

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS-1488-P2]

RIN 0938-A012

**Medicare Program; Hospital Inpatient Prospective Payment
Systems Implementation of the Fiscal Year 2007 Occupational
Mix Adjustment to the Wage Index**

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would revise the methodology for calculating the occupational mix adjustment announced in the Fiscal Year (FY) 2007 Hospital Inpatient Prospective Payment System (IPPS) proposed rule by applying the occupational mix adjustment to 100 percent of the wage index using the new occupational mix data collected from hospitals. This proposed rule also proposes to modify hospitals' procedures for withdrawing requests to reclassify for the FY 2007 wage index and for supplementing the FY 2008 reclassification application with official data used to develop the FY 2007 wage index. In addition, we are proposing to replace in full the descriptions of the data and methodology that would be used in calculating the occupational mix adjustment discussed in the FY 2007 IPPS

proposed rule.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 12, 2006.

ADDRESSES: In commenting, please refer to file code CMS-1488-P2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. Electronically. You may submit electronic comments on specific issues in this regulation to <http://www.cms.hhs.gov/eRulemaking>. Click on the link "Submit electronic comments on CMS regulations with an open comment period." (Attachments should be in Microsoft Word, WordPerfect, or Excel; however, we prefer Microsoft Word.)

2. By regular mail. You may mail written comments (one original and two copies) to the following address ONLY:
Centers for Medicare & Medicaid Services,

Department of Health and Human Services,
Attention: CMS-1488-P2,
P.O. Box 8012,
Baltimore, MD 21244-8012.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By express or overnight mail. You may send written comments (one original and two copies) to the following address ONLY:

Centers for Medicare & Medicaid Services,

Department of Health and Human Services,

Attention: CMS-1488-PN2,

Mail Stop C4-26-05,

7500 Security Boulevard,

Baltimore, MD 21244-8012.

4. By hand or courier. If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to one of the following addresses. If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786-4492 in advance to schedule your arrival with one of our staff members.

Room 445-G, Hubert H. Humphrey Building,

200 Independence Avenue, SW.,

Washington, DC 20201; or

7500 Security Boulevard,

Baltimore, MD 21244-1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their

comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by mailing your comments to the addresses provided at the end of the "Collection of Information Requirements" section in this document.

For information on viewing public comments, see the beginning of the "SUPPLEMENTARY INFORMATION" section.

FOR FURTHER INFORMATION CONTACT:

Valerie Miller, (410) 786-4535.

SUPPLEMENTARY INFORMATION:

Submitting Comments: We welcome comments from the public on all issues set forth in this rule to assist us in fully considering issues and developing CMS-1488-P2 and the specific "issue identifier" that precedes the section on which you choose to comment.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by

the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received:

<http://www.cms.hhs.gov/eRulemaking>. Click on the link "Electronic Comments on CMS Regulations" on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1-800-743-3951.

I. Background

[If you choose to comment on issues in this section, please include the caption "BACKGROUND" at the beginning of your comments.]

A. General Background

On April 25, 2006, we published in the **Federal Register** the FY 2007 IPPS proposed rule (71 FR 23996) that set forth the proposed changes to the Medicare IPPS for operating

costs and for capital-related costs. In the FY 2007 IPPS proposed rule, we discussed our proposals for calculating the FY 2007 occupational mix adjustment. We proposed to use the same CMS Wage Index Occupational Mix Survey and Bureau of Labor Statistics (BLS) data that we used for the FY 2005 and FY 2006 wage indices, with a few exceptions. We also proposed to use a blend of the occupational mix adjusted wage index and the unadjusted wage index. Specifically, we proposed to adjust 10 percent of the FY 2007 wage index by a factor reflecting occupational mix. We stated that a 10 percent adjustment for occupational mix was a prudent policy because we were proposing to rely on the same survey data used in FY 2005 and FY 2006 wage indices.

On April 3, 2006, in Bellevue Hosp. Ctr v. Leavitt, the Court of Appeals for the Second Circuit (the Court) ordered the Centers for Medicare & Medicaid Services (CMS) to apply the occupational mix adjustment to 100 percent of the wage index effective for FY 2007. The Court ordered CMS to "immediately ... collect data that are sufficiently robust to permit full application of the occupational mix adjustment." The Court also ordered that all "data collection and measurement and any other preparations necessary for full application be completed by September 30, 2006, at which time the agency is to immediately apply the adjustment in

full." For more information see WestLaw 2006 WL 851934 at *13.

To comply with the Court's order, on April 21, 2006, we issued a Joint-Signature Memorandum (see JSM-06412) to all Medicare Fiscal Intermediaries (FIs) announcing our plans to collect new occupational mix data from hospitals.

B. Legislative History

Section 1886(d)(3)(E) of the Social Security Act (the Act) requires that, as part of the methodology for determining prospective payments to hospitals, the Secretary must adjust the standardized amounts "for area differences in hospital wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the hospital compared to the national average hospital wage level." In accordance with the broad discretion conferred under the Act, we currently define hospital labor market areas based on the definitions of statistical areas established by the Office of Management and Budget (OMB). (See (71 FR 24074) for a discussion of the proposed FY 2007 hospital wage index based on the statistical areas, including OMB's revised definitions of Metropolitan Areas).

