DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 413

[CMS–1469–P2]

RIN 0938–AL20

Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities—Update

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

ACTION: Proposed rule.

SUMMARY: In this proposed rule, we are considering an adjustment to the annual update for skilled nursing facilities (SNFs) that would account for forecast errors. In addition, we are proposing to make a technical correction to correct a misspelling in existing regulation text. This proposed rule supplements the proposed rule that we published previously in the **Federal Register** on May 16, 2003 (68 FR 26758), which included proposed updates to the payment rates used under the prospective payment system (PPS) for SNFs, for fiscal year (FY) 2004, as required by section 1888(e) of the Social Security Act (the Act), as amended by the Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (BBRA) and the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA), relating to Medicare payments and consolidated billing for SNFs.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on July 7, 2003 (*see* section VI of this proposed rule for a discussion of the comment period).

ADDRESSES: Mail written comments (one original and three copies) to the following address:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1469–P2, P.O. Box 8013, Baltimore, MD 21244–8013.

If you prefer, you may deliver your written comments (one original and three copies) to one of the following addresses:

Hubert H. Humphrey Building, Room 443–G, 200 Independence Avenue, SW., Washington, DC 20201, or

Centers for Medicare & Medicaid Services, Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–8013.

Comments mailed to those addresses designated for courier delivery may be delayed and could be considered late. Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. Please refer to file code CMS–1469–P2 on each comment. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of this document, in Room C5–12–08 of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland, Monday through Friday of each week from 8:30 a.m. to 4 p.m. Please call (410) 786–7197 to make an appointment to view comments.

FOR FURTHER INFORMATION CONTACT: Stephen Heffler, (410) 786–1211 (for information related to the SNF Market Basket Index and forecast error adjustments). Bill Ullman, (410) 786–5667, and Sheila Lambowitz, (410) 786–7605 (for general information).

SUPPLEMENTARY INFORMATION: To assist readers in referencing sections contained in this document, we are providing the following Table of Contents.

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I. Background and Purpose of this Proposed Rule

Annual updates to the prospective payment system (PPS) rates are required by section 1888(e) of the Social Security Act (the Act), as amended by the Medicare, Medicaid, and State Children's Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (BBRA, Pub. L. 106–113), and the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA, Pub. L. 106–554), relating to Medicare payments and consolidated billing for SNFs.

On May 16, 2003, we published in the **Federal Register** a proposed rule (68 FR 26758) in connection with the Medicare PPS for skilled nursing facilities (SNFs). The proposed rule included updated payment rates for fiscal year (FY) 2004, as well as a number of proposed revisions and technical corrections to the associated regulations. We are now publishing this supplemental proposed rule in order to propose an additional possible change, concerning the regulations in 42 CFR 413.337(d)(2) for determining the annual update to the SNF payment rates. Specifically, we are considering an adjustment that would account for forecast error. In addition, we propose to make a technical correction to correct a misspelling in the existing regulation text at § 413.345.

We note that the issue of establishing an adjustment to account for forecast error is one that we have considered previously. To date, we have not implemented such an adjustment, because we were concerned that it might tend to detract from the prospective nature of the SNF payment system. Additionally, we note that, in the past, our evaluation of a possible adjustment to account for forecast error has not taken place in isolation, but rather, within the broader context of considering the possibility of developing a SNF-specific update framework, which would keep track of the various factors that affect costs and payment per case. This would include not only the market basket, but also other factors as well, such as productivity changes, intensity changes, and adjustment for case-mix creep. For example, the May 12, 1998 interim final rule on the SNF PPS (63 FR 26293) discussed the possibility of adopting a forecast error adjustment, similar to the one employed in the existing update framework for the inpatient hospital PPS:

> We are considering a mechanism to adjust future SNF PPS rates for forecast errors. * * * In any given year, there may be unanticipated price fluctuations that may result in differences between the actual increases in prices faced by SNFs and the forecast used in calculating the update factors.

