

Free Transportation: Recent OIG Opinion Permits in Limited Circumstances— What Does This Mean for ASCs?

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On March 17, 2011, the U.S. Department of Health and Human Services Office of Inspector General (OIG) once again issued a favorable Advisory Opinion¹ to a hospital to provide free transportation for patients unable to transport themselves to the hospital from physician offices located on, or contiguous to the hospital's campus to receive further treatment. However, OIG has still not issued any guidance to ambulatory surgery centers (ASCs) that wish to provide free transportation to their patients. Therefore, ASCs must carefully consider whether providing transportation at no cost to patients would pass muster under the law.

Law

Complimentary transportation implicates both the Civil Monetary Penalty (CMP) law² and the federal Anti-Kickback Statute (AKS).³ CMP law provides for a penalty against any person who “offers or transfers remuneration to any individual . . . to influence such individual to order or receive from a particular provider . . . any item or service for which payment may be made, in whole or in part, under [Medicare or Medicaid].” A violation of the CMP law may result in a penalty of up to \$10,000 for each item or service, an assessment of up to three times the amount claimed for each such item or service, and exclusion from participation in Medicare and Medicaid. AKS provides that “whoever knowingly and willfully offers or pays [or solicits or receives] any remuneration

. . . to induce such person—to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a federal healthcare program . . . shall be guilty of a felony, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.”

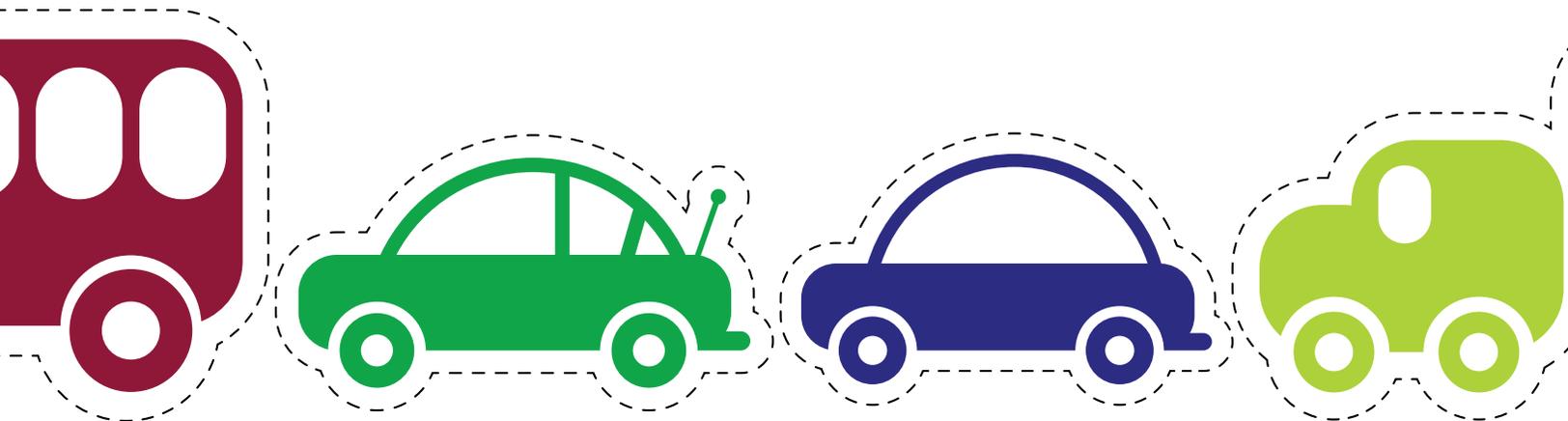
Legislative history shows Congress did not intend to impose penalties for free local transportation of nominal value. OIG has determined that complimentary transportation that has a value of no more than \$10 per trip or \$50 per patient in the aggregate annually is of “nominal value” and therefore is not a violation of CMP law.⁴

Recent Advisory Opinion

A nonprofit, tax-exempt hospital requested an Advisory Opinion from OIG relating to its proposed plan to provide free local transportation to patients and their families that are treated at physician offices located on, or contiguous to the hospital's campus, require further evaluation and treatment, including admission to the hospital, and are unable to transport themselves.

