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Insights

OIG Allows Retail Pharmacy's Discount Program to Include Medicaid and Medicare Beneficiaries

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On September 7, 2017, the Health and Human Services Office of Inspector General ("OIG") published Opinion 17-05 ("Opinion") that allowed a retail pharmacy to include Medicare and Medicaid beneficiaries in the pharmacy's discount benefit program. The OIG determined that the program design did not violate the beneficiary inducements clause under the Civil Monetary Penalty ("CMP") law or the Anti-Kickback Statute ("AKS"). However, pharmacy providers should be mindful that the Opinion does not take into account state-specific laws that may impact the analysis, and it is fact specific. Interested providers should seek legal counsel prior to implementing similar discount programs.

The retail pharmacy chain requesting the Opinion ("Requestor") operated a discount benefit program in which individuals paid an annual fee in exchange for: 1) access to discounts for certain retail items; 2) a discount on certain clinic services; and 3) store credit for future retail purchases of certain retail items ("Benefit Program"). The Benefit Program required participants to pay for any services or discounted items out-of-pocket, and the Requestor did not submit claims for any discounted items to a Federal health care program for reimbursement. The Requestor proposed allowing Medicare and Medicaid beneficiaries over 18 years of age to participate in the Benefit Program under the same terms and conditions.

The OIG determined that the proposed changes to the Benefit Program did not violate the CMP or the AKS. Specifically, and with regard to the CMP, the OIG determined that the proposal fit within a new CMP pharmacy discount exception published in December of 2016: 1) it met the definition of a "coupon" and "rebate;" 2) the items and services were offered on equal terms to the general public regardless of insurance status; and 3) the offer was not tied to the provision of other items or services reimbursed under a Federal health care program. With regard to the AKS, the OIG determined that, while no safe harbor or exception protected the Benefit Program, it posed little risk of fraud and abuse since no services or items were billed to a Federal health care program. The OIG viewed as favorable the requirement that members of the Benefit Program purchase discounted pharmacy items and services with their own funds.

Indiana law also has regulations that govern pharmacy discount programs. The Indiana Office of Medicaid Policy and Planning ("OMPP") published a Bulletin on March 23, 2013, that described specific requirements pharmacy providers must follow in order to bill a Medicaid beneficiary directly. Additionally, OMPP rules require pharmacy providers to account for discounts when reporting their usual and customary charges for purposes of Indiana Medicaid reimbursement. Accordingly, a provider interested in pursuing a similar program in Indiana should seek legal advice to determine compliance with the CMP, the AKS, and State Medicaid requirements.

If you are interested in implementing a similar discount program and need advice, contact Stephanie T. Eckerle or Brandon W. Shirley.