DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

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/S/

FROM: Stuart Wright
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SUBJECT: Memorandum Report: *Lack of Data Regarding Physicians Opting Out of Medicare*, OEI-07-11-00340

This memorandum report provides information about data limitations that we encountered while conducting a review of physicians who opted out of Medicare. The lack of complete data prevented us from conducting a full review of physicians who have opted out of Medicare. We plan to conduct a full evaluation when a complete data source of opted-out physicians is available.

SUMMARY

In April 2011, we began an evaluation entitled *Impact of Physicians Opting Out of Medicare*. The objectives of the evaluation were to determine the extent to which and reasons why physicians opt out of the Medicare program, and the effects of physician opt-out on Medicare beneficiaries. We specifically sought to answer:

- What are the characteristics (i.e., specialty, location, practice type, gender) of physicians who opt out of Medicare?
- Has the number of opted-out physicians increased or decreased over time?
- Why do physicians choose to opt out of the program?

In the course of our review, we determined that the Centers for Medicare & Medicaid Services (CMS), Medicare Administrative Contractors (MACs), and legacy carriers (i.e., Medicare claims payment contractors) do not maintain sufficient data regarding physicians who opt out of Medicare. As a result, we are unable to conduct the proposed evaluation at this time.

Although the percentage of physicians who choose to opt out may be small (perhaps less than 1 percent[1]), monitoring the number of opted-out physicians and their specialties is important to ensure that Medicare beneficiaries have sufficient access to providers, including specialized providers. Additionally, having appropriate data on opted-out physicians is essential to ensuring that such physicians are not inappropriately receiving Medicare payments. Based on the limited data that we received, the number of opted-out physicians appears to have increased each year from 2006 to 2010. Section 1848(f) of the Social Security Act (SSA) specifies a sustainable growth rate (SGR) for all physician services, which is intended to control the aggregate growth of Medicare expenditures for these services. Unless Congress intervenes, the SGR would cause Medicare physician payments to decrease by 27.4 percent in 2012.[2] The Texas Medical Association (TMA) states on its Web site, "This decade-long and continued uncertainty is forcing some physicians to make a difficult decision to either opt out of Medicare, limit the number of patients they treat, or retire early. A TMA survey [from August 2011] indicates that 50 percent of Texas physicians are considering opting out of the Medicare program altogether."[3]

BACKGROUND

Prior to passage of the Balanced Budget Act of 1997 (BBA), physicians did not have a mechanism for opting out of the Medicare program to contract privately with Medicare beneficiaries.[4] As amended by the BBA, section 1802 of the SSA allowed physicians to opt out of the Medicare program for 2-year intervals starting in 1998.

Physician Provision of Services to Medicare Beneficiaries

In general, physicians must enroll in the Medicare program to provide services to Medicare beneficiaries. Once enrolled, physicians agree to abide by Medicare laws, regulations, and program instructions.[5] Physicians who provide Medicare-covered services to Medicare beneficiaries must file claims on the beneficiaries' behalf within 1 year, or face civil monetary penalties.[6] Participating physicians agree to accept assignment (i.e., the Medicare-allowed amount) for covered services; nonparticipating physicians are limited to 115 percent of the Medicare-allowed amount for the service.[7]

A third option available to physicians is to opt out of the Medicare program, which allows them to enter into private contracts with Medicare beneficiaries. Medicare policy changes that decreased physician reimbursement and increased administrative burden have been factors associated with physicians' decisions to opt out of the Medicare program.[8] These changes include decreases in the Medicare fee schedule, increased

