

OIG issues Advisory Opinion on a Retail Pharmacy's Paid Membership Program Which Includes Federal Health Care Program Beneficiaries

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On September 7, 2017, the OIG posted an advisory opinion regarding a retail pharmacy chain's proposal to extend to federal health care program beneficiaries the option to participate in a paid membership program that includes discounts on certain prescriptions and clinical services offered by the retail chains' pharmacies and in-store clinics. Presently, the pharmacy chain's program excludes federal health care program beneficiaries. The OIG found that the proposed program would meet the retailer reward exception to the definition of remuneration under the Beneficiary Inducement law, and that the proposed program would pose a minimal risk of fraud and abuse under the Anti-Kickback Statute.

The pharmacy chain's proposed membership program included the following benefits:

1. Members of the program would have access to discounts on the pharmacies' retail prices for specific items that the Member paid for entirely out-of-pocket (ex. generic drugs, pet prescriptions, nebulizer devices, blood glucose testing meters, immunizations, and other prescriptions listed on the pharmacy membership benefit program's formulary);
2. Members would have access to a 10 percent discount on clinical services paid for out-of-pocket (ex. physicals, immunizations, health screenings);
3. Members could earn a 10 percent credit toward future eligible retail purchases when they purchased certain company-branded products and in-store photo finishing. The credit could not be used to purchase prescriptions, immunizations, clinic services, alcohol, gift cards, postage stamps, pre-paid cards, milk products, tobacco products, or for retail pharmacy or clinic cost-sharing amounts. The OIG noted that the vast majority of products and services for which Members could earn and redeem credits are not federally reimbursable.

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Members could enroll in the program either online through the company's website or in person. The membership would be open to the general public. The only requirements for membership are a payment of an annual membership fee, that the Member be over 18 years of age, and that the Member provide certain personal information such as name, date of birth, address and phone number.

In order for federal health care program beneficiaries to access the discounts, the Members would need to pay for such items and services out-of-pocket (if the Member's health plan or prescription plan covers an item that the Member would like to purchase through the retailer's membership program, the Member would have to relinquish his or her health or prescription plan's coverage for that particular purchase and instead, pay for the item out-of-pocket). The proposed membership program's terms and conditions specifically state that Members are entirely responsible for all charges for discounted items or services they purchase through the program and that there would be no additional incentives given to Members for filling or transferring a new prescription to the pharmacy. The proposed program would allow for Medicare beneficiaries to submit claims for drugs purchased out-of-pocket while the beneficiary is in the Part D coverage gap, which would count toward a Medicare Part D beneficiary's true out-of-pocket cost calculation.

Based on these facts, the OIG concluded that the proposed arrangement would implicate both the Anti-Kickback Statute and the Beneficiary Inducement CMP because the discounted items, services and earned credits could induce a beneficiary to select the retailer for his or her federally reimbursable items or services. However, the OIG found that inclusion of federal health care program beneficiaries into the paid membership program would not constitute grounds for civil money penalties under the Beneficiary Inducement law, and that the OIG would not impose administrative sanctions under the Anti-Kickback Statute because the program:

1. Would satisfy the requirements of the exception to the definition of remuneration related to retailer rewards under the Beneficiary Inducement law.
 - a. Specifically, the OIG noted that: the membership is the equivalent of a "coupon" under the retailer rewards exception; the earned credits would constitute a "rebate" under the same exception; the membership is available to the general public on equal terms; and the offer or transfer of rewards would not be tied to the provision of any other items or services that are federally reimbursed. The retailer specifically certified that its pharmacies and clinics would not submit a claim to a Federal healthcare program or to any other 3rd party payor for any of the items or services purchased at a discount under the membership program, and that the Members would be entirely responsible for all charges. Further, the OIG noted

that with respect to the credits, the membership program did not have a different mechanism for accumulating or redeeming credits between items and services that are, and are not, covered by Federal health care programs. Also, the vast majority of items and services for which a Member could earn and redeem a credit are not federally reimbursable. Of note, the OIG stated that if the Member could only earn or redeem (or could preferentially accumulate or use) credits based on the purchase of federally reimbursable items or services, the OIG would reach a different conclusion; and

2. Would pose a low risk of fraud and abuse under the Anti-Kickback Statute because, in addition to the positive factors described under the OIG's analysis under the Beneficiary Inducement law, the arrangement also does not include any features to specifically steer beneficiaries to the retail pharmacies or clinics or to purchase federally reimbursable items or services.
 - a. It was noted that the membership program included a broad range of inventory, including groceries and toiletries. The Members would not be required to purchase prescriptions, immunizations, clinic services or any other services that are federally reimbursable. Instead, the Members would earn credits through other purchases under the membership program. Also, there would not be any offers related to transferring prescriptions or filling them at the retailer, or receiving clinic services at the retailer's stores.
 - b. Further, the OIG pointed out that the arrangement would be unlikely to result in overutilization or otherwise increase costs to Federal health care programs because the Member would already have obtained a written order for a prescription from his or her prescriber, and, regardless, the pharmacies would not submit claims for the prescriptions purchased under the membership program to any Federal health care program. Further, the arrangement would not involve a waiver or reduction in any cost sharing amounts incurred by Federal health care program beneficiaries, and there would only be "very limited exceptions" in which Members would earn/redeem credits on items that would be paid for by Federal health care programs.

As always, OIG opinions are only applicable to the requesting individual or entity and cannot be relied on by any other individual or entity. However, this opinion provides guidance on the OIG's current stance on pharmacy member benefit programs that include federal health care beneficiaries. We recommend organizations looking to extend their member benefit programs to include federal health care beneficiaries contact their legal representatives to help structure the program in accordance with federal and state statutes and regulations.

The full advisory opinion can be found [here](#).