



## ALERTS

### HHS-OIG Determines Consultant's Gift Cards Given To Physicians Recommending Services Do Not Implicate Anti-Kickback Statute

January 11, 2024

#### Highlights

HHS-OIG released a favorable opinion allowing a consulting services company to offer gift cards to incentivize physician practices to recommend its services to other physicians

The agency determined the Anti-Kickback Statute would not be implicated

The arrangement would not involve referrals or purchases of any item or service for which payment may be made under a federal health care program

In late December, the U.S. Department of Health and Human Services' Office of Inspector General (HHS-OIG) released [Advisory Opinion No. 23-15](#), a favorable opinion regarding a proposed arrangement in which a company providing consulting services to physician practices would provide gift card incentives to the practices that recommend the company's services to other physicians.

The company's consulting services included workflow optimization services, data analytics services, electronic health record consulting

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services, compliance monitoring services, biannual Medicare Merit-Based Incentive Payment System (MIPS) eligibility checks, annual MIPS-related training, MIPS-related performance measure audits, and assistance with submitting MIPS data. Because the gifts cards, the payments for consulting services by physician practices, and any additional reimbursements from Medicare as a result of the consulting services would not be made in return for referrals or purchases for which payment may be made in whole or in part under a federal healthcare program, the HHS-OIG determined that the Anti-Kickback Statute (AKS) would not be implicated by the proposed arrangement.

As a result, the HHS-OIG said it would not impose sanctions.

## **Background and Analysis: Three Streams of Remuneration**

The proposed arrangement involved three streams of remuneration: 1) the company would give \$25 gift cards to physician practices who recommend the company to other physician practices (and an additional \$50 gift card for successful referrals), 2) physician practice customers would pay the company for consulting services, and 3) physician practice customers would potentially receive higher MIPS reimbursements from Medicare as a result of utilizing the company's consulting services.

However, the company certified that:

- None of the services that it provides are or would be paid for, in whole or in part, directly or indirectly, by a federal health care program
- It would not provide any items or services outside of the proposed arrangement that may be paid for, in whole or in part, directly or indirectly, by a federal healthcare program
- It does not have an ownership or investment interest in any other entity that provides items or services that are paid for, in whole or in part, directly or indirectly, by a federal healthcare program

## **Key Takeaways**

This advisory opinion serves as a reminder that even when a proposed arrangement involves remuneration and healthcare providers, the AKS is not implicated and sanctions will not be imposed when the proposed arrangement does not involve "referrals for, the purchase of, or arranging for or recommending the purchase of, any item or service for which payment may be made in whole or in part under a Federal health care program."

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