OIG cited several factors in determining that the arrangement would not subject the hospital to administrative sanctions under the CMP law or AKS:

- The selection of patients eligible for the transportation would not be limited to targeted federal healthcare program beneficiaries, but rather determined based on uniform standards.
- The transportation was reasonable, and not a luxury or specialized vehicle.
- Transportation was only offered locally.
- The free transportation would not be marketed or advertised, other than to inform the physicians the transportation is available.
- Public transportation and parking on the hospital's campus was limited.
- The cost of the transportation would not be claimed on any cost report or claim, or otherwise shifted to any federal healthcare program.



Previous Guidance⁵

On November 17, 2000, OIG issued a favorable Advisory Opinion⁶ to a hospital that would provide free transportation services to certain patients who were referred to the hospital for extended courses of treatment.

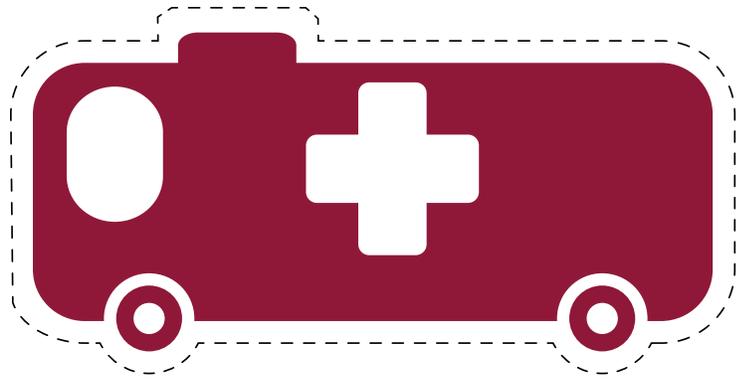
In August 2002, OIG issued a Special Advisory Bulletin on offering gifts and other inducements to beneficiaries wherein the OIG stated it was considering the possibility of a regulatory “safe harbor” exception under the CMP law for complimentary local transportation offered to beneficiaries residing in the provider’s primary service area. Later that year, OIG solicited public comments on the possible development of an exception under the CMP law for complimentary local transportation greater than nominal value.⁷

On December 9, 2002, OIG issued a letter stating free local transportation provided by a hospital that costs no more than \$10 per trip and \$50 per patient in the aggregate on an annual basis does not violate the CMP law.

On March 6, 2009, OIG issued a favorable Advisory Opinion to a skilled nursing facility proposing to provide free local transportation for friends and families of its residents.⁸ Similar to its most recent Advisory Opinion, in concluding the arrangement would not constitute grounds for the imposition of CMPs under the CMP law or administrative sanctions under AKS, OIG cited a number of factors. These factors included that the services are not provided to targeted populations of federal healthcare program beneficiaries, the type of transportation was reasonable, the services would only be offered locally, advertising would only be done locally, public transportation was limited, and the cost of the transportation would not be claimed on any cost report or claim.

How Does This Affect ASCs?

This most recent Advisory Opinion does not alter the general rule that free transportation in excess of nominal value potentially implicates the CMP law and AKS. Although on its face it appears that OIG is loosening its standards for when free transportation will be acceptable, in reality free transportation is permitted only in limited circumstances. To date, OIG has not adopted an



exception to the law or provided any specific guidance for ASCs. Therefore, free transportation provided by ASCs must be carefully evaluated to determine compliance with the law as well as the factors enumerated by OIG.

1 OIG Advisory Opinion No. 11-02 (Mar. 17, 2011).

2 42 U.S.C. 1320-7a(a)(5).

3 42 U.S.C. 1320-7b(b).

4 65 Fed. Reg. 24400, 24411 (Apr. 26, 2000).

5 For a more detailed discussion of previous guidance on free local transportation, please see articles titled “Can ASCs Provide Free Transportation?,” published in the June 2006 issue of *Physician Organizations*, and “OIG Provides New Guidance on Free Transportation,” published in the July 2009 issue of *Physician Organizations*.

6 OIG Advisory Opinion No. 00-7 (Nov. 17, 2000).

7 67 Fed. Reg. 72892-72894 (Dec. 9, 2002).

8 OIG Advisory Opinion No. 09-01 (Mar. 6, 2009).

