The Sunshine Act:
Casting a Shadow on Health Care Innovation

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I. INTRODUCTION

The Physician Payment Sunshine Act (“Sunshine Act”)1 was enacted with the Patient Protection and Affordable Care Act in 2010.2 The Sunshine Act was proposed in 2007 by two senators who sought to promote honesty and full disclosure of the financial relationships pharmaceutical companies enter into with physicians.3 In short, the Sunshine Act requires all “applicable manufacturers” to report any payments or transfers of value to physicians or teaching hospitals,4 the hope being that this required disclosure will deter any corrupt financial influences on research, education, and physicians’ clinical judgment.5 The Sunshine Act takes a different approach to transparency by relying on self-reporting mechanisms, which shift the burden from whistleblowers and government investigations to the organizations themselves.6 The Sunshine Act considerably impacts the business of...
manufacturers and physicians, and its proponents hope to change the way
patients approach their healthcare decisions.\textsuperscript{7} Despite its underlying noble
intentions, the Sunshine Act is unexpectedly affecting physicians who
dedicate themselves to advancing the healthcare industry through research
and development. The Act is casting a negative shadow on the relationships
with industry that make innovation possible. This article will argue the
Sunshine Act has caused physicians to refrain from participating in beneficial
industry relationships because of their fear that public response to the
required disclosures will be misguided and result in misinterpretation of the
data. Further, this article will argue that the physician response may be
unfounded and an unnecessary hindrance to innovation and advancement
because patients will not take the necessary steps to access, thoughtfully
consider, and then confront their physicians regarding their financial ties to
industry actors.

II. BACKGROUND

The Sunshine Act requires all applicable manufacturers to report to the
Centers for Medicare and Medicaid Services (“CMS”) on three broad
categories: (1) general payments or transfers of value, (2) research
payments,\textsuperscript{8} and (3) “ownership and investment interests in manufacturers
held by physicians as well as their immediate family members.”\textsuperscript{9}
Manufacturers are required to report their annual data to CMS by the
ninetieth day of each calendar year.\textsuperscript{10} CMS then aggregates this data and
posts it on the CMS Open Payments website.\textsuperscript{11} Penalties for failing to report
could be severe—an unreported payment could incur penalties ranging from
$1,000 to $10,000 per indiscretion, with a maximum of up to $150,000 per
year.\textsuperscript{12} Manufacturers are subject to even more severe penalties if they

\textsuperscript{7} The Sunshine Act: Increasing Transparency or Opening Pandora’s Box, SHYFT
ANALYTICS (June 28, 2012), http://shyftanalytics.com/shyft-insights/the-sunshine-act-
increasing-transparency-or-opening-pandoras-box, (“[I]t is hoped that this mandate will
ellevate public concern that their patient care is being compromised by manufacturer-physician
conflicts-of-interest.”).

\textsuperscript{8} See Elizabeth Richardson, Health Policy Brief: The Physician Payments Sunshine
php?brief_id=127, (explaining these payments will be reported in a separate section so it does
not appear that individual physicians are profiting the entire amount of a research grant).

\textsuperscript{9} Id.

\textsuperscript{10} Memmott & Clarke, supra note 4.


\textsuperscript{12} Stamatoglou, supra note 3, at 978.
knowingly fail to report penalties. Manufacturer penalties range from $10,000 to $100,000, with a maximum of up to $1 million per year. Certain types of value transfers are excluded from the reporting requirement, including free drug samples intended for patient use and payments for products that are still in the course of development. Reporting must be done with specificity, designating both the nature and form of the payment made.

The hope is that these disclosures will improve "health care quality, [lower] health care costs, and [engage] consumers in decision making about their health care."

III. FINANCIAL TIES AND THEIR PLACE IN THE INDUSTRY

It is no secret that drug manufacturers use incentive-based programs to market their products to physicians, but are these relationships necessarily a bad thing? This gift-giving relationship can be beneficial to the healthcare industry because the collaboration between physicians and manufacturers can bring about swifter improvements in patient care. However, proponents of the Sunshine Act cite to physicians’ impaired medical judgment as the main driving force behind the need for transparency. Financial incentives and gifts have the potential to influence physicians to prescribe certain manufacturers’ products more frequently than they would have otherwise.
Often, as a patient’s sole source of information and advice, physicians are
depended on to make judgments that are “wholly loyal to the patient’s
therapeutic needs and unaffected by other interests.”22 It is the violation
of this duty that has sparked the perceived need for more transparency.23

