



# Rewards and Incentives in Medicare Advantage 2022

REVIEW OF CMS REGULATIONS AND GUIDANCE

ADAM ZAVADIL, ZAHEALTH LLC

# REWARDS AND INCENTIVES REVIEW

## MEDICARE ADVANTAGE COMPLIANCE GUIDANCE

### ZAHealth, LLC

This report was created by [Adam Zavadil](#), Founder and Principle of [ZAHealth, LLC](#). Adam Zavadil, JD, MPH has been helping clients at the intersection of health care delivery and financing for over 15 years. Adam has developed deep expertise in the areas of health care financing, market research, regulatory review, federal health care policy, quality performance, and insurance product and benefit design. ZAHealth serves a variety of clients in technology, managed care, and care delivery on strategic issues at the intersection of business and public policy.

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### Purpose

For 2022 CMS updated its regulations regarding Rewards and Incentives programs. This paper describes what these changes require and how they may affect existing approaches for Medicare Advantage Organizations (MAOs) deploying Part C Rewards and Incentives Programs specifically related to allowable rewards and incentives.

### Executive Summary

- The 2022 MA Final Rule made contradictory statements about how Rewards and Incentives programs can be administered
  - CMS has interpreted cash-equivalence in two different ways throughout their guidance: 1) “*can be used to buy a lot of different stuff*” and 2) “*can become cash*”
- CMS has been consistent in ensuring that cash and cash-equivalents cannot be used for Rewards and Incentives
- In the discussion around the RTBT program, CMS also specifically mentioned Amazon and general-purpose Visa debit cards as cash-equivalents
- In [2022 Proposed Rule](#), CMS proposed to adopt the OIG’s definition of “cash equivalent” (The final regulation defines cash equivalent for restrictive purposes, but provides the language around gift cards as a permissible example):

“items convertible to cash (such as a check) or that can be used like cash (such as a general purpose debit card, but not a gift card that can be redeemed only at certain stores, certain store chains, or for a specific category of items like a gasoline gift card).”<sup>1</sup>
- General purpose debit cards (i.e., the Visa Cards mentioned in RTBT) with no restrictions run afoul of both cash-equivalent definitions because
  - They can become cash through ATM Withdrawal, Wire Transfers, etc.

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<sup>1</sup> 85 FR 9002, 9107

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- They can be used for any purchase type at any retailer
- CMS never cites Amazon or other big box/general stores in their description of Part C requirements, it only mentions it in the preamble to RTBT regulations and “in-kind” rewards for the MSSP.
- While probably not applicable, if an MAO believed that the guidance for RTBT rewards was applicable to RI Programs, one way an MAO could make a good faith effort to comply with both definitions could be to utilize restricted debit cards that (1) could not be converted to cash and (2) would limit purchases from “general stores” broadly e.g., Amazon, Walmart, Target and similar. Nonetheless, how to comply with the conflicting guidance is unclear and good faith compliance could utilize other possible approaches.

### Findings

While the 2022 MA Final Rule sought to update the regulations related to Rewards and Incentives to increase clarity, it made numerous contradictory statements in guidance that are not connected to specific policy objectives and difficult for Medicare Advantage Organizations (MAOs) and their partners to translate in logical compliance actions.

The clearest statement regarding reward items is what is actually part of the regulation:

**(2) The reward item for a target activity must not:**

**(i) Be offered in the form of cash, cash equivalents, or other monetary rebates (including reduced cost sharing or premiums). An item is classified as a cash equivalent if it either:**

**(A) Is convertible to cash (such as a check); or**

**(B) Can be used like cash (such as a general purpose debit card).**

These restrictions arise from statutory limits prohibiting inducements for enrollment, where CMS believes cash could be more easily used as a benefit (e.g., reducing cost sharing or paying plan premiums). The part where CMS guidance is particularly unclear is the meaning of term “used like cash” in the regulatory language. In some instances, they seem to advance the definition that this means it *can buy a lot of different stuff*, while in others they use equate this to *easily becoming cash*.

Thus, CMS’ various discussions around how plans should consider types of rewards in terms of similarities to cash is very muddled.