[1] Buczko, William, "Provider Opt-Out Under Medicare Private Contracting," *Health Care Financing Review*, Winter 2004-2005, Vol. 26, No. 2.
[2] 76 Fed. Reg. 73026, 73277 (Nov. 28, 2011).
[3] TMA, *Medicare Meltdown Redux Fact Sheet*. Accessed at http://www.texmed.org/ on November 16, 2011.
[4] BBA, P.L. 105-33 § 4507.
[5] CMS, Form 855i, *Medicare Enrollment Application*, p. 25, July 2011.
[6] SSA §§ 1848(g)(4)(A) and 1848(g)(4)(B)(ii).
[7] SSA §§ 1842(h)(1), 1848(g)(1)(A), and 1848(g)(2)(C).
[8] Buczko, William, "Provider Opt-Out Under Medicare Private Contracting," *Health Care Financing Review*, Winter 2004-2005, Vol. 26, No. 2.

monitoring of claim coding, and increased fines and prosecution for fraud and abuse.[9] If physicians wish to provide services to Medicare-eligible beneficiaries through private contracts and not bill Medicare, they must opt out of the Medicare program and renew their opt-out status every 2 years. Physicians who have never enrolled in the Medicare program must still opt out if they plan to treat Medicare beneficiaries through private contracts.[10]

Private Contracts. Any physician who opts out of the Medicare program may enter into private contracts with Medicare beneficiaries; however, the contracts must meet the terms and conditions outlined in Federal regulations.[11] These private contracts must state that the physician has chosen to opt out of the Medicare program, and that the beneficiary or beneficiary's legal representative accepts full responsibility for payment of the physician's charge for all services. Because Medicare charge limits do not apply to physicians who opt out of the program, the contracts must clearly state that the beneficiary has the right to receive services provided by other physicians who have not opted out of the program and are willing to accept Medicare payments. The beneficiary or the beneficiary's legal representative agrees not to submit a claim to Medicare or to ask the physician to submit a claim to Medicare on his or her behalf. Physicians who opt out of the Medicare program must sign a new contract with each beneficiary at the beginning of each 2-year period for which they have chosen to opt out of the Medicare program.[12]

Physician and Medicare Administrative Contractor Responsibilities

Physicians who elect to opt out of the Medicare program must sign written affidavits stating that they will comply with Federal requirements for opting out. These requirements provide that:

- physicians may not submit claims to Medicare for any service provided during their 2-year opt-out period, beginning on the date the affidavit is signed;[13] and
- physicians may not receive direct or indirect Medicare payment for services furnished to Medicare beneficiaries with whom they have privately contracted.[14]

CMS uses MACs to enroll providers and process Medicare claims. No later than 10 days after the physician enters into the first private contract with a beneficiary, the physician must file a signed affidavit with all MACs that have jurisdiction over claims that the physician would otherwise file with Medicare. This requirement is intended to ensure that a MAC can prevent improper payments to opted-out physicians. However, an opted-out physician may submit claims to Medicare for emergency and urgent care services provided to beneficiaries who have not signed private contracts with that

[9] Ibid.
[10] CMS, *Medicare Benefit Policy Manual* [Internet-Only Manual], Pub.100-02, ch. 15, § 40.13. Accessed at http://www.cms.hhs.gov/Manuals/IOM/list.asp on June 14, 2011.
[11] 42 CFR § 405.415.
[12] 42 CFR § 405.415(o).
[13] SSA § 1802(b)(3)(B)(ii).
[14] Ibid.

physician.[15] In addition, an opted-out physician may refer and order services to be provided by a non-opted-out physician.[16]

MACs are required to maintain information about opted-out physicians.[17] At a minimum, MACs must maintain: (1) the name of the physician, (2) the physician's National Provider Identifier (NPI), (3) the effective date of the opt-out affidavit, and (4) the end date of the opt-out period. MACs may maintain additional data elements at their discretion. MACs are required to provide CMS with quarterly counts of newly opted-out physicians by physician specialty; however, they are not required to identify the physicians by name or NPI in their reports.[18] To keep Medicare managed care plans apprised of which physicians have opted out, MACs must develop data exchange mechanisms with managed care plans in their service area.[19] MACs may establish a Web site to meet this requirement.