The Sunshine Act places a heavy burden on manufacturers to provide
accurate data of their financial interactions with physicians and teaching
hospitals.24 The Sunshine Act discourages manufacturers from pursuing
beneficial relationships with physicians by means of imposing burdensome
reporting measures and severe penalties for noncompliance.25 However, it
appears that the Sunshine Act may provide the most deterrence due to
physician concern for their public perception. The threat of public backlash
from disclosing financial ties is enough incentive for many physicians to
scale back their efforts in promoting research, innovation, and advancement
in their field.26

In addition to manufacturers and physicians, patients also play a
significant role under the Sunshine Act. The Sunshine Act assumes patients
will thoughtfully consider the disclosures and will thus deter dishonest
influence on physicians.27 However, it is unclear whether patients will
actually access and consider this information in any meaningful manner,
making the threat of public backlash an unnecessary inhibition to the sharing
of knowledge and expertise.28

IV. PHYSICIANS CONCERNED OVER POTENTIAL MISUNDERSTANDINGS OF
THEIR FINANCIAL TIES TO INDUSTRY

The Sunshine Act has raised real concerns amongst physicians across
every specialty, even though it does not require any direct participation on

22. Stamatoglou, supra note 3, at 967.
23. Uknis, supra note 18 (“As physicians, we are duty bound to remain free from conflict
of interest that may influence our patient care decisions. There is no question that a conflict of
interest may serve to undermine the trust that is essential to the therapeutic doctor-patient
relationship. The critical issue on which we should focus is that transparency should help to
maintain this essential trust.”).
24. Richardson, supra note 8, at 4.
25. See The Impact of Health Care Reform on Academic Cancer Centers, Nat’l
policy_program/pdf/2014_health_care_reform_summit_summary.pdf (last visited Nov. 29,
2015).
26. Richardson, supra note 8, at 5.
27. Perry et al., supra note 6, at 477 (“[T]he promise of increased transparency includes
an additional potential benefit beyond improved levels of trust between the patient and
physician. Open Payments aim to improve levels of sophistication and awareness among
patients, in an effort to further educate and empower health care consumers consistent with
so-called market-driven approaches to health care.”).
28. See Lichter, supra note 3, at 654, for a discussion that evidence exists that the public
does not use existing health-related databases to help their healthcare decision.
their part. Physicians are encouraged, but not required, to register on the CMS Open Payments website so they may review the data published about them and check for accuracy. A survey done after the website launched in September 2014 found that forty-six percent of the physicians surveyed visited the CMS website to ensure accuracy of the data. Of the physicians who did visit the website, sixty-two percent of them found inaccuracies in the data regarding their financial ties with manufacturers. CMS recommends that physicians keep a record “of all payments and transfers of value received from industry” so the physicians may reconcile with the reporting entities any discrepancies the reporting entities find. The Sunshine Act allows forty-five days for physicians to review and confirm accuracy of the data reported before it is released to the public via the Open Payments Website. Physicians’ concerns over the potential negative reception of their financial relationships with the industry may be heightened by the frequency of inaccuracies in the data; however, for busy physicians, forty-five days may not be enough time to carefully review data submitted for the previous twelve months. Physicians are put in a difficult position because of the fear that consumers may perceive inaccurate data in an unfavorable way, yet they have very little time to correct inaccuracies.

A study published by BBC disclosed that of “the world’s ten largest pharmaceutical companies, nine of them spent more on sales and marketing than they did on research and development in 2013,” with the majority of these marketing efforts focused on physicians. Despite this statistic, a majority of physicians take the view that accepting items from manufacturers, such as free drug samples or consulting agreements, does not

