PUBLICATION

OIG Approves Loyalty Rewards Program in Supermarket Pharmacies

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In its last Advisory Opinion of 2019 (19-06), the OIG approved a proposed arrangement involving a retailer rewards program through which out-of-pocket costs on in-store pharmacy purchases would qualify customers for future discounts on other eligible retail purchases. While such an arrangement would implicate the civil monetary penalty provision prohibiting beneficiary inducements (Beneficiary Inducement CMP) and the federal Anti-Kickback Statute, the OIG concluded it met the retailer rewards program exception to the Beneficiary Inducement CMP's definition of *remuneration* and posed a minimal risk under the Anti-Kickback Statute.

The retailer in this opinion operates more than 200 supermarkets across multiple states which, in addition to groceries and general retail products, contain in-store pharmacies that provide over-the-counter and prescription medications and immunizations. Some of the pharmacy items and services provided are reimbursable by federal health care programs. The retailer's current loyalty program rewards customers one point per dollar spent on qualifying purchases, but customers may not earn points on pharmacy product purchases nor can they redeem points for cash or pharmacy products.

Under the retailer's proposal, the loyalty program would be expanded to allow customers to earn points on out-of-pocket costs for pharmacy purchases (including federally reimbursable items or services), up to a maximum of 6,750 points annually (equivalent to a $75 discount on store purchases). In addition to the restriction on reward redemptions for pharmacy purchases, pharmacy purchases would not be eligible for special program incentives (i.e., "double-points"), nor would customers be able to apply rewards earned towards future pharmacy product purchases. The retailer certified its software is capable of tracking earned points and implementing the relevant restrictions for the program. Any customer would be eligible to participate equally, regardless of health insurance status.

In addressing both the Beneficiary Inducement CMP and Anti-Kickback Statute implications, the OIG first examined the retailer rewards program exception to the Beneficiary Inducement CMP. The OIG explained the discounts from points earned could induce a beneficiary to choose the retailer as the beneficiary's provider of federally reimbursable items or services. However, in the arrangement under consideration, the retailer's loyalty program met all the criteria for the exception to the definition of *remuneration* under the Beneficiary Inducement CMP. First, the general operations of the retailer qualified it as a retailer and the points earned under the loyalty program constituted rewards from a retailer. Second, the program's terms and conditions applied equally to all customers choosing to participate, regardless of their health insurance status. And third, the program offering would not be tied to the provision of other items or services reimbursed in whole or in part by Medicare or Medicaid programs. The OIG noted the lack of ties on both the "redeeming" side and the "earning" side of the program. On the redeeming side, customers would not be able to redeem points for cash or for pharmacy products. On the earning side, customers would not be required to make pharmacy product purchases to participate and no additional reward points would be awarded for pharmacy product purchases.

Because no analogous exception exists under the Anti-Kickback Statute, the OIG analyzed the certified facts and circumstances of the loyalty program to evaluate its risk for fraud and abuse. Two main factors led the OIG to conclude the loyalty program, as expanded, posed a minimal risk under the Anti-Kickback Statute. First, the program would not require customers to purchase pharmacy products to participate and would not tie any specific incentives to the retailer's pharmacy products. The OIG determined that there was a low risk that a program offered by a general supermarket retailer selling a large range of non-federally reimbursable items would steer beneficiaries to that retailer to purchase federally reimbursable items or services. Secondly, only actual out-of-pocket costs for pharmacy products already prescribed or recommended would qualify for reward points. Further, the program would not involve cost-sharing waivers or reductions and would prohibit the redemption of points for pharmacy products. These restrictions and lack of incentives made it unlikely to the OIG that the loyalty program would cause overutilization or increased costs to federal health care programs.

Based on the cited factors, the OIG concluded that the loyalty program would not constitute grounds for civil monetary penalties under the Beneficiary Inducement CMP and, although it could potentially generate prohibited remuneration under the Anti-Kickback Statute, the loyalty program would pose a low risk of fraud and abuse.

Distinctions from Similar Advisory Opinions

Advisory Opinion 19-06 is the OIG's fourth examination of the retailer rewards program exception in the past decade. Prior advisory opinions addressing this exception (12-05, 12-14, and 17-05) each track the same analysis performed by the OIG and reach the same conclusions. (Mainly, the programs met all exception criteria and posed a low or minimal risk of fraud and abuse.) As previously noted regarding Advisory Opinion 17-05, Advisory Opinion 19-06 reinforces the idea that, in the OIG's view, similar arrangements satisfying the Beneficiary Inducement CMP exception are unlikely to result in an Anti-Kickback Statute violation. However, as with all advisory opinions, the OIG's determination is not binding on other arrangements, and there are additional facts in Advisory Opinion 19-06 that distinguish it from its predecessors. In the instant advisory opinion, the retailer certified it would not extend multiplier reward promotions (i.e., double points) to out-of-pocket costs for pharmacy products. This contrasts with Advisory Opinion 12-14, which noted the retailer would run double-point promotions on everything in store and include prescription copayments. Further, Advisory Opinion 19-06 referenced the retailer's imposed annual limits on points earned for pharmacy product purchases (up to the $75 nominal value) and the ability to track points earned to enforce these limitations through the retailer's software. This nominal value limitation and the resources to track the same are notably absent in the prior advisory opinions on the subject.