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Congress of the United States
House of Representatives
Washington, DC 20515-5401

COMMITTEES:
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September 6, 2013

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Marilyn B. Tavenner
Administrator
Centers for Medicare and Medicaid Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Comment Letter on Proposed Rule (CMS-1600-P)

Dear Secretary Sebelius and Administrator Tavenner:

I write to comment on the proposed rule (CMS-1600-P) published by the Centers for Medicare and Medicaid Services on July 17, 2013, which would revise payment polices under the Medicare Physician Fee Schedule and make other policy changes related to Medicare Part B payments for Calendar Year 2014. This comment letter expands upon arguments I made in a letter to Administrator Tavenner and Deputy Administrator Jonathan Blum on May 24, 2012 (which Ms. Tavenner responded to on July 2, 2012); in a meeting I held with Mr. Blum in my office on August 2, 2012; and in a comment letter I submitted on September 4, 2012, in connection with proposed rule CMS-1590-P for Calendar Year 2013 (which Secretary Sebelius responded to on December 7, 2012 and which CMS discussed in its final rule published on November 16, 2012).

In this letter, I make three brief observations about the proposed rule, followed by a specific request for revision to the proposed Geographic Practice Cost Index, or GPCI, assigned to Puerto Rico as part of the final rule.

First, I thank CMS for working to obtain better medical malpractice premium data for Puerto Rico and, based on that data, proposing to increase the malpractice GPCI assigned to Puerto Rico—from 0.249 in 2013, to 0.270 in 2014, to 0.291 in 2015. I should note that, even with this proposed increase, Puerto Rico's malpractice GPCI would remain the lowest of any payment locality in the nation, including the other U.S. territories. Minnesota would still have the second-lowest malpractice GPCI, at 0.300 in 2014 and 0.317 in 2015. The U.S. Virgin Islands would have a malpractice GPCI of 1.00 in 2014 and 0.990 in 2015, far higher than Puerto Rico. The

disparity between the malpractice GPCI assigned to Puerto Rico and the (artificial) malpractice GPCI assigned to the neighboring U.S. Virgin Islands is unjustified, and CMS has not argued otherwise.

Second, I note that, under CMS's proposed across-the-board update to the GPCI system, the practice expense GPCI calculated for Puerto Rico would increase modestly, from 0.678 in 2013, to 0.691 in 2014, to 0.704 in 2015—a total increase of about 4 percent. Even with this proposed increase, Puerto Rico's practice expense GPCI would continue to be—by far—the lowest of any payment locality, including the other U.S. territories. West Virginia would still have the second-lowest practice expense GPCI, at 0.831 in 2014 and 0.834 in 2015. The U.S. Virgin Islands would have a practice expense GPCI of 1.003 in 2014 and 2015. Again, the disparity between the practice expense GPCI calculated for Puerto Rico and the practice expense GPCI (artificially) assigned to the neighboring U.S. Virgin Islands is groundless, and CMS has not attempted to defend the differential.

Third, I am urging my colleagues in Congress to extend the 1.00 physician work GPCI floor, which was established in 2006, has been extended multiple times, and is scheduled to expire at the end of 2013. If this floor does expire, the work GPCI calculated for Puerto Rico—although increasing modestly, from 0.908 in 2013, to 0.911 in 2014, to 0.913 in 2015—would be well below the 1.00 floor. Thus, failure to extend the work GPCI floor could exacerbate an already-bad situation, further compromising patient care in Puerto Rico. I urge the Administration to weigh in with Congress in support of extending the work GPCI floor.