30. *Chen*, supra note 1, at 366.
31. *Id.* at 365.
34. *Richardson*, supra note 8, at 4; *Chen*, supra note 1, at 365.
35. Peter Frost et al., *Obamacare Sunshine Act Sheds Light on $3.5B Paid to Doctors*, CHI. TRIB. (Oct. 1, 2014), http://www.chicagotribune.com/business/ct-sunshine-act-1001-biz-20141001-story.html (stating that the data published is “significantly incomplete, and physician and industry groups have raised concerns about accuracy and context.”); *Bracing for the Physician Payment Sunshine Act*, THE ADVISORY BOARD CO.: HEALTH CARE INDUS. COMM., at 1, https://www.hunton.com/files/Publication/f6ff11b1-a9e9-4321-a6ea-340044695e59/Presentation/PublicationAttachment/5d21979f-4295-4448-9f01-3f2a7e47fb13/Physician_Payment_Sunshine_Act.pdf, (“Some physicians have expressed concerns that their reputations could be damaged by inaccurate public reporting about the payments they have received from manufacturers.”).
36. *Chen*, supra note 1, at 359 (“[I]n 2012, while $3 billion was spent in the United States marketing to consumers, a whopping $24 billion was targeted at physicians.”).
violate their ethical responsibilities.\textsuperscript{37} Further, most of these physicians also deny that any kind of incentive from the industry influences prescribing habits, yet years of data suggests otherwise.\textsuperscript{38} While incentives influence physicians in varying degrees, data collected over a thirty-year span indicates that physician-industry relationships can compromise a physician’s objectivity and judgment.\textsuperscript{39} These financial relationships can have such a negative impact on a physician’s judgment that they could “compromise patient care and jeopardize public trust.”\textsuperscript{40} The Sunshine Act seeks to remedy this behavior.\textsuperscript{41} While this is certainly a noble notion, the practical effects may not yield the intended results.

Physicians have grave concerns over the effect of the required reporting in relation to their public perception and the shadow cast over industry relationships as a whole.\textsuperscript{42} The effectiveness of the Sunshine Act relies on the active participation of patients to seek out the information being reported and to improve their knowledge about potential physician biases.\textsuperscript{43} Physicians worry patients may not be able to easily “distinguish compensation for research-related services from payments of a more promotional nature.”\textsuperscript{44} Patients may misunderstand certain arrangements and assume that a physician’s judgment is compromised because of his or her financial interests.\textsuperscript{45} For example, a surgeon who helped invent a certain product and thereby holds patents on that product may appear to have high levels of compensation from a manufacturer.\textsuperscript{46} Such data may give a patient the impression that a physician has a financial incentive to use a certain

\begin{itemize}
\item 37. Perry et al., supra note 6, at 475 (citing to M.A. Morgan et al., \textit{Interactions of Doctors with the Pharmaceutical Industry}, 32 J. OF MED. ETHICS 559, 562 (2006) (“However, while physicians are adamant in their denial that financial relationships inappropriately influence their personal medical decision making, studies consistently show that physicians believe these relationships may cause other physicians to be biased in their prescribing behavior.” (emphasis added)).
\item 38. \textit{Id.} at 477.
\item 39. \textit{Id.}
\item 40. \textit{Id.} at 475.
\item 41. Stamatoglou, supra note 3 at 976.
\item 42. \textit{Id.} at 476.
\item 43. \textit{See generally} Whelan, supra note 20 at 13 (“[Disclosure laws] place great—and perhaps excessive—responsibility on patients, and essentially require patients to police their doctors’ behavior and determine the impact of industry relationships on their doctors’ medical judgments.”).
\item 44. Perry et al., supra note 6, at 476.
\item 45. \textit{Id.}
\item 46. \textit{See} Elizabeth Hofheinz, \textit{Do Sunshine Act Disclosures Hurt Ortho Innovation?}, ORTHOPEDICS THIS WEEK (Oct. 27, 2014), http://ryortho.com/2014/10/do-sunshine-act-disclosures-hurt-ortho-innovation-holy-grail-of-registries-ramping-up-and-more/ (expressing concern by an orthopedic surgeon over the reporting category entitled “General Non-Research Related Payments” under which his compensation resulting from the patent he holds on popular implant technologies and products is reported).
\end{itemize}
product, when in actuality the physician does not get paid to use that company’s product.\textsuperscript{47}

Physicians are also concerned that sensationalized reporting by the media may inaccurately influence their public perception.\textsuperscript{48} The CMS Open Payments website practically gives journalists leads on stories by explicitly disclosing which physicians are receiving the highest compensation from which manufacturers.\textsuperscript{49} Physicians have expressed concern that their names may end up in a headline one day, even if resulting from a legitimate financial arrangement.\textsuperscript{50} For instance, Stephen S. Burkhart, an orthopedic surgeon, found himself at the top of the list in an article published by the \textit{Wall Street Journal} listing the top paid surgeons based on consulting fees and royalties.\textsuperscript{51} The article suggested that there may be a “dark side” to physicians receiving these top payments when in fact, Dr. Burkhart simply held twenty-eight patents for which the manufacturer had been assigned the intellectual property rights.\textsuperscript{52} The payments received by Dr. Burkhart were for legitimate innovation and advancement in patient care, yet the media skewed the story to make it appear that something less than ethical was occurring.\textsuperscript{53} The media’s vilification of physicians who receive royalty payments for products they have developed discourages innovators from pursuing relationships with the industry in order to develop their products.\textsuperscript{54} Physicians are concerned that the disclosure of their financial ties with manufacturers may damage the public’s trust in the medical community through patient misunderstanding, as well as misguided reporting in the media.\textsuperscript{55}

