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OIG Approves Gift Cards in Advisory Opinion, But Something More Is in Play, Lawyer Says

By Nina Youngstrom

In an advisory opinion posted Jan. 3, the HHS Office of Inspector General (OIG) cleared the way for a consulting firm to give gift cards to its physician customers for recommending its services.^[1] Additional gift cards would be handed out if the recommendation led to new business. OIG doesn't see a problem under the Anti-Kickback Statute (AKS) because the proposed arrangement "would not generate prohibited remuneration" — a stronger statement than the more familiar refrain in advisory opinions of a proposed arrangement generating prohibited remuneration but posing a low risk of fraud and abuse. The reason in a nutshell: there's no direct link to payments by federal health care programs.

The advisory opinion speaks to something larger than gift cards, said attorney Larry Vernaglia, with Foley & Lardner LLP in Boston. "It's about the underlying remuneration," he said. OIG is drawing a distinction between payments associated with services that are not payable by federal health care programs and services that are, Vernaglia explained. If not, OIG is saying the AKS doesn't apply. He called it "an excellent opinion."

The takeaway is encouraging, but compliance officers should look closely at the requestor's certifications in the opinion, said Robert Trusiak, an attorney in Buffalo, New York. He also suggests they pay attention to the specific definition of federal health care programs. "I love to say yes as a compliance officer and organizations need revenue, but soberly assess what this says," Trusiak advised. As always, the devil is in the details.

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