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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Part 413

[HCFA-1876-P]

RIN 0938-AH61

Medicare Program; Revision to Accrual Basis of Accounting Policy

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Proposed rule.

SUMMARY: Current policy provides that payroll taxes a provider becomes obligated to remit to governmental agencies are included in allowable costs under Medicare only in the cost reporting period in which payment (upon which the payroll taxes are based) is actually made to an employee. Therefore, for payroll accrued in one year but not paid until the next year, the associated payroll taxes on the payroll are not an allowable cost until the next year. This proposed rule would make one exception, in the situation where payment would be made to the employee in the current year but for the fact the regularly scheduled payment date is after the end of the year. In that case, the rule would require allowance in the current year of accrued taxes on payroll that is accrued through the end of the year but not paid until the beginning of the next year, thus allowing accrued taxes on end-of-the-year payroll in the same year that the accrual of the payroll itself is allowed. The effect of this proposal is not on the allowability of cost but rather only on the timing of payment; that is, the cost of payroll taxes on end-of-the-year payroll would be allowable in the current period rather than in the following period.

DATES: Written comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on July 17, 1998.

ADDRESSES: Mail written comments (one original and three copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: HCFA-1876-P, P.O. Box 7517, Baltimore, MD 21207-0517.

If you prefer, you may deliver your written comments to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building, 200 Independence Avenue, SW, Washington, DC 20201, or Room C5-11-17 Central Building, 7500 Security Boulevard, Baltimore, MD 21244-1850.

Because of staffing and resource limitations, we cannot accept comments by facsimile (FAX) transmission. In commenting, please refer to file code HCFA-1876-P. Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, in room 309-G of the Department's offices at 200 Independence Avenue, SW, Washington, DC, on Monday through Friday of each week from 8:30 a.m. to 5 p.m. (Phone: (202) 690-7890).

Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, PO Box 37194, Pittsburgh, PA 15250-7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or MasterCard number and expiration date. Credit card numbers can also be placed by calling the order desk at (202) 512-1800 or by faxing to (202) 512-2250. The cost for each copy is \$8.00. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Deposit Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**.

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SUPPLEMENTARY INFORMATION:

I. Background

Generally, under the Medicare program, health care providers not subject to prospective payment are paid

for the reasonable costs of covered services furnished to Medicare beneficiaries. This policy pertains to all services furnished by providers other than inpatient hospital services furnished in acute care hospitals (section 1886(d) of the Social Security Act (the Act)) and certain inpatient routine services furnished by skilled nursing facilities choosing to be paid on a prospective payment basis (section 1888(d) of the Act). Additionally, there are other limited services not paid on a reasonable cost basis, to which this policy will not apply.

Section 1861(v)(1)(A) of the Act defines reasonable cost and provides that reasonable cost shall be determined in accordance with implementing regulations. Section 413.24 establishes the methods to be used and the adequacy of data needed to determine reasonable costs for various types or classes of institutions, agencies, and services. Section 413.24(a) requires providers receiving payment on the basis of reasonable cost to maintain financial records and statistical data sufficient for the proper determination of costs payable under the program and for verification of costs by qualified auditors. The cost data are required to be based on an approved method of cost finding and on the accrual basis of accounting. Section 413.24(b)(2) provides that under the accrual basis of accounting, revenue is reported in the period in which it is earned, regardless of when it is collected, and expenses are reported in the period in which they are incurred, regardless of when they are paid. Further, § 413.100 (see 60 FR 33126, June 27, 1995) provides for special treatment of certain accrued costs, including Federal Insurance Contribution Act (FICA) and other payroll taxes claimed by providers on their cost reports. Specifically, § 413.100(c)(2)(vi) provides that a provider's share of FICA and other payroll taxes that the provider becomes obligated to remit to governmental agencies is included in allowable costs only during the cost reporting period in which payment (upon which the payroll taxes are based) is actually made to the employee.

Prior to publication of § 413.100 on June 27, 1995, we published a proposed rule on October 9, 1991 (56 FR 50834). Following publication of that proposal, we received several comments that we should recognize accrued payroll taxes during the same period that the employee benefits are earned and accrued. One commenter asserted that costs related to the accrual of payroll taxes should be allowed especially as they relate to the accrual of year-end

wages. Based on our belief that payroll taxes should not be accrued and claimed for Medicare payment until the period in which actual payment is made to the employees, we published § 413.100(c)(2)(vi) in its present form. The policy in § 413.100(c)(2)(vi) continues to be Medicare's policy, subject to the exception proposed in section II below. When an employee is paid by a provider as part of a provider payroll, whether the payment is for time worked during the payroll period or for benefits (for example, vacation benefits) earned in an earlier period, the provider's share of FICA and other payroll taxes is an allowable cost during the cost reporting period in which payment is made to the employee. Our policy is based on the fact that a provider becomes obligated to governmental agencies for payroll taxes only at the time that the salary or benefits, upon which the payroll taxes are based, are actually paid to the provider's employee. Further, until the salary or benefits are actually paid, it cannot be known for certain whether there will be a payroll tax or taxes, what the amount of the tax(es) will be, or whether a particular employee will be liable for the tax(es).