We further noted that if such a mechanism were adopted,

> * * * an adjustment would be made only if the forecasted market basket percentage change for any year differs from the actual percentage change by 0.25 percentage points or more. There would be a 2-year lag between the forecast and the measurement of the forecast error. Thus, for example, we would adjust for an error in forecasting the 1997 market basket percentage used to compute the PPS rates effective with this interim final

rule through an adjustment to the fiscal year 1999 update to the SNF PPS rates.

As noted in the May 12, 1998 interim final rule, the existing update framework for the inpatient hospital capital PPS already includes an adjustment to account for forecast error (see the regulations at § 412.308(c)(1)(ii)). The update framework for the inpatient hospital operating PPS includes a similar forecast error adjustment as well. However, the latter framework serves as the basis for making a recommendation to the Congress, which then establishes the actual update amount for the operating PPS through legislation. In the context of discussing a possible update framework for the SNF PPS in the FY 2002 proposed rule published on May 10, 2001 (66 FR 24018 through 24019), we observed that in this existing update framework,

> a forecast error adjustment has typically been included, to reflect that the updates are set prospectively and some degree of forecast error is inevitable. In the case of the inpatient hospital PPS, this adjustment is made on a two-year lag and only if the error exceeds a defined threshold (0.25 percentage points).

Further, in the FY 2002 final rule published on July 31, 2001 (66 FR 39586), one commenter specifically suggested establishing a mechanism in the SNF PPS to account for forecast error. In response, we noted that the development of a SNF-specific update framework ''* * * would give us the ability to factor in a forecast error adjustment in our recommendation for an update to SNF payments.''

As the preceding discussion indicates, our consideration of adopting a mechanism for making forecast error adjustments has, to date, occurred exclusively within the broader context of developing a SNF-specific update framework, where the end result would be solely a recommendation to the Congress, rather than an actual adjustment to the payment rates. However, it might also be possible to establish a forecast error adjustment mechanism independently as a separate initiative, as we discuss in the following sections of this proposed rule.

II. Proposed Adjustment to the Annual Increase in the SNF Market Basket Index Amount to Account for Forecast Error

A. Background

Since the implementation of the SNF PPS in July 1998, annual updates to the national PPS rate have been based on the forecasted percent change in the SNF market basket for the upcoming fiscal year. The SNF market basket was described in detail in the interim final rule that we published on May 12, 1998 (63 FR 26289), and in the final rule published on July 31, 2001 (65 FR 39581). The use of a forecasted market basket percent change is consistent with section 1888(e)(5) of the Act, which directs us to establish a market basket index for SNFs that ''* * * reflects changes over time in the prices of an appropriate mix of goods and services'' included in covered SNF services, and to calculate the percentage change in that index from the midpoint of the prior fiscal year to the midpoint of the current one. It is also consistent with the methodology used for other prospective payment systems, most notably the inpatient hospital PPS.

The forecast of the SNF market basket percent change for the upcoming fiscal year is based on data that are available when the final rule is developed. This generally means that historical data that are available through the first quarter of the current calendar year are used to develop forecasts for the upcoming fiscal year. For example, the SNF market basket percent change for the FY 2003 payment update was forecast in June 2002, with historical data available through the first quarter of 2002. We purchase the forecasts of the individual price series in the SNF market basket from a leading macroeconometric forecasting firm, Global Insights, Inc. We define the SNF market basket forecast error as the difference in the forecasted percent change in the SNF market basket and the actual percent change in the SNF market basket for a given period, generally the fiscal year.

