PUBLICATION

OIG Allows Gift Card Incentives for Rescheduling and Attending Missed FQHC Appointments in Advisory Opinion 20-08

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A federally qualified health center (FQHC) received the go-ahead of the Office of Inspector General (OIG) to offer $20 gift cards as one-time incentives for pediatric patients who have previously missed at least two care appointments to reschedule and attend their appointments. The OIG reviewed the proposed incentive arrangement in Advisory Opinion No. 20-08, issued in December 2020, and determined that offering and providing the gift cards, as proposed by the FQHC, presents a low risk of fraud and abuse and does not constitute grounds for the imposition of sanctions under the under the Anti-Kickback Statute or the beneficiary inducement civil monetary penalties (CMP) law.

The FQHC would offer the incentive only to patients who are younger than 19 years old and have missed two or more previously scheduled preventive or early intervention care appointments with the FQHC in the previous six months (Eligible Patients). The FQHC would contact an Eligible Patient (or his or her parent or guardian) by telephone to notify him or her of the opportunity to receive a gift card upon rescheduling and attending a care appointment and would provide the gift card at checkout following the rescheduled appointment.

The stated goal of the incentive program is to "improve the attendance rate for Eligible Patients," based on internal data analyzed by the FQHC indicating that approximately 30 percent of its pediatric patients miss one or more care appointments. Eligibility to receive the gift card would not take into account health insurance status or ability to pay for services, and Eligible Patients would only be able to receive an incentive gift card one time. The FQHC would not advertise the program, other than notifying Eligible Patients (or their parents or guardians) of the incentive by telephone.

The OIG determined that the proposed incentive program would implicate the Anti-Kickback Statute and the CMP law, but would not constitute grounds for the imposition of administrative sanctions.

The Anti-Kickback Statute criminalizes knowingly and willfully offering or paying any remuneration to induce a referral of services reimbursable by a federal health care program. (See Section 1128B(b) of the Social Security Act.) The CMP law prohibits offering or transferring remuneration to a Federal health care program beneficiary that is likely to influence the beneficiary's selection of a provider or supplier of a federally reimbursable item or service. (See Sections 1128A(a)(5) and 1128A(i)(6) of the Social Security Act.)

According to OIG, the gift card incentive program proposed by the FQHC would implicate the Anti-Kickback Statute because the $20 gift card would constitute remuneration intended to influence Eligible Patients, at least some of whom would likely be federal health care program beneficiaries, to select the FQHC for future items or services (specifically, attending their rescheduled care appointments or seeking other federally reimbursable items or services from the FQHC in the future).

OIG acknowledged that it has recently published regulations promulgating a new safe harbor from the Anti-Kickback Statute for "patient engagement and support," which could potentially apply to the proposed incentive gift card program, but concluded (without providing detailed analysis) that "the facts presented to us do not demonstrate that the Proposed Arrangement would satisfy all conditions of that safe harbor." (See 42 C.F.R. § 1001.952(hh)). This is likely due to the new safe harbor applying to a value-based enterprise furnishing appropriate, in-kind, preventive, medically necessary tools, items, goods, incentives, services, and supports to patients in a target patient population to promote the patients' engagement with their care and adherence to care protocols and to improve quality, health outcomes, and efficiency. Similarly, OIG concluded that the gift card the FQHC would offer Eligible Patients would not fall within the exceptions to the CMP law's definition of "remuneration" for promoting access to care (because the gift cards reward Eligible Patients for accessing care, but they do not *improve* access) or promoting the delivery of preventive care (because the FQHC acknowledged that not all of the services provided at care appointments meet the regulatory definition of preventive care).

Despite the application of the Anti-Kickback Statute and the CMP law, OIG determined that the gift card incentive program would present a low risk of fraud and abuse under both laws, based on four factors:

- First, OIG stated its belief that the narrowly defined pool of Eligible Patients would minimize the risk of inappropriate patient steering, since Eligible Patients would have established relationships with the FQHC by virtue of previously contacting it to schedule their care appointments. Furthermore, the gift card incentive program would entail the offer and furnishing of a one-time $20 gift card, even if an Eligible Patient continues to miss care appointments in the future.

- Second, OIG asserted that the proposed gift card incentive would be unlikely to lead to increased costs to federal health care programs or patients through overutilization or inappropriate utilization, because any increase in costs to federal health care programs resulting from Eligible Patients attending their rescheduled appointments would reflect *appropriate* utilization. According to OIG, "[b]y design, the Proposed Arrangement targets chronic underutilization of preventive and early intervention items and services for low-income, pediatric patients. In addition, all items and services furnished to such patients during Care Appointments would be medically necessary, and for any such patient with Medicaid coverage, the Care Appointment would be covered by the Medicaid [Early Periodic Screening, Diagnostic, and Treatment] benefit."

- Third, according to OIG, the proposed gift card incentive is unlikely to harm competition because (1) an Eligible Patient could only receive the remuneration once, (2) the remuneration would be of modest value, and (3) outreach regarding the incentive program would only be to a narrowly defined group of Eligible Patients and not through general advertising.

- Fourth, OIG cited the fact that the scope of the gift card incentive program appears to be specifically targeted at improving attendance rates at Eligible Patients' care appointments, as evidenced by: (i) the FQHC's reliance on internal data to identify a policy concern and potential solution; (ii) the incentive program's focus on a targeted subset of patients to address the identified concern; (iii) the FQHC's stated intention to pair the gift card offering with patient education, an eligibility verification process, documentation requirements, and an annual effectiveness review; and (iv) the fact that the one-time reward for attending a care appointment is not conditioned on utilization of the FQHC beyond the initial rescheduled appointment.

Based on its analysis that the safeguards outlined above distinguish the FQHC's proposed gift card incentive program from "problematic programs that offer free goods or other remuneration to beneficiaries merely as an incentive for those patients to obtain federally reimbursable items and services," OIG concluded that, in an exercise of its discretion, it would not subject the FQHC to sanctions under the Anti-Kickback Statute or the CMP law on the basis of the proposed gift card incentive program.

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