

August 6, 2013

REQUEST FOR PUBLIC COMMENTS ON THE POTENTIAL RELEASE OF MEDICARE PHYSICIAN DATA

The Department of Health and Human Services (HHS), including the Centers for Medicare & Medicaid Services (CMS), have demonstrated a strong commitment to greater data transparency in recent years. The Health Data Initiative was launched by HHS in 2010 to promote transparent, innovative, and safe data use. CMS is also engaged with a wide range of public, non-profit, and private sector stakeholders to foster the availability and use of health care data to drive innovations that improve health and health care.

Since 2010, CMS has released an unprecedented amount of aggregated data in machine-readable form. These data range from previously unpublished statistics on Medicare spending, utilization, and quality at the state, hospital referral region, and county level, to detailed information on the quality performance of hospitals, nursing homes, and other providers. In May 2013, CMS released information on the average charges for the 100 most common inpatient services at more than 3,000 hospitals nationwide, followed in June with the release of average charges for 30 selected outpatient procedures.

On May 31, 2013, a Florida federal district court lifted a permanent injunction originally issued in 1979 that prohibited the Department of Health, Education, and Welfare (as HHS was then known) from disclosing annual Medicare reimbursement payments to individual physicians or in a manner that could identify individual physicians.^{1,2} In light of this recent legal development and our ongoing commitment to greater transparency in the health care system, CMS seeks public input on the most appropriate policies with respect to disclosure of individual physician payment data.

I. Summary of the Recent Court Decision

Dow Jones & Company (parent company of *The Wall Street Journal*) and Real Time Medical Data (RTMD), a consulting firm, sought access to physician-level Medicare payment data in 2011. They formally intervened in the case that had led to the 1979 injunction and petitioned the court to overturn the injunction. HHS joined Dow Jones and RTMD in the case on the grounds that the 1979 injunction was no longer equitable because it was a type of broad, prospective injunctive relief that was no longer authorized under the Privacy Act after the Eleventh Circuit's decision in *Edison v. Department of the Army*.³ On May 31, 2013, the court issued an order vacating the 1979 injunction. The parties each had until July 30, 2013 to appeal the court's decision, and no appeal was filed.

While the court has vacated the injunction, HHS's policy regarding release of individual physician data, adopted in 1980, states "that the public interest in the individually identified payment amounts is not

¹ For the original injunction order, see *Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare*, 479 F.Supp. 1291 (M.D.Fla. 1979). In 1978, the Department of Health, Education, and Welfare (HEW, as HHS was then known) planned to release a list of all physicians and providers who received Medicare reimbursements in 1977, including physician names and net total amounts of Medicare reimbursements paid directly to each physician, as HEW had similarly done the year before. Prior to the release of this second list, the Florida Medical Association and six individual physicians, joined by the American Medical Association, representing their physician members who provide Medicare services, filed suit to enjoin HEW from releasing this list and any similar lists in the future.

² For the order vacating the injunction, see *Florida Medical Ass'n, Inc. v. Department of Health, Educ., & Welfare*, 2013 WL 2382270 (M.D.Fla. May 31, 2013).

³ *Edison v. Department of the Army*, 672 F.2d 840 (11th Cir. 1982).

sufficient to compel disclosure in view of the privacy interests of the physicians.”⁴ HHS created this policy in response to the 1979 injunction. As a result, with the recent decision to vacate the injunction, CMS now seeks public input on whether and how to modify the policy.