Beginning October 1, 1993, section 1886(d)(3)(E) of the Act requires that we update the wage index annually.

Furthermore, the section provides that the Secretary base the update on a survey of wages and wage-related costs of short-term, acute care hospitals. The survey should measure the earnings and paid hours of employment by occupational category, and must exclude the wages and wage-related costs incurred in furnishing skilled nursing services. The provision also requires us to make any updates or adjustments to the wage index in a manner that ensures that aggregate payments to hospitals are not affected by the change in the wage index. See the FY 2007 IPPS proposed rule (71 FR 24148 through 24149) for a discussion of the original proposed adjustment for FY 2007.

As discussed in the FY 2007 IPPS proposed rule (71 FR 24082), we also take into account the geographic reclassification of hospitals in accordance with sections 1886(d)(8)(B) and section 1886(d)(10) of the Act when calculating the wage index. Under section 1886(d)(8)(D) of the Act, the Secretary is required to adjust the standardized amounts to ensure that aggregate payments under the IPPS after implementation of the provisions of sections 1886(d)(8)(B) and section 1886(d)(8)(C) of the Act and section 1886(d)(10) of the Act are equal to the aggregate prospective payments that would have been made absent these provisions. See the FY 2007 IPPS proposed rule

(71 FR 24149) for a discussion of the original proposed budget neutrality adjustment for FY 2007.

C. Revised Proposed Changes to the Occupational Mix Adjustment for the Proposed FY 2007 Wage Index

Section 1886(d)(3)(E) of the Act provides for the collection of data every 3 years on the occupational mix of employees for each short-term, acute care hospital participating in the Medicare program, in order to construct an occupational mix adjustment to the wage index, for application beginning October 1, 2004 (the FY 2005 wage index). The purpose of the occupational mix adjustment is to control for the effect of hospitals' employment choices on the wage index. For example, hospitals may choose to employ different combinations of registered nurses (RNs), licensed practical nurses (LPNs), nursing aides, and medical assistants for the purpose of providing nursing care to their patients. The varying labor costs associated with these choices reflect hospital management decisions rather than geographic differences in the costs of labor.

1. Development of Data for the Proposed Occupational Mix Adjustment

[If you choose to comment on issues in this section, please include the caption "DEVELOPMENT OF DATA FOR THE PROPOSED

OCCUPATIONAL MIX ADJUSTMENT" at the beginning of your comments.]

Section 1886(d)(3)(E) of the Act requires us to conduct a new survey at least once every 3 years. On October 14, 2005, we published a notice in the **Federal Register** (70 FR 60092) proposing to use a new survey, the 2006 Medicare Wage Index Occupational Mix Survey, (the 2006 survey) to apply an occupational mix adjustment to the FY 2008 wage index. In the proposed 2006 survey, we included several modifications based on the comments and recommendations we received on the 2003 survey including (1) allowing hospitals to report their own average hourly wage rather than using BLS data; (2) extending the prospective survey period; and (3) reducing the number of occupational categories but refining the subcategories for RNs.

We made the changes to the occupational categories in response to MedPAC comments to the FY 2005 IPPS final rule (69 FR 49036). Specifically, MedPAC recommended that CMS assess whether including subcategories of RNs would result in a more accurate occupational mix adjustment. MedPAC believed that including all RNs in a single category may obscure significant wage differences among the subcategories of RNs, for example, the wages of surgical RNs and floor RNs may differ. Also, to offset additional reporting burden for

hospitals, MedPAC recommended that CMS should combine the general service categories that account for only a small percentage of a hospital's total hours with the "all other occupations" category, since most of the occupational mix adjustment is correlated with the nursing general service category.

Also, in response to the public comments on the October 14, 2005 notice, we modified the 2006 survey. On February 10, 2006, we published a **Federal Register** notice (71 FR 7047) that solicited comments and announced our intent to seek OMB approval on the revised occupational mix survey (Form CMS-10079 (2006)).

The revised 2006 survey provides for the collection of hospital-specific wages and hours data, a 6-month prospective reporting period (that is, January 1, 2006 through June 30, 2006), the transfer of each general service category that comprised less than 4 percent of total hospital employees in the 2003 survey to the "all other occupations" category (the revised survey focuses only on the mix of nursing occupations), additional clarification of the definitions for the occupational categories, an expansion of the RN category to include functional subcategories, and the exclusion of average hourly rate data associated with advance practice nurses.

The 2006 survey includes only 2 general occupational categories: Nursing and "all other occupations." The Nursing category has 4 subcategories: RNs, LPNs, Aides, Orderlies, Attendants, and Medical Assistants. The RN subcategory includes 2 functional subcategories: Management Personnel and Staff Nurses or Clinicians. As indicated above, the 2006 survey provides for a 6-month data collection period, from January 1, 2006 through June 30, 2006. However, we are allowing flexibility for the reporting period begin and end dates to accommodate some hospitals' bi-weekly payroll and reporting systems. That is, the 6-month reporting period must begin on or after December 25, 2005, and must end before July 9, 2006.

