(1) Are furnished to outpatients;

(2) Are furnished by or under the direction of a physician or dentist; and

(3) Are furnished by an institution that—

(i) Is licensed or formally approved as a hospital by an officially designated authority for State standard-setting; and

(ii) Meets the requirements for participation in Medicare as a hospital; and

(4) May be limited by a Medicaid agency in the following manner: A Medicaid agency may exclude from the definition of ''outpatient hospital services'' those types of items and services that are not generally furnished by most hospitals in the State.

* * * * *

§ 440.169 [Amended]

■ 7. Section 440.169 is amended by removing and reserving paragraph (c).

■ 8. Section 440.170(a)(1) is revised to read as follows:

§ 440.170 Any other medical care or remedial care recognized under State law and specified by the Secretary.

(a) *Transportation.* (1) ''Transportation'' includes expenses for transportation and other related travel expenses determined to be necessary by the agency to secure medical examinations and treatment for a recipient.

* * * * *

PART 441—SERVICES: REQUIREMENTS AND LIMITS APPLICABLE TO SPECIFIC SERVICES

■ 9. The authority citation for part 441 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 10. Section 441.18 is amended by removing and reserving paragraphs (a)(5), and (a)(8)(vi); removing (a)(8)(viii); and revising paragraph (c) to read as follows:

§ 441.18 Case management services.

* * * * *

(c) Case management does not include, and FFP is not available in expenditures for, services defined in § 441.169 of this chapter when the case management activities constitute the direct delivery of underlying medical, educational, social, or other services to which an eligible individual has been referred, including for foster care programs, services such as, but not limited to, the following:

(1) Research gathering and completion of documentation required by the foster care program.

(2) Assessing adoption placements.

(3) Recruiting or interviewing potential foster care parents.

(4) Serving legal papers.

(5) Home investigations.

(6) Providing transportation.

(7) Administering foster care subsidies.

(8) Making placement arrangements.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medical Assistance Program.)

Dated: June 5, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: June 17, 2009.

Kathleen Sebelius,

Secretary.

[FR Doc. E9–15345 Filed 6–29–09; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 433

[CMS–2275–F2]

RIN 0938–AP74

Medicaid Program; Health Care-Related Taxes

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

ACTION: Final rule.

SUMMARY: This rule finalizes our proposal to delay enforcement of certain clarifications regarding standards for determining hold harmless arrangements in the final rule entitled, ''Medicaid Program; Health Care-Related Taxes'' from the expiration of a Congressional moratorium on enforcement from July 1, 2009 to June 30, 2010.

DATES: *Effective Date:* These regulations are effective on July 1, 2009.

FOR FURTHER INFORMATION CONTACT: Stuart Goldstein, (410) 786–0694.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1903(w) of the Social Security Act (the Act) provides for a reduction of Federal Medicaid funding based on State health care-related taxes unless those taxes are imposed on a permissible class of health care services; broad based, applying to all providers within a class; uniform, such that all providers within a class must be taxed at the same rate; and are not part of hold harmless arrangements in which collected taxes are returned, whether directly or indirectly. A similar hold harmless restriction applies to provider-related donations. Section 1903(w)(3)(E) of the Act specifies that the Secretary shall approve broad based (and uniform) waiver applications if the net impact of the health care-related tax is generally redistributive and the amount of the tax is not directly correlated to Medicaid payments. The broad based and uniformity requirements are waivable through a statistical test that measures the degree to which the Medicaid program incurs a greater tax burden than if these requirements were met. The permissible class of health care services and hold harmless requirements cannot be waived. The statute and Federal regulation identify 19 permissible classes of health care items or services that States can tax without triggering a penalty against Medicaid expenditures.

On February 22, 2008, we published a final rule entitled, ''Medicaid Program; Health Care-Related Taxes'' (73 FR 9685). This final rule amended provisions governing the determination of whether health care provider taxes or donations constitute ''hold harmless'' arrangements, codified statutory changes to the indirect guarantee threshold test and the definition of the class of managed care organization services, and deleted certain obsolete transition period regulatory provisions. The rule codified the reduction in the indirect guarantee threshold test in order to reduce the allowable amount that can be collected from a health care-related tax for the period of January 1, 2008, through September 30, 2011, as required by the Tax Relief and Health Care Act of 2006 (Pub. L. 109–432). The rule also codified changes to the permissible class of health care items or services related to managed care organizations as enacted by the Deficit Reduction Act of 2005 (Pub. L. 109–171).