V. FEAR OF BEING PUBLISHED ON THE OPEN PAYMENTS WEBSITE IS DETERRING PHYSICIANS FROM PARTICIPATING IN CRITICAL RELATIONSHIPS AND LEARNING OPPORTUNITIES

The negative picture painted by the Sunshine Act’s required disclosures has led many physicians to reconsider their relationships with manufacturers

\textsuperscript{47} The physician does not receive royalties when he personally uses the device he helped invent, thereby preventing any financially-driven decisions to use his own product. \textit{Id.}

\textsuperscript{48} \textit{Id.}


\textsuperscript{50} \textit{Id.}

\textsuperscript{51} Hofheinz, \textit{supra} note 46.

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} \textit{Id.}


\textsuperscript{55} Hofheinz, \textit{supra} note 46.
and potentially scale back on activities that could lead to innovation and advancement within the health care industry.\textsuperscript{56} Yet these are the physicians who have the greatest opportunity to recognize gaps in knowledge and procedures and “to innovate and to perform basic and clinical research related to the development of new...devices.”\textsuperscript{57} Physicians are crucial to the advancement of medicine and oftentimes do not possess the funding or the time to “develop, produce, and distribute innovative medical and surgical products independently.”\textsuperscript{58} Funding is difficult to secure from sources other than pharmaceutical and device companies.\textsuperscript{59} The federal government does offer limited grants, and certain specialty organizations attempt to contribute; however, these resources are not enough to fund a majority of the trials occurring today.\textsuperscript{60} Without physicians’ relationships with manufacturers, these innovations would be extremely delayed and potentially impossible in some circumstances.\textsuperscript{61}

Physicians are not only wary of contributing to the research and development of products for fear of public backlash, but also of participating in educational opportunities to share knowledge and research, whether this be speaking at an event or simply attending one.\textsuperscript{62} Speaking engagements are a big source of income for many physicians who are considered experts in their fields and research leaders.\textsuperscript{63} However, the required reporting of Continuing Medical Education (“CME”) related payments may lead some physicians to forgo these learning opportunities in an effort to prevent what could appear to be influential compensation from companies sponsoring these programs.\textsuperscript{64} An update to the final rule for the Sunshine Act eliminated a previous exception to reporting for indirect CME payments.\textsuperscript{65} Specifically,

\begin{itemize}
  \item[56.] Loftus, supra note 32.
  \item[57.] Hofheinz, supra note 46.
  \item[58.] Id.
  \item[59.] Dyda, supra note 54; Stamatoglou, supra note 3, at 972-73.
  \item[60.] Dyda, supra note 54.
  \item[61.] Hofheinz, supra note 46.
  \item[62.] Loftus, supra note 32.
  \item[63.] See Charles Ornstein & Ryann Grochowski Jones, Double Dip: Doctors Paid to Advise, Promote Drug Companies That Fund Their Research, PROPUBLICA (Mar. 25, 2014, 12:00AM), http://www.propublica.org/article/double-dip-doctors-paid-to-advise-promote-drug-companies-that-fund-research (explaining that an infectious disease specialist was paid $51,000 for research he performed, $13,000 for consulting, and $125,000 for speaking arrangements).
  \item[65.] Larry Husten, Continuing Medical Education Payments to Physicians Will Be Exposed to Sunshine, FORBES (Dec. 16, 2014, 8:02 PM), http://www.forbes.com/sites/larryhusten/2014/12/16/continuing-medical-education-payments-to-physicians-will-be-exposed-to-sunshine/ (“The new rule will not go into effect until 2016. The first reports will
prior to this update CME payments did not need to be reported if the CME program met certain certification standards and the applicable manufacturer did not directly select or pay the speaker. However, this exclusion has since been eliminated and any indirect payments made by an applicable manufacturer in support of CME programs must be reported if the applicable manufacturer eventually learns of the speaker’s identity, regardless of whether they knew of the speaker’s identity at the time the payment was made. The Sunshine Act is effectively dwindling the pool of expert speakers who are willing to provide “teaching and experience to many health care providers.” Not only are physicians becoming less willing to speak at these engagements, they are also hesitant about even attending these events where they may be subject to having their name appear on the CMS Open Payment website.

