

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Health Care Financing Administration****42 CFR Part 414****[BPD-901-NC]****RIN 0938-AI33****Medicare Program; Delay in Implementing the Adjustments to the Practice Expense Relative Value Units Under the Physician Fee Schedule for Calendar Year 1998****AGENCY:** Health Care Financing Administration (HCFA), HHS.**ACTION:** Notice of intent to regulate.

**SUMMARY:** This notice identifies provisions in the Medicare physician fee schedule regulations that are affected by enactment of the Balanced Budget Act of 1997 (BBA 1997). Section 4505 of the BBA 1997 postpones implementation of a resource-based practice expense relative value unit system until January 1, 1999 and provides for a 4-year transition. In addition, it provides for an adjustment for practice expense relative value units for 1998. It also requires publication of a new proposed rule for practice expense by May 1, 1998, thus requiring significant revision of our proposal contained in the proposed rule published June 18, 1997 (62 FR 33158).

**DATES:** *Comment Date:* Comments will be considered if we receive them at the appropriate address, as provided below, no later than 5 p.m. on December 30, 1997.

**ADDRESSES:** Mail written comments (1 original and 3 copies) to the following address: Health Care Financing Administration, Department of Health and Human Services, Attention: BPD-901-NC, P.O. Box 26688, Baltimore, MD 21207-0488.

If you prefer, you may deliver your written comments (1 original and 3 copies) to one of the following addresses:

Room 309-G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5-09-26, 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 BPD-901-NC. Comments received timely will be available for public inspection as they are received, beginning approximately 3 weeks after publication of the 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).

**FOR FURTHER INFORMATION CONTACT:** Stanley Weintraub, (410) 786-4498.

**SUPPLEMENTARY INFORMATION:****I. Legislative History**

Since January 1, 1992, Medicare has paid for physician services under section 1848 of the Social Security Act (the Act), "Payment for Physicians' Services." This section contains three major elements: (1) A fee schedule for the payment of physician services; (2) a method to control the rates of increase in Medicare expenditures for physician services; and (3) limits on the amounts that nonparticipating physicians can charge beneficiaries. Title XVIII of the Act requires that payments under the fee schedule be based on national uniform relative value units (RVUs) based on the resources used in furnishing a service. Section 1848(c) of the Act requires that national RVUs be established for physician work, practice expense, and malpractice expense.

Section 1848(c)(2)(B)(ii)(II) of the Act provides that adjustments in RVUs because of changes resulting from a review of those RVUs may not cause total physician fee schedule payments to differ by more than \$20 million from what they would have been had the adjustments not been made. If this tolerance is exceeded, we must make adjustments to the conversion factor to preserve budget neutrality.

**II. Published Changes to the Fee Schedule**

We published a final rule on November 25, 1991 (56 FR 59502) to implement section 1848 of the Act by establishing a fee schedule for physician services furnished on or after January 1, 1992. In the November 1991 final rule (56 FR 59511), we stated our intention to update RVUs for new and revised codes in the American Medical Association's (AMA's) Physicians' Current Procedural Terminology (CPT) through an "interim RVU" process every year. The latest update to the RVUs and fee schedule was published on November 22, 1996, as a final rule with comment period (61 FR 59490).

In addition, on June 18, 1997, we issued a proposed rule (62 FR 33158) to revise various policies relating to physician services and included in that proposal a chronology of all regulations that updated the fee schedule and related policies.

**III. Implementation of Section 4505 of the Balanced Budget Act of 1997**

Under the law in effect at the time that the June 18, 1997 physician fee schedule proposed rule was published, we were required to develop a resource-based system for determining practice expense RVUs effective January 1, 1998. The BBA 1997 (Pub. L. 105-33), enacted on August 5, 1997, provides for several revisions in the requirement to change from charge-based practice expense RVUs to a resource-based method.

Specifically, the BBA 1997 provides for the following:

- One-year delay.

Section 4505(a) of the BBA 1997 provides that the implementation of the requirement to move from the current charge-based practice expense RVUs to resource-based practice expense RVUs be delayed from January 1, 1998 to January 1, 1999.

- Phased-in implementation.

Instead of paying for all services entirely under a resource-based system in 1999, section 4505(b) of the BBA 1997 provides for a 4-year transition period. Practice expense RVUs for 1998 will be based on the adjustments described below. The practice expense RVUs for the year 1999 will be determined as the product of 75 percent of the previous year's RVUs (1998) and 25 percent of the resource-based RVUs. For the year 2000, the percentages will be 50 percent charge-based and 50 percent resource-based. For the year 2001, the percentages will be 25 percent charge-based and 75 percent resource-based. For subsequent years, the RVUs will be totally resource-based.

- Review by Comptroller General.

