

OIG Approves Online Retailer's Discount Program

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On January 19, 2022, the Office of Inspector General for the Department of Health and Human Services (OIG) issued a favorable [Advisory Opinion](#) regarding an online retailer's proposal to make its discount programs available to Medicaid beneficiaries. Currently, lower-income individuals are eligible for the retailer's discount programs based on their enrollment in a number of assistance programs (e.g. Supplemental Security Income, Supplemental Nutrition Assistance Program), and the retailer proposes Medicaid enrollment as another category of eligibility.

OIG Advisory Opinion 22-01 is one of several advisory opinions analyzing retailer loyalty or discount programs under the retailer rewards exception to the Beneficiary Inducements Civil Monetary Penalties Law (CMPL), but this is the first Advisory Opinion where the discount program is offered specifically to Medicaid beneficiaries and not to the general public.

Proposed Arrangement

The online retailer offers consumers a wide variety of consumer goods, video and music streaming services, grocery items, photo storage, and drugs through its pharmacy. The retailer also offers two discount programs to low-income individuals: (1) a discount on the retailer's monthly fee for its membership program which includes expedited 2-day shipping and eligibility for a prescription savings benefit; and (2) a discount on certain food and other grocery items. Individuals are eligible for the discount programs if they can show proof that they are receiving benefits from one of several programs that serve low-income individuals. The retailer proposes to add enrollment in Medicaid as an additional category of eligibility for the discount programs.

Analysis

The OIG noted that the proposal would implicate both the federal Anti-Kickback Statute (AKS) and the Beneficiary Inducements CMPL because the discount programs and expedited shipping could induce Medicaid beneficiaries to select the retailer's pharmacy for the purchase of future drugs reimbursable by Medicaid.

The arrangement does not satisfy any AKS safe harbors. Further, the arrangement does not satisfy all of the conditions for the retailer rewards exception to the Beneficiary Inducements CMPL, under which retailer rewards do not constitute 'remuneration' if:

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- the rewards consist of coupons, rebates, or other rewards from a retailer;
 - the rewards are offered or transferred on equal terms available to the general public, regardless of health insurance status; and
 - the offer or transfer of the rewards is not tied to the provision of other items or services reimbursed in whole or in part by the Medicare or Medicaid programs.

Here, the retailer's discount program would not satisfy the second element because the program would be available only to individuals enrolled in one of a number of programs, including Medicaid, and, thus, not offered on the equal terms available to the general public, regardless of health insurance status.

Nevertheless, the OIG found that the proposal presents minimal risk under the AKS and chose not to exercise its enforcement discretion under the Beneficiary Inducements CPML for the following reasons:

- ***Only an Attenuated Nexus Between the Discount Programs and Medicaid Beneficiaries' Potential Ordering of Drugs from the Retailer's Pharmacy.*** The discount programs offer a wide range of benefits unrelated to the pharmacy, including discounted groceries, expedited shipping across the retailer's broad array of consumer items, video and music streaming services, and photo storage.
- ***Discount Program Not Specifically Targeting Medicaid Beneficiaries.*** The retailer certified that its desires to use Medicaid enrollment to validate individuals' financial need is for convenience, and that the proposal is not part of an effort to provide remuneration only to Medicaid beneficiaries. The retailer also certified that it would not track utilization of its pharmacy by individuals who qualify for the discount program based on Medicaid enrollment.
- ***Unlikely to Lead to Overutilization or Inappropriate Utilization.*** There is no indication that the free expedited shipping offered through the membership program would induce beneficiaries to order prescription drugs they would not otherwise purchase. In addition, although the membership program includes discounts on certain drugs, it would not induce overutilization or inappropriate utilization of drugs reimbursable by a Federal health care program because the discounts apply only when customers pay out of pocket.
- ***No Risk of Patient Safety or Quality of Care Concerns.*** The OIG noted that, in fact, the proposal can provide meaningful assistance to low-income individuals, especially the discounts on food and other grocery items.
- ***Low Risk of Steering Beneficiaries to the Retailer's Pharmacy.*** While the expedited shipping offered by the retailer may factor into beneficiaries' decision to choose the retailer's pharmacy, other important factors like price, location, availability, and medication management also could inform that decision.

Key Takeaways

This is the OIG's fifth Advisory Opinion addressing retailer discount or loyalty programs under the

retailer rewards exception to the Beneficiary Inducements CMPL (see OIG Advisory Opinion Nos. [19-06](#), [17-05](#), [12-14](#), [12-05](#)). In all of five Advisory Opinions, the OIG has tracked a similar analysis, determining that the retailers' programs are unlikely to present a heightened risk of beneficiary steering or result in inappropriate utilization or overutilization of items or services reimbursable by Medicare or Medicaid.

But Advisory Opinion 22-01 is distinct from its predecessors as the only Advisory Opinion where the OIG determined that the arrangement would not satisfy the retailer rewards exception and nevertheless determined that it would not impose sanctions. But, as with all Advisory Opinions, this Advisory Opinion is limited to its facts and is binding only with respect to the requesting party. Here, a crucial factor is that the retailer is not specifically targeting Medicaid beneficiaries, merely using Medicaid enrollment to assess individuals' financial need. The OIG may very well have a different view of a loyalty or discount program designed specifically to garner the business of Medicare or Medicaid beneficiaries.

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