

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 409, 410, 411, 414, 415, and 424

[CMS–1503–CN]

RIN 0938–AP79

Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011; Corrections

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

ACTION: Correction of proposed rule.

SUMMARY: This document corrects technical and typographical errors in the proposed rule entitled “Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011” that appeared in the July 13, 2010 **Federal Register**. The proposed rule that appeared in the July 13, 2010 **Federal Register** addressed proposed changes to the physician fee schedule and other Medicare Part B payment policies to ensure that our payment systems are updated to reflect changes in medical practice and the relative value of services.

FOR FURTHER INFORMATION CONTACT: Rebecca Cole, (410) 786–4497.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2010–15900 of July 13, 2010 (75 FR 40040), there were a number of technical errors that are identified and corrected in the Correction of Errors section below.

II. Summary of Errors

The following is a summary of the errors identified in the calendar year (CY) 2011 Physician Fee Schedule proposed rule and corrected in section III. of this notice:

A. Errors in the Preamble

On page 40043, we made inadvertent errors in the table of contents for the durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) provisions.

On page 40089, in Table 24, we made formatting errors (omitted indentations) in listing some of the cost subcategories for office expenses, and pharmaceuticals and medical materials and supplies. In addition, we inadvertently listed a cost category as “All Other Labor-Related” instead of “All Other Services”.

On page 40091, we are correcting typographical errors in our description of fixed capital.

On page 40095, we made an error in the footnotes to Table 30. The footnote numbered “N/A” was inadvertently combined with the preceding footnote (number 4).

On page 40121, in our discussion of revisions for payment for power-driven wheelchairs, we erroneously included the word “falling” in our description of the DMEPOS quality standards definition of certain power wheelchairs. In addition, on page 40122 of this discussion, we inadvertently included the word “of” in our description of the statutory provision and the methodologies used to calculate and update the purchase price of power wheelchairs.

On page 40123, in our discussion of the productivity adjustment regarding ambulatory surgical center (ASC), ambulance, clinical laboratory, and DMEPOS fee schedules, in several places we inadvertently omitted references to the DMEPOS fee schedule and erroneously referenced three payment systems instead of four payment systems.

On page 40136, in Table 39, in the listing of the primary care services Healthcare Common Procedure Coding System (HCPCS) codes that are eligible for CY 2011 primary care incentive payments, we inadvertently omitted HCPCS code 99213.

On page 40158, in Table 46, which is an example of the ASP price substitution timeframe, we inadvertently included language that should have appeared in the fourth column, (Q1–11), in the third column, (Q4–10).

On page 40180, in our discussion of the four disease modules covered by the proposed PQRI group practice reporting option I (GPRO I) measures, we inadvertently omitted hypertension from the list of disease modules.

On page 40186, in our discussion of the proposed Physician Quality Reporting Initiative (PQRI) measures, we inadvertently include measure #135 (Chronic Kidney Disease (CKD): Influenza Immunization) in Table 51 which lists the 2010 PQRI quality measures that are not proposed for inclusion in the 2011 PQRI quality measures. In addition, we also made errors in referencing the number of 2010 measures that will be retained in 2011. On pages 40189 and 40194, we also erred by omitting measure #135 from Table 52, which lists the proposed 2011 quality measure from the 2010 PQRI quality measures set and from Table 58,

which lists the proposed 2011 CKD Measures Group.

On page 40190, in Table 52, regarding the NQF Measure No., we inadvertently listed the wrong NQF measure numbers for two of the proposed PQRI measures (measure #201 Ischemic Vascular Disease (IVD): Blood Pressure Management Control and measure #202 Ischemic Vascular Disease (IVD): Complete Lipid Profile).

On page 40193, in our listing (Table 56) of the 2011 PQRI quality measures for electronic health record (EHR) reporting, we made an error in the table heading.

On pages 40192 and 40197, in Tables 54 and 70 regarding the new individual quality measures proposed for 2011 and the proposed 2011 asthma measures group, we made errors in the titles of the two of the asthma-related measures.

On page 40199, in our discussion of the statutory requirements for the additional incentive payments authorized under section 1848(m)(7) of the Act, we inadvertently omitted some of the language describing the requirements.

