

broader rural definition under the Balanced Budget Refinement Act of 1999 (BBRA) for the exception to the payment limit for RHCs based in small rural hospitals. This definition, which is purported to be an improvement over the MSA definition, addresses the problem experienced in certain western States.

*Response:* In 2000, section 224 of BIPA expanded the eligibility criteria for receiving an exception to the RHC annual payment limit, effective July 1, 2001. Specifically, this section of BIPA extends the exemption from the upper payment limit to RHCs based in small urban hospitals. Thus, all hospitals of less than 50 beds are now eligible to receive an exception from the per visit payment limit for their RHCs. Therefore, we are revising § 405.2462(a)(3) to reflect changes made by BIPA. Please note that we will continue to use the bed size definition at § 412.105(b) to determine which RHCs are eligible for the payment limit exception. We will continue to apply to the alternative definition of bed size (patient census) only extremely rural hospitals operating under extenuating circumstances as set forth at § 405(a)(3)(ii)(A).

*Comment:* A commenter encouraged us to adopt the RHC definition of rural for purposes of exemption to the payment limit. This rural definition resolves the problems with the MSA definition as it relates to western States.

*Response:* As discussed above, we are revising § 405.2462(a)(3) to reflect changes made by BIPA.

*Comment:* A commenter recommended that the payment limit exception should be based on whether the provider is in a rural area or whether its average daily census is less than 50 beds.

*Response:* Although section 224 of BIPA expanded the eligibility criteria for receiving an exception to recognize RHCs based in small urban and rural hospitals, it maintained the bed size test. Consequently, we are retaining that requirement in our rules at § 405.2462(a)(3).

*Comment:* A commenter believes that allowing any hospitals with an average daily census of 40 is very generous and will probably continue the abuse of the RHC program.

*Response:* We agree with the commenter; therefore, we will retain the requirement in § 405.2462(a)(3)(ii)(A), which states that the average daily census criterion would apply only to extremely rural, sole community hospitals.

*Comment:* Several commenters indicated that the 50-bed requirement should be defined using average daily

census. Rural hospitals with an average daily census of below 50 beds are the types of facilities the Congress is concerned about. Also, this information is reflective of the number of patients served and the size of the hospital.

*Response:* Although there are a number of ways to define a hospital bed size (that is, licensed, certified, staffed, or patient census), we believe our available bed definition (staffed) is appropriate and generous compared to the other existing definitions. We believe it is the most reflective method for identifying the actual size of a hospital. As a general measure, the average daily census definition for counting inpatient hospital beds would be too generous for this provision, as it is less reflective in terms of identifying the actual size of a hospital. For example, this definition could qualify hospitals staffed or licensed for 75 beds or more. We believe qualifying those hospitals for the RHC payment limit exception would be inconsistent with the congressional intent.

*Comment:* Several commenters suggested changing the proposed threshold pertaining to the fluctuation of patient census at or above 150 percent of the lowest monthly average census to a more reasonable level or eliminating the standard. Many vulnerable hospitals do not have a single period of seasonal fluctuation in census, but instead experience multiple, and unpredictable, fluctuation in patient census.

*Response:* We share the commenters' concerns that some rural hospitals may experience multiseasonal activity making it impossible, for an otherwise eligible facility, to meet the 150 percent fluctuation occupancy threshold. Therefore, we are revising proposed § 405.2462(a)(3)(ii) to eliminate the proposed 150 percent fluctuation threshold for patient census.

*Comment:* Two commenters suggested that we use the ambulatory payment classification (APC) system when defining rural for the payment limit exception. The commenters believe that this system would allow physicians in the rural census tracks of MSAs to be considered rural. The commenter asked us to use the same rural definition being used for the APC system.

*Response:* The current APC system uses the OMB "rural" definition as well as the Goldsmith modifier. As discussed above, the BIPA expanded the location requirement to include rural and urban areas. Consequently, the Congress has resolved this issue by recognizing small hospitals in urban and rural communities as qualifying for the payment exception.

*Comment:* Two commenters suggested an automatic exception should be given to small rural hospitals with an average daily census of 15 beds or less, regardless of the number of licensed or staffed beds, and any hospital in a frontier area.

*Response:* We do not have the discretion to waive the 50-bed requirement for hospitals located in frontier areas. Furthermore, we fail to see the merit, as it relates to the intent of this provision, in providing an automatic exception to hospitals with very low occupancy rates that are staffed or licensed with more than 50 beds. This provision was established to help small rural hospitals and their clinics that represent the sole source of health for their communities remain financially viable. An automatic exception of this type could grant an exception to hospitals with significant excess capacity located in marginally rural areas. Even for hospitals in frontier areas, we do not have the authority to grant an automatic exception to extremely rural hospitals that cannot satisfy the 50-bed requirement.

*Comment:* A commenter recommended extending the payment limit exception in § 405.2462 to clinics based in rural hospitals with less than 50 beds and to freestanding clinics in the same rural area.

*Response:* We do not have the authority to grant exceptions to the RHC payment limit for these providers. Only RHCs based in small hospitals with fewer than 50 beds are eligible for the exception.

*Comment:* Two commenters recommended that the 40 or less average daily patient census requirement should be increased to 45. Hospitals in remote rural areas should not be required to hold their inpatient acute care occupancy to a level that is significantly below the 50-bed maximum requirement in the BBA. Very rural hospitals do not have the ability to transfer, and should not be required to reject patients just to meet this requirement.

*Response:* We believe this requirement is necessary and appropriate for this provision. The 40 or less average daily patient census requirement was established to meet the needs of small hospitals in extremely rural areas experiencing seasonal fluctuations. Without significant fluctuations in patient census, these hospitals would be operating with less than 50 staffed beds. Hospitals with an average daily patient census in excess of 40, in spite of seasonal fluctuations, would likely have to operate with more