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November 29, 2011

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

Re: CY 2012 Medicare Physician Fee Schedule Final Rule and CMS Refinement Panels

Dear Secretary Sebelius:

On November 28, 2011, the Federal Register published the Centers for Medicare and Medicaid Services' (CMS) Calendar Year (CY) 2012 Medicare Physician Fee Schedule Final Rule. On behalf of the American College of Surgeons (ACS), I am writing to express concern regarding the decision making process and lack of transparency on the part of CMS related to the work relative value units (wRVUs) for 2012 reviewed under CMS' refinement panel process. The ACS, with over 78,000 members, is a scientific and educational organization of surgeons that was founded in 1913 to raise the standards of surgical practice and to improve the care of the surgical patient.

The ACS has participated in the efforts of the American Medical Association's Relative Value Scale Update Committee (AMA RUC) for years given the value we place on the AMA RUC process and our assumption that CMS will evaluate the RUC recommendations with fairness, transparency, and accuracy according to a process that has been set out via the Federal rulemaking process. As part of the work that led to the CY 2012 Medicare Physician Fee Schedule Final Rule, the ACS devoted significant resources to conducting AMA RUC surveys for over 100 new or existing codes at the request of CMS. The AMA RUC evaluated wRVU recommendations made by the ACS, based upon those surveys, and came to agreement on final recommended values to be submitted to CMS.

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Fifty-seven of the aforementioned codes that the ACS surveyed were sent to the refinement panel. CMS accepted **only 12 percent** of those refinement panel recommendations.

For most of the 88 percent of refinement panel recommendations that CMS rejected, CMS lowered the wRVU by reducing the value of the post-operative evaluation and management work performed by surgeons in the hospital by 69 percent. However, if that same work is performed by any other physician other than the surgeon, that same service is paid at 100 percent. We believe that the refinement panel physicians completely rejected this concept as they agreed to a work RVU that did not discount post-surgical work in this fashion. We note that the multispecialty panel included physicians from primary care, contractor medical directors (CMDs), physicians in related specialties, and general surgeons. At no time did the Agency's Medical Officer in charge of the panel process disagree with the presenters or offer a contrary opinion to the discussion.

Our concerns were piqued when CMS issued the CY 2011 Medicare Physician Fee Schedule Final Rule in which CMS stated that it could change wRVU recommendations of the refinement panel convened by CMS if “policy concerns warrant their modification,” without providing additional clarification on what would trigger this ability of CMS to subvert the more transparent process of the refinement panel. However, we continued to participate in the process under the belief that CMS would operate fairly and transparently and that if there were indeed “policy concerns” that CMS had regarding the values of the codes under consideration that those concerns would be stated clearly so all parties could address them during the refinement panel reviews.

CMS has now implemented a policy by which it is creating differential payments for the same work performed by different physicians as a backdoor mechanism for reducing the work RVUs for surgical procedures. They have valued the worth of a surgeon for post-operative evaluation and management work at about 30 percent of a non-surgeon.. Non-surgeons are allowed to provide the same work to the same patient at 100 percent reimbursement. First, we believe that this policy leads to a loss of validity and integrity of the current system. In addition, this policy is prohibited by the Omnibus Budget

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Reconciliation Act of 1989, which states, “[t]he Secretary may not vary the conversion factor or the number of relative value units for a physicians’ service based on whether the physician furnishing the service is a specialist or based on the type of specialty of the physician.” (42 U.S.C. §1395w-4(c)(6)).

The ACS has been a vocal proponent of needed reforms in the delivery and payment of health care. We believe that the future of these reforms will be based on driving greater awareness of proven continuous quality improvement programs to achieve ongoing, tangible results for quality improvements. However, in order for these reforms to be effective, they must be built on a system that is consistent with previous Agency decisions, fair, and transparent, and it is our concern that many of the policy decisions made by CMS in the latest Medicare Physician Fee Schedule Final Rule move us away from those goals. The resource based relative value system (RBRVS) requires a resource basis for decisions on the valuation of physician services. We believe that the resource basis for the decision to reduce these values is not evident. We ask that under your authority as Secretary you will seek to have CMS define a more transparent process in the future for decisions that are not aligned with the RUC and refinement panel recommendations in order to help maintain the transparency and fairness of the current system and to restore the values of these services to the level that is supported by the RBRVS process.

Sincerely,

A handwritten signature in black ink that reads "David B. Hoyt".

David B. Hoyt, MD, FACS
Executive Director

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