On page 40217, we made an error in the language regarding the authority of the competitive bidding implementation contractor (CBIC).

On page 40243, in our discussion of the off-the-shelf (OTS) orthotics exemption, we inadvertently omitted references to hospitals. We also made an error in the discussion of access to OTS orthotics.

On page 40244, in the DMEPOS diabetic testing supplies section, we inadvertently omitted the word “not” from our discussion of the provisions impact on suppliers and whether suppliers require beneficiaries to switch brands.

On pages 40078, 40081, 40095, 40122, 40124, 40144, 40154 through 40156, 40167 through 40169, 40199, 40200, 40207, and 40225, we are correcting typographical errors which include punctuation, indentation of text, separation of lines of text, and the numbering of section headings and tables.

B. Errors in the Regulations Text

On page 40259, we are correcting punctuation errors in § 414.904 regarding the average sales price as the basis for payment.

III. Correction of Errors

In FR Doc. 2010–15900 of July 13, 2010 (75 FR 40040), make the following corrections:

A. Corrections to the Preamble

1. On page 40043, second and third columns, lines 40 through 76 and 1 through 21, the table of contents entries that begin with the listing “G. DMEPOS Competitive Bidding Program Issues” and end with the listing “(12) Effect of Contract Termination” are corrected to read as follows:

G. DMEPOS Provisions

1. Medicare Durable Medical

Equipment, Prosthetics, Orthotics, and Supplies DMEPOS Competitive Bidding Program (CBP)

- a. Legislative and Regulatory History of DMEPOS CBP
- b. Implementation of a National Mail Order DMEPOS Competitive Bidding Program (CBP) for Diabetic Testing Supplies
 - (1) National Mail Order DMEPOS CBP
 - (2) DMEPOS CBP for National Mail Order Diabetic Supplies
 - (3) Overview of Proposed Rule
 - (4) Future Competitions of Diabetic Testing Supplies
 - (5) Definition of Mail Order Item
 - (6) Special Rule in the Case of Competition for Diabetic Testing Strips
 - (7) Anti-Switching Rule in Case of Competition for Diabetic Test Strips
- c. Off-the-Shelf (OTS) Orthotics Exemption
- d. Grandfathering Rules Resulting in Additional Payments to Contract Suppliers Under the DMEPOS Competitive Bidding Program (CBP)

e. Appeals Process

- (1) Purpose and Definitions: (§ 414.402)
- (2) Applicability
- (3) Contract Termination
- (4) Notice of Termination
- (5) Corrective Action Plan
- (6) Right to Request a Hearing by the CBIC Hearing Officer (HO)
- (7) Scheduling of the Hearing
- (8) Burden of Proof
- (9) Role of the Hearing Officer (HO)
- (10) CMS’s Final Determination
- (11) Effective Date of the Contract Termination
- (12) Effect of Contract Termination

2. Changes to Payment Rules for Oxygen and Oxygen Equipment

- a. Background
- b. Furnishing Oxygen Equipment After the 36-Month Rental Period (Cap)
- c. Furnishing Oxygen Equipment During the 36-Month Rental Period (Cap)

2. On page 40078—

a. Top third of the page, third column, partial paragraph, line 24, the table reference “Table 20” is corrected to read “Table 20A.”

b. Middle of the page, in the table title, the table number “20” is corrected to read “20A.”

3. On page 40080, top of the page—
a. Third column, partial paragraph, last line, the table reference “Table 20” is corrected to read “Table 20B”.

b. Table title, the table number “20” is corrected to read “20B”.

4. On page 40081—

a. Top half of the page, in the table title, the table number “TABLE 20” is corrected to read “TABLE 20B”.

b. Lower half of the page, second column, last paragraph, ninth line, the table reference “Table 20” is corrected to read “Table 20B”.

