

CLIENT ADVISORY

**OIG ISSUES ADVISORY OPINION PERMITTING
GIFT CARDS TO PATIENTS**

On July 7, 2008, the Office of Inspector General (“OIG”) of the United States Department of Health and Human Services issued Advisory Opinion 08-07 which provides guidance for health care providers regarding the provision of gift cards to patients who do not receive adequate service from the provider. Specifically, the OIG held that based on the limitations and structure of the gift card program described in the request for the opinion, it would not constitute grounds for sanctions under either the Civil Monetary Penalty (“CMP”) provision of the Social Security Act¹ or the Federal Anti-Kickback Statute².

The entity which requested the Advisory Opinion is an integrated health delivery system comprised of three hospitals, twenty-two clinics, one skilled nursing facility, and one health plan. In response to patient complaints pertaining to service shortfalls, the entity proposed a program to provide \$10 gift cards to patients who experience less than satisfactory service. Examples of service shortcomings identified by the entity include: excessive wait times, cancelled appointments, delayed meals, excess noise, housekeeping or dietary concerns, equipment problems, or loss of personal items. The gift cards would be supplied by a gift certificate service and would be redeemable at certain local vendors such as restaurants or movie theaters. Each card would not exceed \$10 and would not be redeemable for cash, items of service from the health care entity, or for health care items or services. Further, the distribution of the cards would be systematically tracked by the entity to ensure that no single patient received multiple cards aggregating to an amount greater than \$50 per year. The tracking would also be used to allow management to become aware of the incidents and address the shortfalls to rectify the issue. In addition, the program would not be advertised.

The CMP provides for the imposition of penalties against any person who gives something of value to a Medicare or state health care program beneficiary that the benefactor knows or should know is likely to influence the beneficiary’s selection of a provider, practitioner, or supplier of service for which payment may be made by Medicare or a state health care program, including Medicaid. For purposes of the CMP, the Social Security Act defines “remuneration” to include “transfers of items or services for free or for

¹ Social Security Act § 1128A(a)(5); 42 C.F.R. § 1003.102(b)(13).

² Social Security Act § 1128B(b).

other than fair market value.”³ However, the OIG has held that when the value of an incentive is nominal, it is unlikely to induce the beneficiary based on its value. Therefore, incentives that are only nominal in value are not prohibited.⁴ Specifically, the OIG holds that nominal value means no more than \$10 per item or \$50 in the aggregate, per year.⁵ As the gift cards provided under the program described in the Advisory Opinion would be nominal in value, the OIG concluded that the health care entity would not be subject to sanctions under the CMP.

Similarly, the Anti-Kickback Statute prohibits the knowing and willful offer, payment, solicitation, or receipt of any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. The statute has been interpreted to cover many arrangements where one purpose of the remuneration was to obtain referrals or services to induce further referrals.⁶ This statute provides that “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind. Violation of this statute is a felony punishable by fine, imprisonment or both. The OIG may also initiate proceedings in order to exclude the violating party from participation in Federal health care programs. The OIG held that the gift card program would not subject the health care entity to sanctions under the Anti-Kickback Statute based upon the specific limitations and assurances of the program to prevent fraud and abuse. The specific limitation and assurances include the following:

- the value of the gift cards does not exceed \$10;
- gift cards are redeemable only at vendors that do not sell or provide services paid for by Federal health care programs;
- gift cards are not redeemable for cash or items and services from the health care entity; and
- the gift card program will be monitored by the health care entity to ensure no patient receives an aggregate total in excess of \$50 per year.

The Advisory Opinion provides useful guidance to health care providers contemplating a patient gift card program. Provided that the specific limitations and assurances of the Advisory Opinion are followed by a health care provider, it is unlikely to be subject to sanctions under the CMP or the Anti-Kickback Statute.

³ Social Security Act § 1128A(i)(6).

⁴ 65 F.R. 24400, 24410 (April 26, 2000).

⁵ OIG Special Advisory Bulletin: Offering Gifts and Other Inducements to Beneficiaries, August 2002. The OIG will review these limits periodically and may adjust them for inflation if appropriate.

⁶ See *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985).

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