- As it relates to the Real Time Benefit Tool rewards (which is not directly applicable to RI Programs), CMS seems to consider “used like cash” to mean loosely that you can buy a lot of different things with it.<sup>2</sup>
- On the other hand, CMS notes for the RI Programs that when considering state laws that give gift cards a cash value “we consider this allowable because the gift card is **not immediately convertible to cash**. The fact that later on it may be worth a nominal amount does not retroactively cancel its non-cash equivalent status.”<sup>3</sup>

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<sup>2</sup> 86 FR 5864, 5954

<sup>3</sup> 85 FR 9002, 9108

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- CMS also notes offering a wide array of gift cards is definitely permitted; having more gift cards would seem to make the breadth of purchasing options wider—cutting against the “buys a lot of different stuff” interpretation.
- CMS guidance in the Managed Care Manual states: “*Rewards and/or incentives may not be offered in the form of cash or monetary rebates, including reduced cost-sharing or premiums. Otherwise, MAOs have **considerable flexibility** with regard to what may be offered as a reward or incentive. Gift cards are a permissible form of reward or incentive as long as they are not redeemable for cash. MA plans are **encouraged** to offer enrollees a choice of gift cards from which to choose in order to account for differences in enrollees’ preferences and accessibility of retailers.*” (**emphasis added**)

Trying to sort this out, the “can buy a lot of different stuff” definition of cash-equivalent seems to be limited to the RTBT regulation and multiple other pieces of the RI Program guidance align with the “cannot become actual cash” definition of cash-equivalent. Thus, while still unclear and maybe contradictory, compliance may be better attained by following the latter “cannot become actual cash” definition for RI programs.

Additionally, it does not appear that CMS’ discussion around Amazon gift cards at it relates to the RTBT would be connected with an assumption of a secondary cash market (i.e., someone will give you cash for the gift card) as secondary cash markets exist for almost all national retailer-specific gift cards.

### Background and Discussion

The Part C Rewards and Incentive program (RI Program) regulations were put in place as part of the *Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs (2015 Final Rule)*. In this rule, CMS states “*This proposed requirement would not preclude MA organizations from offering rewards and incentives programs that target a specific disease, chronic condition or preventive service.*”<sup>4</sup> These regulations also noted that “(2) Reward and incentive items may not— (i) Be offered in the form of cash or other monetary rebates”<sup>5</sup>

The main regulatory concern CMS has regarding RI Programs is their potential use for creating adverse selection and discrimination:

*Because we are concerned about the possibility that such programs would be targeted only to healthier enrollees, and discourage sicker enrollees from participating in such incentives and in remaining enrolled in the plan, we also proposed to include specific requirements regarding rewards and incentives so as to ensure that such programs do not discriminate against beneficiaries on the basis of health status or disability, or other impermissible bases for discrimination.*<sup>6</sup>

When the regulation was promulgated, little discussion was given to restrictions related to the types of rewards that were being offered. The restriction on the cash or cash equivalents ties back to the Social Security Act:

*1851(h)(4) PROHIBITION OF CERTAIN MARKETING PRACTICES.—Each Medicare+Choice organization shall conform to fair marketing standards, in relation to Medicare+Choice plans offered under this part,*

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<sup>4</sup> 79 FR 29844, 22916

<sup>5</sup> 79 FR 29844, 22956

<sup>6</sup> 79 FR 29844, 22916

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*included in the standards established under section 1856. Such standards—(A) shall not permit a Medicare+Choice organization to provide for, subject to subsection (j)(2)(C),<sup>7</sup> cash, gifts, prizes, or other monetary rebates as an inducement for enrollment or otherwise;*

As part of the *Medicare and Medicaid Programs; Contract Year 2022 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicaid Program, Medicare Cost Plan Program, and Programs of All-Inclusive Care for the Elderly (2022 Final Rule)*, CMS updated the regulations for RI Programs. The 2022 Final Rule includes two permissible reward type discussions: one around incentives for the use of a real time benefit tool (RTBT) and another around the Part C RI Program requirements. These policies are codified separately in the federal regulations at [42 CFR §423.128](#) and [42 CFR §422.134](#) respectively.

The RI Program regulations in the 2022 Final Rule were updated “...to codify the guidance we have given, unify principles governing MA rewards and incentive programs, clarify the requirements of the regulation, and clarify flexibilities available to MA organizations under the regulation.”<sup>8</sup> This 2022 Final rule clarifies the restriction around cash and monetary rebates. It states in the preamble

*The reward item for a target activity must not: (i) Be offered in the form of cash, cash equivalents, or other monetary rebates (including reduced cost sharing or premiums). An item is classified as a cash equivalent if it either: (A) Is convertible to cash (such as a check); or (B) Can be used like cash (such as a general purpose debit card).*

In [2022 Proposed Rule](#), CMS proposed to adopt the OIG’s definition of “cash equivalent”: “items convertible to cash (such as a check) or that can be used like cash (such as a general purpose debit card, but not a gift card that can be redeemed only at certain stores, certain store chains, or for a specific category of items like a gasoline gift card).”<sup>9</sup> The final regulation defines cash equivalent for restrictive purposes, but provides the language around gift cards as a permissible example.<sup>10</sup>

**Permissible reward items for a target activity may be reward items that:**

- (i) Consist of “points” or “tokens” that can be used to acquire tangible items.**
- (ii) Are offered in the form of a gift card that can be redeemed only at specific retailers or retail chains or for a specific category of items or services.**

CMS states that the 2022 rule was meant to “codify existing guidance”,<sup>11</sup> and “our subregulatory guidance explains that this [reward restrictions] includes reductions in cost sharing or premiums and gift cards that are redeemable for cash”<sup>12</sup>. It is important to note that the discussion around the Part C RI Program requirements is

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<sup>7</sup> Nominal gifts

<sup>8</sup> 85 FR 9002, 9105

<sup>9</sup> 85 FR 9002, 9107

<sup>10</sup> 42 CFR §422.134(d)(3)

<sup>11</sup> 86 FR 5864, 5979

<sup>12</sup> Id.