METHODOLOGY

We sought to obtain data on opted-out physicians both from CMS and from individual MACs and legacy carriers (i.e., Medicare claims payment contractors that remain in jurisdictions not yet awarded to MACs). A CMS official provided us with a list of approximately 7,900 opted-out providers (e.g., physicians and nonphysician practitioners), which included opted-out providers from 1998 to March 2011. This official indicated that the data were updated by using the lists of opted-out providers posted on MAC and legacy carrier websites. These data did not indicate the end dates of the opt-out periods. In some cases, affidavit effective dates were as early as 1998; however, there was no information to indicate whether the opt-out extended past the initial 2-year opt-out period. The CMS official stated that the MACs and legacy carriers would have the best available data on opted-out physicians.

In July 2011, we requested information from each MAC and legacy carrier regarding opted-out physicians for the period January 2009 through June 2011. Our request specifically called for the following data elements: (1) demographic (i.e., name, address, and NPI) and specialty information for each opted-out physician, (2) effective date of opt-out, and (3) if applicable, date of the physician's return to Medicare (i.e., reinstatement date). We note that these data elements are a combination of (1) data elements that CMS requires MACs and legacy carriers to maintain for opted-out physicians, and (2) data elements accessible in their internal enrollment databases or the Provider Enrollment Chain Ownership System (PECOS). We requested this information from all 10 MACs and 6 legacy carriers that pay Part B Medicare claims. After at least three requests via telephone and email, as of September 2011 we had received data from

[15] CMS, *Medicare Benefit Policy Manual* [Internet-Only Manual], Pub.100-02, ch. 15, § 40.28. Accessed at http://www.cms.hhs.gov/Manuals/IOM/list.asp on June 14, 2011.
[16] CMS, *Medicare Benefit Policy Manual* [Internet-Only Manual], Pub.100-02, ch. 15, § 40.32. Accessed at http://www.cms.hhs.gov/Manuals/IOM/list.asp on June 14, 2011.
[17] CMS, *Medicare Benefit Policy Manual* [Internet Only Manual], Pub.100-02, ch. 15, § 40.20. Accessed at http://www.cms.hhs.gov/Manuals/IOM/list.asp on June 14, 2011.
[18] CMS, *Medicare Benefit Policy Manual* [Internet Only Manual], Pub.100-02, ch. 15, § 40.40. Accessed at http://www.cms.hhs.gov/Manuals/IOM/list.asp on June 14, 2011.
[19] CMS, *Medicare Benefit Policy Manual* [Internet Only Manual], Pub.100-02, ch. 15, § 40.21. Accessed at http://www.cms.hhs.gov/Manuals/IOM/list.asp on June 14, 2011.

seven MACs and four legacy carriers. However, the data provided were often incomplete. Only one MAC and one legacy carrier provided all data elements that CMS requires.

Table 1 shows the number of MACs and legacy carriers that provided each data element in response to our request. Detailed information can be found in the Appendix.

Table 1: Number of MACs and Legacy Carriers That Provided Data Elements

Data Element	Number of MACs/Legacy Carriers (n=11)
Physician Name	11
NPI	5
Specialty	10
Address	7
Opt-Out Effective Date	11
Opt-Out Expiration Date	6
Reinstatement Date	3

Standards

This study was conducted in accordance with the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency.

RESULTS

We were unable to answer the issue questions in our proposed study on opted-out physicians because no centralized data exist and the data that we received from MACs and legacy carriers were insufficient or not provided at all. Specifically, we cannot determine the characteristics of physicians who opt out of Medicare, the trend in the number of opted-out physicians, or why physicians choose to opt out of Medicare.

