January 31, 2003

Paul Rudolf, M.D., J.D.
Executive Director
Practicing Physicians Advisory Council
Centers for Medicare & Medicaid Services
Department of Health and Human Services
7500 Security Boulevard
Mail Stop C4-10-07
Baltimore, MD 21244-1850

Dear Dr. Rudolf:

On behalf of the 64,000 Fellows of the American College of Surgeons, we are submitting the enclosed oral testimony recommending changes in the Medicare physician fee schedule for 2004. This is in response to the solicitation by the Centers for Medicare & Medicaid Services (CMS) in the December 27, 2002, *Federal Register*. It is for the meeting of the Practicing Physician Advisory Council (PPAC) on February 10, 2003. Our testimony will be presented by Hugh H. Trout, III, MD, FACS.

Please contact Jean Harris or Corrine Colgan in our Washington office with additional information about events on February 10th. Their e-mail addresses are Jharris@facs.org and Ccolgan@facs.gov and the phone number is 202-337-2707.

Sincerely,

Thomas R. Russell, MD, FACS
Executive Director

**STATEMENT**
**of**
**AMERICAN COLLEGE OF SURGEONS**

**to the**

**Practicing Physicians Advisory Council**

**presented by**

**Hugh H. Trout III, MD, FACS**

**RE: Medicare Physician Fee Schedule for 2004**

**February 10, 2003**

**STATEMENT**
**of**
**AMERICAN COLLEGE OF SURGEONS**

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**Hugh H. Trout III, MD, FACS**

**RE: Medicare Physician Fee Schedule for 2004**

**February 10, 2003**

My name is Hugh H. Trout III, MD, FACS, and I am here today representing the American College of Surgeons. The College represents 64,000 surgeons of all specialties. I am a vascular surgeon in private practice in Bethesda, MD.

The threat of a 4.4 percent cut in Medicare payments effective March 1, on top of a 5.4 percent cut last year, is the most important issue confronting physicians today. We are all working very hard, as is CMS, to avert the cut. Surgeons have always been very strong supporters of participation in Medicare but I can tell you that surprisingly large numbers of them are planning to opt for non-participation if this across-the-board payment reduction takes place. I cannot emphasize enough that the impact of a cut will affect the access to care for Medicare patients in many ways—some of which are difficult to measure. And, importantly, the pressure these cuts impose on struggling surgical practices has a ripple effect on the services available for non-Medicare patients, too, as physicians are forced to change their ways of "doing business" in order to compensate.

Sustainable Growth Rate (SGR)

The ultimate solution to the update problem is for Congress to fix the flawed formula that is used today to calculate the annual changes made to the conversion factor. Physicians are the only group that has payment update that reflects a sustainable growth rate or SGR, and the formula has other parts that are faulty--such as using the gross domestic product (GDP).

One thing CMS can do, though, is to adjust the SGR formula. Our interest is to revise the SGR formula to reflect changes in Medicare benefits that are attributable to national coverage decisions, but there are many, many other problems with the SGR formula that other specialties may wish to pursue.

Although one component of the SGR reflects changes in law and regulation, CMS currently only includes changes in program benefits that are attributable to legislation. By excluding important benefit expansions that are made through national coverage decisions, CMS compares actual expenditure data that include these services against a spending target that does not include them, making it more likely that the target will be exceeded. We urge PPAC to recommend to CMS that they invite public comment on changes in the SGR formula.

Reimbursement for Liability Costs

The growing liability crisis ranks right alongside the threatened payment cut as a major concern for most surgeons, and for many other specialists, as well. In a growing number of states, surgeons are having difficulty obtaining medical liability insurance, and for those who are able to find coverage the cost is often prohibitively high. The large premium increases and declining number of liability insurance carriers are forcing many surgeons to make difficult decisions about limiting the scope of their practice, moving to other states, or retiring early. Medicare payment cuts, if they do materialize, will add more financial pressure to make these decisions.

Let me talk briefly about the increases because they are very real and very large for some specialties. In Broward County, Florida, for example, the premium of a general surgeon was $67,647 in 2001. In 2002 that surgeon's premium rose to $108,997--a 61percent increase. In Ohio, the premium for an obstetrician-gynecologist was $95,310 in 2001. In 2002 that physician paid a $152,496 premium--a 60 percent increase. According to the *Medical Liability Monitor*, an independent trade publication, the median increase in premiums for general surgeons was 29.1 percent last year.