My specific request for revision to the proposed rule before it becomes final relates to the practice expense GPCI. For the reasons set forth below and in my prior communications, I believe that the final rule should make an additional upward adjustment in the practice expense GPCI calculated for Puerto Rico so that it more accurately reflects the actual cost of operating a medical practice in the territory. Such action is essential in order to retain medical professionals in Puerto Rico and to improve the quality and timeliness of care made available to Island patients. As was confirmed in an April 2013 *Associated Press* article ("Doctors Flee Puerto Rico for U.S. Mainland"), a "medical exodus" is taking place as physicians leave Puerto Rico for the states in search of more reasonable salaries and reimbursement rates, especially under Medicare.[1] According to this article, based on information provided by Puerto Rico's Medical Licensing and Studies Board, the number of doctors in the territory has decreased by 13 percent over the last five years, from 11,397 to 9,950, with the largest reductions observed among primary care physicians and sub-specialists. Dr. Eduardo Ibarra, the president of the Puerto Rico College of Physicians and Surgeons ("Colegio de Médicos-Cirujanos de Puerto Rico"), which represents 16,800 doctors across 72 specialties, has described the ongoing exodus as "truly catastrophic," a sentiment that has been expressed to me by many other credible sources as well. Accordingly, I

[1] Danica Coto, "Doctors Flee Puerto Rico for U.S. Mainland," *Associated Press*, April 17, 2013, available at http://bigstory.ap.org/article/doctors-flee-puerto-rico-us-mainland.

urge CMS to take—additional—meaningful action by increasing the practice expense GPCI calculated for Puerto Rico, so that it is equal to, or more closely approximates, the practice expense GPCI calculated for the state with the lowest practice expense GPCI (in this case, West Virginia).

CMS Actions to Date

In the final rule for Calendar Year 2013, in response to submissions made by myself and other commenters, CMS stated in pertinent part as follows:

> As noted in the CY 2013 proposed rule, we have received inquiries from representatives of the Puerto Rico medical community regarding our policies for determining the GPCIs for the Puerto Rico payment locality. While we did not make any proposals related to the GPCIs for Puerto Rico, in response to those inquiries, we provided the following discussion regarding the GPCIs assigned to the Puerto Rico payment locality. We anticipate recalculating all the GPCIs in the seventh GPCI update, currently anticipated to be implemented for CY 2014.
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> As noted above, we are required by section 1848(e)(1)(A) of the Act to develop separate GPCIs to measure relative resource cost differences among localities compared to the national average for each of the three fee schedule components: work, PE and malpractice expense. To calculate these GPCI values, we rely on three primary data sources. We currently use the 2006-2008 BLS OES data to calculate the work GPCI, the nonphysician employee wage component of PE GPCI, and the labor costs associated with the purchased services component of PE GPCI. We use 2006-2008 ACS data to calculate the office rent component of the PE GPCI. Finally, we use 2006-2007 malpractice premium data to calculate the malpractice GPCI. For all localities, including Puerto Rico, we assume equipment, supplies, and other expenses are purchased in a national market and that the costs do not vary by geographic location. Therefore, we do not use data on the price of equipment, supplies, and expenses across localities in calculating PE GPCIs. With the exception of the malpractice GPCI, we have current data from the applicable sources allowing us to calculate the work and PE GPCIs for the Puerto Rico payment locality. The 2006-2008 BLS OES data and rental values derived from the 2006-2008 ACS indicate that the costs associated with operating a physician practice in Puerto Rico are the lowest among all payment localities.
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> Comment: In response to our inquiry regarding potential sources for data that could be used in calculating a malpractice GPCI for Puerto Rico, we received numerous comments about the costs of practicing medicine in Puerto Rico. The commenters primarily expressed concern about the PE GPCI (with emphases on the rent component) and the malpractice GPCI. The commenters stated that the current GPCI values for Puerto Rico are low in comparison to other PFS localities and that this disparity may create incentives for doctors to move their practices to the continental United States. As a result, the commenters explained that access to both primary and specialty care for Medicare beneficiaries residing in Puerto