To comply with the Bellevue Court's order, as discussed above, we propose to collect new survey data, instead of using the 2003 survey data proposed in the FY 2007 IPPS proposed rule, to calculate the occupational mix adjustment for the FY 2007 wage index. Since hospitals are currently collecting data for the revised 2006 survey, we are proposing to use the first 3 months of that data (that is, from January 1, 2006 through March 31, 2006) to calculate the FY 2007 occupational mix adjustment. In order to allow sufficient time for hospitals, FIs, and CMS to collect, review, and correct the new data, and for us to perform

required analyses and apply the new data in calculating the FY 2007 occupational mix adjustment, it would be impossible for us to apply the full 6-months of data by

October 1, 2006. (See section II.C.2 below for proposed detailed data collection, review, and correction process.)

2. Timeline for the Collection, Review, and Correction of the Occupational Mix Data

[If you choose to comment on issues in this section, please include the caption "TIMELINE" at the beginning of your comments.]

On April 21, 2006, we issued a Joint-Signature Memorandum (JSM-06412) instructing all FIs to immediately alert the hospitals they service to the changes in the schedule for submitting the occupational mix data files.

The Joint-Signature Memorandum is available on the CMS website at: <http://www.cms.hhs.gov/AcuteInpatientPPS>.

Click on "Wage Index Files" and the link is titled: [2006 Occupational Mix Survey -- Interim Data Collection - CMS Memo to Fiscal Intermediaries](#).

The Joint-Signature Memorandum provides hospitals and FIs with the revised schedule for the occupational mix survey data that would be used in the FY 2007 wage index. The schedule includes deadlines for--

- Hospitals to submit occupational mix data. The deadline is June 1, 2006.
- FI review of the submitted data. The deadline is June 22, 2006.
- Availability of the submitted data on the CMS website. The deadline is June 29, 2006.
- Hospitals to submit requests to their FIs for corrections to their interim occupational mix data. The deadline is July 13, 2006.
- FIs to submit corrected interim occupational mix survey data for the January 1, 2006 through March 31, 2006 period. The deadline is July 27, 2006.

We note that it is critical that hospitals provide information according to the dates provided in this schedule in order to be able to appeal any disputed calculations at a later point to the Provider Review Reimbursement Board (PRRB). The final deadline for the FIs to make occupational mix data available to CMS is July 27, 2006. These data would reflect FI review and the resolution of any errors or adjustments between the hospitals and FI. Once these data are available on the CMS website, changes to a hospital's occupational mix data would be allowed only in those very limited situations involving an error by the FI or CMS that the hospital could not have known about before its review of

the final occupational mix data file. Specifically, neither the FI nor CMS would approve the following types of requests:

- Requests for occupational mix data corrections that were submitted too late to be included in the data transmitted to CMS by FIs on or before July 27, 2006.
- Requests for correction of errors that were not, but could have been, identified during the hospital's review of the June 29, 2006 occupational mix file.

Verified corrections to the occupational mix received by the FIs and CMS (that is, by July 13, 2006) would be incorporated into the final wage index for FY 2007, to be effective October 1, 2006.

We created the process described above to resolve all substantive occupational mix correction disputes before we finalize the wage and occupational mix data for the FY 2007 payment rates. Accordingly, hospitals that do not meet the procedural deadlines set forth above would not be afforded a later opportunity to submit occupational mix data corrections or to dispute the FI's decision with respect to requested changes. Specifically, our policy is that hospitals that do not meet the procedural deadlines set forth above would not be permitted to challenge later, before the PRRB, the failure of CMS to make a requested data

revision. (See W.A. Foote Memorial Hospital v. Shalala, No. 99-CV-75202-DT (E.D. Mich.2001) and Palisades General Hospital v. Thompson, No. 99-1230 (D.D.C. 2003)). We also refer the reader to the FY 2000 IPPS final rule (64 FR 41513) for a discussion of the parameters for appealing to the PRRB for wage index data corrections.

We believe the occupational mix data correction process described above provides hospitals with the opportunity to bring errors in their occupational mix data to the FI's attention.

Since hospitals would have access to the final occupational mix data by June 29, 2006, they would have the opportunity to detect any data entry or tabulation errors made by the FI or CMS before the development and publication of the final FY 2007 wage index and the implementation of the FY 2007 wage index on October 1, 2006. We believe that if hospitals avail themselves of the opportunities afforded to provide and make corrections to the occupational mix data, the wage index implemented on October 1, 2006 should be accurate. In the event that errors are identified by hospitals and brought to our attention after July 13, 2006, we would only make mid-year changes to the wage index in accordance with §412.64(k). For a detailed discussion see the FY 2007 IPPS proposed rule (71 FR 24089). However, note

that a hospital's deadline for making corrections to the proposed occupational mix data is July 13, 2006.

3. Calculation of the Proposed FY 2007 Occupational Mix Adjustment Factor and the Proposed FY 2007 Occupational Mix Adjusted Wage Index

[If you choose to comment on issues in this section, please include the caption "CALCULATION OF THE PROPOSED FY 2007 OCCUPATIONAL MIX ADJUSTMENT" at the beginning of your comments.]

