

## **OIG Posts New FAQ and Advisory Opinion Addressing Cash, Cash Equivalents, and Gift Cards**

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The Department of Health and Human Services Office of Inspector General (OIG) recently published a new frequently asked question (FAQ) and advisory opinion addressing how to analyze arrangements that may involve providing cash, cash equivalents, and/or gift cards to Medicare and/or Medicaid beneficiaries under the beneficiary inducements prohibition provision in the Civil Monetary Penalty Law (Beneficiary Inducements CMP) and Anti-Kickback Statute (AKS).

### **March 2023 FAQ**

In the new [FAQ](#) posted to the OIG's website on March 22, 2023, the OIG explained how it distinguishes among various types of remuneration under the Beneficiary Inducements CMP and the AKS:

*How does OIG differentiate between “cash,” “cash equivalents,” and “in-kind” gift cards? How would OIG categorize a gift card to a big-box store? How would OIG categorize a gift card to a big-box store, the terms of which expressly limit the scope of items the consumer could purchase with such gift card (e.g., the gift card could only be used to purchase fresh food items)?*

The OIG's response is helpful and may open the door for arrangements previously thought to likely violate the Beneficiary Inducements CMP and/or AKS.

### **Cash**

The OIG explained that “cash” means “monetary payments in the form of currency.” The OIG also added that funds transferred electronically, such as through a peer-to-peer application (think Venmo, CashApp, PayPal, or Zelle) are also cash.

### **Cash Equivalents**

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Historically, the OIG interpreted the phrase “cash equivalent” to mean items convertible to cash, like a check, or items that can be used like cash, such as a general-purpose prepaid card such as a Visa or Mastercard gift card. In recent years, the OIG expanded its interpretation of what qualified as a cash equivalent to also include gift cards from retailers it referred to as “big-box stores” – large retailers or online vendors that sell a wide variety of items that, in the OIG’s view, “could easily be diverted from their intended purpose or converted to cash.” This interpretation proved to be difficult to apply in real world situations because while we all might think of Amazon and WalMart as big-box stores, it was not clear what other stores might also fall into this category and present a compliance risk. Were gift cards from large grocery store chains whose stores included items like household appliances, electronics, and clothing included? If so, which items in particular made the store cross the line from permissible gift card to prohibited cash equivalent? Another common question was whether a gift card from one of these stores that limited what could be purchased could avoid being treated as a cash equivalent.

The OIG provides some much-needed clarification to at least one of these questions in the new FAQ by identifying a subset of gift cards, including gift cards from big box retailers, that it considers to be “in-kind” remuneration and not cash equivalents. The OIG stated that gift cards that can be redeemed for a limited category of items or services, such as a gas card or food delivery service gift card or voucher would be considered in-kind remuneration. The OIG also confirmed that a gift card to a big box retailer that, by its express terms, may only be used to purchase a particular item or select categories of items would also be considered in-kind remuneration. As an example, the OIG cited a gift card to a big box store that can only be used to purchase fresh food items such as produce.

The OIG noted that understanding how it views these different categories of gift cards is important to the application of certain AKS safe harbors and Beneficiary Inducements CMP exceptions. Citing the patient engagement and support safe harbor as an example, the OIG noted that safe harbor only protects the provision of in-kind items, goods, and services. That means that a Visa and MasterCard gift card or an unrestricted gift card to a big-box store would not qualify for safe harbor protection, but a gas card, a gift card to a fitness center, or a restricted big-box store gift card could qualify under that safe harbor (assuming all other safe harbor requirements are met).

## **Instruments Convertible to Cash**

The OIG also clarified for the first time that the term “instruments convertible to cash” is not a synonym for “cash equivalent”. Rather, the OIG explained that “instruments convertible to cash” refers to a subset of “cash equivalents” and noted, as an example, that while a prepaid Visa or MasterCard gift card is a “cash equivalent,” it is not an “instrument convertible to cash.” This distinction is relevant for applying the Preventive Care Exception to the Beneficiary Inducements CMP and may allow for a greater variety of incentives to be given to Medicare and Medicaid beneficiaries when the other requirements of that exception are met.

## **OIG Advisory Opinion (AO) 23-03**

On March 29, 2023, the OIG posted [AO 23-03](#) to its website. AO 23-03 is the OIG’s first opportunity to apply its newly announced clarification of the difference between a “cash equivalent” and an “instrument convertible to cash” in an advisory opinion. In this advisory opinion, the OIG considered a proposal by a laboratory to provide a prepaid card, such as a Visa or MasterCard gift card, with a value of up to \$75 to certain individuals, including federal health care program beneficiaries, to

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encourage those individuals to return the sample collection kit associated with a stool-based DNA colorectal cancer screening test (Test).

