

OIG Advisory Opinion 12-05 Approves Consumer Rewards Program

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In [OIG Advisory Opinion 12-05](#), the OIG found that a consumer rewards program (the “Program”) offered by a supermarket chain with in-store and independent pharmacies (the “Requestor”) would not be subject to enforcement under the Anti-Kickback Statute (the “Kickback Statute”) or the beneficiary inducement prohibition found in the civil monetary penalties law (the “CMP Law”). Under the Program, customers who signed up for the Requestor’s free loyalty card could earn gasoline discounts based on the amount spent on purchases in the Requestor’s retail stores and pharmacies, including cost-sharing amounts paid in connection with items covered by federal health care programs.

The OIG concluded that the gasoline rewards would satisfy the terms of a new exception to the CMP Law for retailer rewards included among the provisions of the Affordable Care Act. Specifically, (i) the gasoline rewards consist of coupons, rebates or other rewards from a retailer, (ii) the Program would be offered on equal terms to all customers at the Requestor’s supermarkets and pharmacies, and (iii) the offer of the gasoline rewards would not be tied to the provision of other items or services reimbursed by the Medicare or Medicaid programs. Of key importance to the OIG was the lack of any tie to federally reimbursable items on either the “redeeming” or the “earning” side of the Program’s rewards transaction. Customers could redeem the rewards only on gasoline purchases, which are not federally reimbursable items or services, and prescription drug purchases would not be required to earn the rewards. Prescription drug purchases would be treated the same as any other purchases in the Requestor’s stores for purposes of earning rewards and would not result in higher or different rewards than dollars spent on grocery items.

This Advisory Opinion is the third to invoke one of the new ACA exceptions to the CMP Law (it had previously done so in Advisory Opinions [11-01](#) and [11-06](#), as detailed in a [previous post](#)) and appears to indicate that the OIG will support providers taking advantage of these beneficiary-friendly exceptions even though it has yet to promulgate regulations or offer any guidance.

The OIG also determined that the Program would pose a minimal risk of fraud and abuse under the Anti-Kickback Statute. Because the Program would not require customers to purchase prescriptions to earn rewards and would not offer any specific incentive for transferring prescriptions to the Requestor’s pharmacies, the OIG concluded that the risk of steering federal health care program beneficiaries to the Requestor’s supermarkets and pharmacies was low. The importance the OIG places on avoiding beneficiary steering is underscored by the Department of Justice’s recent \$7.9 million [settlement](#) with Walgreens to resolve allegations that Walgreens offered \$25 gift cards to induce beneficiaries to transfer their prescriptions to Walgreens pharmacies.

The OIG also concluded that the Program was unlikely to result in overutilization or increased federal health care program costs. The Program would not involve the waiver or reduction of cost-sharing amounts and any cost-sharing amounts counting toward a customer’s rewards would result from prescription drugs already prescribed.

This Advisory Opinion should provide helpful guidance to health plans, providers, and pharmacy benefit managers

looking to structure compliant rewards programs. The OIG's guidance indicates that if federally reimbursable items are avoided on both the redeeming and earning side of a rewards program, the corresponding beneficiary inducement risks can be significantly reduced. In addition, specific incentives for beneficiaries to transfer their business from one provider to another should be avoided. Finally, it is helpful that the OIG recognized that there is a limited risk of overutilization where a beneficiary has already been prescribed a drug or a specific course of treatment. Plans and providers can look to these broad guidelines when structuring a variety of programs.

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