Upon further consideration of the language of the statute and consistent with the use of a forecast to calculate the market basket percentage under section 1888(e)(5) of the Act, we believe that the statute provides us with authority to make adjustments to the update to the SNF per diem amount computed under section 1888(e)(4)(E)(ii)(IV) of the Act to adjust for differences in the forecasted percent change in the SNF market basket and the actual percent change in the SNF market basket, determined on the basis of later acquired, actual data. Pursuant to section 1888(e)(4)(E)(ii)(IV) of the Act, the SNF market basket percentage calculated by the Secretary is used to update the per diem rate computed for the prior fiscal year in order to determine the unadjusted Federal per diem rates to be applied during the upcoming fiscal year. Consistent with section 1888(e)(4)(H)(i) of the Act, before August 1, the Secretary shall publish in the **Federal Register** ''the unadjusted Federal per diem rates to be applied to days of covered skilled nursing facility services furnished during the fiscal year.'' There is, however, no requirement that this published figure be used for purposes of computing the payment rate for the following fiscal year. Rather, the annual update to the SNF per diem rate is equal to ''the rate computed for the previous fiscal year increased by the skilled nursing facility market basket percentage change for the fiscal year involved'' (section 1888(e)(4)(E)(ii)(IV) of the Act). Accordingly, we believe the language of these provisions supports an interpretation of the Act in which the payment rate for a fiscal year can be computed again after the end of a fiscal year to reflect later acquired, actual data regarding changes in the market basket, and that this recomputed rate could then be used in determining updates to the SNF payment rate for the subsequent fiscal year. Because the payment rates to be applied during a fiscal year are the rates that are published in the **Federal Register** by the August 1 preceding the start of the fiscal year, (*see* section 1888(e)(4)(H)(i) of the Act), any such adjustments would be made for FY 2004 and subsequent years.

B. Possible Approaches

We believe that establishing an adjustment for forecast error in prior years could help to further ensure that the payment rates appropriately reflect changes over time in the price of goods and services. However, it is important to consider certain additional factors in evaluating the feasibility of such an approach. In order to ensure that any such adjustment reflects actual market conditions accurately, it is absolutely essential that the adjustment be applied uniformly—not only in those instances where the forecasted percent change is lower than the actual percent change (as has been the case up to this point under the SNF PPS), but also in those instances where the forecasted percent change is higher than the actual percent change.

We note that the latter circumstance would result in SNFs receiving lower than expected payments. In fact, it is even possible that, under a certain set of circumstances (for example, a year in which the law specifies an adjustment of the SNF market basket percentage change minus one percentage point, in combination with a negative forecast error correction and low price inflation), it could actually yield a net *decrease* in payment rates.

This possibility underscores a potential disadvantage of establishing a forecast error adjustment, in that it would inevitably introduce an element

of uncertainty regarding the amount of future updates. This uncertainty, in turn, would tend to detract from the prospective nature of the SNF payment system. In fact, the final rule that we published on January 3, 1984 at the inception of the prospective payment system for inpatient hospital services (49 FR 252) cited those very concerns in declining to adopt a suggestion to establish a forecast error adjustment at that point:

> One of the purposes of the prospective payment system is that hospitals will know in advance of each discharge the amount of Medicare payment. Using the latest available market basket projections prior to the beginning of a particular Federal fiscal year is consistent with this concept. To permit retroactive adjustments of the market basket inflation rates would erode the prospective nature of the system. We believe this would introduce an element of uncertainty incompatible with the very purpose of the prospective payment system. Therefore, we have not adopted the suggestion that the rates be adjusted if market basket projections prove to be inaccurate.

Thus, while there are considerations that argue in favor of establishing an adjustment to account for forecast error, we believe that such a change also raises a number of concerns. Accordingly, we seek comments on the advisability of pursuing this approach.

Further, along with the basic question of whether to adopt a forecast error adjustment, it is also necessary to consider other related issues involving the precise nature of any such adjustment. For example, as further discussed in section II.D of this proposed rule, we are considering the inclusion of a threshold under which no forecast error adjustment would be made if the forecasted percent change is within 0.25 percentage points of the actual percent change (as is currently the case under the inpatient capital PPS). However, it would also be possible to set a different threshold, such as the 0.3 percentage point level that was used in updating the SNF routine cost limits under the reasonable cost payment methodology that preceded the SNF PPS. Alternatively, we could even use a significantly higher threshold in this context, such as a full percentage point.

