66 FR 59906).

After the publication of the November 30 final rule, we discovered that the final rule reflects several inadvertent technical errors in which we incorrectly associated specific devices approved for transitional pass-through payments with particular procedures. The effects of the errors we have identified are of a magnitude significant enough to affect not only the estimate of total transitional pass-through payments and the uniform reduction percentage to be applied to transitional pass-through payments in 2002, but also the payment rates for all APCs. Using rates that reflect these errors would result in inappropriate, uneven effects on payments to hospitals. Thus, we believe it would be inappropriate to proceed to make the payment rates published on November 30 effective without further changes.

In order to thoroughly assess the accuracy of the data files containing these errors and to assure that they do not contain further errors that might also have significant implications, an intensive review of the data will be necessary. Because of the time needed for this review, we cannot complete this review and recalculate the rates before the previously published effective date of January 1, 2002. We will, therefore, continue to pay for services covered under the OPPS after January 1 and until no later than April 1, 2002 under the rates in effect on December 31, 2001. We will also continue until no later than April 1, 2002 to make transitional pass-through payments for drugs and devices without applying the uniform reduction announced on November 30, 2001.

Once our review has been completed and the rates corrected, we will publish a final rule with revised rates and a revised calculation of the uniform reduction in transitional pass-through payments. We will announce the effective date of these changes in that rule.

II. List of OPPS Provisions That Are Not Delayed

This document does not delay the following provisions:

- Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 coinsurance limit.
- Limitation of coinsurance amount to inpatient hospital deductible amount.
- Changes in services covered within the scope of OPPS.
- Categories of hospitals subject to, and excluded from, the OPPS.
- Criteria for new technology APCs.
- Provider-based issues.
- Change to the definition of ''single-use devices'' for transitional pass-through payments.

III. Waiver of Notice of Proposed Rulemaking and the 30-Day Delay in the Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment

procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

We normally provide a delay of 30 days in the effective date of a final rule. However, if adherence to this procedure would be impracticable, unnecessary, or contrary to the public interest, we may waive the delay in the effective date. We find that a 30-day delay in the effective date of this regulation would be both impracticable and contrary to the public interest. In addition, although this is an ongoing final rule proceeding, we nevertheless have good cause to waive notice and comment. As we have discussed above, the rates that are scheduled to go into effect on January 1, 2002 reflect inadvertent technical errors that have major consequences. We, therefore, do not believe it is appropriate to implement the new rates on January 1, 2002. To proceed with making payments on the basis of significantly incorrect rates would be imprudent and contrary to the public interest. These errors were discovered within 30 days of the January 1, 2002 effective date. Therefore, there is an urgent need to proceed with a delay in the effective date of the 2002 rates, and there is not sufficient time to provide notice of proposed rulemaking and a 30-day notice of the delay.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 18, 2001.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: December 21, 2001.

Tommy G. Thompson,

Secretary.

[FR Doc. 01–32091 Filed 12–27–01; 8:55 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No.010607150–1264–02; I.D.091200F]

RIN 0648–AN64

Sea Turtle Conservation; Restrictions Applicable to Fishing and Scientific Research Activities

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS is amending the sea turtle handling and resuscitation regulation. Recent scientific and technical information indicates that the current procedures need to be updated. This measure is necessary to improve the handling of sea turtles that are incidentally captured during scientific research or fishing activities.

DATES: This rule is effective December 31, 2001.

ADDRESSES:

FOR FURTHER INFORMATION CONTACT: Therese A. Conant (301) 713–1401.

SUPPLEMENTARY INFORMATION: The taking of sea turtles is governed by regulations implementing the Endangered Species Act (ESA) at 50 CFR parts 222 and 223 (see 64 FR 14051, March 23, 1999, final rule consolidating and reorganizing ESA regulations). Generally, the taking of sea turtles is prohibited. However, the incidental take of turtles during shrimp and summer flounder fishing in areas of the Atlantic Ocean and in the Gulf of Mexico is excepted from the taking prohibition pursuant to sea turtle conservation regulations at 50 CFR 223.206, which include a requirement to have a NMFS-approved turtle excluder device (TED) installed in each net rigged for fishing. Other exceptions to the taking prohibition include incidental take that is authorized for ESA scientific research permits, incidental take permits, and section 7 incidental take statements. All take excepted from the prohibitions requires safe handling and resuscitation of incidentally caught sea turtles as specified at 50 CFR 223.206 (d)(1).

Sea turtles are air breathers and may drown under conditions of forced submergence. To minimize the impact of forced submergence, NMFS developed protocols to handle comatose turtles (FR 43 32801, July 28, 1978) and subsequently updated the protocols (57 FR 57354, December 4, 1992). New scientific and technical information has been collected since the last update. For example, the practice of stepping on the plastron to revive the turtle may actually do more harm than good. Plastral pumping may cause the airway to block, thus prohibiting air from entering the lungs. Pumping the plastron while a turtle is on its back also causes the viscera to compress the lungs which are located dorsally, thereby hindering lung ventilation. Recent physiological studies on the effects of trawl capture on small sea turtles show that high stress levels are developed during short-duration forced submergences and that the turtles may require from 3.5 up to 24 hours to recover from the stress effects. Resuscitation techniques have been refined over the years as biologists have developed effective ways to test for reflexes in order to determine the status of the turtle.

NMFS published a proposed rule (66 FR 32787, June 18, 2001) requesting comment on the following proposed changes: Eliminate stepping on the plastron as a method for resuscitation; provide a more defined criteria to determine dead versus comatose turtles; increase the minimum elevation of the hindquarters; add carapace movement and a reflex test to the resuscitation methods; and add several minor changes to clarify the guidance for keeping a turtle moist. No comments were received. The proposed changes are adopted as final.

Classification

The AA has determined that this final rule is consistent with the ESA and with other applicable law.

This action has been determined to be not significant for purposes of Executive Order 12866.

The AA prepared an environmental impact statement (EIS) for the 1978 listing determination, establishing the handling and resuscitation requirements and prepared an environmental assessment (EA) for the 1992 updated of the requirements. The proposed rule was determined to be a Categorical Exclusion under the National Environmental Policy Act since the changes did not constitute a new action and individually or cumulatively have a significant impact on the quality of the human environment.

A memorandum was prepared for the Chief Counsel for Regulation of the Department of Commerce who certified to the Chief Counsel for Advocacy of the Small Business Administration stating that the proposed rule would not have significant economic impact on a substantial number of small entities. None of the changes will result in additional economic effects, since NMFS already requires fishermen and scientific researchers to safely handle and attempt resuscitation on sea turtles as necessary. The changes are limited to protocols for monitoring the turtle and make minor changes to the treatment that would require no additional material beyond what is already generally available onboard a vessel (e.g. elevating the sea turtles' hindquarters can be done with a tackle box or bumper). No comments were received regarding this certification. Thus, the