

OIG ISSUES FAVORABLE OPINION ON PREVENTIVE CARE PROGRAM INCENTIVES

The Department of Health and Human Services Office of Inspector General ("OIG") recently issued Advisory Opinion 15-01,¹ which provided a favorable opinion of an arrangement that offered Medicaid beneficiaries free diapers and playpens if the beneficiaries chose a provider's program for the state's Maternal Infant Health Program ("Arrangement"). OIG found that the Arrangement did not violate the federal Civil Monetary Penalties law ("CMP") because the Arrangement complied with the CMP's statutory preventive care exception.

BACKGROUND

The requestor of the Advisory Opinion ("Requestor") is a health care provider furnishing care coordination and clinical intervention services to pregnant women and children under a state's Maternal Infant Health Program ("Program"). The Program provides preventive services to pregnant women and infants that are Medicaid beneficiaries and reimburses those services via the state's Medicaid program. Program providers are encouraged by the state's Program Operations Guide ("Guide") to conduct outreach activities to target pregnant women and medical care providers. According to the Guide, one example of an outreach activity is for Program providers to advertise incentives, such as free diapers, in exchange for participation in the Program.

Under the Arrangement, Requestor will advertise and provide free diapers and playpens to Program-eligible Medicaid beneficiaries. Requestor will provide beneficiaries with one free package of diapers during the beneficiary's initial consultation, regardless of whether the mother and infant enroll in the Program. If the mother and infant enroll in the Program and choose Requestor as their provider, they may receive one free package of diapers per billable prenatal or well-child visit, up to a maximum of 10 total visits that are billable to Medicaid. Furthermore, if a mother and infant enroll in the Program, select Requestor as their provider and complete all 10 visits, they will receive a playpen in addition to the 10 packages of diapers. The Requestor asserted that each package of diapers is valued at less than \$5 and each playpen has a value of approximately \$50.

OIG ANALYSIS

The federal Anti-Kickback Statute ("AKS") makes it a criminal offense to knowingly and willfully offer or receive remuneration in an effort to induce or reward referrals of items or services reimbursable by federal health care programs. Furthermore, the CMP provides for penalties against anyone who offers or transfers remuneration to a Medicare or Medicaid beneficiary that the provider knows or should know is likely to influence the beneficiary's selection of a provider or supplier of any item or service that will be paid, in whole or in part, by Medicare or Medicaid.

OIG has previously stated that incentives that are nominal in value, meaning no more than \$10 per item and \$50 in annual aggregate, are not prohibited by the CMP. The CMP also provides several exceptions to the definition of "remuneration." One of these exceptions relates to incentives that promote preventive care services when the delivery of those services is not tied to the provision of additional Medicare or Medicaid services ("Preventive Care Exception"). The Preventive Care Exception includes those services listed in the U.S. Preventive Services Task Force's *Guide to Clinical Preventive Services* as well as prenatal services and postnatal well-baby visits. Incentives that satisfy the requirements of the Preventive Care Exception are not prohibited by the CMP. OIG has clarified whether an incentive satisfies the requirements of the Preventive Care Exception is a separate inquiry from whether the incentive is of nominal value. In other words, an incentive need not be of nominal value and meet the Preventive Care Exception in order to be permissible under the CMP.

OIG concluded that the Arrangement would not implicate the CMP for two reasons: 1) the diapers were of nominal value because the Requestor confirmed they were less than \$10 per item and less than \$50 in the aggregate; and 2) both the diapers and the playpens met the Preventive Care Exception because the prenatal and postnatal visits in the Arrangement are specifically identified as preventive services in the Preventive Care Exception regulations, neither item is disproportionately large compared to the value of the Program services and Program services are not tied to the provision of additional services reimbursed under Medicare or Medicaid. OIG stated that although the Arrangement could potentially generate prohibited remuneration under the AKS, OIG would not sanction the provider for the reasons listed above.

PRACTICAL TAKEAWAYS

Health care providers and entities that offer care coordination services should carefully consider any items or services provided to Medicare or Medicaid beneficiaries in order to ensure that these incentives do not violate the AKS or CMP. However, it is important to note the opportunity that providers may have to serve a community need by providing certain items and/or services to Medicare or Medicaid beneficiaries without running afoul of the CMP prohibition on beneficiary inducements.

When considering the provision of items or services to Medicare or Medicaid beneficiaries for free or less than fair market value, providers should consider the following takeaways in order to reduce any risk associated with the arrangement:

- The incentives should be of nominal value (less than \$10 per item and less than \$50 in the aggregate over a one year period); or
- The arrangement should comply with one of the exceptions to the definition of remuneration under the CMP such as the Preventive Care Exception. To comply with the Preventive Care Exception, a provider should ensure that the services for which the incentives are provided are:
 - prenatal services, postnatal well-baby visits or the specific clinical services described in the U.S. Preventive Services Task Force's *Guide to Clinical Preventive Services*;
 - reimbursable in whole or in part by Medicare or an applicable state health care program; and
 - not tied to the provision of additional health care services reimbursable in whole or in part by Medicare or an applicable state health care program.

Additionally, incentives should not include cash or instruments convertible to cash and should not have a value that is disproportionately large in relationship to the value of the preventive care service.

Note that there are several other exceptions to the CMP established by the Affordable Care Act that allow health care providers certain opportunities to offer items and services to Medicare and Medicaid beneficiaries for less than fair market value. A more detailed summary of these exceptions can be found [here](#).

If you have any questions or would like additional information about this topic, please contact:

- [Julie K. Lappas](#) at 317.977.1490 or jlappas@hallrender.com;
- [Alyssa C. James](#) at 317.429.3640 or ajames@hallrender.com; or
- Your regular **Hall Render** attorney.

Special thanks to Alli Potenza, law clerk, for her assistance with the preparation of this Health Law News article.

¹For a copy of Advisory Opinion 15-01, click [here](#).