

OIG Draws Bright Line on Gifts

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Practice Area: Health Law

The Office of Inspector General recently sent a strong message to health care providers to clean up their practices regarding gifts to beneficiaries, or risk enforcement. The OIG published what it called “bright-line” guidance, which may call into question many common practices, as well as some of the OIG’s previous guidance. The OIG said it will consider, in choosing to exercise its enforcement discretion, whether providers terminate prohibited activities expeditiously following publication of the new guidance. Now is a good time to take the opportunity to scrutinize practices, or run the risk of being subjected to increased enforcement by the OIG.

Special Advisory Bulletin

On August 30, 2002, the OIG issued a Special Advisory Bulletin regarding the prohibition on furnishing gifts and other inducements to Medicare and Medicaid beneficiaries. The OIG announced that if a provider offers gifts or free services to beneficiaries, this practice must (i) fit within an exception, (ii) be the subject of a favorable advisory opinion covering the provider’s own activity, or (iii) consist of an “inexpensive” gift or free service to beneficiaries, in order to avoid possible imposition of civil monetary penalties.

The OIG’s Analysis

Section 1128A(a)(5) of the Social Security Act prohibits a person from offering or transferring to a Medicare or Medicaid beneficiary any remuneration that the person knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner, or supplier of Medicare or Medicaid payable items or services. Violation may subject the provider to civil monetary penalties of up to \$10,000 for each wrongful act.

The OIG separately analyzed the “remuneration” and “inducement” elements of the offense in the Bulletin.

Remuneration

The Bulletin’s discussion of remuneration essentially restates the OIG’s longstanding position. According to the OIG, remuneration means anything of value, and includes waivers of coinsurance and deductible amounts, and transfers of items or services for free or for other than fair market value.

There are five statutory exceptions to the definition of remuneration. If providers offer beneficiaries items or services that fit within one of these exceptions, the items or services will not be considered remuneration for purposes of section 1128A(a)(5) of the Act. The statutory exceptions to the definition of remuneration include:

1. *Non-routine, unadvertised waivers of copayments or deductible amounts based on individualized determinations of financial need or exhaustion of reasonable collection efforts.* This exception does not protect paying the premiums for a beneficiary’s Medicare Part B or supplemental insurance.

2. *Properly disclosed differentials in a health insurance plan's copayments or deductibles.* Included within this exception are incentives that are part of a health plan design. This may involve lower plan copayments for using preferred providers, mail order pharmacies, or generic drugs. This exception does not include waivers of Medicare or Medicaid copayments.

3. *Incentives to promote the delivery of preventive care.* Preventive care is defined to mean items and services that are (a) covered by Medicare or Medicaid and (b) are either pre-natal or post-natal wellbaby services or are services described in the Guide to Clinical Preventive Services. The incentives to promote preventive care may not be in the form of cash or cash equivalents, and may not be disproportionate to the value of the preventive care provided.

4. *Any practice permitted under an anti-kickback statute safe harbor provision in 42 CFR §1001.952.* For instance, there are anti-kickback statute safe harbor provisions for warranties, discounts, employee compensation, and waivers of certain beneficiary coinsurance and deductible amounts.

5. *Waivers of copayment amounts in excess of the minimum copayment amounts under the Medicare hospital outpatient fee schedule.*

Inducement

The statute bars offering valuable remuneration the provider knows or should know will influence, or induce, a beneficiary's choice of services or items. According to the OIG, this "should know" standard does not require proof of specific intent but, rather, that there is deliberate ignorance or reckless disregard by the provider. The OIG's discussion of this inducement element arguably goes further than previous guidance.

The OIG considers any offer of valuable goods and services as part of a marketing or promotional activity to be an inducement under the statute. The OIG will hold the provider accountable for inducements from both active and passive conduct. This includes any indirect forms of marketing, promoting, or informing beneficiaries about any available benefit. For instance, even "word of mouth" promotion by practitioner or patient support groups may be considered indirect marketing by the provider. Furthermore, according to the OIG, providing free goods or services to customers that have an established and ongoing relationship with a provider may also be considered inducement for any future purchases. This interpretation of inducement is a change from previous guidance, which suggested that providing free items or services after the beneficiary had already chosen the provider was acceptable.

No Exceptions for Needy or Chronically Ill Beneficiaries

The OIG emphasized that the prohibition applies to remuneration offered as an inducement to any Medicare or Medicaid beneficiary. There is no meaningful statutory basis for a broad exception based on the financial need of a category of patients. Further, there is no exception for beneficiaries with chronic conditions. Acknowledging that patients with chronic illness face substantial hardship, the OIG noted that such patients also generate substantially more business than other beneficiaries. Following its reasoning that even unadvertised remuneration furnished to ongoing patients may constitute inducement, the OIG apparently sees furnishing valuable items or services to beneficiaries with chronic disease as an inducement to use the provider for the substantial anticipated future medical needs.

OIG Enforcement

The OIG indicated that it will enforce section 1128A(a)(5) according to the following four principles:

1. Inexpensive Gifts. Medicare and Medicaid providers may offer beneficiaries inexpensive gifts or services, not to include cash or cash equivalents, without violating section 1128A(a)(5). An inexpensive gift or service is defined as having a retail value of no more than \$10 for an individual gift or service or an annual aggregate retail value of \$50 per patient.
2. Statutory Exceptions. Providers may offer Medicare and Medicaid beneficiaries more expensive items or services that fit within one of the five statutory exceptions to the definition of remuneration discussed above.
3. Additional Regulatory Exceptions. The OIG indicated that additional regulatory exceptions will be narrow in scope and limited in number. However, the OIG is currently considering two safe harbors for complimentary local transportation and for goods and services provided in connection with government-sponsored clinical trials. The OIG is considering soliciting public comment on these exceptions.
4. Advisory Opinions. The OIG will continue to consider requests for advisory opinions related to the prohibition on inducements to beneficiaries. Advisory opinions are issued by the OIG in response to a requesting party's inquiry into whether its conduct would be sanctioned for violating section 1128A(a)(5) of the Act. Advisory opinions are binding, but may only be relied upon by the requesting provider.

Conclusion

The OIG has issued what it considers to be "bright-line" guidance on how it will enforce the prohibition against inducements to beneficiaries. Considering the potentially severe penalties for improperly offering gifts to beneficiaries, providers may wish to review their practices involving free goods and services to beneficiaries to ensure that these practices are consistent with the OIG's guidance. Providers may also consider requesting advisory opinions for arrangements that may not clearly fall within the scope of acceptable practices under the OIG's guidance.

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