

I Object!

Questions Facing Physicians' Rights to Dispute Sunshine Data

Will your practice be prepared when CMS posts Sunshine disclosures later this year?

BY STEVEN J. CAGNETTA, ESQ, AND STEVEN K. LADD

Since June 1, 2014, physicians have been able to start the sign-up process on the Centers for Medicare & Medicaid Services (CMS) Enterprise Portal for access to Sunshine payment data submitted by companies and other required filers. This critical, albeit delayed, milestone is intended to provide physicians with the ability to review and dispute payments attributed to them before it goes public on the Open Payments website.

Although lots of attention has been paid to the Sunshine Act generally, less has been paid to the physician dispute resolution process. That changed recently, when CMS put out a request for comments relating to the dispute process. The results include blunt commentary from some heavy hitters. The purpose of this article is to describe the process while highlighting the more salient comments.

CMS SUPPORTS PHYSICIAN REVIEW, BUT ACCESS IS FOGGY

Anita Griner, CMS's deputy director for the Data Sharing & Partnership Group, has said that data accuracy is the agency's top priority as it implements the Sunshine Act. Speaking to physicians at the American Medical Association's House of Delegates meeting last year, Griner encouraged physicians to challenge any costs or records they feel are incorrect. "We want the data put on the public website to be complete and accurate," she added.¹

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Physicians must go through a two-step registration process on the CMS portal (summarized in a 42-slide document, see *Quick Links*) in order to review and dispute Sunshine data. The first step, available now, gives physicians Enterprise Identity Management (EIDM) credentials. It takes a few minutes after finding a somewhat hidden page (see *Quick Links*). Physicians enter their name, email, address, telephone, birthdate, and Social Security number along with selecting and answering three future identification challenge questions (eg, "What was your favorite toy as a child?"). The second step, scheduled to start in July, uses the EIDM credentials to register for Open Payment access. Questions in the second step are based on information provided in the first steps and information in physicians' credit reports.

CMS told Primacea that the AMA has been advocating for physicians to have adequate time to register on the portal. Although CMS is "incredibly supportive" of such advanced collaboration, the process is still confus-

ing, which worries many. According to an official comment to CMS by the American Association of Clinical Endocrinologists (AACE):

Unless all parties have a clear understanding of the dispute resolution process the Sunshine Act will fail. Until covered recipients understand every nuance of the process of appeal, and CMS is confident that manufacturers are capable of handling disputes fairly, the public may be overwhelmed with inaccurate and false information.

LITTLE TIME, LOTS TO DO

The dates for company data submission and physician review have slipped considerably since our January 2014 article, *The Sunshine Act Inevitably Rises*.² However, at the time of this writing, CMS has held to September 30, 2014, as the date for publication of the Sunshine data. This means that there are less than 4 months remaining before the scheduled publication date for several essential steps to take place:

- physicians register for EIDM credentials
- physicians register for Open Payment access
- companies submit detailed payment data
- physicians review data and begin dispute process (45 days after data submission)
- companies and physicians resolve disputes (60 days after data submission)
- CMS processes the resulting data

The CMS Center for Program Integrity told Primacea that physicians and physician organizations are asking about the 45-day period for physicians to initiate disputes with companies over submitted data. They are concerned that the 45-day period will be compressed. CMS told Primacea that the 45-day period is one of the “primary things we are protecting.”

Forty-five days may not be enough. Seven of the first 24 comments to CMS on the dispute process requested more time to review and resolve disputes (while five urged CMS to not delay the release of Sunshine data any longer).

CAN COMPANIES JUST IGNORE PHYSICIANS?

CMS posted Medicare physician payment data online on April 9, leading to headlines that put some physicians in an unfair light. Looking ahead to the posting of Sunshine data, physicians have raised a number of concerns ranging from “Will research funds paid to my hospital be ‘charged’ to me under Sunshine?” to “Will I be reported on for meals I didn’t even eat?”

Physicians have also been asking what, if anything, precludes companies from simply ignoring physicians’ versions

QUICK LINKS: HOW AND WHERE TO REVIEW AND DISPUTE SUNSHINE DATA

Summary of Physician/Teaching Hospital registration portal and process for reviewing and disputing Sunshine/Open Payments claims:

<http://bit.ly/SunshineDisputeSummary>

Physician Enterprise Identity Management registration portal (Step 1 in dispute resolution):

<http://bit.ly/SunshineDisputeRegistration>

of the facts and dismissing their Sunshine disputes outright. Last month, Primacea asked the CMS Center for Program Integrity about this concern. The reply: “We haven’t heard that, but the rules don’t exclude it.”