5. On page 40089, in Table 24, first column (Cost category), the entries for Office Expenses, and Pharmaceuticals and Medical Materials and Supplies are corrected to read as follows:

Cost category
Office Expenses
Utilities
Chemicals
Paper
Rubber & Plastics
Telephone
Postage
All Other Services
Fixed Capital
Moveable Capital
Pharmaceuticals and Medical Materials and Supplies
Pharmaceuticals
Medical Materials and Supplies

6. On page 40091, first column, seventh full paragraph, line 3, the phrase “building leases and depreciation.” is corrected to read “building leases, mortgage interest, and depreciation on medical buildings.”

7. On page 40095, in Table 30, the footnote that begins with the phrase “⁴ Derived from a CMS survey” is corrected to read as follows:

“⁴ Derived from a CMS survey of several major commercial insurers.

^{N/A} Productivity is factored into the MEI categories as an adjustment to the price variables; therefore, no explicit weight exists for productivity in the MEI.”

8. On page 40121, second column, first full paragraph, line 22, the phrase, “power wheelchairs falling” is corrected to read “power wheelchairs”.

9. On page 40122—

a. First column, first partial paragraph, line 10, the phrase “subsequently update of” is corrected to read “subsequently update”.

b. Second column, last partial paragraph, the phrase “The ACAAct” is corrected to read “The ACA.”

10. On page 40123—

a. Top of the page, first column, first paragraph, lines 8 and 9, the phrase

“and the clinical laboratory fee schedule (CLFS)” is corrected to read “the clinical laboratory fee schedule (CLFS) and the DMEPOS fee schedule”.

b. Lower half of the page—

(1) First column—

(a) First paragraph, last line, the phrase “and the CLFS.” is corrected to read “the CLFS and the DMEPOS fee schedule.”

(b) Third paragraph, line 1, the phrase “all three payment” is corrected to read “all four payment”.

(2) Second column, last paragraph—

(a) Line 3, the phrase “the three payment” is corrected to read “the four payment”.

(b) Last line, the phrase “ASCs, the AFS, and the CLFS” is corrected to read “ASCs, the AFS, the CLFS, and the DMEPOS fee schedule”.

(3) Third column, first partial paragraph, line 11, “the AFS and CLFS” is corrected to read “AFS, CLFS, and DMEPOS fee schedule”.

11. On page 40124, last portion of the page, third column, partial paragraph, first line, the parenthetical phrase “(United States city average minus,” is corrected to read “(United States city average) minus.”

12. On page 40136—

a. Middle third of the page, first column, in the section heading, the section number “4” is corrected to read “3”.

b. Lower third of the page, in Table 39, the table is corrected by adding the following entry:

CPT codes	Description
99213	Level 3 established patient office or other outpatient visit.

13. On page 40144, third column, first paragraph, line 1, the reference “Section VI.H” is corrected to read “Section VI.G.”

14. On page 40152, lower half of the page, third column, partial paragraph, lines 12 and 13, the phrase “services furnished and using” is corrected to read “services furnished using”.

15. On page 40154, lower half of the page, second column, first full paragraph, line 4, the phrase “for example:.” is corrected to read “for example:”.

16. On page 40155, second column, last paragraph, line 12, the phrase “biological under section 1861(s)(2)(A)” is corrected to read “biologicals under section 1861(s)(2)(A) of the Act”.

17. On page 40156, third column, last paragraph, lines 4 and 5, the phrase “some concerns using the volume-weighted AMP” is corrected to read

“some concern about using this volume-weighted AMP”.

18. On page 40158, middle of the page, Table 46, fourth column, lines 3 through 8, the entry “CMS calculates ASP payment limits for Q1. Compares calculated payment limits to OIG substitute prices. Published Q1–11 prices that may include OIG substitute prices.” is corrected by moving the entry to the fifth column.

19. On page 40167, second column—

a. Before the first full paragraph, line 1, in the section heading, the section number, “i.” is corrected to read “h.”.

b. Before the third full paragraph line 1, in the section heading, the section number, “j.” is corrected to read “i.”.

20. On page 40168—

a. First column, before the first full paragraph, line 1, in the section heading, the section number, “k.” is corrected to read “j.”.

b. Second column—

(1) Before the third full paragraph, in the section heading, line 1, the section number, “l.” is corrected to read “k.”.

(2) Third full paragraph, line 9, the figure “1057057” is corrected to read “1.057057”.

