

September 5, 2013

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
Via email to Physician_Data_Comments@cms.hhs.gov

Re: Request for Public Comments on the Potential Release of Medicare Physician Data

We, the undersigned organizations, dedicated to advancing government transparency and accountability, welcome the opportunity to respond to the Centers for Medicare and Medicaid Services' (CMS) request for public comments on the potential release of Medicare physician data. We urge CMS to uphold its stated commitment to transparency and adopt a policy to promptly disclose, in an open format, payment data, with as much detail as practicable while protecting patient privacy.¹

Public interest in disclosure of payment data

There is a strong public interest in disclosure of Medicare payment information, including the amounts of payments made to particular medical providers.

The public has a fundamental right to know how government spends public funds.ⁱ Medicare expenditures represent a significant portion of the public funds spent each year by the federal government – an estimated \$555 billion in 2012. The program also impacts many Americans – it covered more than 49 million beneficiaries in 2012.ⁱⁱ

Medicare spending has also attracted public attention due to concerns about fraud or waste in the program. Medicare reported improper payments estimated at more than \$44 billion in 2012.ⁱⁱⁱ Greater disclosure of Medicare spending could help deter fraud and waste and detect it when it occurs. In fact, the former chair of the Recovery Accountability and Transparency Board suggested that the increased transparency of payments under the American Recovery and Reinvestment Act of 2009^{iv} deterred fraudsters from targeting recovery programs, specifically as compared to Medicare.^v When the *Wall Street Journal* was able to access a subset of the Medicare payment data, it successfully demonstrated the ability of journalists to use the data to

¹ CMS should also revoke its previous policy, published at 45 F.R. 79172.

identify suspicious practices through its groundbreaking 2010 series^{vi} – and was a finalist for a Pulitzer Prize as a result.^{vii}

Additionally, disclosure could support public health and safety by enabling greater public understanding of medical practices. For instance, ProPublica and *The Washington Post* used Medicare data identifying providers for their groundbreaking series on prescription drugs,^{viii} finding “hazardous prescribing practices.”^{ix} Furthermore, releasing payment data could inform discussions about the growing costs of health care, including disparate prices charged to different patients and insurance companies.^x

Medical businesses do not have a privacy interest in Medicare payments

In our view, CMS is obligated to release payment data if requested under the Freedom of Information Act (FOIA).^{xi} Recent developments support the position that payment data should not be considered exempt from disclosure under FOIA’s Exemption 6.^{xii}

Medicare payments are commercial transactions for services and goods rendered in a professional context. In its 2011 decision in *Federal Communications Commission v. AT&T*, the Supreme Court made clear that corporations do not have “personal privacy” for the purposes of FOIA’s Exemption 7(C), which uses the same phrase as Exemption 6.^{xiii} In that opinion, Chief Justice Roberts pointed to the distinction between commercial and personal interests, noting, “We often use the word ‘personal’ to mean precisely the *opposite* of business-related.”^{xiv} Because the amount that CMS pays to medical businesses is clearly “business-related,” we suggest that there is likewise no personal privacy interest in the disclosure of such amounts. If that is the case, then Exemption 6 cannot be used to withhold such information, and CMS is required to release such information in response to FOIA requests. Moreover, even if any personal privacy interest did exist, it would be outweighed by the strong public interest in disclosure.²

Indeed, to treat such information as exempt would create a tremendous disparity among recipients of federal funds. Under the Federal Funding Accountability and Transparency Act of 2006, all expenditures of federal funds – including contracts, grants, purchases, and other forms of financial assistance – of \$25,000 or more must be disclosed on a public website.^{xv} All entities that receive federal funds are covered by such disclosure requirements, including sole proprietorships. While Congress did not specifically address Medicare payments under the law, we see no logic by which medical providers would have a privacy interest in the amount of federal funds received, while providers of non-medical services and goods would have no such interest.

² However, we agree that CMS should not publicly disclose information that would identify individual patients.

CMS should adopt a policy to disclose granular data in an open format

Given the strong public interest in disclosure and the fact that payment information should not be exempt under FOIA, we urge CMS to adopt a policy to promptly disclose, in an open format, payment data, with as much detail as practicable while protecting patient privacy.