We are proposing to use the following steps for calculating the proposed FY 2007 occupational mix adjustment factor for the proposed FY 2007 wage index:

Step 1--For each hospital, determine the percentage of the total nursing category attributable to a nursing subcategory by dividing the nursing subcategory hours by the total nursing category's hours (RN Management Personnel and RN Staff Nurses or Clinicians are treated as separate nursing subcategories). Repeat this computation for each of the 5 nursing subcategories: RN Management Personnel, RN Staff Nurses or Clinicians, LPNs; Nursing Aides, Orderlies, and Attendants; and Medical Assistants.

Step 2 - Determine a national average hourly rate for each nursing subcategory by dividing a subcategory's total salaries for all hospitals in the occupational mix survey

database by the subcategory's total hours for all hospitals in the occupational mix survey database.

Step 3--For each hospital, determine an adjusted average hourly rate for each nursing subcategory by multiplying the percentage of the total nursing category (from Step 1) by the national average hourly rate for that nursing subcategory (from Step 2). Repeat this calculation for each of the 5 nursing subcategories.

Step 4--For each hospital, determine the adjusted average hourly rate for the total nursing category by summing the adjusted average hourly rate (from Step 3) for each of the nursing subcategories.

Step 5 - Determine the national average hourly rate for the total nursing category by dividing total nursing category salaries for all hospitals in the occupational mix survey database by total nursing category hours for all hospitals in the occupational mix survey database.

Step 6--For each hospital, compute the occupational mix adjustment factor for the total nursing category by dividing the national average hourly rate for the total nursing category (from Step 5) by the hospital's adjusted average hourly rate for the total nursing category (from Step 4).

If the hospital's adjusted average hourly rate is less than the national average hourly rate (indicating the

hospital employs a less costly mix of nursing employees), the occupational mix adjustment factor would be greater than 1.0000.

If the hospital's adjusted average hourly rate is greater than the national average hourly rate, the occupational mix adjustment factor would be less than 1.0000.

Step 7--For each hospital, calculate the occupational mix adjusted salaries and wage-related costs for the total nursing category by multiplying the hospital's total salaries and wage-related costs (from Step 5 of the unadjusted wage index calculation in section III.F. of the preamble of the FY 2007 IPPS proposed rule (71 FR 24081), by the percentage of the hospital's total workers attributable to the total nursing category (using the occupational mix survey data, this percentage is determined by dividing the hospital's total nursing category hours by the hospital's total hours for "nursing and all other") and by the total nursing category's occupational mix adjustment factor (from Step 6 above).

The remaining portion of the hospital's total salaries and wage-related costs that is attributable to all other employees of the hospital is not adjusted by the occupational mix. A hospital's all other portion is

determined by subtracting the hospital's nursing category percentage from 100 percent.

Step 8--For each hospital, calculate the total occupational mix adjusted salaries and wage-related costs for a hospital by summing the occupational mix adjusted salaries and wage-related costs for the total nursing category (from Step 7) and the portion of the hospital's salaries and wage-related costs for all other employees (from Step 7).

To compute a hospital's occupational mix adjusted average hourly wage, divide the hospital's total occupational mix adjusted salaries and wage-related costs by the hospital's total hours (from Step 4 of the unadjusted wage index calculation in section III.F. of the preamble of the FY 2007 IPPS proposed rule (71 FR 24080)).

Step 9--To compute the occupational mix adjusted average hourly wage for an urban or rural area, sum the total occupational mix adjusted salaries and wage-related costs for all hospitals in the area, then sum the total hours for all hospitals in the area. Next, divide the area's occupational mix adjusted salaries and wage-related costs by the area's hours.

Step 10--To compute the national occupational mix adjusted average hourly wage, sum the total occupational mix

adjusted salaries and wage-related costs for all hospitals in the Nation, then sum the total hours for all hospitals in the Nation. Next, divide the national occupational mix adjusted salaries and wage-related costs by the national hours.

Step 11--To compute the occupational mix adjusted wage index, divide each area's occupational mix adjusted average hourly wage (Step 9) by the national occupational mix adjusted average hourly wage (Step 10).

Step 12--To compute the Puerto Rico specific occupational mix adjusted wage index, follow Steps 1 through 11 above.

Table 1 below is an illustrative example of the occupational mix adjustment.

