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OIG Approves Gift Cards in Advisory Opinion, But Something More Is in Play, Lawyer Says

By Nina Youngstrom

In an advisory opinion posted Jan. 3, the HHS Office of Inspector General (OIG) cleared the way for a consulting firm to give gift cards to its physician customers for recommending its services.^[1] Additional gift cards would be handed out if the recommendation led to new business. OIG doesn't see a problem under the Anti-Kickback Statute (AKS) because the proposed arrangement "would not generate prohibited remuneration"—a stronger statement than the more familiar refrain in advisory opinions of a proposed arrangement generating prohibited remuneration but posing a low risk of fraud and abuse. The reason in a nutshell: there's no direct link to payments by federal health care programs.

The advisory opinion speaks to something larger than gift cards, said attorney Larry Vernaglia, with Foley & Lardner LLP in Boston. "It's about the underlying remuneration," he said. OIG is drawing a distinction between payments associated with services that are not payable by federal health care programs and services that are, Vernaglia explained. If not, OIG is saying the AKS doesn't apply. He called it "an excellent opinion."

The takeaway is encouraging, but compliance officers should look closely at the requestor's certifications in the opinion, said Robert Trusiak, an attorney in Buffalo, New York. He also suggests they pay attention to the specific definition of federal health care programs. "I love to say yes as a compliance officer and organizations need revenue, but soberly assess what this says," Trusiak advised. As always, the devil is in the details.

According to the opinion, the requester furnishes consulting services to physician practices, such as helping them find workflow issues; data analytics services; electronic health record consulting services; compliance monitoring services; biannual Medicare Merit-Based Incentive Payment System (MIPS) eligibility checks; annual MIPS-related training; auditing MIPS-related performance measures; and help submitting MIPS data. Some of the services could result in customers getting more MIPS reimbursement, but the requestor "certified that it does not advise its customers to take any action, or otherwise promote any activity, that would violate applicable billing or other rules or regulations," OIG stated. The requestor's fee isn't tied to whether the physician practice's reimbursement goes up or down.

The proposed arrangement calls for the requestor to give its physician-practice customers a \$25 gift card for recommending the requestor's services to prospective customers. If the requestor is hired, the customer would receive a \$50 gift card.

OIG: Three Streams of Possible Remuneration

OIG explained that the proposal involves "three potential streams of remuneration:"

- Gift cards to customers who recommend the requestor;
- Payments made by the customers to the requestor for consulting services; and

- The money customers potentially would earn from higher MIPS reimbursement because of the consulting services.

Notwithstanding the potential remuneration, OIG concluded the proposed arrangement doesn't implicate the AKS. In terms of the first stream, the requestor wouldn't give gift cards in return for referrals of services that are reimbursable in whole or in part by a federal health care program. The requestor certified (1) that none of its services "would be paid for, in whole or in part, directly or indirectly, by a Federal health care program;" (2) that it wouldn't provide items or services beyond the proposed arrangement that may be paid for by a federal health care program; and (3) that it doesn't have an ownership or investment interest in another entity that furnishes items or services paid for by a federal health care program.

The second and third streams of remuneration aren't an AKS problem, OIG stated. The requestor doesn't recommend to customers "the purchasing, leasing, or ordering of any item or service for which payment may be made in whole or in part under a Federal health care program" and any higher MIPS payments stemming from the consulting services are unrelated to the referrals for items or services payable by a federal health care program.

Lawyer: Not the Same as Meaningful Use Payments

Although advisory opinions only apply to their requestors, Vernaglia said they're read with great interest in the industry. "It's now in the thought process that it will be important for providers and suppliers, when doing an analysis of whether there's an AKS issue, to ask whether a party paid the potential inducement to provide any services that are reimbursed in whole or in part by a federal health care program," he observed.

Even with the MIPS connection, Vernaglia noted the advisory opinion's differences with a 2021 False Claims Act settlement involving Medicare payments under the meaningful use program (now called the Promoting Interoperability Program). Athenahealth Inc., an electronic health records (EHR) services developer, agreed to pay \$18.25 million to settle false claims allegations it paid kickbacks to generate sales of its EHR product, athenaClinicals, through marketing programs.^[2] "Athena allegedly invited prospects and customers to all-expense-paid sporting, entertainment and recreational events," according to the U.S. Attorney's Office for the District of Massachusetts. The company also had a "Lead Generation" program designed to identify new customers. The U.S. attorney's office said that because of the alleged kickbacks, Athena caused providers to submit false claims "to the federal government related to incentive payments for adoption and 'meaningful use' of Athena's EHR technology."

The timing of the advisory opinion is fortuitous because compliance officers are developing work plans for the year, Trusiak said. "This is a perfect time for compliance officers to be mindful of potential lessons associated with this and any kind of gift-card arrangement," he noted. "It's remarkable because we have a gift-card model, but the margin between it being compliant and criminal is why you have to stay on top of these programs." Unlike the FCA, the AKS is a criminal statute.

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¹ U.S. Department of Health and Human Services, Office of Inspector General, "Re: OIG Advisory Opinion No. 23-15 (Favorable)," posted January 3, 2024, <https://bit.ly/426PA6z>.

² U.S. Department of Justice, U.S. Attorney's Office for the District of Massachusetts, "Athenahealth Agrees to Pay \$18.25 Million to Resolve Allegations that It Paid Illegal Kickbacks," news release, January 28, 2021, <http://bit.ly/3t2ZXWR>.

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