Section 4505(c) of the BBA 1997 requires the Comptroller General to review and evaluate our proposed rule and report to the Congress within 6 months of the date of enactment of the BBA 1997 (that is, by February 5, 1998). The review is to include an analysis of (1) the adequacy of the data used in preparing the rule, (2) categories of allowable costs, (3) methods for allocating direct and indirect expenses, (4) the potential impact of the rule on beneficiary access to services, and (5) any other matters related to the appropriateness of resource-based methodology for practice expenses. The Comptroller General is to consult with representatives of physicians' organizations with respect to matters of both data and methodology.

- Adjustment for practice expense RVUs for 1998.

Section 4505(e) of the BBA 1997 provides that, for 1998, the practice expense RVUs will be adjusted for

certain services in anticipation of the implementation of resource-based practice expenses beginning in 1999. Practice expense RVUs for office visits will increase, while practice expense RVUs for certain other services will be reduced according to a formula included in section 4505(e) of the BBA 1997. The formula requires that services that were proposed to be reduced in the June 18, 1997 proposed rule, and were not performed at least 75 percent of the time in an office setting, would get a uniform percentage reduction. The reduced RVUs for practice expense would be calculated to be equivalent to 110 percent of the work RVUs for the service. However, the total of the reductions cannot exceed \$390 million. The procedure codes affected and the final RVUs for 1998 are being published in the physician fee schedule final rule.

- Requirements for new resource-based practice expense RVUs.

Section 4505(d)(3) of the BBA 1997 requires that the Secretary transmit a Report to the Congress by March 1, 1998 including a presentation of data to be used in developing the practice expense RVUs and an explanation of the methodology. Section 4505(d)(3) requires that a proposed rule be published by May 1, 1998, with a 90-day comment period. In order for the transition to begin on January 1, 1999, a final rule would need to be published by October 31, 1998.

In the May 1, 1998 proposed rule, we are required to develop new resource-based practice expense RVUs. In developing new practice expense RVUs, section 4505(d)(3) requires us to: (1) utilize, to the maximum extent practicable, generally accepted cost accounting principles that recognize all staff, equipment, supplies, and expenses, not solely those that can be linked to specific procedures, and use actual data on equipment utilization and other key assumptions; (2) consult with organizations representing physicians regarding methodology and data to be used; and (3) develop a refinement process to be used during each of the 4 years of the transition period.

To assist us in developing the new RVUs using the data the BBA 1997 requires, we are requesting that any physicians, physician organizations, or others provide us with the following information:

- Generally accepted cost accounting principles—We are requesting comments on generally accepted cost accounting principles that recognize all staff, equipment, supplies, and expenses, not just those that can be tied to specific procedures. We particularly

solicit comments on aspects of the cost accounting methodology used in the June 18, 1997 proposed rule that were not consistent with the statutory guidance.

We understand from various representatives of physicians and physician groups that special studies were conducted to develop or validate resource-based RVUs for physicians' services. We believe that the information collected from these studies could be helpful in allowing us to evaluate the consistency of our methodology with generally accepted cost accounting principles that recognize all resources, not just those that can be tied to specific procedures. Those studies would also provide a valuable source of information to develop the new set of proposed RVUs. Therefore, we are requesting that completed copies of studies of resource-based RVUs be submitted during the comment period for this notice. We are requesting any underlying surveys supporting those studies, including copies of the actual survey instrument, sample design, general and item response rates, and characteristics of non-response bias.

- Equipment utilization—We are requesting complete copies of any studies or other data showing the actual utilization of equipment by physician practices. The data should be related to specific pieces of equipment used in medical, surgical, and diagnostic (including radiology) services and should be identified as being used in the provision of specific procedure codes. In providing the information, the methodology used to determine the actual equipment utilization should be provided. If a survey was used to obtain the information, pertinent details about the survey (for example, the number and type of surveyed entities and general and item response rates, and assessment of the characteristics of non-response bias) should be provided, as well as a complete copy of the report describing the sampling design, methodology, directions, and definitions.

- Other assumptions—During the development of the proposed practice expense RVUs published in our June 18, 1997 proposed rule, we made a number of assumptions about pricing and other information needed. We would like any actual data that would assist us in reviewing or revising our assumptions for the following:

- + Useful life of equipment—We utilized manufacturer and other estimates of the useful life of equipment. We would like information on the actual useful life of equipment used in providing services. That is, we

would like information about the time equipment is in service from the time it is purchased until it is disposed of. This information should be for equipment used by physician practices in furnishing specific procedures.