Table 1--Example of Occupational Mix Adjustment

			Step 1	Step 2	Step 3	Step 5	Step 6	In Step 7
			Provider Percentage by Subcategory	National Average Hourly Wages by Subcategory	Provider-Adjusted Average Hourly Wage	National-Adjusted Nursing Average Hourly Wage	Nursing Occupational Mix Adjustment Factor	Provider Percentage by Total
Hospital A								
Provider Occupational Mix Hours								
Nursing Hours								
RN Management	202,387.00		9.84%	\$50.00	\$4.92			
RN Staff	1,439,742.00		70.00%	\$30.00	\$21.00			
LPNs	67,860.00		3.30%	\$20.00	\$0.66			
Nurse Aides	259,177.00		12.60%	\$13.00	\$1.64			
Medical Assistants	87,622.00		4.26%	\$12.00	\$0.51			
Total Nursing Hours	2,056,788.00				\$28.73	\$27.00	0.9398	29.15%
All Other Employees Hours	5,000,000.00				step 4			70.85%
TOTAL HOURS	7,056,788.00							
Wage Data from Cost Report								
Wages (From S-3, Parts II and III)	\$83,312,942.55							
Hours (From S-3, Parts II and III)	3,836,299.60							
Hospital A Unadjusted Average Hourly Wage	\$21.72							
Nursing Occupational Mix Wages	\$22,821,141	step 7						
All Other Employees Unadjusted Occupational Mix Wages	\$59,030,357	step 7						
Total Occupational Mix Wages	\$81,851,498	step 8						
Hospital A Final Occupational Mix Adj. Avg. Hourly Wage	\$21.34	step 8						
Hospital B								
Provider Occupational Mix Hours								
Nursing Hours								
RN Management	70,333.00		3.01%	\$50.00	\$1.51			
RN Staff	1,430,114.00		61.27%	\$30.00	\$18.38			
LPNs	159,795.00		6.85%	\$20.00	\$1.37			
Nurse Aides	391,201.00		16.76%	\$13.00	\$2.18			
Medical Assistants	282,728.00		12.11%	\$12.00	\$1.45			

			Step 1	Step 2	Step 3	Step 5	Step 6	In Step 7
			Provider Percentage by Subcategory	National Average Hourly Wages by Subcategory	Provider-Adjusted Average Hourly Wage	National-Adjusted Nursing Average Hourly Wage	Nursing Occupational Mix Adjustment Factor	Provider Percentage by Total
Total Nursing Hours	2,334,171.00				\$24.89	\$27.00	1.0848	31.83%
All Other Employees Hours	5,000,000.00				step 4			70.85%
TOTAL HOURS	7,334,171.00							
Wage Data from Cost Report								
Wages (From S-3, Parts II and III)	\$25,979,714							
Hours (From S-3, Parts II and III)	1,097,585							
Hospital B Unadjusted Average Hourly Wage	\$23.67							
Nursing Occupational Mix Wages	\$8,969,717	step 7						
All Other Employees Unadjusted Occupational Mix Wages	\$17,711,418	step 7						
Total Occupational Mix Wages	\$26,681,135	step 8						
Hospital B Final Occupational Mix Adj. Avg. Hourly Wage	\$24.31	step 8						

Note: The numbers used in this example are hypothetical.

Because the occupational mix adjustment is required by statute, all hospitals that are subject to payments under the IPPS, or any hospital that would be subject to the IPPS if not granted a waiver, must complete the occupational mix survey, unless the hospital has no associated cost report wage data that are included in the FY 2007 wage index.

For the FY 2005 and FY 2006 final wage indices, we used the unadjusted wage data for hospitals that did not submit occupational mix survey data. For calculation purposes, this equates to applying the national nursing mix to the wage data for these hospitals, because hospitals having the same mix as the Nation would have an occupational mix adjustment factor equaling 1.0000. However, an adjustment may not be equitable in situations where the hospital has a higher or lower than average occupational mix than the Nation as a whole. If the hospital's occupational mix is higher than the average for the nation as a whole, hospitals in other areas are disadvantaged by the hospital not providing occupational mix information. If the hospital's occupational mix is lower than the average for the Nation as a whole, other hospitals in the same geographic area would be disadvantaged by the hospital not providing the information.

In the FY 2005 and FY 2006 IPPS final rules (69 FR 49035 and 70 FR 47368), we noted that we would revisit this matter with subsequent collections of the occupational mix data. For the FY 2007 wage index, we are proposing to use 1 of 4 options for treating the occupational mix data for non-responsive hospitals: (1) assign the hospital an occupational mix adjustment factor of 1.0000 as we did for FY 2005 and FY 2006; (2) assign the hospital the average occupational mix adjustment factor for its labor market area; (3) assign the hospital the lowest occupational mix adjustment factor for its labor market area; or (4) assign the hospital the average occupational mix factor for similar hospitals, based on factors such as, geographic location, bed size, teaching versus non-teaching status and case mix. We are requesting comments on these or other alternatives for equitably addressing the situation of hospitals that are not responsive to the occupational mix survey.

D. Implementation of the Proposed FY 2007 Occupational Mix Adjusted Wage Index

[If you choose to comment on issues in this section, please include the caption "IMPLEMENTATION OF PROPOSED FY 2007 OCCUPATIONAL MIX ADJUSTMENT" at the beginning of your comments.]

In the FY 2007 IPPS proposed rule, we proposed to adjust 10 percent of the FY 2007 wage index by the occupational mix adjustment factor. However, to comply with the Court's order, we would apply the occupational mix adjustment to 100 percent of the FY 2007 wage index. Therefore, we are proposing to calculate the FY 2007 occupational mix adjustment using the first 3 months of the 2006 survey data and apply that adjustment to 100 percent of the FY 2007 wage index. We also believe that, with the modifications we included in the 2006 survey, hospitals' experience with collecting occupational mix survey data, and the review and correction process described in section C.2 of this preamble, an 100 percent adjustment is reasonable.