Under FOIA, CMS is obligated to provide records in the format requested.^{xvi} In addition, CMS should also, as resources allow, construct a publicly accessible database to proactively disclose payment data. Proactive disclosure, without waiting for FOIA requests, will make the data most accessible and avoid duplicative FOIA requests. CMS should release as much detail as practicable while protecting patient privacy, which will best facilitate investigation and research. Data should be disclosed in an open, machine-readable, and well-documented format, in compliance with the government-wide open data policy.^{xvii}

Conclusion

We appreciate the opportunity to respond to CMS's request for public comments on the potential release of Medicare physician data. We appreciate you taking our recommendations into consideration. If you have questions about our comments or want to discuss the issues further, please feel free to contact us.

Sincerely,

Article 19

Cause of Action

Center for Effective Government (formerly OMB Watch)

Center for Public Integrity

Essential Information

Health Care for America Now

Liberty Coalition

National Priorities Project

OpenTheGovernment.org

Project On Government Oversight

Public Citizen

Society of Professional Journalists

Sunlight Foundation

Taxpayers for Common Sense

ⁱ See U.S. Senate, Committee on Homeland Security and Governmental Affairs, *Federal Funding Accountability and Transparency Act of 2006: Report Together with Additional Views to Require Full Disclosure of All Entities and Organizations Receiving Federal Funds* (to accompany S. 2590) (S.Rpt.109-329), Washington: Government Printing Office, 2006, p. 3 (“Greater transparency allows taxpayers to judge whether government funds are being used for purposes they consider valuable, or whether spending in certain areas is excessive or wasteful. It also allows the public to better understand, assess, and appreciate the scope and value of federal investments in their communities and to more fully participate in shaping priorities for Federal spending.”).

ⁱⁱ Government Accountability Office, “GAO’s 2013 High-Risk Update: Medicare and Medicaid,” GAO-13-433T, Feb. 27, 2013, <http://gao.gov/products/GAO-13-433T>.

ⁱⁱⁱ *Id.*

^{iv} P.L. 111–5.

^v Ed O’Keefe, “Set to retire, stimulus watchdog Earl Devaney tried to stay above the fray,” *The Washington Post*, Dec. 11, 2011, http://articles.washingtonpost.com/2011-12-11/politics/35286129_1_recovery-accountability-transparency-board-stimulus, quoting Earl Devaney (“I think this money was so transparent that guys that really commit big frauds and try to steal big money just stayed with the old tried-and-true fraud and waste like Medicare fraud and didn’t come near this money,” he said.”).

^{vi} Dow Jones, “Secrets of the System,” <http://www.dowjones.com/pressroom/presskits/secrets/secretsofsystem.asp>.

^{vii} The Pulitzer Prizes, “Explanatory Reporting,” <http://www.pulitzer.org/bycat/Explanatory-Reporting>.

^{viii} Jennifer LaFleur, et al., “How We Analyzed Medicare’s Drug Data,” *ProPublica*, May 11, 2013, <http://www.propublica.org/article/how-we-analyzed-medicare-drug-data-long-methodology>.

^{ix} Tracy Weber, et al., “Medicare Drug Program Fails to Monitor Prescribers, Putting Seniors and Disabled at Risk,” *ProPublica*, May 11, 2013, <http://www.propublica.org/article/part-d-prescriber-checkup-mainbar>.

^x Steven Brill, “An End to Medical-Billing Secrecy?,” *Time*, May 8, 2013, <http://swampland.time.com/2013/05/08/an-end-to-medical-billing-secrecy/>.

^{xi} 5 U.S.C. § 552.

^{xii} 5 U.S.C. § 552(b)(6).

^{xiii} *Federal Communications Commission v. AT&T Inc.*, 562 U.S. ____ (2011).

^{xiv} *Id.*, slip op. at 5.

^{xv} P.L. 109-282.

^{xvi} 5 U.S.C. § 552(a)(3)(B).

^{xvii} Sylvia M. Burwell, et al., “Open Data Policy—Managing Information as an Asset,” Office of Management and Budget memorandum M-13-13, May 9, 2013, <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf>.