The College appreciates CMS' recognition of the growing liability crisis and is pleased that the agency has responded by implementing an increase in the Medicare Economic Index (MEI) update for professional liability insurance of 11.3 percent in the 2003 Physician Fee Schedule. While we support this increase, there is a heightened concern that specialties being hit the hardest by rising insurance costs are not getting the help they need. Certain surgical specialties--such as neurosurgeons, general surgeons, thoracic surgeons, and those in obstetrics-gynecology and orthopaedics—pay the highest premiums as a matter of course and are suffering disproportionately from the current escalation in premium rates. Yet, any MEI adjustment applies broadly and can not direct funds to those who are actually experiencing these increases—even if the faulty SGR system did not eliminate the benefits of such an adjustment entirely.

We cannot emphasize enough how important it is for CMS to take the steps needed to address this problem and to ensure that the resource-based payment system reflects the costs involved. Professional liability premiums are a major resource “input,” the cost of which falls outside physicians’ control. Further, as press reports have shown, the recent escalation in these costs is starting to have a significant adverse impact on access to many important services. Since the Medicare fee schedule is used as the basis for determining payments for many insurers, it is critical for the entire health care system--not just Medicare--that these costs be accounted for appropriately.

We are concerned that CMS has not devoted the staff and resources necessary to assure that the relative value units for malpractice truly reflect the relative costs associated with malpractice premiums. To some extent this is understandable, given the CMS resources that must be devoted to the physician work and practice expense portions of the fee schedule. However, there is a liability crisis now, and it must be addressed immediately.

Section 1848(c)(2)(B)(i) of the Social Security Act requires that "The Secretary, not less often than every 5 years, shall review the relative values established under this paragraph for all physicians' services." The current resource-based malpractice expense RVUs were implemented on January 1, 2000. Therefore, the resource-based malpractice expense RVUs resulting from a 5-year review must be implemented on January 1, 2005. That may seem like a long way off--but the reality is that the refinement of malpractice RVUs should already be well under way.

It is important to recall that the 5-year refinement of work RVUs that ended on January 1, 2002, began with a CMS request for comments in the November 1999, *Federal Register*. Under time frame like this, CMS should have invited comments on the refinement of malpractice expense RVUs in the final rule for this year's fee schedule--which was published on December 31, 2002. It did not.

Therefore, it is essential that the proposed rule for 2004 address the refinement of the malpractice RVUs. We urge PPAC to make this an explicit recommendation to CMS. We believe the agency should present options and invite public comment on various approaches to refinement. For example, in response to the proposed rule for the 2000 fee schedule, the neurosurgeons submitted a detailed methodology that they suggested might be used as an alternative to CMS' proposed methodology.

CMS did not accept the neurosurgeons' comments but they did state in the final rule: “We are examining the alternative to CMS’s proposed methodology suggested by the neurosurgeons and will consider it along with other alternatives during future refinement of malpractice RVUs." We recommend that the proposed rule for 2004 include a more detailed description of this option and the other alternatives that are being considered.

The College also is involved in its own development and analysis of various alternatives. As part of our process, we believe it is essential that we have access to the data used by CMS in the calculation of the 2003 MEI update. In the final rule for the 2003 fee schedule, CMS stated that the professional liability data used to develop the 2003 MEI update was based on premium rates effective as of June 2002. These data included both the premium amount and effective date, which CMS used to create a quarterly time series. Thus, the professional liability insurance component of the 2003 MEI update includes effective premium rates through the second quarter of 2002. We have requested these data but, to date, they have not been provided to us. We ask PPAC to recommend the immediate public release of this current professional liability data to facilitate the development and review of various options for refining the malpractice expense RVUs.

Finally, we are so concerned about the impact of rising premiums that we believe CMS must be prepared to make necessary revisions in the malpractice expense RVUs in the final rule for the 2004 fee schedule. While the statute requires that refinement must take place by 2005, the actual wording of the statute is "not less often than every 5 years." Thus, the Congress granted CMS has the flexibility to revise the RVUs in 2004.

In light of the crisis created by the dramatic increase in liability premiums for many critical specialties, we ask PPAC to recommend that CMS include in the proposed rule for 2004, an explicit request for comments on the appropriateness of refining the malpractice expense RVUs in 2004, rather than 2005.

Let me repeat the recommendations we are asking PPAC to make to CMS:

- That they invite public comment in the proposed rule on changes in the SGR formula
- That the proposed rule address the refinement of the malpractice RVUs
- That the proposed rule include a more detailed description of the methodology proposed by the neurosurgeons and the other alternatives CMS is considering for malpractice RVUs
- That they make available current professional liability premium data at the specialty level immediately
- That they make an explicit request for comments on the appropriateness of refining the malpractice RVUs in 2004 rather than 2005

I would like to close by thanking CMS for involving PPAC in this important discussion. I would be happy to take any questions you have.

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