Since the 2006 survey data is currently being collected by hospitals, we are unable to estimate how the new data would affect the FY 2007 wage index. Due to the short time frame for implementing the Court's order, we do not expect to be able to provide the occupational mix adjusted wage index tables, rates, and impacts with the FY 2007 IPPS final rule. We are proposing to post the FY 2007 occupational mix adjusted wage index tables and related impacts on the CMS website, shortly after we publish the FY 2007 IPPS final rule, and in advance of October 1, 2006. We believe these procedures would comply with section 1886(d)(6) of the Act

because, by August 1, we would describe our data and methods for calculating the wage index and IPPS rates in the FY 2007 IPPS final rule, but the actual rates and wage tables would not be issued until a later date. Further, we expect to discuss in the IPPS final rule that the new occupational mix data should have a redistributive effect on hospital payments and should not increase or decrease total payments, as the wage index is budget neutral. Also, due to the unusual circumstances imposed by the Court's order, we therefore would depart from our normal practice of providing the weights and factors that would be used in calculating the IPPS rates along with the final rule. Given the short timeframe for collecting and properly allowing for corrections of occupational mix data, for FY 2007, these weights and factors would be published on the CMS website after the final rule, but in advance of October 1, 2006.

E. Impact of the Proposed FY 2007 Occupational Mix Adjusted Wage Index on the Out-migration Adjustment and Hospital Reclassifications

[If you choose to comment on issues in this section, please include the caption "OUT-MIGRATION" at the beginning of your comments.]

1. FY 2007 Wage Index Adjustment Based on Commuting Patterns of Hospital Employees

In accordance with section 505 of Pub. L. 108-173, beginning with FY 2005, we established a process to make adjustments to the hospital wage index based on commuting patterns of hospital employees. The process, outlined in the FY 2005 IPPS final rule (69 FR 49061), provides for an increase in the wage index for hospitals located in certain counties that have a relatively high percentage of hospital employees who reside in the county but work in a different county (or counties) with a higher wage index. The adjustments to the wage index are effective for 3 years, unless a hospital requests to waive the application of the adjustment. A county would not lose its status as a qualifying county due to wage index changes during the 3-year period, and counties would receive the same wage index increase for those 3 years. Hospitals that receive the adjustment to their wage index are not eligible for reclassification under section 1886(d)(8) of the Act or section 1886(d)(10) of the Act.

Hospitals located in counties that qualify for the wage index adjustment are to receive an increase in the wage index that is equal to the average of the differences between the wage indices of the labor market area(s) with higher wage indices and the wage index of the resident county, weighted by the overall percentage of hospital

workers residing in the qualifying county who are employed in any labor market area with a higher wage index. We employ the pre-reclassified wage indices in making these calculations.

In the FY 2007 IPPS proposed rule (71 FR 24264 through 24272), in the Out-Migration Adjustment table, Table 4J, we identified hospitals located in qualifying counties. Table 4J also lists the proposed adjustments calculated for qualifying hospitals. Hospitals that newly qualified for the adjustment in FY 2005 or FY 2006 are eligible to receive the same adjustment in FY 2007. In the FY 2007 IPPS proposed rule, we determined county eligibility based on a 10 percent occupational mix adjustment to the wage index. However, under this proposed rule, we would apply the occupational mix adjustment to 100 percent of the FY 2007 wage index. Therefore, we must re-evaluate which counties are newly eligible for the out-migration adjustment in FY 2007 using the 100 percent occupational mix adjusted wage index data. We are proposing to publish an updated version of Table 4J showing eligible hospitals and their corresponding wage index adjustments on the CMS website shortly after we publish the IPPS final rule, and in advance of October 1, 2006.

2. Proposed Procedures for Withdrawing Reclassifications in FY 2007

[If you choose to comment on issues in this section, please include the caption "WITHDRAWING RECLASSIFICATIONS" at the beginning of your comments.]

Under section 1886(d)(10) of the Act, the Medicare Geographic Classification Review Board (MGCRB) considers applications by hospitals for geographic reclassification for purposes of payment under the IPPS. The specific procedures and rules that apply to the geographic reclassification process are outlined in §412.230 through §412.280.

In the FY 2007 IPPS proposed rule (71 FR 24377), we identified hospitals that have reclassifications effective in FY 2007. As specified in §412.273, hospitals that have been reclassified by the MGCRB are permitted to withdraw an application for reclassification or terminate an existing 3-year reclassification for FY 2007. The request must be received by the MGCRB within 45 days of publication of the IPPS proposed rule.

However, as a result of the Court order that we collect new occupational mix data and calculate a 100 percent occupational mix adjustment, information in the IPPS proposed rule that hospitals use to make these decisions

regarding reclassification withdrawals is now obsolete. In addition, the necessary data (including wage indices and out-migration adjustments) hospitals utilize in evaluating whether to accept or terminate a previously approved reclassification would not be available until after the IPPS final rule has been published. Therefore, in this limited circumstance, we are proposing to suspend the 45-day deadline and are proposing to establish the new procedure described below to withdraw from reclassifications for FY 2007. Some hospitals may have adhered to the established process and notified the MGCRB of their decision to withdraw or terminate a reclassification in accordance with §412.273 before publication of this proposed rule.

