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DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Medicare & Medicaid Services****42 CFR Part 447**

[CMS-2100-F]

RIN 0938-AK89

Medicaid Program; Modification of the Medicaid Upper Payment Limit Transition Period for Inpatient Hospital Services, Outpatient Hospital Services, Nursing Facility Services, Intermediate Care Facility Services for the Mentally Retarded, and Clinic Services**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.**ACTION:** Final rule.

SUMMARY: This final rule modifies the Medicaid upper payment (UPL) limit provisions by establishing a new transition period for States that submitted plan amendments before March 13, 2001 that do not comply with the new UPLs effective on that date (but do comply with the prior UPLs) and were approved on or after January 22, 2001. This new transition period applies to payments for inpatient hospital services, outpatient hospital services, nursing facility services, intermediate care facility services for the mentally retarded, and clinic services.

EFFECTIVE DATE: November 5, 2001.**FOR FURTHER INFORMATION CONTACT:**

Robert Weaver, (410) 786-5914—Nursing facility services and intermediate care facility services for the mentally retarded

Marge Lee, (410) 786-4361—Inpatient and outpatient hospital services and clinic services

SUPPLEMENTARY INFORMATION:**I. Background**

In the final rule published on January 12, 2001 in the **Federal Register** (66 FR 3148), we specified transition periods for those States with State plan amendments (SPAs) approved before the final rule effective date of March 13, 2001. In our March 13, 2001 letter to State Medicaid Directors, we clarified that state plan amendments submitted on or after the effective date of that final rule would be subject to the new requirements of that final rule. We further explained that we would disapprove any state plan amendment

that is submitted on or after that date, including modification to existing state plans, that does not conform with the new upper payment limitations.

The State Medicaid Directors letter did not address the amendments pending CMS approval. After reviewing the legal and policy issues involved, the Administration now believes that each State's pending amendment should be reviewed under the criteria in place when it was submitted, and, for those submitted before March 13, 2001, the criteria before the January 12, 2001 final rule rather than applying the provisions of that rule. However, the Administration is also committed to phasing out the UPL loophole and assuring that tax dollars are spent properly. Absent modification of the UPL transition provisions, approval of these State plan amendments could trigger a 2-year transition period through September 30, 2002, which would have greater budget implications than anticipated.

II. Provisions of the Proposed Rule

On April 3, 2001, we published a proposed rule in the **Federal Register** (66 FR 17657) proposing to create a separate UPL transition period for State plan amendments that were submitted to us before March 13, 2001 but were approved on or after January 22, 2001. We proposed that these State plan amendments would qualify for a transition period that would end on the later of March 13, 2001 or 1 year after the approved effective date of each State plan amendment. With respect to pending UPL plans that are expansions of previously approved plans, we proposed that the separate transition period would only apply to the portion of spending under the pending plan that is above the amount that was previously approved.

The proposed rule did not include those State plan amendments that were actively (not deemed) approved after January 12, 2001 based on their compliance with the final rule of January 12, 2001. Because these amendments comply with the January 12, 2001 final rule, the amendments are not subject to the transition periods specified in the January 12, 2001 final rule. Also, as noted in the State Medicaid Directors letter of March 13, 2001, any State plan amendments submitted on or after March 13, 2001 would be reviewed and acted upon under the January 12, 2001 final rule. We would also treat any material change submitted on or after March 13, 2001 to a State plan amendment pending on that date as a new State plan amendment. We would not be able to approve such

a submission under the UPL requirements in effect, and it would not be eligible for the new transition period.

III. Analysis of and Responses to Public Comments

We received 7 timely comments in response to the April 3, 2001 proposed rule. The majority of the comments were from State agencies, and associations representing hospitals, health care systems, and providers of long-term care, assisted living, and nursing facilities. We reviewed each comment and grouped like or related comments. The comments and our responses are summarized below.

Comment: Several commenters requested either this regulation be withdrawn or that State plan amendments submitted prior to March 13, 2001 and approved after January 22, 2001 receive the transition period as defined in the January 12, 2001 final UPL rule. Several of these commenters felt the rule was a retroactive application of policy. Two commenters pointed out that the impact on one State would be to reduce its transition period from September 30, 2002 to September 30, 2001. Another commenter felt it was unfair to change the rules in mid-stream on States that had submitted amendments prior to January 12, 2001. If we decline to withdraw this proposal, one commenter asked that States submitting plan amendments on or before January 12, 2001 be allowed to exceed the newly established payment limits until September 30, 2002, the rationale being that States did not receive official word until the rule was published on January 12, 2001.

