

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