II. Provisions of Proposed Rule

Upon reconsideration, we agree with the comment to the October 9, 1991 proposed rule that Medicare should recognize, as allowable, the costs related to the accrual of provider payroll taxes specifically as they relate to the accrual of year-end payroll. Therefore, we propose to revise § 413.100(c)(2)(vi) to make one exception to the above-stated policy. We propose to provide that if payment would be made to an employee during a cost reporting period but for the fact that the regularly scheduled payment date is after the end of the period, costs of accrued payroll taxes related to the portion of payroll accrued through the end of the period, but paid to the employee after the beginning of the new period, are allowable costs in the year of accrual, subject to the liquidation requirements specified in the regulations (§ 413.100(c)(2)(i)). The revision made in this proposed rule thus is intended to allow accrued taxes on end-of-the-year payroll in the same year that the accrual of the payroll itself is allowed, just as Medicare, in other than end-of-the-year payroll situations, allows accrued taxes on payroll in the same year that the accrual of the payroll is allowed. Our proposal is based on the notion that the insignificant amount of time passing between the accrual of the end-of-the-year payroll and the payment of the payroll in the following year does

not give rise to the same concerns described in section I. above.

We also propose to change the example in § 413.100(c)(2)(vi) to emphasize, as discussed above, that payroll taxes applicable to benefits accrued, such as vacation benefits, are not allowable until the period in which the employee uses the benefits, that is, takes the vacation. Finally, we propose to change payroll tax from singular to plural throughout the section to clarify that there can be more than one payroll tax.

III. Impact Statement

We have examined the impact of this proposed rule as required by Executive Order 12866. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). This proposed rule, which would permit allowance of accrued taxes on end-of-the-year payroll in the same year that the accrual of the payroll itself is allowed, does not make any significant changes in program payments. The proposal is limited in nature, as it affects only accrued payroll taxes for payroll accrued at the end of one cost reporting period which is not actually paid to employees until the beginning of the next period. Furthermore, in this situation, the effect of the proposal is only on the timing of payment; that is, it does not allow an additional cost of payroll taxes but rather allows the cost in the current period instead of in the following period. The proposal should not involve changes in provider accounting systems and, in fact, will free providers or intermediaries from making cost report adjustments, under the current policy, to postpone reimbursement of the cost on the current cost report to the subsequent cost report. We do not expect any significant costs or savings due to this change.

We have also examined the impact of the proposed rule as required by the Regulatory Flexibility Act (RFA) (Pub. L. 96-354), and by section 1102(b) of the Act. The RFA requires agencies to analyze options for regulatory relief for small businesses. For purposes of the RFA, most hospitals, and most other providers, physicians, and health care suppliers are small entities, either by nonprofit status or by having revenues of \$5 million or less annually. 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. Such an 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 50 beds.

We are not preparing analyses for either the RFA or section 1102(b) of the Act since we have determined, and we certify, that this proposed rule would not result in a significant economic impact on a substantial number of small entities and would not have a significant impact on the operations of a substantial number of small rural hospitals.

In accordance with the provisions of Executive Order 12866, this proposed rule was reviewed by the Office of Management and Budget.

IV. Paperwork Reduction Act

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.

V. Response to Public Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, if we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

List of Subjects in 42 CFR Part 413

Health facilities, Kidney disease, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR part 413 would be amended as follows:

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

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

Authority: Secs. 1102, 1861(v)(1)(A), and 1871 of the Social Security Act (42 U.S.C. 1302, 1395x(v)(1)(A), and 1395hh).

Subpart F—Specific Categories of Costs

B. In § 413.100, paragraph (c)(2)(vi) is revised to read as follows:

§ 413.100 Special treatment of certain accrued costs.

(c) *Recognition of accrued costs.*

* * * * *

(2) *Requirements for liquidation of liabilities.*

* * * * *

(vi) *FICA and other payroll taxes.*—

(A) *General rule.* The provider's share of FICA and other payroll taxes that the provider becomes obligated to remit to governmental agencies is included in allowable costs only during the cost reporting period in which payment (upon which the payroll taxes are based) is actually made to the employee. For example, payroll taxes applicable to vacation benefits are not to be accrued in the period in which the vacation benefits themselves are accrued but rather are allowable only in the period in which the employee takes the vacation.

(B) *Exception.* If payment would be made to an employee during a cost reporting period but for the fact the regularly scheduled payment date is after the end of the period, costs of accrued payroll taxes related to the portion of payroll accrued through the end of the period, but paid to the employee after the beginning of the new period, are allowable costs in the year of accrual, subject to the liquidation requirements specified in paragraph (c)(2)(i) of this section.