The companies are concerned too. Some who spoke with Primacea say that they will handle major issues from the key physicians they work with. However, they don’t see a path to resolving issues if even 1% of transactions are disputed. In particular, they have been surprised by the number of physician objections to proposed disclosures around meals and refreshments that the physicians don’t recall accepting.

The AMA has a whole different view of physician rights. In its comment to CMS during the recently concluded public comment period regarding the collection of this information, the AMA argues:

The agency is not permitted by law or regulation to authorize and facilitate the unilateral dismissal of disputes between manufacturers and group purchasing organizations (GPOs) and physicians.

The AMA quotes CMS’ document Open Payments System: Review and Dispute Email Notifications, Centers for Medicare & Medicaid Services, April 2014:

You [the manufacturer or GPO] may resolve the dispute by submitting and attesting to the corrected data. After reviewing the disputed information, *if you determine that no change is required to the data, you may dismiss the dispute* or request that physician or teaching hospital who initiated the dispute to withdraw it [emphasis added].

The AMA states that the final rule does not authorize companies to dismiss disputes “without both parties agreeing that the dispute is resolved.” To be clear, the AMA stresses that allowing companies to dismiss physi-

cian disputes “violates the Administrative Procedures Act, the Paperwork Reduction Act, the Physician Payments Sunshine Act (Sunshine Act) provision of the Affordable Care Act (ACA), and the due process rights of physicians.”

Several organizations agree with the AMA. In its comment to CMS, the American Academy of Physical Medicine and Rehabilitation (AAPM&R) is concerned that “the information will lack clarity” and will:

... increase the paperwork burden as physicians will have to repeatedly initiate disputes to revive disputes that remain unresolved, and be of limited usefulness since self-serving attestation of one party to a dispute cannot be reasonably relied upon by the general public where the other party (physician or teaching hospital) dispute the data. It will also increase significantly the likelihood of litigation that will call into question the quality and reliability of the information gathered and published.

IS THERE ANY OTHER MECHANISM FOR CHECKING THE QUALITY OF DATA?

CMS reports that it is initiating an audit process. They state that a high degree of disputes might generate a “target.” They will look at the percentage of disputed submissions versus “peer groups” as well as the nature of disputes (eg, meals vs substantial payments). If a company were to fail a CMS audit, its submission could be determined as incorrect or incomplete and subject to substantial fines.

Primacea and others have suggested to CMS that physicians be allowed to have agents represent them in Sunshine-related matters. In this view, just as taxpayers can designate an attorney or accountant to represent them in dealings with clients and the government, overwhelmed physicians and their hospitals could empower a designee to help ensure accuracy.

HOW WILL DISPUTED PAYMENTS BE REPORTED?

Initial CMS rules required the flagging of disputed data. In its comment to CMS, the Pew Charitable Trusts recommends that CMS clearly mark disputed payments as “under review,” adding that it should “be easy for consumers to recognize that a particular payment is under review.”

Primacea’s comment to CMS goes further. Lack of time, limited resources, or “playing it safe” on the company’s part should not result in the physicians’ perspectives being ignored or simply marked as disputed.

Primacea proposes that two new fields be added to the Open Payments database in the case of unre-

WHERE TO FIND ALL PUBLIC COMMENTS SUBMITTED

To view the full context of the public comments made by various organizations and medical associations to CMS regarding Sunshine/Open Payments data sharing and dispute processes, please visit:

<http://bit.ly/SunshinePublicComments>

solved disputes. First, the correct value per the physician. Second, a text field that would allow physicians to document their specific disagreement with the reported entry.

Industry’s Aggregate Spend Alliance has a different perspective. It suggests requiring physicians to add a “Reason for Dispute” for every disputed record.

WHY SHOULD PHYSICIANS BE CONCERNED WITH DISPUTING SUNSHINE DATA?

As with the public posting of Medicare payment data, the posting of Sunshine payment data has the potential to substantially impact how patients and the public view physicians. In its comment to CMS, when referring to the “unworkable timetable and unpredictable dispute resolution process,” the AACE put it bluntly:

The implication for those covered recipients could include antifraud, antikickback and Stark law investigations, the provision of inaccurate evidence for a tax audit, and potential violations of private employment contracts with job loss.

Obviously, the whole story has yet to be written. However, it behooves all physicians to pay attention as the process unfolds. ■

Primacea provides tools to physicians and leading hospitals to facilitate transparency in innovation and manage compliance obligations. For more information, please visit www.primacea.com.

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1. CMS Stresses Doctors’ Rights to Challenge Data Collected Under Sunshine Act. Available at <http://www.bna.com/cms-stresses-doctors-n17179874630/>. Accessed June 9, 2014.

2. Cagnetta SJ, Ladd, SK. The Sunshine Act inevitably rises. *Endovascular Today*. 2014;13:61-63.