contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). This proposed rule also does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant. In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings'' issued under the executive order. This proposed rule regarding Maryland's RACM analysis for the Baltimore area does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 31, 2001.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 01–22619 Filed 9–6–01; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 431

[CMS–2128–P]

RIN 0938–AL06

Medicaid Program; Continue To Allow States an Option Under the Medicaid Spousal Impoverishment Provisions To Increase the Community Spouse's Income When Adjusting the Protected Resource Allowance

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

ACTION: Proposed rule.

SUMMARY: Section 1924 of the Social Security Act (the ''Act'') sets forth provisions designed to afford financial protection against impoverishment to a non-institutionalized spouse of an institutionalized individual. These provisions contain several formulas to provide this protection and specify how income and resources of spouses separated by institutionalization will be treated for purposes of determining the institutionalized spouse's Medicaid eligibility and calculating the amount the institutionalized spouse must contribute towards the cost of his or her institutional care. This proposed rule would implement certain provisions of section 1924 of the Act, which provides for fair hearings for an increase in the community spouse resource allowance.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on November 6, 2001.

ADDRESSES: In commenting, please refer to file code CMS–2128–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. Mail written comments (one original and three copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2128–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be timely received in the event of delivery delays.

If you prefer, you may deliver (by hand or courier) your written comments (one original and three copies) to one of the following addresses: Room 443–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–16–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Roy Trudel, (410) 786–3417.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–0626 or (410) 786–7195.

I. Background

A. Statutory Basis

Title XIX of the Social Security Act (the Act), ''provid[es] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.'' *Harris* v. *McRae,* 448 U.S. 297, 301 (1980). Under section 1902(a)(17) of the Act, each participating State must develop a plan containing ''reasonable standards * * * for determining eligibility for and the extent of medical assistance.'' *Schweiker* v. *Gray Panthers,* 453 U.S. 34, 36 (1981). Section 1902(a)(17)(B) of the Act states that those State standards must ''provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient.''

Section 1924 of the Act requires a State with a Medicaid program to use special rules for the treatment of income and resources of married institutionalized individuals who have

spouses who are not institutionalized. (Throughout this preamble, we use the term ''institutionalized spouses'' to mean married institutionalized individuals and the term ''community spouses'' to mean spouses who are not institutionalized.) These provisions are referred to as the ''spousal impoverishment'' provisions. The spousal impoverishment provisions govern the allocation of income and resources between the spouses for determining Medicaid eligibility of the institutionalized spouse as well as allowing the States to determine how much income of the institutionalized spouse is available to be applied toward the cost of his or her institutional care (''post-eligibility determinations'').

B. Income and Resource Allocation

Income and resource calculations for married persons have proved to be a matter of great complexity, particularly when one of the spouses is cared for in an institutional setting, such as a nursing home, but the other spouse is not institutionalized. Before 1989, the provisions governing the Medicaid eligibility of institutionalized spouses sometimes left the community spouse with income below the poverty level and with minimal resources as well. At that time, after the month of institutionalization, the income of the two spouses was considered separately in most States for purposes of determining an institutionalized spouse's eligibility. However, very little of the institutionalized spouse's income could be protected for use by the spouse in the community. This often left the community spouse with little income to live on. After the month of institutionalization, most States would consider the joint resources of the community spouse and the institutionalized spouse (subject to a limited exclusion), and any property owned solely by the institutionalized spouse to be available for the care of the institutionalized spouse. (Property owned solely by the community spouse was not considered.) Thus, depending on how resources were owned, many married couples would have to deplete almost all of their resources before the institutionalized spouse would qualify for Medicaid. The net effect of those requirements in some cases was the ''pauperization'' of the community spouse. H.R. Rep. No. 105, 100th Cong., 1st Sess. Pt. 2, at 65 (1987).

The Congress attempted to alleviate that spousal impoverishment hardship in the Medicare Catastrophic Coverage Act (MCCA) of 1988, (Public Law 100–360, enacted on December 22, 1988.) The MCCA requires a State to use a complex set of requirements and exclusions when allocating income and resources between community and institutionalized spouses, both when the State makes the initial eligibility determination, and later in post-eligibility determinations.

