

#### IV. Anesthesia and Physician Fee Schedule Conversion Factors

The 2003 physician fee schedule CF will be \$36.7856. The 2003 national average anesthesia CF will be \$17.05.

The specific calculations to determine the physician fee schedule and anesthesia CFs for 2003 are explained below.

##### • *Physician Fee Schedule Conversion Factor.*

Under section 1848(d)(1)(A) of the Act, the physician fee schedule CF is equal to the CF for the previous year multiplied by the update determined under section 1848(d)(4) of the Act. In addition, section 1848(c)(2)(B)(ii)(II) of the Act requires that changes to relative value units (RVUs) cannot cause the amount of expenditures to increase or decrease by more than \$20 million from the amount of expenditures that would have been made if such adjustments had not been made. We implement this requirement through a uniform budget neutrality adjustment to the CF. There is one change that will require us to make an adjustment to the CF to comply with the budget neutrality requirement in section 1848(c)(2)(B)(ii)(II) of the Act. We are making a 0.04 percent reduction (0.9996) in the CF to account for the increase in anesthesia work resulting from the 5-year review.

We illustrate the calculation for the 2003 physician fee schedule CF in table 8:

TABLE 8

|   |           |
|---|-----------|
| 2002 Conversion Factor .....                                    | \$36.1992 |
| 2003 Update .....   | 1.0166    |
| Budget-Neutrality Adjustment: Increase in Anesthesia Work ..... | 0.9996    |
| 2003 Conversion Factor .....                                    | \$36.7856 |

##### • *Anesthesia Fee Schedule Conversion Factor.*

As described in the December 31, 2002, final rule (67 FR 80032), anesthesia services do not have RVUs like other physician fee schedule services. For this reason, we are accounting for the changes to anesthesia work and practice expenses through a 1.6 percent (1.016) adjustment to the anesthesia fee schedule CF. In addition, we are also applying the physician fee schedule update and the budget neutrality adjustment for the increase in anesthesia work that also apply to the physician fee schedule CF. To determine the anesthesia fee schedule CF for 2003, we used the following figures:

TABLE 9

|                              |           |
|------------------------------|-----------|
| 2002 Conversion Factor ..... | \$16.6055 |
|------------------------------|-----------|

TABLE 9—Continued

|   |           |
|---|-----------|
| Adjustments for Work and Practice Expense .....                 | 1.0106    |
| 2003 Update .....   | 1.0166    |
| Budget-Neutrality Adjustment: Increase in Anesthesia Work ..... | 0.9996    |
| 2003 Conversion Factor .....                                    | \$17.0522 |

#### V. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on a proposed rule. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued. In addition, the Administrative Procedure Act (APA) normally requires a 30-day delay in the effective date of a final rule. Furthermore, the Congressional Review Act (CRA) generally requires an agency to delay the effective date of a major rule by 60 days in order to allow for congressional review of the agency action.

We find it unnecessary to undertake notice-and-comment rulemaking prior to implementation of the revisions contained in this final rule. The revisions in this final rule constitute technical corrections to the final rule published on December 31, 2002, which are necessary in order to implement the Congress's decision to confer authority for CMS to make prospective redeterminations of the SGRs for the FY 1998 and FY 1999 but do not otherwise change the policies announced in the final rule. In the December 31, 2002, final rule we expressly indicated that we would make these changes in the event that the Congress conferred the requisite authority upon the agency prior to the March 1, 2003, effective date of the rule. Accordingly, because this final rule simply makes technical modifications to a final rule that has previously gone through notice-and-comment rulemaking, we do not believe that this final rule is subject to notice-and-comment or the 30-day delay in the effective date under the APA. Even if this rule were something other than a technical correction or amendment to the final rule published on December 31, 2002, we believe good cause would exist under the APA to waive the requirements of notice-and-comment

rulemaking and the 30-day delay in the effective date.

As indicated above, on December 31, 2002, we announced that, effective March 1, 2003, Medicare physician fee schedule rates would be reduced by an average of 4.4 percent. We indicated in our December 31, 2002, final rule (67 FR 79966) that the 4.4 percent reduction would be inappropriate because it would occur under a statutory methodology that did not allow us to reflect actual, after-the-fact data from earlier years in the determination of the SGR and allowed expenditures. We stated the Department was unable to revise those estimates without further congressional action. ("The Department intends to work closely with Congress to develop legislation that could permit a positive update, and hopes that such legislation can be passed before the negative update takes effect." Since we published the December 31, 2002, final rule, as described above, the Congress has taken action that evinces the Congress's intent to permit revisions of all prior FY SGRs for the purposes of allowing for prospective application of those revisions to future physician fee schedule updates (that is, to the 2003 physician fee schedule update.)

To go through further notice-and-comment rulemaking at this time would be unnecessary, impracticable, and contrary to the public interest because, in our December 31, 2002, final rule we unequivocally expressed our intent to prospectively redetermine the SGRs for FYs 1998 and 1999 in order to establish the 2003 CF. "Because the Department would adopt a change in the formula that determines the physician update if the law permitted it, we have examined how proper adjustments to past data could result in a positive update." To go through notice-and-comment rulemaking at this point, when we have already stated unequivocally our intent to recompute the CF for 2003 if the Congress were to act to permit a prospective redetermination of the SGRs for fiscal years 1998 and 1999, would be unnecessary and contrary to the public interest.

Because the Department wished to make changes to the physician fee schedule update promptly in the event that the Congress acted legislatively, our December 31, 2002, final rule specifically requested public comment on revisions to the estimates that were used to establish the FY 1998 and FY 1999 SGRs, if the statute were to be amended to provide us with this authority. Because we have already requested public comments on the issues included in this final rule, we believe it is unnecessary and contrary to