The February 22, 2008 final rule became effective on April 22, 2008. However, section 7001(a)(3)(C) of the Supplemental Appropriations Act of 2008, Pub. L. No. 110–252, imposed a partial moratorium until April 1, 2009, prohibiting CMS from taking any action to implement any provisions of the final rule that are more restrictive than the provisions in effect on February 21, 2008, with the exception of the change in the statutory definition of the class of services of a managed care organization and the statutorily-required change to the indirect guarantee threshold test. This moratorium was extended by

section 5003(a) of the American Recovery and Reinvestment Act of 2009 (the Recovery Act), Public Law 111–5, until July 1, 2009. Although not subject to the moratorium, a statutorily established transition period was established until October 1, 2009, for those States with previously enacted health care-related taxes under the previous definition of Medicaid managed care organization services.

On May 6, 2009, we published a proposed rule (74 FR 21230) that delayed the enforcement of the changes made in the February 22, 2008 final rule to the hold harmless tests under § 433.54(c) and § 433.68(f), other than the statutorily-required change to the indirect guarantee threshold level, until June 30, 2010. This portion of the regulation has been the subject of the Congressional moratoria and has not yet been implemented by CMS. We explained that the delay was necessary in order to determine whether additional clarification or guidance is necessary or helpful to our State partners. In addition, we explained that certain States were concerned that the regulatory language is broad or unclear. Furthermore, we indicated that the delay would allow more time to obtain information about the potential impact of the rule and alternative approaches, and to ensure appropriate implementation of the statutory restrictions on provider taxes and donations.

II. Provisions of the Proposed Rule and Response to Comments

In the May 6, 2009 proposed rule (74 FR 21230), we proposed to delay enforcement of certain provisions concerning hold harmless arrangements, for 1 year. We received a total of 11 timely comments from national hospital associations, State Medicaid Agencies, and the National Association of State Medicaid Directors. The comments supported our decision to delay enforcement of certain clarifications regarding standards for determining hold harmless arrangements in the final rule entitled, ''Medicaid Program; Health Care-Related Taxes'' from the expiration of a Congressional moratorium on enforcement on July 1, 2009 to June 30, 2010. We appreciate these comments and agree that the delay in enforcement of these specific provisions is merited. A summary of the public comments we received, and our responses to comments, are set forth below.

Comment: Several commenters expressed support for CMS in delaying enforcement of clarifications regarding standards for determining hold harmless arrangements. Commenters indicated that this delay would enable the Agency to further examine the impact of changes on States and providers. The commenters felt that any change to current policy should be carefully considered to ensure that it would not negatively affect the ability of State Medicaid programs to maintain coverage and payment levels. Some commenters believe that the provisions of the rule relating to the hold harmless provision overstepped the authority and guidelines provided by Congress. Commenters encouraged CMS to work with States to develop objective standards by which the hold harmless provisions for health care-related taxes can be measured.

Response: We appreciate the commenters' support for the delay in enforcement of the clarifications regarding standards for determining hold harmless arrangements. We will continue to work with States to ensure that Federal statutory requirements are met. We are committed not only to applying objective analysis in determining whether State tax programs contain hold harmless arrangements but also to working with each State on a case-by-case basis, given the unique nature of the programs, to ensure implementation of permissible tax programs.

As indicated by the commenters, the delay will provide us with time to determine whether further clarification or guidance is needed and would be of assistance to States. The delay will also allow more time to obtain information about the potential impacts of the rule and alternative approaches as well as to assure the appropriate implementation of the statutory restrictions.

Comment: Several commenters stated that the current provisions of the hold harmless test specified in the March 23, 2007 (72 FR 13726) proposed rule do not represent a reasonable interpretation of Federal statutory guidelines. Commenters believe that the hold harmless clarifications should be rescinded in their entirety and returned to the original regulatory language from the August 13, 1993 (58 FR 43156) final rule. These commenters stated that the 1993 regulatory language represented clearly understood and easily interpreted standards.

Response: Our responsibility is to ensure that the Federal statutory requirements governing health care-related taxes are met. Therefore, we believe it is necessary and appropriate for the Secretary to issue regulatory provisions to provide States with clear guidance on which health care-related tax programs are permissible and therefore eligible for Federal Financial Participation (FFP). We understand that certain States are concerned that the current regulatory language may be overly broad or unclear. During the delay in enforcement, we will work with States to learn more about the potential impact of the current regulatory language and to explore other alternatives in order to assure the appropriate implementation of the statutory restrictions.

Comment: One commenter resubmitted their original comments to the March 23, 2007 proposed rule.

Response: Comments on the March 23, 2007 proposed rule were previously considered and responded to in the February 22, 2008 final rule; therefore, we are not responding to them in this rule.

III. Provisions of the Final Regulations

In this final rule, we are adopting the provisions as set forth in the May 6, 2009 proposed rule (74 FR 21232) as final, with no changes.