In addition, we are considering that the initial forecast error adjustment would occur in FY 2004, and would take into account the cumulative forecast error between FYs 2000 and 2002, that is, since the beginning of the SNF PPS. We would apply the forecast error threshold of 0.25 percentage points to the forecast error calculation for the entire cumulative forecast error for FYs 2000 through 2002 instead of applying it to each year individually. We would do this because, in this calculation, the base payment rate is being adjusted in FY 2004 to bring the payment system in line with the actual experience. Alternatively, we could adopt an approach under which the initial adjustment takes into account only the forecast error for periods beginning after the effective date of the FY 2004 final rule. Under this alternative approach, the initial adjustment would not occur until FY 2006, and would take into account the forecast error from FY 2004. Accordingly, we invite comments not only on whether to adopt an adjustment to account for forecast error, but also on the specific characteristics of any such adjustment. The following describes the methodology that would be used if we considered an initial, cumulative forecast error adjustment provision.

C. SNF Market Basket Forecast Error for FYs 2000 Through 2002

The initial SNF market basket forecasted update under the SNF PPS was for FY 2000 (3.1 percent), followed by forecasted updates for FY 2001 (3.161 percent), FY 2002 (3.3 percent), and FY 2003 (3.1 percent). Historical market basket data are now available through FY 2002; therefore, we can calculate the cumulative SNF market basket forecast error for FYs 2000 through 2002, as shown in Table A. Historical data for the FY 2003 SNF market basket increase will not be available until early in 2004.

TABLE A.—CUMULATIVE SNF MARKET BASKET FORECAST ERROR FOR FYS 2000 THROUGH 2002

	Forecasted SNF market basket percent change	Actual SNF market basket percent change
FY 2000	3.1	4.1
FY 2001	3.161	5.1
FY 2002	3.3	3.4
Cumulative Growth FY 2000 through 2002	9.869	13.129
Cumulative SNF Market Basket Forecast Error	.....	3.26

Note: The FY 2000 and FY 2001 SNF market basket percent changes are based on the 1992-based SNF market basket. The FY 2002 SNF market basket percent changes are based on the 1997-based SNF market basket.

As indicated in Table A, the cumulative SNF market basket forecast error from FYs 2000 through 2002 is 3.26 percent. This figure is calculated by taking the difference in the cumulative forecasted SNF market basket increase over this period (1.031*1.03161*1.033=1.09869) and the cumulative actual SNF market basket increase (1.041*1.051*1.034=1.13129). As mentioned previously in section II.B of this proposed rule, we applied the forecast error threshold of 0.25 percentage points to the forecast error calculation for the entire cumulative forecast error for FYs 2000 through 2002 instead of applying it to each year individually. We did this because, in this calculation, the base payment rate is being adjusted in FY 2004 to bring the payment system in line with the actual experience. The difference between these two cumulative increases equals 0.0326 (1.13129 minus 1.09869). This means that the SNF market basket was under-forecast by 3.26 percent for the period FY 2000 through 2002. Similarly, the base payment rate computed for FY 2003 was 3.26 percent lower than it would have been if actual data had been used.

The major reason that the SNF market basket forecast was under-forecast during this period was that wages and benefits for nursing home workers increased more rapidly than expected. This faster-than-expected increase occurred primarily because the health sector continued to grow rapidly despite the economic downturn, and also because of the impacts of nursing staff shortages and other conditions generally affecting the health care market.

In order to illustrate the potential impact that an initial, cumulative forecast error adjustment provision would have on payment rates, we are reproducing the original figures from Tables 1 and 2 in the FY 2004 SNF PPS proposed rule that appeared in the **Federal Register** on May 16, 2003 (68 FR 26761). The Federal rates in that proposed rule reflect an update to the rates that we published in the July 31, 2002 **Federal Register** (67 FR 49798) equal to the full change in the SNF market basket index. According to our interpretation of section 1888(e)(4)(E)(ii)(IV) of the Act, we would update the SNF PPS national base payment rate for FY 2003 by the cumulative forecast error amount. Thus, we would increase the SNF PPS national base payment rate for FY 2003 by 3.26 percent. We would then update the rate by adjusting the revised rate by the full SNF market basket index (see the May 16, 2003 proposed rule (68 FR 26775) for an explanation of how we calculate the full SNF market basket index). The FY 2004 market basket increase factor is 2.9 percent. We are inviting comments on including an