In section 1924(a)(1) of the Act, it provides that the spousal impoverishment provisions ''supersede any other provision'' of the Medicaid statute that ''is inconsistent with them.'' However, the MCCA did not repeal the Secretary's authority to prescribe standards (under section 1902(a)(17)(B) of the Act) for determining what income is ''available'' to a spouse, and the requirement for States to set reasonable standards for determining eligibility and amount of assistance. That section 1902(a)(17) authority may now only be exercised in a manner that does not contravene the specific requirements of the spousal impoverishment provisions.

With respect to the allocation of income as part of an eligibility determination, the spousal impoverishment provisions impose only a single rule. Section 1924(b)(1) of the Act provides that during any month in which an institutionalized spouse is in the institution, no income of the community spouse shall be deemed available to the institutionalized spouse (subject to certain qualifications regarding income attribution). Thus, section 1924(b)(1) of the Act establishes a special rule that protects the income of the community spouse by excluding that income from consideration when determining whether the institutionalized spouse is eligible for Medicaid. Section 1924(b)(1) of the Act, however, does not address the extent to which the State may consider the institutionalized spouse's income available to meet the needs of the community spouse.

With respect to income attribution after the State makes the initial eligibility determination, the spousal impoverishment provisions provide more extensive guidance and requirements. Specifically, section 1924(b)(2) of the Act provides that, if payment of income is made solely in the name of one spouse, that income is generally treated as available *only* to that spouse. Section 1924(d) of the Act provides a number of exceptions to that rule, which are generally designed to ensure that the community spouse has sufficient income to meet his or her basic monthly needs. In particular, section 1924(d) of the Act provides for the establishment of a minimum monthly maintenance needs allowance for each community spouse. The community spouse's minimum monthly maintenance needs allowance is set at a level that is much higher than the official Federal poverty level. Once income is attributed to each of the spouses according to the general rules in section 1924(b) of the Act, the income attributed to the community spouse is compared to the community spouse's minimum monthly maintenance needs allowance. Section 1924(d)(2) of the Act provides that if the community spouse's income is less than the minimum monthly maintenance needs allowance, the amount of the shortfall can be deducted from the income of the institutionalized spouse that would otherwise be considered available for the care of the institutionalized spouse. The amount of that deduction is referred to as the community spouse monthly income allowance.

The deduction of the community spouse monthly income allowance, in effect, prevents income the community spouse needs to meet basic living expenses from being considered available for the care of the institutionalized spouse. The deduction thus causes Medicaid to assume a greater portion of the costs of institutionalized care. The greater Medicaid payments for care of the institutionalized spouse would free up income to meet the minimum needs of the community spouse. The community spouse monthly income allowance, therefore, ensures that the community spouse's basic monthly maintenance needs can be met *before* the institutionalized spouse's income is considered available to pay for the costs of his or her own institutional care.

With respect to the attribution of resources between the institutionalized spouse and community spouse, the statute provides extensive rules for both initial and post-eligibility decisions. For initial eligibility determinations, each spouse's share of resources is calculated as of the beginning of the institutionalized spouse's first period of institutionalization. At that time, all of the institutionalized spouse's and community spouse's resources are tallied together, and one half of the total value is allocated to each spouse (the ''spousal share''). Often, most of the resources allocated to the institutionalized spouse must be exhausted before the institutionalized spouse is eligible for Medicaid. In contrast, the community spouse's share is protected from complete exhaustion. In particular, the community spouse's resources are not considered available for the care of the institutionalized spouse (and the institutionalized spouse can become Medicaid eligible) so long as the community spouse's share does

not exceed the community spouse resource allowance (CSRA). Thus, the CSRA limits the extent to which the spouses must exhaust resources before the institutionalized spouse becomes eligible for Medicaid. Section 1924(f)(2)(A) of the Act specifies that the CSRA is the greatest of (1) $12,000 or a State standard up to $60,000 (indexed for inflation; for 2001 the indexed amount is $87,000); (2) the lesser of the spousal share (approximately one-half of the spouses' pooled resources) or $60,000 (indexed for inflation); (3) the amount set at a fair hearing under section 1924(e)(2) of the Act; or (4) the amount transferred under a court order.