Another interesting effect of the spotlight on disclosure is that a trend is evolving amongst young physicians attempting to keep their records “squeaky clean.” It appears that the recent focus on the negative impact of ties to industry has bred an unwillingness of newer physicians to participate in any significant way, including many CME opportunities. Seasoned physicians have taken notice of this trend, commenting that the relationship between young colleagues and manufacturers appears to be “more standoffish” and may potentially get in the way of innovative concepts and commercialization of new ideas. This unwillingness to enter into relationships with manufacturers will only become a stronger sentiment within the industry as increasing amounts of young physicians enter the workforce.

Physicians have expressed real concern over the potential tarnishing of their integrity as a result of the Sunshine Act. Physicians across the country

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67. See CMS Implements Final Rule Changes for Open Payments, Ctrs. For Medicare & Medicaid Servs., https://www.cms.gov/OpenPayments/About/Law-and-Policy.html; see also Husten, supra note 65 (quoting Daniel Carlat, the former director of the Prescription Project at Pew Charitable Trusts, “It would be almost unimaginable for a case where the company did not learn the identity of the physicians speaking.”); see also The Impact of Health Care Reform on Academic Cancer Centers, supra note 25 (“[R]eporting of indirect payments is more challenging and companies are being cautious as they are liable for accurate information.”).

68. Loftus, supra note 32.

69. Id.

70. The Impact of Health Care Reform on Academic Cancer Centers, supra note 25.

71. Id.

72. Dyrda, supra note 54.
have vowed they are becoming more cautious in their interactions with the industry “and what they will accept from industry representatives.” Those physicians with genuine intentions to promote innovation and education are having their relationships with industry come under close scrutiny because of a handful of physicians who may be allowing compensation from manufacturers to cloud their judgment. But how will this play out moving forward?

VI. SUNSHINE ACT DISCLOSURES WILL NOT SERVE THEIR INTENDED PURPOSE BUT RATHER FACILITATE THE UNINTENDED CONSEQUENCE OF PHYSICIAN UNWILLINGNESS TO CONTRIBUTE KNOWLEDGE AND INNOVATION TO THE INDUSTRY

The crux of the Sunshine Act is the assumption that patients will access and thoughtfully evaluate the information provided on the CMS Open Payment website and hopefully, in effect, deter those “bad apple” arrangements from forming or continuing. However, will these new disclosures even serve their purpose in mitigating conflicts of interest? With no way to decipher biases, there is no guarantee these disclosures will serve their purpose of thinning out the relationships causing undue influence on physicians’ medical judgment. Further, patients may not have a solid grasp on what is and what is not fair market value for certain services or any means of determining which payments are ethical in nature or potentially too influential on a physician’s medical decision making. What is guaranteed is that enough physicians are taking precautions against these potential backlashes that healthcare advancement and innovation is going to suffer.

Despite findings from multiple studies that patients view some financial

73. Loftus, supra note 32.
74. See Gorlach, supra note 2, at 319 (“If the public and media can, based on the disclosed information, discriminate well between payments made solely for marketing purposes and those made for services that are helpful for innovation, the net effect of data accessibility will be positive; if the disclosed information paints all payments, including those that foster innovation and improve public welfare, with a broad negative brush, data accessibility may curtail some useful kinds of payments.”).
75. See Richardson, supra note 8, at 5 (“[E]ven those who champion the program agree that simple disclosure is not sufficient to address financial conflicts of interest.”); Whelan, supra note 20, at 17 (Even CMS recognizes that “disclosure is not sufficient to differentiate beneficial, legitimate financial relationships from those that create a conflict of interest or are otherwise improper.”).
76. Frost et al., supra note 35 (“The open payments program does not identify which financial relationships are beneficial and which could cause conflicts of interest”); See Uknis, supra note 18 for a discussion on the need for a “user’s manual” to understand the data reported on the Open Payments website.
77. See Richardson, supra note 8, at 4-5 (expressing concern that “it may be difficult to distinguish payments that inappropriately influence prescribing from payments made for services that are helpful for innovation or clinical practice.”).
relationships in a positive light and even indicators of prestige on the part of their physician, physicians are still treading cautiously when it comes to entering into financial arrangements with manufacturers. The Sunshine Act purports to advance an important ideal, but the negative shadow cast on the physician-industry relationship will certainly hinder those physicians with a true desire to bring innovation and development to the healthcare industry.