Response: We do not agree with the request to withdraw this rule or to extend the full two-year transition period to States with pending (unapproved) amendments as of January 12, 2001 but we have altered the timing of the new transition period to ensure that it will not apply retroactively to any payments that may already have been made.

We note that States had clear and sufficient notice of an impending change in the UPL rules, and should have had no reasonable expectation of favorable treatment for unapproved amendments after the publication of the final rule. Therefore, the proposed shorter transition reflected an approach to balance our interest in curtailing the use of inappropriate Federal Medicaid funds with the States concerns about a shift in federal rules. When the final UPL regulation was issued on January 12, 2001, we did not state that pending State plan amendments would be approved. Thus, we do not believe

States had a reasonable reliance on the expectation of a full transition period. Nevertheless, we were aware of the possibility that some States may have been adversely affected by the timing of the issuance of the final rule. Thus, we determined that we would approve amendments pending prior to the effective date (March 13, 2001) of the January UPL regulation but we announced that we would propose a shorter transition period for those amendments.

The duration of the proposed new transition period was not intended to apply retroactively to any payments. Because of the timing in issuing this final rule, we have lengthened the duration of the new transition period to ensure that this remains the case. The new transition period will not end until the later of: (1) One year from the initial effective date of the State plan provision; or (2) the effective date of this final rule.

As a result of this change, no State that qualifies for this new transition period will have its transition period expire prior to the effective date of this final rule. In addition, all such States will also have or have had at least 1 full year to make payments under their amendments, which was our intent in issuing the transition policies in the April 3, 2001 proposed rule.

Comment: One commenter asked for clarification that state plan amendments pending as of March 12, 2001 that do not increase spending levels at non-State, government owned hospitals would not be impacted by this rule.

Response: If the pending amendments do not increase spending, then the transition period provided by this rule would not be applicable.

Comment: Two commenters indicated that they were uncertain how the transition period in this final regulation would impact States that have relied on enhanced Medicaid funding for many years. One of these commenters was under the impression that this regulation would permit a window of two years for those States that had approved state plans before October 1, 1992 and did not submit amendments.

Response: A State's eligibility for one of the two longer transition periods set forth in the January 12, 2001 final UPL rule is not altered by this rule. What could be impacted is the maximum amount of excessive funding that is phased out over long periods of time. If an amendment pending on March 13 was approved after January 22, 2001, and the amendment had the effect of increasing the amount of spending that already exceeded the January 12, 2001 final UPL rule, then just the incremental

increase provided by that amendment would be subject to the transition period in this rule.

Comment: One commenter recommended that only state plan amendments submitted to CMS on or after March 13, 2001, the effective date of the January 12, 2001 UPL regulation, be subject to this regulation. A second commenter similarly recommended this regulation apply only to amendments submitted after January 12, 2001.

Response: We do not agree with these comments. The purpose of providing any transition period is to help mitigate the effect the new upper payment limits may have in States which have relied on enhanced payments under the former regulations to leverage federal Medicaid dollars. By extending a grace period to amendments submitted after the March 13, 2001 effective date of the new upper payment limits, this recommendation would provide a transition period to spending situations where clearly there was no reliance when the new rules took effect. We similarly believe that any State that submitted an amendment after the January 12, 2001 publication date of the final rule arguably had no basis to expect the amendment would be approved or had any history of reliance on such spending.

Comment: One commenter stated that we did not respond adequately in the January 12, 2001 final rule to several comments submitted on the October 10, 2000 proposed rule. Another commenter expressed concerns over the provisions of the January 12, 2001 final rule.

Response: We believe that, in the January 12, 2001 final rule, we adequately responded to all comments submitted in response to the October 10, 2000 proposed rule. We do not think it is necessary or appropriate to further respond to those comments, or respond to comments on the provisions of the January 12, 2001 final rule, in this final rule.

IV. Provisions of the Final Regulation

For the reasons discussed in section III of this preamble, this final rule adopts the separate UPL transition period proposed in the April 3, 2001 proposed rule.

V. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

VI. Regulatory Impact Analysis

A. Introduction

We have examined the impact of this final rule as required by Executive Order (EO) 12866, the Unfunded Mandates Act of 1995, and the Regulatory Flexibility Act (RFA) (Pub. L. 96-354). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects (\$110 million or more in any one year). We consider this to be a major rule and we have provided an analysis below.

B. Overall Impact

The estimates provided below are based on State-reported Federal fiscal year information submitted with State plan amendments and State expenditure information, where available. We have lowered our estimate of potentially impacted State plan amendments that may qualify for a transition period to 4. In the April 3, 2001 proposed rule, we had estimated that 11 State plan amendments may have qualified for the transition period provided by this rule. Our revised estimate is based on a better understanding of State spending made pursuant to the amendments that targeted payments to public providers.