(3) Fourth full paragraph, line 5, the phrase “identified EPs (EPs)” is corrected to read “identified eligible professionals (EPs)”.

21. On page 40169, third column, first partial paragraph, lines 7 and 8, the reference “section G.1.d.” is corrected to read “section VI.F.1.d.”

22. On page 40180, second column, second full paragraph, lines 3 and 4, the phrase “heart failure; and preventive care services.” is corrected to read “heart failure; hypertension; and preventive care services.”.

23. On page 40186—

a. Top quarter of the page, first column, second partial paragraph, line

1, the figure “198” is corrected to read “199.”

b. Second quarter of the page, Table 51, the table is corrected by removing the entry for “Measure No. 135”.

c. Third quarter of the page—

(1) First column, first full paragraph—
(a) Line 3, the figure “5” is corrected to read “4”.

(b) Line 8, the phrase “PQRI measures #135, #136, and #139” is corrected to read “PQRI measures #136 and #139”.

(2) Second column—

(a) First full paragraph—
(1) Line 1, the figure “170” is corrected to read “171”.

(2) Line 3, the figure “170” is corrected to read “171”.

(b) First partial paragraph, line 1, the figure “125” is corrected to read “126”.

24. On pages 40186 through 40190, in Table 52, the table is corrected by—

(a) Adding the following entry in numerical order:

Measure No.	Measure title	Measure developer	NQF Measure No.
135	Chronic Kidney Disease (CKD): Influenza Immunization	AMA-PCPI	AQA

(b) Revising the fourth column (NQF measure no.) for the following entries:

Measure No.	Measure title	Measure developer	NQF Measure No.
201	Ischemic Vascular Disease (IVD): Blood Pressure Management Control.	NCQA	0073
202	Ischemic Vascular Disease (IVD): Complete Lipid Profile	NCQA	0075

25. On page 40192, lower half of the page, Table 54, first column,

a. Lines 35 and 36, the measure title “Asthma: Assessment of Asthma Risk—Emergency Department/Inpatient Setting” is corrected to read “Asthma—Tobacco Use Screening—Ambulatory Setting”.

b. Lines 37 and 38, the measure title “Asthma: Discharge Plan—Emergency

Department/Inpatient Setting” is corrected to read “Asthma—Tobacco Use Intervention—Ambulatory Screening”.

26. On page 40193, third quarter of the page, Table 56, the table title, “TABLE 56: PROPOSED 2011 MEDICARE ARRA—HITECH MEASURES AVAILABLE FOR EHR—BASED REPORTING” is corrected to

read “TABLE 56—ADDITIONAL PROPOSED MEASURES AVAILABLE FOR EHR—BASED REPORTING IN 2011”.

27. On page 40194, lower half of the page, Table 58, the table is corrected by adding the following entry in numerical order:

Measure No.	Measure title	NQF Measure No.	Measure developer
135	Chronic Kidney Disease (CKD): Influenza Immunization	AQA adopted	AMA-PCPI

28. On page 40197, middle of the page, Table 70, second column—

a. Lines 3 and 4, the measure title “Assessment of Asthma Risk—Emergency Department/Inpatient Setting” is corrected to read “Asthma—Tobacco Use Screening—Ambulatory Setting”.

b. Line 5, the measure title “Asthma: Discharge Plan—Emergency Department/Inpatient Setting” is corrected to read “Asthma—Tobacco Use Intervention—Ambulatory Screening”.

29. On page 40199—

a. First column, last bulleted paragraph, last line, the phrase “MOCP

for such year” is corrected to read “MOCP practice assessment for such year”.

b. Second column, second numbered paragraph (1), the paragraph “(1) In a form and manner specified by the Secretary, that the EP has successfully completed a qualified MOCP practice

assessment for such year;" is corrected to read "(1) In a form and manner specified by the Secretary, that the EP more frequently than is required to qualify for or maintain board certification status, participates in the MOCP for a year and successfully completes a qualified MOCP practice assessment for such year;"

c. Third column, first bulleted paragraph, line 20, the phrase "her or participate" is corrected to read "EHR or participate".