VII. WILL PATIENTS ACTIVELY SEEK AND CONSIDER THE INFORMATION REPORTED BY THE SUNSHINE ACT?

Studies have concluded that patients are not necessarily invested in this type of information as to spark them to inquire further into these relationships past whatever is reported by the media. Patients appear to trust the government and the regulations and standards the government enforces to hold actors in the healthcare industry accountable. In response to these findings, one of the goals of the Sunshine Act is to encourage patients to take the time to look at the data that has been reported and make informed choices as to their health care provider and course of treatment, the intent being that by providing this information in one convenient location patients will be more likely to take an interest in this type of information and open the line of communication with their physicians. The problem is that the Open Payments website has not been a convenient source of information where patients can easily find the specific data for which they are searching.

A study published in the Journal of Law, Medicine, & Ethics in 2013 sought to examine the way payments made to physician affected consumer perception. This study concluded that patients found physicians who did

78. Dyrda, supra note 54; Perry et al., supra note 6, at 484.
79. Bracing for the Physician Payment Sunshine Act, supra note 35 (“There is a real concern that the new disclosure requirements will have the effect of dissuading physicians from joining efforts to develop and test new products.”).
80. Chen, supra note 1, at 358.
81. Id.
82. Perry et al., supra note 6, at 476; Kelly M. Cleary, Physician Payment Sunshine Act: How Hot Could It Get in the Sun, BNA (Apr. 17, 2013), http://www.bna.com/physician-payment-sunshine-act-how-hot-could-it-get-in-the-sun/ (“This transparency initiative, as theory goes, will allow patients to better understand the financial relationships their doctors may have with the drug and device industry, question whether financial relationship might negatively affect their course of treatment, and, ultimately, make better informed decisions.”).
83. Stamatoglou, supra note 3, at 988 (discussing the likelihood that patients will not have the courage to bring this topic up with their physician due to the traditional roles in the patient-physician relationship despite the Act’s intent “to encourage conversations between patients and their physicians by allowing patients to broach the subject with their physicians”).
85. Perry et al., supra note 6, at 477.
not accept any payments or who only accepted free drug samples more trustworthy than physicians who accepted payments or owned stock in pharmaceutical companies.\footnote{Id. at 481, 484-85.} However, patients also perceived these physicians as potentially being inexperienced or professionally isolated.\footnote{Id. at 484-85.} Almost across the board, patients interpreted a physician ownership interest in a company as negative and many assumed that “bias and dishonesty flowed from [the physician’s] personal financial interest in the drug company.”\footnote{Id. at 483.} However, patients perceived consulting payments as a legitimate payment, and physicians who accepted these payments were viewed as having a higher level of expertise.\footnote{Id. at 484.}

Based on such findings, it would appear the Sunshine Act would be successful in serving its purpose because different types of payments to physicians do seem to illicit different reactions in patients.\footnote{Id.} The Sunshine Act requires that manufacturers report the nature of the payment made and requires a high degree of specificity.\footnote{Id.} Ideally, this requirement will allow patients to decipher what types of payments they find acceptable and what types they do not and thereby make an informed decision about whether to see that particular physician. However, this will require that patients have the ability to access the CMS Open Payments website and actually take the time to thoughtfully process and understand this information.\footnote{Id. at 488.}

This reliance on patient participation is what will keep the Sunshine Act from achieving its intended purpose.\footnote{Id. at 28 (explaining that the Sunshine Act is unlikely to achieve its goal because patients are unlikely to “access the information, understand the information, and/or know how to appropriately use the information”).} Not only will patients need to care enough to look up their physician on the CMS Open Payments website, they must also be able to understand what kind of data they are viewing. The confusing way in which payments are reported exacerbates the potential for misunderstanding amongst patients.\footnote{Id. at 17 (“The potential for interpretation difficulties is further exacerbated by the different “forms” and “natures” of payments that must be reported, some of which represent more legitimate payments than others”).} According to a publication by ProPublica, the Open Payments website has been called an “organizational nightmare” on which even patients who are very comfortable using