II. Discussion

When a third party (such as a member of the news media) makes a request for information for individually identifiable physician information, such as the amount of annual Medicare payments a physician received, CMS must disclose the information under the Freedom of Information Act unless an exemption applies. In this case, since physician information is covered by the Privacy Act, we look at whether such disclosure may constitute a clearly unwarranted invasion of personal privacy⁵ by weighing whether the public interest in disclosure outweighs the physician’s privacy interest in the information. Since the 1979 injunction, a number of changes have occurred related to physicians’ privacy interests in maintaining the confidentiality of their Medicare payments and the public interest in disclosure of such amounts.⁶ For example:

- Public interest in the information has increased given the substantial growth in size of Medicare since 1979, both in terms of total cost per year and as a portion of the federal budget;
- Changes in the Medicare reimbursement system that have resulted in greater standardization of payment amounts for physician services;
- The creation of the Qualified Entity program (known as Medicare data sharing for performance reporting), authorized by Section 10332 of the Affordable Care Act, which allows CMS to disclose Medicare claims data to qualified entities for the production of public performance reports; and
- The greater consequences of Medicare fraud, waste, and abuse, which disclosure of payment information could help expose.

In addition, during the past several years, CMS’ management role as a processor of Medicare claims for services has evolved toward becoming a more effective steward and partner of transformation in the health care system with the goal of incentivizing high quality care and better health at lower costs. As previously noted, the Agency is also committed to greater data transparency. With this transformation in the services that CMS provides, the Agency now receives multiple requests from various stakeholders for physician payment and reimbursement data. These requestors argue that this data is an important part of the ongoing research, assessment, and evaluation of programs and services necessary to make improvements in the delivery, quality, and cost of care. CMS recognizes the role data can play in achieving the common goal of better quality health care at lower costs.

It is important to note that CMS is not considering public disclosure of any information that could directly or indirectly reveal patient-identifiable information. CMS is committed to protecting the privacy of Medicare beneficiaries.

III. Questions for Public Comment

In light of this new legal development and the Agency’s demonstrated commitment to transparency, CMS seeks public input as the Agency considers what would be the most appropriate policy regarding release of physician payment data. Specifically, CMS seeks comments and input with regard to:

⁴ 45 Fed. Reg. 79172 (November 28, 1980).

⁵ 5 U.S.C. 552(b)(6).

⁶ The court in its decision did not address the appropriateness of disclosure with respect to any of the specific types of physician payment information that HHS had proposed to release back in 1978, nor did it address the current balance of competing interests between the public and the privacy interest of physicians in their payment information.

- (1) whether physicians have a privacy interest in information concerning payments they receive from Medicare and, if so, how to properly weigh the balance between that privacy interest and the public interest in disclosure of Medicare payment information, including physician-identifiable reimbursement data;
- (2) what specific policies CMS should consider with respect to disclosure of individual physician payment data that will further the goals of improving the quality and value of care, enhancing access and availability of CMS data, increasing transparency in government, and reducing fraud, waste, and abuse within CMS programs; and
- (3) the form in which CMS should release information about individual physician payment, should CMS choose to release it (e.g., line item claim details, aggregated data at the individual physician level).

IV. Instructions for Submitting Comments

Deadline: To be assured consideration, electronic or written comments must be received at one of the addresses provided below and postmarked by no later than 5:00 p.m. ET within 30 days from the date of this request.

Addresses: You may submit comments identified by any of the following methods below (please do not submit duplicate comments). CMS cannot accept comments by facsimile (FAX) transmission.

- ***Email:*** Send email comments to: **Physician_Data_Comments@cms.hhs.gov**. Attachments should be provided in Microsoft Word, Excel, or Adobe PDF format; however, Microsoft Word format is preferred.
- ***Regular, Express, or Overnight Mail:*** Department of Health and Human Services, Centers for Medicare and Medicaid Services, Attention: *Physician Data Comments*, Hubert H. Humphrey Building, Office 341D-05, 200 Independence Avenue, SW, Washington, DC 20201. Please submit one original and two copies. Please allow sufficient time for mailed comments to be received before the close of the 30 day period.
- ***Hand Delivery or Courier:*** Department of Health and Human Services, Centers for Medicare and Medicaid Services, Attention: *Physician Data Comments*, Hubert H. Humphrey Building, Office 341D-05, 200 Independence Avenue, SW, Washington, DC 20201. Please submit one original and two copies. (Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without federal government identification, commenters are encouraged to leave their comments in the mail drop slots located in the main lobby of the building.)