- + Direct and indirect costs—We would like actual data describing the amount and percentage of direct practice costs versus the amount and percentage of indirect practice costs by specialty. Indirect costs are generally being defined as those costs not *directly* allocable to individual services, such as rent, utilities, maintenance, phones, general clerical staff, and office equipment. We would also like summary information by specialty for these major types of indirect costs. Costs attributable to billing, procedure-specific equipment maintenance, and other direct expenses should not be included since they were captured by the clinical practice expert panels or through other means. The methodology commenters use to gather this information should be provided. If a survey was used, the details of the survey methodology, including the general and item response rates, and characteristics of non-response bias, should be provided, as well as a complete copy of the report describing the sampling design, methodology, directions, and definitions.

Site-of-service assumptions—In our June 18, 1997 proposed rule, we did not publish a practice expense RVU for a site-of-service (in-office or out-of-office) if the service, according to our data, was not performed in that site. We indicated "NA" (not applicable) in the column describing that site in Addendum C (Relative Value Units (RVUs) and Related Information) of the June 1997 proposed rule. We invite comments about whether services where an "NA" indicator was shown can be done safely at that site. Conversely, we invite comments about the safety of services furnished at a site where we show an RVU for a practice expense for a service.

(A copy of the entire June 1997 proposed rule, including the addenda, is available through the Internet at the following address: [http://www.access.gpo.gov/su\\_docs/](http://www.access.gpo.gov/su_docs/), by using local WAIS client software, or by telnet to [swais.access.gpo.gov](http://swais.access.gpo.gov), then login as guest (no password required).)

- Use of physician-employed staff in hospitals and other facility settings.

We have been informed by physicians and others that it is a common and widespread practice for a physician's employees, for example, nurses, to accompany the physician to the hospital, ambulatory surgical center, and other facilities. It has been

suggested that the function of the staff is to assist the physician in providing services by acting as assistants-at-surgery or serving as scrub nurses.

There seems to be some question whether this practice is in fact common and widespread; therefore, we are requesting comments and information about this practice. We seek precise information about the extent to which it occurs, including but not limited to the specific procedures involved, the specific functions performed by the staff, the specific type of staff involved and their training and credentialing, the particular types of facilities involved, and the type of diagnosis-related group to which the service is assigned. We seek comments from physicians who are familiar with this practice as well as from physicians who are not familiar with it.

We particularly seek information and data from executives and managers of hospitals, ambulatory surgical centers, and other facilities about the nature and extent of this practice. Where it occurs, we are particularly interested in the specific functions performed by the physician's employees and the extent to which they are substitutes for hospital employees. This is particularly important because action would have to be taken to reduce the Medicare facility reimbursement rate since the rate currently covers payment for staff to provide functions that are not provided directly by the facility.

For physicians and others who are providing information about the use of their own staff, and for others who are familiar with the practice, we would like the details of the arrangements, including the name and location of the hospital or facility; whether the facility is a teaching or community hospital;

whether the hospital is located in an urban or rural area; the facility's requirements for credentialing of the staff; the specific functions the physician's staff are performing, including any limits on duties of the staff by the facility; and any compensation arrangements from the facility. In addition, where surveys have been conducted to document this practice, we would like to receive complete copies of the survey and its results, including the details of the survey methodology, the response rates, a description of the survey universe and any analysis of non-response bias, the sampling design, directions, definitions, survey forms, and correspondence with respondents.

We would like to contact some of these specific institutions in order to provide us with a more complete understanding of the specific types of staff involved and the specific types of functions provided by the staff.

- **Refinement process**—We have concluded the first step in the refinement process for resource-based practice expenses. From October 6 through October 8, 1997, we conducted 17 validation panels to review the raw input data previously accumulated by our contractor, Abt Associates, during the clinical practice expert panel process. We validated about 325 high-volume procedure codes. The information from this validation process, subsequent processes under development, and information obtained as a result of this notice will provide a basis for the practice expense RVUs to be proposed in our proposed rule in 1998.

We expect that refinement will be a continuing process for the existing codes and for new codes that come into

the system. Since section 4505(d)(1)(C) of the BBA 1997 requires that we develop a refinement process for each of the 4 years of the transition, we would welcome comments on how such a refinement process would operate. In particular, we would like comments about the process to refine the current codes each year and specific comments about assigning practice expense RVUs to new codes. The comments should describe not only the process, but who should be involved and how all of the users of the physician fee schedule would have access to the process. Commenters should consider the amount of time for refinements in 1998 given when the comment period will close (July 31, 1998) and when a final rule needs to be published (October 31, 1998) allowing sufficient time to compile and assemble comments. We will consider the public comments we receive in response to this notice to develop our spring 1998 proposed rule for resource-based practice expense RVUs.

(Secs. 1102, 1848, and 1871 of the Social Security Act; 42 U.S.C. 1302, 1395w-4, and 1395hh)

(Catalog of Federal Domestic Assistance Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: October 9, 1997.

**Nancy-Ann Min DeParle,**

*Deputy Administrator, Health Care Financing Administration.*

Dated: October 28, 1997.

**Donna E. Shalala,**

*Secretary.*

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