\footnote{86. Id. at 481, 484-85.} \footnote{87. Id. at 484-85.} \footnote{88. Id. at 483.} \footnote{89. Id. at 484.} \footnote{90. Id.} \footnote{91. Id. at 488.} \footnote{92. Patients must be able to access this website and use it efficiently. Whelan, supra note 20, at 11-12. (“According to the United States Census Bureau, in 2010 54.3% of Americans fifteen and older connected to the internet at home, with the elderly having the lowest rate at 29.8%.”). Furthermore, more vulnerable populations, namely minorities and low income citizens, are even less likely to have internet access at home. Id.} \footnote{93. Id. at 28 (explaining that the Sunshine Act is unlikely to achieve its goal because patients are unlikely to “access the information, understand the information, and/or know how to appropriately use the information”).} \footnote{94. Id. at 17 (“The potential for interpretation difficulties is further exacerbated by the different “forms” and “natures” of payments that must be reported, some of which represent more legitimate payments than others”).}
computers may have trouble locating data with ease. If patients are unable, or unwilling, to understand these disclosures, the Sunshine Act is deterring ethical physicians from pursuing beneficial relationships with industry because of a misguided assumption that patients will view that financial arrangement in a negative light.

The primary concern physicians have with the Sunshine Act is the public’s perception of the reported financial relationships, whether by patients or the media. Physicians fear that patients may not understand the information presented and have no way of distinguishing the good from the bad when it comes to payments. Physicians’ concern over patients misinterpreting financial relationships and potentially assuming tainted judgment on behalf of the physician has resulted in a trend of “doctors . . . increasingly opting out of attending or speaking at [teaching programs].” Despite findings that patients may be unlikely to actually access the information reported, physicians are still put off by the methods of the Sunshine Act and intimidated by the potential for adverse reactions to their financial relationships. This hesitancy physicians have over their names appearing on the CMS website is unnecessarily inhibiting innovation in the healthcare industry.

VIII. CONCLUSION

While the intention of the Sunshine Act is to shed light on the financial ties physicians may have with industry actors, the fear of being scrutinized has pushed physicians in the direction opposite of progress. Many


96. Whelan, supra note 20, at 16 (“[S]imply posting a dollar amount next to a physician’s name does not tell the whole story and will often be misleading and suggest that all physician-industry relationships are unethical or at least suspect.”).

97. However, patients and the media may not be the only two sources of criticism. Cleary, supra note 82 (“Other groups likely to tap into this data include law enforcement entities charged with ferreting out fraud and abuse, lawmakers critical of physician-industry ties, and whistleblowers looking to make a profit.”).

98. Whelan, supra note 20, at 16-18 (explaining even those with industry knowledge may have a difficult time discerning the payments reported on the Open Payment website; without the proper context there is a greater likelihood of the data being misconstrued or misunderstood.).

99. Loftus, supra note 32.

100. Amaka Uchegbu, Open Payments Law Unlikely to Affect Doctor-Patient Relationships, YALE DAILY NEWS (Oct. 30, 2014), http://yaledailynews.com/blog/2014/10/30/open-payments-law-unlikely-to-affect-doctor-patient-relationships/ (“Even if the act has little effect, industry experts conceded that most medical professionals are not overwhelmingly supportive of the act because they believe it can lead to ambiguous interpretations.”).

101. See Bracing for the Physician Payment Sunshine Act, supra note 35, at 1, for a discussion about why some feel the Sunshine Act will dissuade “physicians from joining efforts to develop and test new products.”
Physicians are unwilling to take a chance on their reputation being compromised by having their name reported on the CMS Open Payment website.\textsuperscript{102} The relationship between physicians and industry manufacturers has historically been crucial in research, development, and education.\textsuperscript{103} However, despite this necessary relationship, many physicians believe the Sunshine Act will “result in fewer clinical studies, conferences, research publications, and scientific advisory board meetings associated with manufacturers.”\textsuperscript{104} Physicians are treading lightly until it is empirically proven whether patients will actually take the time to make thoughtful decisions based on the relationships that are reported on the CMS website. The potential backlash of the Sunshine Act’s disclosures has intimidated physicians enough to dissuade them from actively participating in the development and advancement of the health care industry – a detrimental consequence to all those involved.

\textsuperscript{102} Id.
\textsuperscript{103} Dyrda, supra note 54.
\textsuperscript{104} SHIFT ANALYTICS, supra note 7.