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devoid of any mention of the restrictions on using gift cards from “general store” merchants (such as Amazon). In its existing guidance, CMS states:

*Rewards and/or incentives may not be offered in the form of cash or monetary rebates, including reduced cost-sharing or premiums. Otherwise, MAOs have considerable flexibility with regard to what may be offered as a reward or incentive. Gift cards are a permissible form of reward or incentive as long as they are not redeemable for cash. MA plans are encouraged to offer enrollees a choice of gift cards from which to choose in order to account for differences in enrollees’ preferences and accessibility of retailers.*<sup>13</sup>

There is a discussion around the use of Amazon and VISA gift cards in the preamble language for the RTBT. Here it states:

*However, we did propose to allow for the use of gift cards, as long as they are **not** cash equivalents and do not encourage enrollees to further patronize the plan or any of the plan’s corporate affiliates. For purposes of this proposal, CMS proposed that gift cards that can be used like cash, for example, a VISA or Amazon gift card, to be a “cash equivalent.” Cash equivalents also may include, for example, instruments convertible to cash or widely accepted on the same basis as cash, such as checks and debit cards.*<sup>14</sup> (**emphasis added**)

Further unpacking the comments regarding Amazon and VISA gift cards, CMS sites to where this discussion first appears in the **Medicare Program; Medicare Shared Savings Program; Accountable Care Organizations—Pathways to Success and Extreme and Uncontrollable Circumstances Policies for Performance Year 2017** rule (**MSSP Rule**). The MSSP Rule describes the incentives that MSSP entities can provide in regard to avoiding kickbacks and beneficiary inducements. Here there is a safe harbor for “in kind services,” which cannot be cash or cash equivalents.<sup>15</sup>

In this MSSP regulation the purpose of defining cash and cash equivalent is much different than for the RI Program: the primary concern for kickbacks and beneficiary inducement is the risk of offering payments for receiving Medicare services. Thus, a restriction that more broadly considers what types of rewards may be at risk of generating a kickback or inducement is needed. In the MSSP situation general merchandise is a concern because it is unlikely to be “in kind”.

Also, of interest is that the MSSP program does allow for monetary incentives in the tracks where the MSSP is taking total cost of care risk (similar to MA).<sup>16</sup> Here cash and cash-equivalent gift cards are explicitly allowed:

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<sup>13</sup> Medicare Managed Care Manual: Chapter 5- Benefits and Beneficiary Protections Section 100.5

<sup>14</sup> 86 FR 5864, 5954

<sup>15</sup> **In-kind incentives.** ACOs, ACO participants, ACO providers/suppliers, and other individuals or entities performing functions or services related to ACO activities may provide in-kind items or services to Medicare fee-for-service beneficiaries if all of the following conditions are satisfied: (1) There is a reasonable connection between the items and services and the medical care of the beneficiary. (2) The items or services are preventive care items or services or advance a clinical goal for the beneficiary, including adherence to a treatment regime, adherence to a drug regime, adherence to a follow-up care plan, or management of a chronic disease or condition. (3) The in-kind item or service is not a Medicare-covered item or service for the beneficiary on the date the in-kind item or service is furnished to the beneficiary. **42 CFR 425.304(b)**

<sup>16</sup> 42 CFR 425.304(c)

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*Furthermore, we consider a gift card that can be used like cash, for example, a VISA or Amazon “gift card,” to be a “cash equivalent” that **can be** offered only as an incentive payment under an approved beneficiary incentive program, provided that all of the criteria set forth in § 425.304(c), as finalized, are satisfied. We emphasized that, as previously stated, the determination and appropriateness of any in-kind beneficiary incentive must be determined on a case-by-case basis.<sup>17</sup> [**emphasis added**]*

For the RTBT, the incentive is given for simply using the RTBT; although CMS does not discuss the differences between incentives for RI Programs and the RTBT, CMS may be more concerned that the incentive for the RTBT may be less tied to the value of the service; and thus, they may desire a more restrictive reward approach. However, the logical connection or reasoning behind the included discussion of Amazon and VISA gift cards in this part of the preamble is opaque. Also, it is unclear why Amazon gift cards are specifically mentioned, while a similar array of services could also likely be purchased at Wal-Mart or Target.

