

Payment and Practice Management Memo
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The Rulemaking Process and the Medicare Fee Schedule

The Centers for Medicare and Medicaid Services (CMS) publishes its proposed regulations in the U.S. Government's Daily Journal, the *Federal Register*. A proposed regulation or "proposed rule" announces and explains CMS' plan to issue a new regulation or modify an existing one. Typically, it addresses current problems and introduces new goals. It also provides an opportunity to solicit public comments in order to improve the final regulation. The proposed rule includes advance notices of proposed, petitioned, and negotiated rulemaking.¹

How Is This Relevant to Anesthesiologists?

The annual proposed and final rules govern Medicare physician payment policies while providing updates to the Medicare Physician Fee Schedule (PFS). Shortly put, if you would like to be aware of issues such as a Medicare payment or policy change; *or* the positive or negative payment impact of the Physician Quality Reporting System (PQRS) and Value-Based Payment Modifier (VBPM) programs, it is important to understand the basics of the rulemaking process.

A Proposed Rule

This document provides notification of proposed changes and solicits stakeholder feedback on them via comment letters. The comment period specifies how long CMS will accept feedback on the proposed rule. Open to the general public, the comment period provides an opportunity to participate in the rulemaking process. Typically, the docket stays open for at least 30 days for Medicaid regulations and 60 days for Medicare regulations.¹

A Final Rule

After reviewing all comments received, CMS crafts a Final Rule. Per the Administrative Procedures Act (APA), CMS must summarize and respond to comments received for the proposed rule. All rulemaking agencies address⁴:

Notice: The foregoing information is being provided specifically to you based on the facts and details you provided. This information or advice is not necessarily applicable if the facts you provided are incomplete or inaccurate. The ASA has used its best efforts to provide accurate coding and billing advice, but this advice should not be construed as representing ASA policy (unless otherwise stated), making clinical recommendations, dictating payment policy, or substituting for the judgment of a physician.

- How they revised a proposal to include the comments received;
- Why they will not be making any further changes to the proposal or;
- CMS will remove the proposal and state that they intend to address the matter in a future rulemaking process

How Important is Commenting?

How important is commenting? Very. Comment letters in response to various aspects of a proposed rule are an important source of information for CMS. Comments provide stakeholders an opportunity to offer insight on experiences related to issues raised in the rule; agreeing, disagreeing, or proposing an alternative.

Current Events: Significant Cuts in Interlaminar Epidural Injections (CPT® Codes 62310-62319)

In the Final Rule for the 2014 Medicare Physician Fee Schedule, CMS issued notice that it will lower the values for interlaminar epidural injections. The lower values are to go into effect for services provided on/after January 1, 2014. Due to the timing of the code development and valuation process, values for new/revised or revalued services are not part of the proposed rule so no comment period is provided prior to the decision announced in the final rule. The values are considered interim for the coming year.

ASA continues to work diligently on the epidural issue. We will submit comments to CMS that will include a request for a refinement panel. If CMS approves this request, we will have another opportunity state our case as to why the value CMS has assigned to the services is not appropriate; you might look at this as an appeal process. A refinement panel consists of 8-10 physicians representing the specialties that perform the procedures under review, physicians from related specialties, primary care physicians and contractor medical directors. Refinement was successfully used by ASA several years ago when CMS revalued code 64483 - *Injection(s), anesthetic agent and/or steroid, transforaminal epidural, with imaging guidance (fluoroscopy or CT); lumbar or sacral, single level*.

Becoming familiar with the rulemaking process is an important part of staying aware, informed, and active for the good of the specialty.

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Quick Rulemaking Q&A's

Q: Who is able to comment on the Proposed Rule?

A: Any party interested may comment on the Proposed and Final Rule (where applicable).

Q: Are the comments made public or are they private?

A: All comments received are public and are accessible through regulations.gov.

Q: Are we able to comment on all sections of the final rule?

A: CMS will identify the sections of a final rule on which they will accept comments. Not all sections are open for comment.

References:

1. CMS. (2013, April 4). *Quarterly Provider Updates*. Retrieved from Centers for Medicare & Medicaid Services: <http://www.cms.gov/Regulations-and-Guidance/Regulations-and-Policies/QuarterlyProviderUpdates/>
2. *A Guide to the Rulemaking Process*. (n.d.). Retrieved from The Office of the Federal Register: https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf
3. CMS. (2013, April 3). *e-Rulemaking*. Retrieved from Centers for Medicare & Medicaid Services: <http://www.cms.gov/Regulations-and-Guidance/Regulations-and-Policies/eRulemaking/index.html?redirect=/erulemaking>
4. Office of Administrative Law. (n.d.). *The Regular Rulemaking Process*. Retrieved from CA.Gov Office of Administrative Law: http://www.oal.ca.gov/Regular_Rulemaking_Process.htm

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