30. On page 40200, third column, fifth bulleted paragraph that begins with the phrase "The board has signed" is corrected to read as follows:

• The board has signed documentation from the EP that the EP wishes to have their information released to CMS;

• Information from the experience of care survey;"

31. On page 40207, third column, before the third full paragraph, in the section heading, line 1, the section number "(2)" is corrected to read "(ii)".

32. On page 40217, first column, fifth full paragraph, lines 8 through 10, the phrase "independent determination from the CBIC's recommendation to terminate" is corrected to read "independent recommendation whether to terminate".

33. On page 40225, lower third of the page, third column, before the last paragraph, in the section heading, the section number "3." is corrected to read "2."

34. On page 40243—

a. Second column—

(1) Second full paragraph, lines 5 through 7, the phrase "to physicians or other practitioners (as defined by the Secretary)" is corrected to read "to physicians, other practitioners (as defined by the Secretary), or hospitals".

(2) Last paragraph—

(a) Lines 2 and 3, the phrase "physicians and other providers" is corrected to read "physicians, other practitioners, and hospitals".

(b) Lines 3 and 4, the phrase, "allow physicians to continue" is corrected to read "allow physicians, other practitioners, and hospitals to continue".

b. Third column, first partial paragraph, lines 4 through 6, the phrase, "continued access to OTS items for beneficiaries while being seen in their physician's office." is corrected to read "access to these items for beneficiaries when these items are furnished by physicians, other practitioners, and hospitals to their own patients."

35. On page 40244, second column, first full paragraph—

a. Line 5, the phrase "switching beneficiaries" is corrected to read "incentivizing beneficiaries to switch".

b. Line 19, the phrase, "do require beneficiaries" is corrected to "do not require beneficiaries".

B. Corrections to the Regulations Text

1. On page 40259, second column, first partial paragraph § 414.904(d)(3)(iii)(A)—

a. Line 3, the phrase "quarters; immediately preceding" is corrected to read "quarters, immediately preceding".

b. Last line, the phrase "apply; and," is corrected to read "apply; and".

IV. Waiver of 60-Day Comment Period

We ordinarily permit a 60-day comment period on a notice of proposed rulemaking in the **Federal Register**, as provided in section 1871(b)(1) of the Act. However, this period may be shortened, as provided under section 1871(b)(2)(C) of the Act, when the Secretary finds good cause that a 60-day comment period would be impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued.

The changes made by this correction notice do not constitute agency rulemaking, and therefore the 60-day comment period does not apply. This correction notice merely corrects typographical and technical errors in the CY 2011 Physician Fee Schedule proposed rule and does not make substantive changes to the CY 2011 Physician Fee Schedule proposed rule appearing in the July 13, 2010 **Federal Register** that would require additional time on which to comment. Instead, this correction notice is intended to ensure the accuracy of the CY 2011 Physician Fee Schedule proposed rule. To the extent that the 60-day comment period does apply, we find good cause to shorten the period for the reasons set forth above.

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

Dated: August 23, 2010.

Dawn L. Smalls,

Executive Secretary to the Department.

[FR Doc. 2010–21255 Filed 8–23–10; 4:15 pm]

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 213

[Docket No. FRA–2009–0007, Notice No. 1]

RIN 2130–AC01

Track Safety Standards; Concrete Crossties

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to amend the Federal Track Safety Standards to promote the safety of railroad operations over track constructed with concrete crossties. In particular, FRA is proposing specific requirements for effective concrete crossties, for rail fastening systems connected to concrete crossties, and for automated inspections of track constructed with concrete crossties. In addition, FRA is proposing to remove the provision on preemptive effect.

DATES: Written comments must be received by October 12, 2010. Comments received after that date will be considered to the extent possible without incurring additional delay or expense.

FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However if FRA receives a specific request for a public, oral hearing prior to September 27, 2010, one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to this Docket No. FRA–2009–0007, Notice No. 1 may be submitted by any of the following methods:

• *Federal eRulemaking Portal:* Go to <http://www.Regulations.gov>. Follow the online instructions for submitting comments.

• *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

• *Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, West Building, Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

• *Fax:* 202–493–2251.

Instructions: All submissions must include the agency name and docket