Were these State plan amendments to be approved under the 2-year transition period, we estimate the increase in spending attributed to these amendments would total \$1.0 billion over fiscal years 2001 and 2002 as a result of the two-year transition period ending on September 30, 2002. Subjecting these same state payment provisions to the new shorter transition periods provided by this final rule will result in .5 billion savings over the same period relative to the spending that could have occurred under transition 2-year transition period ending September 30, 2002.

C. Impact on Small Entities and Rural Hospitals

The Regulatory Flexibility Act requires agencies to analyze options for regulatory relief of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having

revenues of \$5 million to \$25 million (see 65 FR 69432) or less annually. For purposes of the RFA, all hospitals, nursing facilities, intermediate care facilities for the mentally retarded, and clinics are considered to be small entities. Individuals and States are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds.

We do not believe the shorter transition periods adopted in this final rule will have a significant impact on small entities, including small rural hospitals. Although the transition policy allows States to make higher payments to government providers than what otherwise would have been allowable under the rules that were effective on March 13, 2001, this flexibility is only available for one year. Therefore, we do not expect small entities to develop any reliance on these payments.

D. The Unfunded Mandates Act

The Unfunded Mandates Reform Act of 1995 also requires (in section 202) that agencies perform an assessment of anticipated costs and benefits before proposing any rule that may result in a mandated expenditure in any one year by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$110 million. Because this final rule does not mandate any new spending requirements or costs, but rather provides for new transition periods, we do not believe it has any unfunded mandate implications.

E. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct compliance costs on State and local governments, preempts State law, or otherwise has Federalism implications. We do not believe this final rule in any way imposes substantial direct compliance costs on State and local governments, or preempts or supersedes State or local law. However, we realize the reform of upper payment limits is an issue some States are very interested in. Therefore, in addition to providing States with an opportunity to comment

on the proposed rule, we have tried to afford States ample opportunities to express their interest and concerns as we have moved forward in developing reforms.

F. Executive Order 12866

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs-health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

For the reasons set forth in the preamble, 42 CFR part 447 is amended as follows:

PART 447—PAYMENTS FOR SERVICES

1. The authority citation for part 447 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

2. In § 447.272, revise paragraph (e)(2)(ii)(A) and add a new paragraph (e)(2)(ii)(D) to read as follows:

§ 447.272 Inpatient services: Application of upper payment limits.

- (e) * * *
(2) * * *
(ii) * * *

(A) For State plan provisions that are effective after September 30, 1999 and were approved before January 22, 2001, payments may exceed the upper payment limit in paragraph (b) of this section until September 30, 2002.

(D) For State plan provisions that were effective after September 30, 1999, submitted to CMS before March 13, 2001, and approved by CMS after January 21, 2001, payments may exceed the limit in paragraph (b) of this section until the later of November 5, 2001, or 1 year from the approved effective date of the State plan provision.

3. In § 447.321, revise paragraph (e)(2)(ii)(A) and add a new paragraph (e)(2)(ii)(D) to read as follows:

§ 447.321 Outpatient hospital and clinic services: Application of upper payment limits.

- (e) * * *
(2) * * *
(ii) * * *

(A) For State plan provisions that are effective after September 30, 1999 and were approved before January 22, 2001, payments may exceed the upper payment limit in paragraph (b) of this section until September 30, 2002.

(D) For State plan provisions that were effective after September 30, 1999, submitted to CMS before March 13, 2001, and approved by CMS after January 21, 2001, payments may exceed the limit in paragraph (b) of this section until the later of November 5, 2001, or 1 year from the approved effective date of the State plan provision.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: August 9, 2001.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01-2000; MM Docket No. 00-166; RM-9951; RM-10015; RM-10016]

Radio Broadcasting Services; Wickenburg, Bagdad and Aguila, AZ

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document grants a Petition for Reconsideration of the Report and Order in this proceeding, 66 FR 21680, May 1, 2001, as requested by Circle S Broadcasting Co., Inc., licensee of Station KSWG (FM), Channel 231C3, Wickenburg, Arizona, to the extent it substitutes Channel 242C3 for Channel 231C3 and modifies its license accordingly, rather than the allotment of Channel 242C3 at Wickenburg as that community's third local FM transmission service. The substitution and modification at Wickenburg is preferred over the allotment of Channel 242C3 for general application based upon the original proponent's withdrawal of interest, and the failure of any other party to express an interest therein. Coordinates used for Channel 242C3 at Wickenburg remain as specified in the Report and Order. Allotments made in the context of this proceeding at Bagdad and Aguila, Arizona, remain unchanged. Additionally, as Wickenburg is located