Since hospitals made these decisions based on information in the FY 2007 IPPS proposed rule that is now obsolete, we are proposing that the MGCRB not act on these withdrawal requests. Instead, we are proposing to apply the following procedures for withdrawal determinations for all hospital reclassifications for FY 2007. Specifically, the FY 2007 IPPS rates must go into effect on October 1, 2006. Based on our current schedule, we do not expect to calculate the final occupational mix adjusted wage indices until sometime after August 1, 2006 and before October 1, 2006. For this reason, we do not believe there is sufficient time

for CMS to make the final occupational mix adjusted wage indices available and allow hospitals a 45-day period to make a final decision regarding whether to withdraw a reclassification for FY 2007. In the interim, we propose to make reclassification withdrawal determinations based on what we perceive would be most advantageous to the hospital based on the 100 percent occupational adjusted wage index data and the out-migration adjustment, if applicable.

We also propose to make the final occupational mix adjusted wage indices and out-migration adjustments and our interim decisions on hospital reclassifications available to the public on the CMS website sometime after August 1, 2006, but before October 1, 2006. We would allow hospitals a 30-day period from the date the 100 percent occupational mix adjusted wage index data is made available where they can make final, informed determinations regarding whether to maintain or revise the decision made by CMS regarding its reclassification status.

Hospitals would have 30 days after the data is made available on the CMS website to submit, in writing, whether they wish to reverse the reclassification decision made by CMS. We will make every effort to provide the final data before September 1, 2006 so that the 30 day period to make these determinations would end before October 1, 2006 and no

retroactive adjustments would be necessary. The request for a withdrawal of a reclassification or termination of an existing 3-year reclassification that would be effective in FY 2007 must be received by the MGCRB, in writing with a copy to CMS, no later 30 days after the data is made available on the CMS website. The mailing address is: 2520 Lord Baltimore Drive, Suite L, Baltimore, MD 21244-2670.

3. Procedures for Hospitals Applying for Reclassification Effective in FY 2008 and Reinstating Reclassifications in FY 2008.

[If you choose to comment on issues in this section, please include the caption "RECLASSIFICATION FOR FY 2008" at the beginning of your comments.]

Applications for FY 2008 reclassifications are due to the MGCRB by September 1, 2006. We note that this deadline also applies for canceling a previous wage index reclassification withdrawal or termination under §412.273(d). As we noted in the FY 2007 IPPS proposed rule (71 FR 24083), applications and other information about MGCRB reclassifications may be obtained, beginning in mid-July, on the CMS website at: <http://www.cms.hhs.gov/mgcrb/>, or by calling the MGCRB at (410) 786-1174.

The MGCRB, in evaluating a hospital's request for reclassification for FY 2008 for the wage index, must utilize the official data used to develop the FY 2007 wage index. The wage data used to support the hospital's wage comparisons must be from the CMS hospital wage survey. Generally, the source for this data would be the IPPS final rule that is expected to be published on or about August 1, 2006. However, under this rule, the wage tables identifying the 3-year average hourly wage of hospitals would not be available for the FY 2007 IPPS final rule. Therefore, we are proposing to make the data available subsequent to August 1, 2006 but before October 1, 2006.

Section 1886(d)(10)(C)(ii) of the Act indicates that a hospital requesting a change in geographic classification for a FY must submit its application to the MGCRB not later than the first day of the 13-month period ending on September 30 of the preceding FY. Thus, the statute requires that FY 2008 reclassification applications be submitted to the MGCRB by no later than September 1, 2006. For this reason, hospitals must file an FY 2008 reclassification application by the September 1, 2006 deadline even though the average hourly wage data used to develop the final FY 2007 wage indices may not yet be available. We note that, under §412.256(c), the MGCRB must

review applications and notify the hospital if it determines that the application is incomplete.

As outlined in §412.256(c)(2), hospitals with incomplete applications have the opportunity to request that the MGCRB grant a hospital that has submitted an application by September 1, 2006 an extension beyond September 1, 2006 to complete its application. Thus, while hospitals must file an application for reclassification to the MGCRB by September 1, 2006, they would be able to supplement the reclassification application with official data used to develop the FY 2007 wage index after filing their initial application. We are proposing that hospitals file a supplement to the reclassification application with official data used to develop the FY 2007 wage index no later than 30 days after the data is made available on the CMS website.

II. Provisions of the Proposed Rule

This proposed rule replaces in full the descriptions of the data and methodology that would be used in calculating the occupational mix adjustment discussed in the FY 2007 IPPS proposed rule (71 FR 23996). Readers should refer to this proposed rule on the occupational mix adjustment and reclassification deadlines and procedures.

Consistent with the Court's order to collect new occupational mix data and apply the "adjustment in full," we

are proposing to apply the occupational mix adjustment to 100 percent, rather than 10 percent, of the wage index using the new occupational mix data we are collecting from hospitals.

We are proposing to modify procedures for withdrawing requests to reclassify for the FY 2007 wage index so that hospitals would be able to make these decisions after we publish the new occupational mix adjusted average hourly wages and wage index values. In addition, we are proposing that hospitals applying for reclassification in FY 2008 file a supplement that includes the official data used to develop the FY 2007 wage index no later than 30 days after the data is made available on the CMS website.