> Rico could be compromised. Several stakeholders provided a report on a comprehensive study entitled "Cost of Medical Services in Puerto Rico." The report included results from a physician survey on the costs of operating a medical practice in Puerto Rico, including the cost for obtaining malpractice insurance. For example, the report included information about the leading malpractice insurers in Puerto Rico, the amount of malpractice insurance coverage typically purchased by physicians, and the cost of malpractice insurance by primary and specialty care providers. In addition to malpractice insurance costs, the report also included information on the cost of employees, contracted services, rent and utilities, medical equipment and supplies in Puerto Rico as well as information on the major concerns, demographics, and work patterns of the doctors currently practicing medicine in Puerto Rico and the doctors that have moved from Puerto Rico now practicing in the United States.
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> Response: As noted in the proposed rule, we will be adjusting the GPCIs for CY 2014. Given that we did not make any proposals to modify the malpractice GPCI calculation methodology or values for CY 2013, it would not be appropriate to make changes to the GPCIs in this final rule. We appreciate the physician survey information on the cost of malpractice insurance. We will review the information submitted on the cost of obtaining malpractice insurance in Puerto Rico as we prepare for the seventh GPCI update. We would note that the GPCIs are based upon changes in the relative costs of obtaining malpractice insurance so any changes in the GPCI for Puerto Rico will be based not only on data reflecting the costs on Puerto Rico, but also those in other localities.

CMS also directly addressed the issue of Puerto Rico's GPCIs in the agency's proposed rule for Calendar Year 2014, stating:

> [F]or the past several GPCI updates, we were not able to collect MP [malpractice] premium data from insurer rate filings for the Puerto Rico payment locality. For the CY 2014 (seventh) GPCI update, we worked directly with the Puerto Rico Insurance Commissioner and Institute of Statistics to obtain data on MP insurance premiums that were used to calculate an updated MP GPCI for Puerto Rico. Using updated MP premium data would result in a 17 percent increase in MP GPCI for the Puerto Rico payment locality under the proposed fully phased-in seventh GPCI update, which would be effective CY 2015.

To summarize, as I requested, CMS will no longer use outdated malpractice data for Puerto Rico, but rather has worked to obtain and is proposing to apply up-to-date information from Puerto Rico sources, which will result in a meaningful increase in Puerto Rico's malpractice GPCI. Although this is welcome news, its practical impact will be limited, since the malpractice GPCI is the least-weighted of the three GPCI components.

Moreover, under CMS's proposed across-the-board update to the GPCI system, the practice expense GPCI assigned to Puerto Rico would increase modestly, from 0.678 in 2013, to 0.691 in 2014, to 0.704 in 2015—a total increase of about 4 percent. As I noted, however, even if this

proposed increase is implemented, Puerto Rico's practice expense GPCI will continue to be the lowest of any payment locality in the nation by a substantial amount. In its proposed rule, CMS failed to address the detailed arguments that I have made as to why the practice expense GPCI calculated for Puerto Rico does not reflect the actual cost of operating a medical practice on the Island, and why that GPCI should therefore be increased by a more substantial amount. I reiterate those arguments now, and I urge CMS to respond to these arguments in its final rule.

Puerto Rico's Practice Expense GPCI Should be Increased by a More Substantial Amount Than Proposed in CMS-1600-P

The practice expense (PE) GPCIs are designed to measure the relative cost difference in the mix of goods and services comprising practice expenses among the Medicare payment localities as compared to the national average of these costs. The PE GPCIs are comprised of four component indices: (1) employee wages, (2) purchased services, (3) office rent, and (4) equipment, supplies and other miscellaneous expenses. I will focus on items (3) and (4).

Office Rent

The office rent index component of the PE GPCI measures relative geographic variation in the cost of typical physician office rents. As CMS notes in the proposed rule, the agency has always used *residential* rent data as the proxy to measure the relative cost difference in physician office rents. Historically, CMS utilized apartment rent data produced by the U.S. Department of Housing and Urban Development (HUD). However, starting in Calendar Year 2012, CMS began using 3-year (2006–2008) American Community Survey (ACS) rental data as a proxy for physician office rents, rather than HUD data. In the proposed rule, CMS says it will continue this practice, using the "most recent 3-year ACS residential rent data (2008 through 2010) to calculate the office rent component of the PE GPCI." See CMS-1600-P, page 43323. It should be noted that the "most recent" 3-year ACS residential rent data available is actually 2009 through 2011, not 2008 through 2010, and that the 2010 through 2012 figures are likely to be published by the Census Bureau prior to issuance of the final rule. I encourage CMS to utilize the most recent ACS data available, provided it does not result in a lower PE GPCI for Puerto Rico than is currently proposed.

