

# Healthcare Regulatory Check-Up August 2022: OIG Advisory Opinions

Article By:

Tony Maida

Emily J. Cook

Monica Wallace

Amanda Enyeart

Cathy Ren

Cornelia Dean

---

## Advisory Opinion 22-16, Posted on August 19, 2022

The [requester operates](#) a shared-decision-making online learning tool that educates patients on potential risks, benefits and expectations related to surgeries. The program consists of two modules, each with three components. The first module aims to help patients understand their diagnosis (or diagnoses) and explain their symptoms, educate patients on how to discuss their diagnosis (or diagnoses) with their primary care providers, and educate patients on non-surgical treatment options. The second module is for patients who choose a surgical treatment option and is designed to educate patients on the various types of surgical facilities that exist (e.g., hospitals and ambulatory surgery centers); help patients prepare for surgery by, for example, creating a pre-operation “to-do” list; and reduce the chance of complications and facilitate recovery by providing information on post-operative care. The program’s content is customized to the individual user. The program does not contain any information about particular providers, practitioners, suppliers or services. Instead, the program directs patients to contact their primary care provider for additional information.

The requestor contracts with certain Medicare Advantage Organizations (MAOs) to offer the program to enrollees in their Medicare Advantage (MA) plans, and charges each MAO on a per-member, per-month basis for its services. Enrollees who complete the first module of the program, along with a survey, receive a \$25 gift card to a retailer. The gift cards may be for a big-box store or an online retail vendor that sells a wide variety of items. While enrollees may use the program multiple times during their period of enrollment, each enrollee may only receive one \$25 gift card annually. The requestor conducts regular audits to ensure that each eligible enrollee receives only one gift card in a

---

single year period. The gift card is not contingent on the enrollee undergoing surgery, pursuing a nonsurgical treatment option, receiving any additional treatment or demonstrating surgery literacy on the survey, and the program does not refer to or recommend any provider, practitioner, supplier or service. Use of the program by enrollees is voluntary, and any enrollee may use the program and earn a gift card under the arrangement.

The requestor certified that it does not advertise, market or promote the program or the arrangement to individuals who are not enrollees. The standard contract governing the arrangement between requestor and each MAO prohibits the MAO from including information about the gift cards offered under the arrangement in the MAO's marketing communications to prospective enrollees.

## **OIG Analysis**

The OIG concluded that the arrangement implicates the AKS because the \$25 gift card that requestor provides to enrollees, each of whom is a federal healthcare program beneficiary, is remuneration that could induce the enrollees to self-refer to a particular MA plan offered by an MAO that arranges for the provision of federally reimbursable items or services. The gift cards are also a cash equivalent because they are for a big-box store or an online retail vendor that sells a wide variety of items. However, OIG concluded the arrangement presented a low risk of fraud and abuse under the AKS for the following reasons:

- The arrangement is unlikely to increase costs to federal healthcare programs or result in inappropriate utilization, and could potentially have the opposite effect.
- The likelihood that the arrangement would meaningfully influence a beneficiary's selection of a particular MA plan is low because requestor does not advertise the program or the arrangement to beneficiaries who are not enrollees, and the requestor's standard contract with MAOs prohibits the MAO from including information about the gift cards offered under the arrangement in the MAO's marketing communications to prospective enrollees.
- The arrangement is unlikely to impact competition among healthcare providers, practitioners or suppliers.

For these reasons, OIG stated that it would not impose administrative sanctions on the requestor under the AKS in connection with the arrangement.

OIG also concluded that although the arrangement is clearly remuneration to a Medicare program beneficiary, the arrangement does not implicate the Social Security Act civil monetary penalty provision prohibiting inducements to beneficiaries (beneficiary inducements CMP). OIG noted that, in evaluating an arrangement under the beneficiary inducements CMP, it considers whether the requestor would know or have reason to know that the remuneration it provides to beneficiaries is likely to influence their selection of a particular provider, practitioner or supplier for the order or receipt of any item or service for which payment may be made, in whole or in part, by Medicare or a state healthcare program. The remuneration to enrollees under the arrangement (i.e., the gift card) is provided upon completion of the first module of the program. OIG reasoned that because the program does not refer to or recommend any provider, practitioner, supplier or service, the remuneration provided to enrollees is not likely to influence an enrollee's selection of a particular provider, practitioner or supplier. To the extent that the program has the potential to influence a beneficiary's selection of a particular MA plan, OIG noted that an MA plan is not a provider, practitioner or supplier for purposes of the beneficiary inducements CMP.

National Law Review, Volumess XII, Number 245

Source URL: <https://natlawreview.com/article/healthcare-regulatory-check-august-2022-oig-advisory-opinions>