In allocating income and resources between spouses, States have employed two divergent methods. Under the method used by most States, known as the ''income-first'' method, the institutionalized spouse's income (above the allowances specified in section 1924(d) of the Act) is allocated to the community spouse for purposes of determining the extent to which the community spouse has sufficient income to meet minimum monthly maintenance needs. Under the income-first method, the CSRA is increased only if the community spouse's income will not reach his or her minimum monthly maintenance needs allowance *after* taking into account any income not protected under section 1924(d) that is available or potentially available from the institutionalized spouse. In contrast, under the other method, known as the ''resources-first'' method, the couple's resources can be protected for the benefit of the community spouse to the extent necessary to ensure that the community spouse's total income, including income generated by the CSRA, meets the community spouse's minimum monthly maintenance needs allowance. Additional income from the institutionalized spouse that may be, but has not been, made available for the community spouse is not considered.

C. Current Policy and Implementation of the New Provisions

Section 1924(e)(2)(C) of the Act provides that if either spouse establishes that the CSRA (in relation to the amount of income generated by that allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted an amount adequate to provide a minimum monthly maintenance needs allowance.

We have previously issued policy memoranda and letters expressing our view that section 1924(e)(2)(C) of the Act authorizes a State to consider potential income transfers from an institutionalized spouse to a community spouse, so that a State may adopt the income-first method or apply some other reasonable methodology until we issue final regulations addressing the issue. Thus, under our present policy, States may clearly use the income-first method, and may be able to use other methods, such as resources-first. In other words, consistent with the statutory requirement that State's utilize ''reasonable standards'' for determining eligibility and the amount of benefits as described in Section 1902(a)(17), we have permitted States to employ income-first or other reasonable methodologies. In practice, no State has elected to use a method other than income-first or resources-first. The proposed regulation is therefore intended to codify and reflect long-standing State practices.

However, the issue of which criteria may be employed during the fair hearing under section 1924(e)(2)(C) of the Act to determine whether, and if so by how much, to raise the CSRA has been the subject of some dispute. Permitting the community spouse to obtain a larger CSRA can give the community spouse additional income-generating resources to meet minimum monthly needs. Without an increase in the CSRA, the resources would be considered available to the institutionalized spouse and might have to be exhausted before the institutionalized spouse would be Medicaid eligible. On the other hand, permitting the hearing officer to raise the CSRA when the institutionalized spouse has income which could be used to enable the community spouse to meet minimum monthly maintenance needs can, under some circumstances, have unintended consequences for a State's Medicaid program. This policy can create an avenue for a couple to shelter almost limitless amounts of resources, provided these resources currently have minimal incoming-producing value.

Indeed, the legality of the income first rule has been challenged in several courts. The United States Courts of Appeals for the Sixth and Third Circuits have upheld the income-first rule in *Chambers* v. *Ohio Dep't of Human Servs.,* 145 F.3d 793, 802 (6th Cir. 1998) and *Cleary* v. *Waldman,* 167 F.3d 801, 811–812 (3d Cir. 1999), respectively. Nevertheless, the Wisconsin Court of Appeals invalidated a Wisconsin statute, which adopted the income-first rule, holding that the spousal impoverishment provisions of the Medicaid program unambiguously preclude the use of an ''income-first'' methodology. The United States Supreme Court has granted the State of Wisconsin's petition for review of this decision. See *Wisconsin Department of Health and Family Services* v. *Blumer,* No. 00–952.

Because this subject has been a source of some controversy, we believe it is appropriate to codify provisions regarding the community spouse resource allowance before adopting regulations governing all of the spousal impoverishment protection provisions of section 1924 of the Act.