adjustment to the SNF PPS base payment rate to account for the cumulative forecast error between FY 2000 and FY 2002. Using this approach, we would update the FY 2003 SNF PPS national payment rate by an additional 3.26 percent above the 2.9 percent SNF market basket increase currently forecasted for FY 2004. For a complete description of the multi-step process, see the May 12, 1998 interim final rule (63 FR 26252).

As explained in section II.D, we have also included additional figures that are adjusted to reflect a 3.26 percent forecast error adjustment. The following describes the process we could consider using if we apply a forecast error adjustment only in future years.

TABLE 1.—UNADJUSTED FEDERAL RATE PER DIEM URBAN

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Original Per Diem Amount without Forecast Error Adjustment	$125.15	$94.27	$12.42	$63.87
Revised Per Diem Amount with Forecast Error Adjustment	129.23	97.34	12.82	65.96

TABLE 2.—UNADJUSTED FEDERAL RATE PER DIEM RURAL

Rate component	Nursing—case-mix	Therapy—case-mix	Therapy—non-case-mix	Non-case-mix
Original Per Diem Amount without Forecast Error Adjustment	$119.57	$108.70	$13.26	$65.06
Revised Per Diem Amount with Forecast Error Adjustment	123.47	112.24	13.69	67.18

D. Process for Adjusting for SNF Market Basket Forecast Error

We are also inviting comments on applying the forecast error adjustment in future years, by adjusting the SNF PPS base payment rate annually for any forecast error in the SNF market basket. This process would involve making a one-time adjustment for the forecast error from the most recently available fiscal year. For example, for the FY 2005 update, we could adjust for forecast error for FY 2003 only; FY 2004 information would not yet be final. Similarly, for the FY 2006 update, we could adjust for the FY 2004 forecast error. This process creates what is essentially a 2-year lag on the forecast error correction, but is as timely as possible given the availability of historical data.

The method of adjusting for annual forecast error would be similar to that described above for the FY 2004 update. We could adjust for forecast error in a fiscal year by adjusting the SNF PPS national base payment by the forecast error amount. For example, if the FY 2004 SNF market basket were over-forecast by 0.5 percent, we would reduce the SNF PPS national base payment rate in FY 2006 by 0.5 percent. Accordingly, this is a prospective adjustment and is consistent with the methodology currently employed under the inpatient hospital capital PPS, and with the update framework that we discussed in the FY 2002 SNF PPS proposed rule published on May 10, 2001 (66 FR 24016) and FY 2002 final rule published on July 31, 2001 (66 FR 39587).

In addition, as mentioned previously in section II.B, we are considering adopting a threshold under which no forecast error adjustment would be made if the forecasted percent change is within a defined range of the actual percent change. As noted previously, the inpatient hospital capital PPS already uses a threshold of 0.25 percentage points. We are soliciting comments on what threshold would be appropriate in the context of the SNF PPS. This methodology is again consistent with the methodology used under the inpatient capital PPS, and reflects the concept that there is a certain level of imprecision associated with measuring statistics. We invite comments on the use of this standard.

III. Solicitation of Comments on Quality of Care Efforts Under SNF PPS

We noted above that a major reason the SNF market basket forecast was under-forecasted for previous periods was that wages and benefits for SNF workers increased more rapidly than expected. Part of this wage increase may have been caused by nursing staff shortages which, coupled with the increased demand for services during this period, drove up wages not only in SNFs but in the entire health sector. Since the factors that drive costs in SNFs can also relate to nursing home quality of care, we believe it is important to reflect appropriately the market conditions facing SNFs.