IV. Waiver of Delay in Effective Date

We ordinarily provide a 30-day delay in the effective date of the provisions of a notice in accordance with section 553(d) of the Administrative Procedures Act (APA), at 5 U.S.C. 553(d). We can waive the 30-day delay in effective date, however, if the Secretary finds, for good cause, that it is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons in the notice.

We find there is good cause to waive the delay in the effective date of this issuance because we find that, since the hold harmless provisions of the rule for which enforcement will be delayed have been subject to Congressional moratoria and are not currently being implemented, it would be contrary to the public interest to implement them briefly and then change them back. Such sudden, short-term changes would result in public confusion and administrative chaos. Therefore, under 5 U.S.C. 553(b)(3)(B), for good cause, we waive notice and comment procedures.

V. Collection of Information Requirements

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.

VI. Regulatory Impact Analysis

A. Overall Impact

We have examined the impact of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993, as further amended), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 (as amended by Executive Order 13258) directs agencies to assess all costs and benefits of all 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).

The final rule on health care-related taxes was estimated to result in savings to the Federal government, by reducing its financial participation in the Medicaid program for amounts in excess of the tax-related threshold, with corresponding responses by States that would partially offset these savings. Specifically, the RIA for the final rule estimated that Federal Medicaid outlays would be reduced by $85 million in FY 2008, and $115 million per year in FY 2009 through FY 2011. These savings resulted directly from applying the language in the Tax Relief and Health Care Act of 2006 to reduce the maximum threshold on exclusion of health care-related taxes from 6 percent to 5.5 percent of net patient revenue. This final rule does not delay application of this reduced threshold, which is already in effect. This final rule delays the provisions governing the determination of whether health care provider taxes or donations constitute ''hold harmless'' arrangements. Accordingly, we believe that the delay would not have any substantial economic effect, and that this final rule is not ''economically significant'' under E.O. 12866 or ''major'' under the Congressional Review Act.

The RFA requires agencies to analyze options for regulatory relief of small entities if proposed or final rules have a ''significant economic impact on a substantial number of small entities.'' For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions, including school districts. ''Small'' governmental jurisdictions are defined as having a population of less than fifty thousand. Individuals and States are not included in the definition of a small entity. In the final rule on health care-related taxes, we analyzed potential impacts on small entities that might result from the change in the exclusion threshold. Some effects (such as reduced tax burden) were likely to be positive, and some (such as reductions in State reimbursement rates) could be either positive or negative. All of these effects would depend on future State decisions on taxation and reimbursement that could not be predicted and would in any event be indirect effects rather than the direct result of that rule. Regardless, this rule does not propose to delay the change in the exclusion threshold. As a result, the Secretary has determined that this final rule would not have a significant effect on a substantial number of 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 604 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. Our analysis of the final rule concluded that it would have had no significant direct effect on a substantial number of these hospitals. This final rule does not impose any new requirements. Accordingly, we are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this final rule would not have a direct impact on the operations of a substantial number of 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 one year of $100 million in 1995 dollars, updated annually for inflation. In 2009, that threshold level is currently approximately $133 million. This final rule contains no mandates that will impose spending costs on State, local, or tribal governments in the aggregate, or by the private sector, of $133 million.

Executive Order 13132 on Federalism establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirements on State and local governments, preempts State law, or otherwise has Federalism implications. EO 13132 focuses on the roles and responsibilities of different levels of government, and requires Federal deference to State policy-making discretion when States make decisions about the uses of their own funds or otherwise make State-level decisions. The original final rule, while limiting Federal funding, did not circumscribe the States' authority to make policy decisions regarding taxes and reimbursement. This final rule will likewise not have a substantial effect on State or local government policy discretion.

B. Anticipated Effects

As discussed in the February 22, 2008 final rule, States had a number of options open to them in addressing any reduction in Federal Financial Participation (FFP). They could restructure State spending and shift funds among programs, raise funds through increases in other forms of generally applicable tax revenue increases, or reduce reimbursement to the tax-paying health care providers. Presumably, most of those States have already made those decisions. The delay in this final rule will not affect the tax threshold; it will provide some relief to States in making other adjustments.

C. Alternatives Considered

In the May 6, 2009 proposed rule, we welcomed comments not only on the delay in enforcement, but also on alternatives that may more constructively address the underlying problems and their likely impacts on States and other stakeholders. Some commenters recommended that CMS rescind rather than delay the enforcement of the hold harmless provisions. There were no other specific alternatives offered by commenters. Commenters reiterated that we should work with States to develop objective standards by which compliance with the hold harmless provisions can be measured. CMS will take these comments into consideration throughout the enforcement delay period to assure the most appropriate implementation of the statutory provisions.

The only other option considered was to not finalize this delay in enforcement. However, as discussed in the preamble to this final rule and the response to comments, we believe that this is not the best alternative at this time.

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)

Dated: June 5, 2009.