II. Provisions of the Proposed Regulations

We propose to allow States the threshold choice of using either the income-first or resources-first method when determining whether the community spouse has sufficient income to meet minimum monthly maintenance needs. Under our proposal, States would not be able to use different rules on a case-by-case basis, but must apply the same rule to all spouses. Under section 1902(a)(17)(B) of the Act, the Secretary has authority to prescribe appropriate standards for determining whether income is ''available.'' In the exercise of that authority, and in view of the cooperative federalism considerations embodied in the Medicaid program, we have concluded that States may be in the best position to determine the type of protection to afford community spouses and whether to require hearing officers to take into account any income of the institutionalized spouse before raising the CSRA.

We believe that section 1924 of the Act does not specifically address whether the income-first or resources-first method is appropriate in making the determination on raising the CSRA. Section 1924(e)(2)(C) of the Act directs the State to determine whether the community spouse's income meets his or her minimum monthly maintenance needs. It also provides that, if the community spouse's income falls short of meeting those needs, the CSRA should be increased by an amount that will generate sufficient income *to bring the community spouse's income to the minimum monthly maintenance needs level.* However, this statutory guidance does not address whether the community spouse's income may include the institutionalized spouse's income that could be made available to the community spouse.

In fact, while section 1924(b)(1) specifically prohibits the *community spouse's* income from being considered available for the care of the *institutionalized spouse,* the statute does not preclude the Secretary nor the

State from considering the *institutionalized spouse's income* from being available to the *community spouse* for purposes of determining whether the community spouse's needs will be met absent an increase in the CSRA. That supports an inference that it is permissible to consider all or some portion of the institutionalized spouse's income to be available to the community spouse. In addition, the legislative history suggests that Congress contemplated the possibility that, in determining whether to raise the CSRA, States might take into account not only the community spouse's own income but ''other income attributable to the community spouse'' consistent with the Secretary's rules. H.R. Cong. Rep. No. 661, 100th Cong., 2d Sess 265 (1988). Accordingly, we believe that the statute permits an income-first rule and does not foreclose a resources-first rule.

Because an income-first rule would conserve scarce resources that States may allocate towards their Medicaid programs, avoid sheltering of high value low income-producing resources, and generally affords the community spouse a significant degree of protection from impoverishment, States may prefer to employ this approach. On the other hand, the resources-first rule may in certain cases afford greater protection to the community spouse, especially after the death of the institutionalized spouse. While in our view, the statute certainly does not compel States to adopt the resources-first method, we believe it would be appropriate to afford the option of selecting a resources-first rule.

Section 1924(a) of the Act provides that in determining the eligibility for medical assistance of an institutionalized spouse, its provisions supersede any other provision of title XIX of the Act, ''which is inconsistent with them,'' including section 1902(a)(17). Section 1902(a)(17)(B) of the Act provides that the State plan for medical assistance shall ''provide for taking into account only the income and resources, as are, *as determined in accordance with standards prescribed by the Secretary*, available to the applicant or recipient * * *.'' (Emphasis supplied.) In *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44, 101 S.Ct 2633, 2640 (1981), the Supreme Court held that the underscored language constituted a delegation of substantive rulemaking authority to the Secretary. Therefore, section 1902(a)(17)(B) of the Act gives the Secretary the authority to promulgate regulations on the matter of how much income and resources are available to applicants for, or recipients of, Medicaid for determining their eligibility and the amount of assistance they may receive. Furthermore, because our proposal to permit States to use either the income-first or resources-first method does not conflict with section 1924 of the Act, we can issue a proposed rule on this matter.

As noted above, section 1924(e)(2)(C) of the Act authorizes either spouse to establish whether the community spouse resource allowance is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance. However, it does not specify whether in the process of establishing the inadequacy of the community spouse resource allowance, all of the institutionalized spouse's income which could be made available to the community spouse must be taken into account before seeking this adjustment. Because section 1924(e)(2) of the Act is silent on this issue, it does not conflict with the Secretary's authority under section 1902(a)(17)(B) of the Act to prescribe standards for determining the amount of the institutionalized spouse's income that would be available to the community spouse in determining whether it is appropriate to raise the community spouse resource allowance. This determination would have a corresponding impact on the institutionalized spouse's Medicaid eligibility.