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(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: January 26, 1998.

Nancy-Ann Min DeParle,

Administrator, Health Care Financing Administration.

Dated: April 8, 1998.

Donna E. Shalala,

Secretary.

[FR Doc. 98–13110 Filed 5–15–98; 8:45 am]

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DEPARTMENT OF TRANSPORTATION**Surface Transportation Board****49 CFR Part 1146**

[STB Ex Parte No. 628]

Expedited Relief for Service Inadequacies

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Pursuant to its decision in *Review of Rail Access and Competition Issues*, STB Ex Parte No. 575 (STB served Apr. 17, 1998) (“*Review*”), the Board is instituting a proceeding to solicit comments on proposed rules that would establish expedited procedures for shippers to obtain alternative service from another rail carrier when the incumbent carrier cannot properly serve shippers. The Board requests that persons intending to participate in this proceeding notify the agency of that intent. A separate service list will be issued based on the notices of intent to participate that the Board receives.

DATES: Notices of intent to participate in this proceeding are due May 28, 1998. Comments on this proposal are due June 15, 1998. Replies are due July 15, 1998.

ADDRESSES: An original plus 12 copies of all comments and replies, referring to STB Ex Parte No. 628, must be sent to the Office of the Secretary, Case Control Unit, ATTN: STB Ex Parte No. 628, Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

Copies of the written comments will be available from the Board's contractor, D.C. News and Data, Inc., located in Room 210 in the Board's building. D.C. News can be reached at (202) 289–4357. The comments will also be available for viewing and self copying in the Board's Microfilm Unit, Room 755.

In addition to an original and 12 copies of all paper documents filed with the Board, the parties shall submit their pleadings, including any graphics, on a 3.5-inch diskette formatted for WordPerfect 7.0 (or in a format readily convertible into WordPerfect 7.0). All textual material, including cover letters, certificates of service, appendices and exhibits, shall be included in a single file on the diskette. The diskettes shall be clearly labeled with the filer's name, the docket number of this proceeding, STB Ex Parte No. 628, and the name of the electronic format used on the diskette for files other than those formatted in WordPerfect 7.0. All pleadings submitted on diskettes will be posted on the Board's website (www.stb.dot.gov). The electronic submission requirements set forth in this notice supersede, for the purposes of this proceeding, the otherwise applicable electronic submission requirements set forth in the Board's regulations. See 49 CFR 1104.3(a), as amended in *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, STB Ex Parte No. 527, 61 FR 52710, 711

(Oct. 8, 1996), 61 FR 58490, 58491 (Nov. 15, 1996).¹

FOR FURTHER INFORMATION CONTACT:

Joseph H. Dettmar, (202) 565–1600. [TDD for the hearing impaired: (202) 565–1695.]

SUPPLEMENTARY INFORMATION: In STB Ex Parte No. 575, the Board conducted two days of informational hearings, on April 2 and 3, 1998, to examine issues of rail access and competition in today's railroad industry, and the statutory remedies and agency regulations and procedures that relate to those matters. As a result of those hearings, we announced, *inter alia*, that we would begin a rulemaking proceeding to consider revisions to our rules to provide shippers receiving poor service greater opportunity to obtain service from an additional carrier.

Overview

While the Board lacks general authority to require an unwilling railroad to permit physical access over its lines to the trains and crews of another railroad, it may direct that result in certain situations: under 49 U.S.C. 11324(c), as a condition to the incumbent's merger with another railroad; under 49 U.S.C. 11102(a), to serve terminal facilities when it would be in the public interest; or, under 49 U.S.C. 11123(a), to serve any facilities for a limited period of time (not more than 270 days) because of the carrier's inability or failure to provide its shippers with adequate service.² The Board may also direct an incumbent railroad to afford access indirectly, either by prescribing alternative through routes under 49 U.S.C. 10705(a) (requiring the incumbent to interline traffic with another railroad over a designated interchange and thereby create an alternative route and rates for a shipper's traffic) or by requiring reciprocal switching under 49 U.S.C. 11102(c) (where, for a fee, the incumbent must switch cars to and from another railroad so that the latter, even though it cannot physically reach a shipper, can constructively offer alternative single-line service).

The access remedies under sections 11102 and 10705—terminal trackage rights, reciprocal switching, and alternative through routes—are now invoked through the “competitive access” regulations, 49 CFR part 1144, and, to obtain relief, parties must show

¹ A copy of each diskette submitted to the Board should be provided to any other party upon request.

² The using railroad must compensate the incumbent railroad for the use of its tracks, at a level to be determined by the carriers or fixed by the Board. 49 U.S.C. 11324(c), 11102(a), and 11123(b)(2).