We have focused significant resources in the past two years on improving the quality of health care provided by Medicare providers. Our efforts with respect to nursing home quality have been particularly intensive. In December 2001, we announced a Nursing Home Quality Initiative. This initiative is part of the goal of the Department of Health and Human Services to continue to improve the quality of health care for all Americans, including those covered by the Medicare and Medicaid programs. After a successful six-State pilot in the Spring of 2002, we released quality of care information on November 12, 2002 for nearly 17,000 nursing homes in all 50 States, the District of Columbia, and some U.S. Territories. Consumers can view these measures and other helpful information at *http://www.medicare.gov.*

The Nursing Home Quality Initiative is a four-prong effort that consists of: regulation and enforcement efforts conducted by State survey agencies and by us; improved consumer information on the quality of care in nursing homes; continual, community-based quality improvement programs designed to help nursing homes improve their quality of care; and collaboration and partnership to utilize available knowledge and resources most effectively. State pilot in the Spring of 2002, we released quality of care information on November 12, 2002 for nearly 17,000 nursing homes in all 50 States, the District of Columbia, and some U.S. Territories. Consumers can view these measures and other helpful information at *http://www.medicare.gov.*

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to utilize available knowledge and resources most effectively.

To the extent that market basket adjustments to the SNF PPS result in more appropriate payments to SNFs in future years, it is expected that a majority of the additional payments made in the future to SNFs will be used for direct care services to nursing home residents. Further, we expect that SNFs will use such payments to continue to engage in proactive, quality improvement activities and programs. Accordingly, we invite comments on how SNFs will account for these direct care funds and how CMS may use its authority under section 1888 of the Act or elsewhere to further promote quality improvement efforts among SNFs. We also invite comments on available legal authority, as well as the advisability of refining and structuring payments under the SNF PPS to promote additional caregiver staffing at SNFs.

IV. Provisions of the Proposed Rule

In this proposed rule, we propose to make the following revisions to the existing text of the regulations:

- In § 413.337(d)(2), we would insert additional text at the end of the paragraph, which would provide for an adjustment to the annual update of the previous fiscal year's rate to account for forecast error in the SNF market basket beginning with FY 2004.
- In § 413.345, we would make a technical correction to the second sentence of the regulation text, in order to correct the spelling of the word ''standardized.''

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. 3501 *et seq.*).

VI. Response to Public Comments

Because of the large number of items of correspondence we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, in preparing the final rule, we will consider all comments concerning the provisions of this proposed rule that we receive by the date and time specified in the **DATES** section of this preamble and respond to those comments in the preamble to that rule.

Waiver of 60-day Comment Period

As discussed previously in section I of this preamble, we are issuing this proposed rule specifically in order to supplement the proposed rule that we published previously in the **Federal Register** on May 16, 2003 (68 FR 26758). Section 1871(b)(1) of the Act normally requires a 60-day public comment period for a proposed rule. However, under section 1871(b)(2)(C) of the Act, this requirement can be waived for good cause in situations where the agency finds that its application would be ''* * * impracticable, unnecessary, or contrary to the public interest'' (*see* 5 U.S.C. § 553(b)). We note that under section 1888(e)(4)(H) of the Act, the updated payment rates for FY 2004 must be published in the **Federal Register** no later than July 31, 2003. This means that providing a full 60-day comment period for this supplemental proposed rule could leave insufficient time following the close of the comment period to include any resulting revisions in that publication. We believe it to be in the public interest to consider any revisions in conjunction with the annual update to the SNF PPS rates so any adjustment to the payment rate could be done as part of the annual update process. Moreover, promulgating such revisions in a separate final rule published later than July 31 would require revising the rate structure after the start of the new fiscal year in order to accommodate the change, which would impose an inordinate administrative burden. Additionally, we note that, other than to propose a minor technical correction in the existing regulations text, the sole focus of this supplemental proposed rule concerns a single potential change, to adjust the annual update to the SNF payment rates in order to account for forecast error. Given the extremely narrow scope of this document, we believe that even a comment period of less than 60 days would still give interested parties sufficient opportunity to comment adequately on it.