Since our decision, under section 1902(a)(17)(B) of the Act, to permit States to use either the income-first or resources-first rule does not conflict with section 1924 of the Act, we are able to issue proposed regulations on this matter. In other words, because the statute does not require nor foreclose States from using either the income-first or resources-first method, we can use the rulemaking authority under section 1902(a)(17) of the Act to leave the choice of method to the States. (This approach is consistent with the Supreme Court's decision in *Batterton* v. *Francis*, 432 U.S. 416 (1977), which upheld a regulation that permitted States to define ''unemployed'' either to include families participating in a labor strike or to exclude them.) In addition, Section 1902(a)(17) contemplates that States will establish plans containing ''reasonable standards'' for determining eligibility consistent with the Act and our regulations. The statute thus contemplates that different States may establish different standards for determining eligibility, so long as all are ''reasonable'' and all are consistent with the Act and our regulations. Accordingly, as an exercise of our discretion, we propose to leave to the States the option to either use the income-first or resources-first method for purposes of a fair hearing under section 1924(e)(2)(C) of the Act to determine whether, and if so by how much, to raise the CSRA.

As such, we propose to add a new § 431.260 to provide for fair hearings to raise the community spouse resource allowance. At § 431.260(a), we propose to define ''institutionalized spouse'' as an individual who is married to a person who is not in a medical institution or nursing facility and who is either likely to be in an institution or nursing facility or likely to be receiving services under a home and community-based waiver under section 1902(a)(10)(A)(ii)(VI) of the Act for at least 30 consecutive days. We propose to define the term ''community spouse'' as the spouse of an institutionalized individual. We would define the term ''community spouse resource allowance'' as the amount of a couple's combined resources (held jointly and separately), allocated to the community spouse and considered unavailable to the institutionalized spouse when determining his or her eligibility for Medicaid, as specified in section 1924(f)(2)(A) of the Act. Additionally, we would define ''minimum monthly maintenance needs allowance'' as the minimum amount of an institutionalized spouse's income that is protected for the community spouse.

At § 431.260(b), we would specify that either spouse may request a hearing to establish that the community spouse resource allowance (in relation to the amount of income generated by the allowance) is not adequate to raise the community spouse's income to the minimum monthly maintenance needs allowance. At § 431.260(c), we propose to provide that the State must choose to use either the income-first method or the resources-first method when determining whether to increase the community spouse resource allowance to ensure the community spouse has sufficient income to meet minimum monthly maintenance needs. We would provide that under the income-first method, the State require that all income of the institutionalized spouse that could be made available to the community spouse after subtracting the allowances specified in section 1924(d) be considered to be available before additional resources are allocated to raise the community spouse's income to meet the minimum monthly maintenance needs allowance. We propose that under the resources-first method, the State allocate additional resources to raise the community spouse's income to meet the minimum monthly maintenance needs allowance

without regard to income of the institutionalized spouse that potentially could be made available to the community spouse, but has not been made available.

III. Collection of Information Requirements

Under the Paper Work Reduction Act (PRA) of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment if Office of Management and Budget review and approval is needed because a proposed regulation imposes a collection of information requirement. However, this proposed regulation does not impose any new collection of information requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995. The proposed regulation only codifies the existing State practice of choosing whether to use income-first or resources-first, a matter we have left entirely to each State. We do not currently require States to formally notify us about which approach they take, and the proposed regulation similarly does not require this notification. Thus, the proposed rule imposes no new or different processes or information requirements on States.

IV. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, if we proceed with a subsequent document, we will respond to the major comments in the preamble to that document.

V. Regulatory Impact Statement

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and the Regulatory Flexibility Act (RFA) (September 19, 1980, 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 ($100 million or more in any one year). This proposed rule would give States an option to use either an income-first method or resources-first method when determining whether the community spouse has sufficient income to meet minimum monthly maintenance needs. This proposed rule is not a major rule because it would not impose new costs on State governments or other entities. The proposed rule only codifies existing State practices, and in no way requires States to take any action that would increase or even change their current program costs.