Under the proposed arrangement, a patient's prescriber would order the Test and submit an order to the laboratory for the Test. The laboratory would then ship the Test sample collection kit (Kit) directly to the patient. The laboratory would make at least two patient contacts via telephone, text message, email, or letter to encourage patients to return the Kit to the laboratory. If the laboratory does not receive the patient's Kit following the two patient contacts, then the laboratory would send the patient a reminder letter that informs the patient that if they return the Kit within a specified period of time, the laboratory will send the patient a prepaid card, such as a Visa or MasterCard gift card, with a value of up to \$75. The gift cards would not be redeemable for any items or services provided by the laboratory and would only be available to patients once per 36-month period to align with Medicare's coverage rules for the Test. The availability of the gift card would not be advertised in any patient-focused promotions, nor would it be advertised or marketed to prescribers. The proposed arrangement also would not include any offer or payment of remuneration to prescribers. Additionally, the proposed arrangement would not apply if the prescriber orders the Test through the laboratory's website.

As the OIG explained in its new FAQ (discussed above), "instruments convertible to cash" are not synonymous with "cash equivalents." Rather, "instruments convertible to cash" are a subset of the broader term "cash equivalents." The OIG stated in AO 23-03 that "OIG would consider a prepaid card, such as a Visa or Mastercard gift card, to be a "cash equivalent" but not an "instrument convertible to cash."

In its analysis, the OIG noted that the proposed arrangement implicated both the Beneficiary Inducements CMP and the AKS. However, relying in part on its newly clarified definition of "instruments convertible to cash," the OIG concluded that the offer and transfer of a Visa or MasterCard gift card in the proposed arrangement satisfied the requirements of the Preventive Care Exception under the Beneficiary Inducements CMP. The OIG explained how the proposed arrangement satisfied the other elements of the exception: (i) the Test is a clinical service described by the U.S. Preventive Services Task Force ("USPSTF") as a recommended preventive care service in the current USPSTF's Guide to Clinical Preventive Services; (ii) the Visa or MasterCard gift card valued at up to \$75 was not disproportionately large in relationship to the value of the preventive care service; and (iii) the Test would not be tied, directly or indirectly, to the provision of additional services (such as a colonoscopy) reimbursable by the Medicare or Medicaid programs.

In addition to being the first application of the OIG's new definition of "instruments convertible to cash," AO 23-03 also provides guidance on how to evaluate whether the value of remuneration is disproportionately large in relation to a preventive care service. In the proposed arrangement, the laboratory certified that the Medicare reimbursement for the Test is approximately \$500. The OIG explained that the concept of "value" goes beyond the Medicare reimbursement amount and may also include factors such as potential benefits to a beneficiary or the future health care costs reasonably expected to be avoided as a result of the preventive care. However, the OIG noted that with different facts, "an incentive with a value of up to \$75 would be disproportionately large in relationship to a preventive care service reimbursed at approximately \$500."

The OIG also articulated rationale for its conclusion that the proposed arrangement presents "a minimal risk of fraud and abuse" under the AKS:

- It is unlikely to lead to improperly increased costs to federal health care programs or

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overutilization of federally reimbursable services since:

- The gift card is only available once every 36 months, which aligns with Medicare's coverage of the Test;
  - The laboratory would not offer any incentives to prescribers in connection with the proposed arrangement, and a prescriber would not be able to anticipate whether the laboratory would offer or provide a gift card to any patient for whom the prescriber orders the Test; and
  - The Test is reimbursed at a fixed rate under the Medicare Clinical Laboratory Fee Schedule regardless of whether a gift card is provided to a patient, thus preventing the laboratory from inappropriately increasing costs to federal health care programs by passing on the costs associated with the gift cards, directly or indirectly, to those programs.
- Noting that more than 30% of patients fail to return the Kit to the laboratory, the OIG stated that the proposed arrangement could promote patient compliance with a screening test that has been recommended by the USPSTF and the American Cancer Society to screen for colon cancer and that CMS has said "would benefit the patient and also the Medicare program." The OIG also recognized the potentially unpleasant nature of specimen collection for the Test since it requires patients to collect a stool sample (rather than a saliva sample, for example), making this type of Test one for which a gift card "would be necessary to encourage some patients to return the Kit."
  - Other safeguards in the proposed arrangement that reduce the risk of fraud and abuse:
    - Processes would be implemented to ensure that no patient would be offered or provided a gift card if the patient had received a gift card in the prior 36-month period;
    - There would be no patient-focused promotion of the proposed arrangement, such as direct-to-consumer advertisements on third-party websites or advertisements in newspapers, on television or radio, or in magazines;
    - There would be no advertising or marketing of the gift cards to prescribers, nor would there be any offer or payment of any remuneration to prescribers in connection with the proposed arrangement; and
    - Gift cards would not be available if the Test is ordered by a prescriber through the laboratory's website.

In concluding that it would not impose administrative sanctions under the AKS against the laboratory in connection with the proposed arrangement, the OIG acknowledged the evidence that the proposed arrangement would provide an incentive to encourage legitimate cancer screening services but cautioned "that if any of the foregoing facts were different, we likely would reach a different conclusion with respect to the risk presented by this type of arrangement under the [AKS], regardless of whether the arrangement satisfies an exception to the Beneficiary Inducement CMP."

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