For the reasons set forth in the preceding discussion, which indicate that providing a full comment period would be contrary to the public interest, we find that there is good cause to modify the 60-day comment period in this instance. Accordingly, the closing date of the comment period for this supplemental proposed rule is hereby set at July 7, 2003, to coincide with the close of the initial proposed rule's comment period.

VII. Regulatory Impact Analysis

We have examined the impacts of this proposed rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act (the Act), the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely assigns responsibility of duties) 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 1 year). This proposed rule is a major rule, as defined in 5 U.S.C. 804(2), because, if we proceed with a forecast error adjustment, we estimate that the impact of such a change would be approximately $450 million in FY 2004 (based on the cumulative SNF market basket forecast error of 3.26 percent for FYs 2000 through 2002, as shown in Table A). The $450 million estimate also assumes the use of a 0.25 percentage point threshold (and would be reliable for thresholds up to 3.26 percent). However, as noted previously in section II.D, this estimated impact could change in any given year if we were to adopt a different threshold level.

The RFA requires agencies to analyze options for the regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most SNFs and most other providers and suppliers are small entities, either by their nonprofit status or by having revenues of $11.5 million or less in any 1 year. For purposes of the RFA, approximately 53 percent of SNFs are considered small businesses according to the Small Business Administration's latest size standards with total revenues of $11.5 million or less in any 1 year (for further information, see 65 FR 69432, November 17, 2000). Individuals and States are not included in the definition of a small entity.

The revision that we are considering in this proposed rule would simply provide for adjusting the annual increase in the applicable SNF market basket index amount, effective with FY

2004, to account for forecast error. Accordingly, we certify that this proposed rule would not have a significant impact on small entities.

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. For a proposed rule, 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. Because the change in methodology set forth in this proposed rule would also affect rural hospital swing-bed services, we believe that this proposed rule would similarly affect small rural hospitals. However, because the incremental change in payments for Medicare swing-bed services would be relatively minor in comparison to overall rural hospital revenues, this proposed rule would not have a significant impact on the overall operations of these 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 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million or more. This proposed rule would have no substantial effect on State, local, or tribal governments. We believe the private sector cost of this proposed rule falls below these thresholds as well.

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 requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. As stated above, this proposed rule would have no substantial effect on State and local governments.

As stated previously, the purpose of this proposed rule is simply to consider an adjustment to the annual update to account for forecast error in the SNF market basket. We believe that such a revision would have, at most, only a negligible overall effect in terms of the RFA and the other provisions discussed in this section. As such, it would not represent an additional burden to the industry.

For the reasons set forth in the preceding discussion, we are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined that this proposed rule would 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.

Finally, 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 413

Health facilities, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as follows:

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERVICES; PROSPECTIVELY DETERMINED PAYMENT RATES FOR SKILLED NURSING FACILITIES

1. The authority citation for part 413 continues to read as follows:

Authority: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i) and (n), 1861(v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww).

Subpart J—Prospective Payment for Skilled Nursing Facilities

2. In § 413.337(d)(2), paragraph (d)(2) is revised to read as follows:

§ 413.337 Methodology for calculating the prospective payment rates.

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(d) *Annual updates of Federal unadjusted payment rates.* * * *

(2) For subsequent fiscal years, the unadjusted Federal rate is equal to the rate for the previous fiscal year increased by the applicable SNF market basket index amount. Beginning with fiscal year 2004, an adjustment to the annual update of the previous fiscal year's rate will be computed to account for forecast error. The initial adjustment (in fiscal year 2004) to the update of the previous fiscal year's rate will take into account the cumulative forecast error between fiscal years 2000 and 2002. Subsequent adjustments in succeeding fiscal years will take into account the forecast error from the most recently available fiscal year for which there is final data.

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§ 413.345 [Amended]

3. In the second sentence of § 413.345, the word ''tandardized'' is removed and the word ''standardized'' is added in its place.

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

Dated: May 22, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Dated: June 3, 2003.

Tommy G. Thompson,

Secretary.

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