No Centralized Data on Opted-Out Physicians Exist

We sought to obtain data on opted-out physicians from CMS; however, CMS currently maintains no such data. A CMS official stated that the MACs and legacy carriers would have the most complete data. We note that entering data into PECOS could be one method to compile centralized data on opted-out physicians. However, a CMS official stated that some, but not all MACs and legacy carriers have been entering opt-out data into PECOS from information contained on physician affidavits received since January 1, 2010. In September 2011, CMS issued guidance to MACs and legacy carriers, effective immediately, about entering opt-out affidavit information into PECOS. Further guidance—issued in November 2011 and effective April 1, 2012—requires MACs and legacy carriers to capture opt-out affidavit information from affidavits received on or after January 1, 2009.

Not All MACs and Legacy Carriers Reported Data to OIG
Despite at least three requests via telephone and email, we did not receive data from 3 of 10 MACs and 2 of 6 legacy carriers. Without data from all MACs and legacy carriers, we cannot create a complete universe of opted-out physicians. Without a complete list, we cannot sample opted-out physicians for the purposes of conducting interviews with them.

MACs and Legacy Carriers Failed to Maintain Required Elements
The MACs and legacy carriers are not maintaining all required data elements for opted-out physicians. For example, not all MACs and legacy carriers are tracking the expiration dates of affidavits. In cases in which these dates are tracked, it is unclear whether the information is used to ensure that those physicians who were once enrolled in Medicare are automatically reenrolled in Medicare or are excluded from filing claims until they actively reenroll in Medicare. The September 2011 guidance addresses the steps that MACs and legacy carriers should take if the opt-out period expires without the physician renewing the opt-out status or enrolling in Medicare.

CONCLUSION

The quality of the data and lack of procedures for MACs' handling of opted-out physicians impedes CMS's oversight of this aspect of the Medicare program. Monitoring the number of opted-out physicians and their specialties is important to ensure that Medicare beneficiaries have sufficient access to providers. Based on the limited data that we received, the number of opted-out physicians appears to have increased each year from 2006 to 2010. More physicians may opt out in the near future, given the potential for legislated decreases in Medicare reimbursement for physician services.

Although we acknowledge that CMS guidance addresses the procedures that MACs and legacy carriers must have in place for processing opt-out affidavits, we believe that further direction is necessary to account for data on physicians who filed affidavits between 1998 and 2008. This information is essential for CMS' oversight of opted-out physicians, which would be aided by the ability to assess trends in the numbers and locations of opted-out physicians. We plan to conduct a full evaluation when a complete data source of opted-out physicians is available.

This report is being issued directly in final form because it contains no recommendations. If you have comments or questions about this report, please provide them within 60 days. Please refer to report number OEI-07-11-00340 in all correspondence.

APPENDIX

Data Elements Provided by Medicare Administrative Contractors and Legacy Carriers to the Office of Inspector General

Contractor Jurisdiction/ Name	Data Elements Provided						
	Physician Name	National Provider Identifier	Specialty	Address	Opt-Out Effective Date	Opt-Out Expiration Date	Reinstatement Date
Medicare Administrative Contractors							
1 and 11 – Palmetto	●	●	●		●	●	
3 – Noridian	No Data Received						
4 – Trailblazer	●		●	●	●	●	
5 – Wisconsin Physicians Service	●		●	●	●		
9 – First Coast Service Options	●	●	●	●	●		
10 – Cahaba	●		●		●	●	
12 – Highmark	No Data Received						
13 – National Government Services	No Data Received						
14 – National Heritage Insurance Corporation	●		●		●	●	●
15 – Cigna	●	●	●	●	●		●
Legacy Carriers							
Cahaba – Mississippi	●		●		●	●	
Cigna – Idaho	●	●	●	●	●		●
National Government Services – Indiana	No Data Received						
Noridian – Alaska, Oregon, Washington	No Data Received						
Pinnacle – Arkansas, Louisiana	●	●		●	●	●	
Wisconsin Physicians Service – Illinois, Michigan, Minnesota, Wisconsin	●		●	●	●		
Total	11	5	10	7	11	6	3

Source: Office of Inspector General analysis of data provided by Medicare administrative contractors and legacy carriers, 2011.