Charlene Frizzera,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: June 17, 2009.

Kathleen Sebelius,

Secretary.

[FR Doc. E9–15347 Filed 6–29–09; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 071130780–8013–02]

RIN 0648–XQ05

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Closure of the Closed Area II Scallop Access Area to Scallop Vessels

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS announces the closure of Closed Area II Scallop Access Area (CA II) to scallop vessels until June 15, 2010. This closure is based on a determination by the Northeast Regional Administrator (RA) that scallop vessels will have caught the yellowtail flounder (yellowtail) total allowable catch (TAC) for the CA II by June 29, 2009. Effective 0001 hours, June 29, 2009, vessels may not fish for scallops in the CA II. Vessels on a CA II scallop trip at the time of this announcement must leave the CA II prior to 0001 hour, June 29, 2009. This action is being taken to prevent the scallop fleet from exceeding the yellowtail TAC allocated to the CA II for the 2009 scallop fishing year in accordance with the regulations implementing the Atlantic Sea Scallop Fishery Management Plan (FMP), Northeast (NE) Multispecies FMP and the Magnuson-Stevens Fishery Conservation and Management Act.

DATES: The closure of the CA II to all scallop vessels is effective 0001 hr local time, June 29, 2009, until June 15, 2010.

FOR FURTHER INFORMATION CONTACT: Don Frei, Fishery Management Specialist, (978) 281–9326, fax (978) 281–9135.

SUPPLEMENTARY INFORMATION: Commercial scallop vessels fishing in access areas are allocated 9.8 percent of the annual yellowtail TACs established in the (NE) Multispecies FMP. Given current fishing effort by scallop vessels in the CA II, the RA has made a determination that the CA II yellowtail TAC of 349,358 lb (148.47 mt) is projected to be caught on June 29, 2009. Pursuant to 50 CFR 648.60(a)(5)(ii)(C) and 648.85(c)(3)(ii), this **Federal Register** notice notifies scallop vessel owners that, effective 0001 hours on June 29, 2009, federally permitted scallop vessels are prohibited from declaring or initiating a trip into the CA II until June 15, 2010.

If a vessel with a limited access scallop permit has an unused trip(s) into CA II, it will be allocated 7.9 additional open areas days-at-sea (DAS) for each unused trip. If a vessel has been allocated a broken trip compensation trip that cannot be made, it will be allocated prorated open area DAS based on the remaining allocation and the above listed access area DAS conversion rate. For example, if a full-time vessel had an unused 9,000–lb CA II compensation trip (half of the full possession limit) at the time of a CA II yellowtail TAC closure, the vessel will be allocated 3.95 DAS (half of the 7.9 DAS that would be allocated for a full CA II trip). A separate letter will be sent to notify vessel owners of their allocations for unused trips in the CA II.

Classification

This action is required by 50 CFR part 648 and is exempt from review under Executive Order 12866.

Due to the need to take immediate action to close the CA II once the yellowtail TAC has been taken, pursuant to 5 U.S.C. 553(b)(3) proposed rulemaking is waived because it would be impracticable and contrary to the public interest to allow a period for public comment. The CA II opened for the 2009 fishing year on June 15, 2009 Data indicating the scallop fleet has taken, or is projected to take, all of the CA II yellowtail TAC have only recently become available. To allow scallop vessels to continue to take trips in the CA II during the period necessary to publish and receive comments on a proposed rule would result in vessels taking more yellowtail than allocated to the scallop fleet. Excessive yellowtail harvest from CA II would result in excessive fishing effort on the Georges Bank yellowtail stock, where tight effort controls are critical for the rebuilding program. Should excessive fishing effort occur, future management measures may need to be more restrictive. Based on the above, under 5 U.S.C. 553(d)(3), proposed rule making is waived because it would be impracticable and contrary to the public interest to allow a period for public comment. Furthermore, for the same reasons, there is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delayed effectiveness period for this action.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: June 25, 2009

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. E9–15432 Filed 6–25–09; 4:15 pm]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 090421699–91029–02]

RIN 0648–XO74

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications Modification

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to adjust the harvest specifications for Pacific sardine in the U.S. exclusive economic zone (EEZ) off the Pacific coast for the fishing season of January 1, 2009, through December 31, 2009. This final rule increases the tonnage of Pacific sardine allocated for industry conducted research from 1200 metric tons (mt) to 2400 mt and decreases the second and third period directed harvest allocations by 750 mt and 450 mt, respectively.

DATES: Effective July 1 through December 31, 2009.

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: On February 20, 2009, NMFS published a final rule implementing the harvest guideline (HG) and annual specifications for the 2009 Pacific sardine fishing season off the U.S. West Coast (74 FR 7826) under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq (Magnuson-Stevens Act). These specifications and associated management measures were