The RFA requires agencies to analyze options for regulatory relief of small businesses. 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 $25 million or less annually. 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. This proposed rule would have no impact on small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. The proposed rule would have no impact on the private sector. The rule would impose no requirements on State, local or tribal governments. The rule only codifies existing State practices, and thus requires no new or additional expenditures of funds by any entity, government or private.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that would impose substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. Because this proposed rule only codifies existing State practices, it would impose no requirements on governments, nor does it preempt State law or otherwise have Federalism implications.

B. Anticipated Effects

Because the proposed rule only codifies existing State practices, it will have no new effect on State governments, providers, or the Medicaid and Medicare programs. Therefore, we are not providing an impact analyses.

C. Alternative Considered

We considered imposing a requirement on all States to use the income-first methodology, or a requirement that all States use the resources-first methodology when determining whether to raise the community spouse resource allowance. However, as explained in the preamble to this proposed rule, we do not believe the statute clearly requires the use of either of those alternatives to the exclusion of the other. Therefore, we believe, in the spirit of Federalism, that we should leave to States the decision as to which alternative to use.

D. Conclusion

For these reasons, we are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

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

List of Sections Affected in 42 CFR Part 431

Grant programs-health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services propose to amend 42 CFR part 431 as follows:

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

1. The authority citation for part 431 continues to read as follows:

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

§ 431.200 [Amended]

2. Section 431.200 is amended by adding the sentence, ''This subpart also implements section 1924(e)(2)(C) of the Act, which provides for a fair hearing regarding revision of the community

spouse resource allowance.'' at the end of the section.

3. A new undesignated, centered heading, and new § 431.260 are added to read as follows:

Community Spouse Resource Allowance

§ 431.260 Fair hearings to raise the community spouse resource allowance.

(a) *Definitions.* For purposes of this section, the following definitions apply:

Community spouse means the spouse of an institutionalized individual.

Community spouse resource allowance means the amount of a couple's combined jointly and separately-owned resources, as specified in section 1924(f)(2)(A) of the Act, allocated to the community spouse and considered unavailable to the institutionalized spouse when determining his or her eligibility for Medicaid.

Institutionalized spouse means an individual who meets all of the following criteria:

(1) The individual is in a medical institution or nursing facility (or at the State's option, is eligible for home and community-based waiver services under section 1902(a)(10)(A)(ii)(VI) of the Act).

(2) The individual is likely to remain in a medical institution or nursing facility (or satisfy the State option) for at least 30 consecutive days.

(3) The individual is married to a person who is not in a medical institution or nursing facility.

Minimum monthly maintenance needs allowance means the minimum amount of income, as determined under section 1924(d)(3) of the Act, that is protected for the community spouse when determining the amount of the institutionalized spouse's income that is to be applied to the cost of care.

(b) *Request for a hearing.* Either spouse (or authorized representative) may request a hearing to establish that the community spouse resource allowance (in relation to the amount of income generated by the allowance) is not adequate to raise the community spouse's income to the minimum monthly maintenance needs allowance.

(c) *Methodology for determining an increase in the community spouse resource allowance.* For purposes of conducting a hearing to determine whether it is appropriate to raise the community spouse resource allowance (and if so by how much) a State must elect either of the following methods, which must apply to all hearings of this type under the State's Medicaid program:

(1) *Income-first method.* The State considers that all income of the institutionalized spouse that could be made available to the community spouse, after deducting the allowances specified in section 1924(d) of the Act, has been made available before additional resources are allocated to raise the community spouse's income to the minimum monthly maintenance needs allowance.

(2) *Resources-first method.* The State allocates to the community spouse additional income-producing resources to raise the community spouse's income to the minimum monthly maintenance needs allowance without first considering all income of the institutionalized spouse that could be made available to the community spouse as if it has been made available.

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

Dated: August 28, 2001.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: August 30, 2001.

Tommy G. Thompson,

Secretary.

[FR Doc. 01–22605 Filed 9–6–01; 8:45 am]

BILLING CODE 4120–01–P