CMS acknowledges that, "for many years, we have received requests from physicians and their representatives to use commercial rent data instead of residential rent data as a proxy to measure the relative cost differences in physician office rent." Nevertheless, CMS indicates that it has been "unable to identify a reliable commercial rental data source that is available on a national basis and includes data for non-metropolitan areas," although it has identified a "proprietary" commercial rent data source that "has potential for use in calculating the office rent indices in future years." CMS specifically requests comments on "the potential future use of a proprietary commercial rent data source as well as whether there is a source for these data that is not proprietary." See CMS-1600-P, page 43323.

While CMS is to be credited for seeking to address this problem in good faith, I respectfully submit that the current method being used by the agency—whereby residential rent data is used as a proxy for office rents—*uniquely* prejudices Puerto Rico. Therefore, I believe that, for Calendar Year 2014, CMS should take immediate steps to increase the PE GPCI assigned to Puerto Rico, even as the agency works to find a longer-term solution to this issue for all payment localities.

Simply put, using residential rent as a proxy for office rent is entirely inappropriate in the case of Puerto Rico. It is well established that the residential rental market is less developed in Puerto Rico than it is in the 50 states, and that demand for rental units in the territory is heavily concentrated in low-income to very low-income households who cannot afford to purchase a home. See Dr. Juan Lara, "Puerto Rico's Housing Market: Looking Beyond the Recession," Advantage Business Consulting, January 12, 2007.[2]

Specifically, according to the 2009-2011 American Community Survey published by the U.S. Census Bureau, there are an estimated 1.25 million total occupied housing units in Puerto Rico, of which 29 percent—369,000—are renter-occupied, compared to a national average of 35 percent. According to the ACS, 18.4 percent of individuals or families renting housing units in Puerto Rico pay a monthly rent of less than $200, 10.5 percent pay a monthly rent between $200 and $299, and 30.3 percent pay a monthly rent between $300 and $499. In sum, nearly 60 percent of all rental units in Puerto Rico are occupied by tenants paying less than $499 per month.

Moreover, according to the 2012 American Housing Survey published by HUD, the rent paid for 110,643 of the roughly 369,000 total rental units in Puerto Rico—30 percent—is subsidized by a HUD program, compared to a national average of about only 12 percent. In addition, the average rent paid by a tenant living in HUD-subsidized housing in Puerto Rico is a mere $99 per month (compared to a national average of $298 per month), 92 percent of tenants living in HUD-subsidized housing in Puerto Rico qualify as "very low-income," and 77 percent qualify as "extremely low-income."

In short, because the participants in Puerto Rico's residential rental market are largely skewed towards the very low and extremely low end of the income scale, that market is a particularly poor proxy for commercial office rents. One example helps make this point: Last year, a doctor from Puerto Rico informed my office that he pays $1,725 per month for a 1,200 square-foot office in San Germán, Puerto Rico (a municipality in the southwest part of the Island with a population of 35,000), and that this rental rate is typical for the area. That rental rate—which equates to $17.25 per square foot per year—is about the same as the average asking rent in Indianapolis, which is the county seat of Marion County, Indiana. Yet, according to the ACS,

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[2] Available at http://advantagebusinessconsulting.wordpress.com/2012/01/20/puerto-ricos-housing-market-looking-beyond-the-recession/.

the median cost of renting a two-bedroom residence in Marion County is $719 per month, whereas the cost in San Germán is listed at less than half that amount, at $321 per month. It is clear that using residential rental data as a proxy for commercial rents in Puerto Rico, without making any adjustment to account for unique local market conditions, is not a fair or appropriate way to proceed.