We are proposing to calculate the FY 2007 occupational mix adjustment using the first 3 months of the 2006 survey data.

We are proposing 4 options for treating the occupational mix data for non-responsive hospitals: (1) assign the hospital an occupational mix adjustment factor of 1.0000 as we did for FYs 2005 and 2006; (2) assign the hospital the average occupational mix adjustment factor for its labor market area; (3) assign the hospital the lowest occupational mix adjustment factor for its labor market area; or (4) assign the hospital the average occupational

mix factor for similar hospitals, based on factors such as, geographic location, bed size, teaching versus nonteaching status and case mix.

We are proposing to respond to public comments in the FY 2007 IPPS final rule.

We are proposing to post the FY 2007 occupational mix adjusted wage index tables and related impacts on the CMS website shortly after we publish the FY 2007 IPPS final rule, and in advance of October 1, 2006.

III. Collection of Information Requirements

[If you choose to comment on issues in this section, please include the caption "COLLECTION OF INFORMATION REQUIREMENTS" at the beginning of your comments.]

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. 35)."

IV. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, 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, when

we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Waiver of 60-day Comment Period

[If you choose to comment on issues in this section, please include the caption "WAIVER OF 60-DAY COMMENT PERIOD" at the beginning of your comments.]

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and permit a 60-day comment period. This period, however, may be shortened when the agency finds good cause that a 60-day comment period would be impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued. For this proposed rule, we are waiving the 60-day comment period for good cause and allowing a 30-day comment period that coincides with the comment period on the FY 2007 IPPS proposed rule.

Ordinarily, we begin our preparations for issuing an IPPS proposed rule early in a calendar year so that our proposals may be on public display in early spring of that year. This schedule allows for a 60-day comment period closing in either late spring or early summer, as well as a one-to-two-month period to consider all comments and appropriately respond to them.

In this case, we received the Court's order after almost all of the IPPS proposed rule had already been prepared and finalized. The Court's order requiring that we collect new occupational mix data by September 30, 2006 with immediate application necessitated this modification to the original FY 2007 IPPS proposed rule. A 60-day comment period on this proposal for how we plan to implement the Court's order would be both impracticable and contrary to the public interest, because the comment period would end on **[OFR: insert 60 days after date of display]** and would not allow the agency sufficient time to process the comments and respond to them by the August 1, 2006 date for the final rule. In addition, we do not believe it would be appropriate to review comments relating to the occupational mix in isolation from comments received on the remainder of the FY 2007 IPPS proposed rule.

Because the FY 2007 IPPS proposed rule is an inter-dependent system (for example, occupational mix adjustments affect wage indices, which affect reclassifications and budget neutrality) extending the comment period to take account of this occupational mix proposal would necessarily entail not being able to consider the comments on the remainder of the proposed rule until **[OFR: insert 60 days after date of display]**. We believe it

would be contrary to the public interest to delay consideration of comments that were received timely on the original FY 2007 IPPS proposed rule, solely due to an intervening Court order. If we did delay consideration, timely filed comments would receive a shorter period of time for consideration by the agency. It also would be impracticable to consider all FY 2007 IPPS comments by **[OFR: insert 60 days after date of display]**, as doing so would leave insufficient time for the agency to properly respond to comments and appropriately consider and resolve whether any of the proposed policies would be modified in light of comments received. Therefore, we find good cause to waive the 60-day comment period for this rule of proposed rulemaking.

VI. Regulatory Impact Statement

[If you choose to comment on issues in this section, please include the caption "IMPACT" at the beginning of your comments.]

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96-354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns 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 not a major rule, rather it modifies the occupational mix adjustment to the wage index, which is budget neutral, as published in the FY 2007 IPPS proposed rule (71 FR 23996). While there may be a redistributive effect on payments to hospitals, total program payments would neither increase nor decrease as a result of this proposed rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of \$6 million to \$29 million in any 1 year. (For details,

see the Small Business Administration's regulation that set forth size standards for health care industries at 65 FR 69432). For purposes of the RFA, all hospitals and other providers and suppliers are considered to be small entities. Individuals and States are not included in the definition of a small entity. This proposed rule may result in a redistributive effect on payments to hospitals, therefore, it could result in 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. 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. This proposed rule may result in a redistributive effect on payments to hospitals, therefore, it could result in a significant impact on 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 whose mandates require spending in any 1 year of \$100 million in 1995 dollars,

updated annually for inflation. That threshold level is currently approximately \$120 million. This proposed rule will not have an effect on State, local, or tribal governments in the aggregate nor will private sector costs be greater than the \$120 million threshold, since this rule is purely budget neutral.

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. This proposed rule would not have a substantial effect on State or local governments.

This proposed rule does not include analyses for either the RFA or section 1102(b) of the Act because the data are currently being collected for the 2006 occupational mix survey. Therefore, in this proposed rule, we are unable to estimate how the new occupational mix data would affect the FY 2007 wage index.

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

(Catalog of Federal Domestic Assistance Program
No. 93.778, Medical Assistance Program)

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

Dated: _____

Mark B. McClellan,

Administrator,

Centers for Medicare & Medicaid

Services.

Approved: _____

Michael O. Leavitt,

Secretary.