On the other hand, as previously discussed, the concern around Rewards and Incentive programs is the actual conversion of a reward into cash: being able to turn the reward into cash, not restricting the choices of items that can be redeemed. In fact, CMS encourages plans to offer a choice of gift cards and notes that many MA plans offer multiple gift cards. This would imply that having more options for available retail purchases would be preferred over a narrower set of reward options.

General purpose (unrestricted) debit cards can easily be turned into cash at ATMs and thus CMS has an interest in restricting their use for rewards. On the other hand, beyond this, it is very difficult to make a clear line around how easily a given gift card can become cash. A quick internet search for “cash for gift cards” generates an array of options to get cash in exchange for gift cards from a variety of retailers: department stores, restaurants, specialty retailers etc. Given this, it would be hard to distinguish an Amazon gift card from any other gift card in terms of “cash equivalence.”

Finally, for MAOs trying to comply with the spirit of the regulations, a restricted VISA gift card may even be a better approach to rewards than a gift card from a specific retailer or chain because it would be harder to obtain a cash exchange for such a gift card given the embedded restrictions.

### Questions and Answers

**Q:** Does CMS Prohibit the use of Amazon gift cards and other “general store” retailers as a means for permissible rewards?

**A:** CMS prohibits the use of cash or cash-equivalents for rewards. While CMS’ discusses Amazon gift cards in the preamble to the RTBT regulation and references restrictions of this sort for “in kind” incentives for MSSPs, it does not mention these restrictions related to Part C requirements or make any mention of this restriction in the regulatory text or in any other guidance provided by CMS for RI Programs.

In fact, such a restriction would be contradictory to language in the same preamble by CMS encouraging plans to offer a wide array of gift cards (to broaden the number of redeemable options available). Furthermore, the existing guidance that the new regulation was supposed to incorporate gives plans considerable flexibility around what can be offered as a reward (besides cash).

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<sup>17</sup> 83 FR 67980

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**Q:** Does CMS prohibit the use of VISA gift cards for Part C Rewards and Incentives?

**A:** CMS specifically prohibits the use of general-purpose debit cards, because these can usually be converted into cash. As with Amazon gift cards, VISA gift cards are only mentioned as part of the preamble related to the RTBT rewards and so the applicability of this to Part C RI Programs is unclear. CMS does not provide guidance on the use of VISA gift cards that are restricted, especially related to the ability to convert them into cash.

If an MAO was aware that a gift card was easily convertible to cash, this reward would likely be out of compliance with the CMS regulations. On the other hand, if the gift card was restricted in a way that limits it being used as a cash-equivalent, it would seem to meet the spirit of CMS' requirements.

**Q:** How might an MA Organization handle the unclear CMS' guidance regarding reward programs?

**A:** MA plans should ensure foremost that they are not providing cash rewards, or items that rewards could easily be turned into cash. Primarily it would seem CMS is concerned with the rewards being used to reduce cost-sharing or paying MA plan premiums (which cash would be able to do).

Restricting gift cards to a more limited set of services would also decrease their ability to be converted into cash and the secondary market for such gift cards would be more limited.

Finally, if an MAO believed that the guidance for RTBT rewards was applicable to RI Programs, one way an MAO could make a good faith effort to comply with both definitions could be to utilize restricted debit cards that (1) could not be converted to cash and (2) would limit purchases from "general stores" broadly e.g., Amazon, Walmart, Target and similar. Nonetheless, how to comply with the conflicting guidance is unclear and good faith compliance could utilize other possible approaches.

**Q:** Should a plan consider rewards that are only tied to a limited set of services (e.g., SDOH-specific merchant categories)?

**A:** Part C RI Program requirements do not mandate rewards be health-related, but limiting the ability of rewards to be spent on items that do not promote health would be more in line with the mission of most MA organizations. If RI Program rewards are reimbursing for SDOH items, plans should be cautious if rewards cross into the category of benefits, especially given the adoption of SDOH benefits by many plans.<sup>18</sup>

**Q:** Could CMS sanction a plan for failure to comply with RI Program requirements?

**A:** If beneficiaries are harmed or deceptive practices occur, CMS has had the ability to impose sanctions. This ability was part of the original 2015 RI Program regulations related to discrimination. In the 2022 Rule CMS explained that beneficiary harms may go beyond discrimination. CMS cites an example where a plan promised, but did not pay, a reward.<sup>19</sup> CMS could also impose sanctions if a plan provides false information to CMS or falsely or deceptively markets its RI program.<sup>20</sup>

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<sup>18</sup> CMS has not provided any guidance in this area, but CMS has been clear about RI Programs not being benefits for PDP purposes.

<sup>19</sup> 85 CFR 9002, 9108

<sup>20</sup> 42 CFR 422.752