This conclusion is reinforced by the fact that ACS residential rental data purports to measure "gross" rent, which often—but not always—includes both monthly rent *and* monthly utilities. The cost of electricity in Puerto Rico is more than double the national average: in June 2013, the average price of electricity in Puerto Rico was 25.7 cents per kilowatt/hour, compared to a national average of 12.5 cents per kilowatt/hour. In fact, a September 2012 Study on Cost of Medical Services in Puerto Rico, prepared by Custom Research Center, Inc. concludes that, for a Puerto Rico doctor paying average rent, the electricity bill alone will add 26 percent to the monthly rent and the doctor's *total* utility bill will add 39 percent to the monthly rent.[3] For primary care physicians, who generally earn less and rent smaller offices, the study finds that the total utility bill will add "a whopping 62 percent" to the monthly rent. Of course, the high cost of electricity and other utilities that physicians in Puerto Rico face would not be adequately captured in the ACS gross two-bedroom residential rental data, because nearly one-third of all the renter-occupied units in Puerto Rico are inhabited by individuals or families whose rental payments are subsidized by HUD, and such residents generally receive "utility allowances" and therefore are not responsible for any or all of their utility costs.

Equipment and Supplies

In addition, the PE GPCI formula includes an "equipment, supplies and other miscellaneous expenses" category. However, because CMS assumes that most medical equipment and medical supplies are sold through a national market, the agency does not adjust for differences in equipment and supply costs among jurisdictions; instead, CMS assigns every payment locality a 1.00 for this component. See CMS-1600-P, page 43322 ("[W]e believe there is a national market for these items such that there is not significant geographic variation in costs").

This assumption of a "national market" almost certainly operates to the disadvantage of Puerto Rico, a non-contiguous jurisdiction that is over 1,000 miles from the U.S. mainland, that must import nearly everything it uses (from hand sanitizer to X-ray machines), and that is dependent for equipment deliveries on air and maritime shipping, which tends to be more expensive than ground-based shipping by truck or rail that is available in the contiguous 48 states. Indeed, according to the September 2012 Custom Research Center Study, 82 percent of the nearly 300 physicians surveyed said that the price of medical equipment is higher in Puerto Rico than in the U.S. mainland, with 95 percent of those doctors attributing the price differential to the higher

[3] I submitted this study for the record in connection with my comment letter on CMS's proposed rule for Calendar Year 2013, and summarized its key points in my letter. CMS referenced this study in its final rule.

cost of transportation. One representative of a medical equipment firm that was contacted provided an estimate that the cost of medical equipment was 10 percent to 15 percent higher in Puerto Rico. Other estimates given by respondents ranged from 5 percent to 16 percent.

Accordingly, a reasonable upward adjustment to Puerto Rico's PE GPCI should be made, to account for (1) the fact that residential rents are an especially inaccurate proxy for commercial rents in Puerto Rico, and (2) the fact that the current formula does not adequately capture the higher cost of shipping medical equipment and medical supplies to the Island, relative to the cost borne by physicians in other payment localities.

Conclusion

In conclusion, there are multiple reasons to question the fairness and accuracy of the PE GPCI calculated for Puerto Rico. I believe these reasons warrant a modest upward adjustment in the Island's PE GPCI, so that it is equal to—or more closely approximates—the PE GPCI calculated for the payment locality with the second-lowest PE GPCI. Given the well-substantiated exodus of doctors from Puerto Rico, CMS must address this issue immediately. If CMS believes it needs additional evidence—such as documents from Puerto Rico physicians validating the monthly rent or equipment and supply costs they pay—than I am more than willing to facilitate the submission of such documents. But I respectfully submit that it is unacceptable for CMS, in the face of the serious questions that I have raised for two consecutive years about the accuracy of the PE GPCI calculated for Puerto Rico, to merely acknowledge the concerns that have been put forward but to take no meaningful action.

Sincerely,

Pedro R. Pierluisi
Member of Congress

cc: The Hon. Kevin Brady, Chairman, House Committee on Ways and Means, Subcommittee on Health
The Hon. Jim McDermott, Ranking Member, House Committee on Ways and Means, Subcommittee on Health