

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201



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TO: All Issuers Offering Health Insurance Coverage in the Small Group Market

FROM: Ellen Montz
Director, Center for Consumer Information & Insurance Oversight

Subject: Temporary Policy on 2021 Premium Credits in the Small Group Market
Only Associated with the COVID-19 Public Health Emergency

Purpose

Title I of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104-191, enacted on August 21, 1996) added a new title XXVII to the Public Health Service Act (PHSA) to establish various reforms to the group and individual health insurance markets. These provisions of the PHSA have also been augmented by later laws, including the Patient Protection and Affordable Care Act (ACA).¹ Subtitles A and C of title I of the ACA reorganized, amended, and added to the provisions of part A of title XXVII of the PHSA relating to group health plans and health insurance issuers in the group and individual markets. Section 1321(a) of the ACA provides broad authority for the Secretary of Health and Human Services (Secretary) to establish standards and regulations to implement the statutory requirements related to Exchanges, qualified health plans (QHPs), and other components of title I of the ACA. Section 2792 of the PHSA provides broad authority for the Secretary to issue regulations that are necessary and appropriate to implement the PHSA federal market reform provisions.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way, unless specifically incorporated into a contract. This document is intended only to provide clarity to the public regarding existing requirements under the law.

To support small employers that may struggle to pay premiums because of loss of income or revenues resulting from the COVID-19 public health emergency (PHE),² CMS is exercising

¹ The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010. The Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), which amended and revised several provisions of the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. In this document, we refer to the two statutes collectively as the “Patient Protection and Affordable Care Act” or “ACA”.

² On October 15, 2021, HHS Secretary Xavier Becerra, renewed, effective October 18, 2021, the determination that a public health emergency exists and has existed since January 27, 2020 as the result of the 2019 novel coronavirus,

discretion to adopt a temporary policy of relaxed enforcement of the below identified standards under the conditions outlined in this document for the 2021 benefit year. To complement the support in paying individual market premiums offered to eligible Marketplace enrollees by the American Rescue Plan Act of 2021 (ARPA),³ CMS is permitting small group market health insurance issuers, subject to the applicable state regulator's permission, the flexibility in non-merged market states to temporarily offer premium credits for 2021 coverage. CMS believes that small employers will benefit from this additional flexibility to maintain continuous comprehensive coverage for their employees while recovering from the financial instability caused by the COVID-19 PHE. However, CMS is not permitting this flexibility in the individual market as it would require CMS to collect additional information from issuers to implement, creating operational changes to premium reconciliation and reporting, which could result in errors in premium reconciliation and delay 1095 reporting,⁴ if pursued this late in the benefit year. This would increase the potential harm and burden for individual market consumers.⁵ As such, CMS does not believe that the benefits associated with permitting such flexibility in the individual market outweigh the risks for consumers at this time. This document is being released in accordance with premium credit policies finalized in the September 2, 2020 Interim Final Rule (IFR) on Medicare and Medicaid Programs, Clinical Laboratory Improvements Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency⁶ (hereinafter referred to as the September IFR on COVID-19).

Temporary 2021 Premium Credits in the Small Group Market Only

Issuers generally are not permitted under federal law and regulations to reduce premiums that are otherwise due. However, in 2020, CMS adopted temporary policies of relaxed enforcement of the premium rules⁷ to allow the provision of temporary premium credits for 2020 coverage. CMS announced this temporary flexibility in the August 4, 2020 document, Temporary Policy on 2020 Premium Credits Associated with the COVID-19 Public Health Emergency.⁸ In light of the urgent need to help small employers experiencing economic hardship to maintain continuous coverage for their employees through the COVID-19 PHE, CMS will again adopt a policy of relaxed enforcement with respect to 45 CFR 147.102, 155.200(f)(4), 155.706(b)(6)(1)(A), 156.80(d), 156.210(a), and 156.286(a)(2)–(4) to permit all issuers in the small group market, on a temporary basis and subject to approval by the applicable state regulator, to offer premium credits for 2021 coverage in the manner outlined in this document. Under this temporary exercise of enforcement discretion, CMS will not consider a state to have failed to substantially enforce

nationwide. See: Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVIDI-15Oct21.aspx>.

³ American Rescue Plan Act of 2021, Pub. L. 117-2.

⁴ See: <https://www.irs.gov/forms-pubs/about-form-1095-a>.

⁵ This could result in errors in premium reconciliation which could harm consumers by resulting in errors in tax liability and the need for consumers to file corrected tax returns.

⁶ 85 FR 54820.

⁷ 45 CFR 147.102, 155.200(f)(4), 155.400(e) and (g), 155.706(b)(6)(1)(A), 156.80(d), 156.210(a), and 156.286(a)(2) through (4).

⁸ Available at: <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Marketplaces/Downloads/Premium-Credit-Guidance.pdf>

applicable federal requirements under the PHSA or the ACA if the state permits issuers in the small group market to provide premium credits in the manner outlined in this document. In states where CMS is the primary enforcer of the applicable federal requirements, CMS will adopt a policy of relaxed enforcement to temporarily allow all issuers in the small group market to offer premium credits in the manner outlined in this document and encourages states to adopt a similar approach for their small group markets.

Issuers in the small group market wishing to provide premium credits for 2021 coverage must, in advance of providing these credits, receive the applicable state regulator's permission to provide premium credits as outlined in this document or CMS's permission in states where CMS is the primary enforcer of the applicable federal requirements.⁹ In addition to approval from the applicable state regulator, an issuer seeking to provide premium credits must also receive permission from any applicable Exchange through which they offer small group QHP coverage.¹⁰

In their requests to the applicable state regulator to provide these credits, issuers must indicate the fixed percentage by which they intend to provide credits against 2021 premium amounts and the month(s) in 2021 to which the credits would apply. This fixed percentage credit must be offered uniformly in a non-discriminatory manner¹¹ to all employers in the small group market in a state without regard to whether the plan is offered through or outside an Exchange. Any premium credit must begin on the first day of a month and continue for one or more full months, ending no later than the end of the 2021 calendar year. In addition, premium credits can only be applied prospectively to future month(s) of 2021 coverage for which premiums are not yet due.

Requirements for Reporting Information on 2021 Temporary Premium Credits

In part 2 of the 2022 Notice of Benefit and Payment Parameters final rule (2022 Payment Notice),¹² HHS permanently adopted risk adjustment and medical loss ratio (MLR) reporting requirements introduced in the September IFR on COVID-19, for all health insurance issuers in the individual and small group (or merged) markets that elect to offer premium credits in the 2021 benefit year and beyond during a PHE declared by the Secretary of HHS if the premium credits are permitted by HHS in future benefit years.

In accordance with policies finalized in the 2022 Payment Notice, issuers of risk adjustment covered plans in the small group market that elect to offer these premium credits in the 2021

⁹ CMS is currently the primary enforcer of the applicable federal requirements in Missouri, Oklahoma, Texas, and Wyoming. CMS will coordinate with state regulators in these states for premium credit requests submitted to CMS pursuant to this policy.

¹⁰ QHP issuers in the small group market in a State Exchange that does not use the HealthCare.gov platform for 2021, and that has been approved to offer premium credits by the applicable state regulator, should follow any requirements established by the State Exchange for reporting temporary premium credits. If the State Exchange has its own reporting requirements, states should abide by those requirements. State Exchange issuers in the small group market will also be subject to this guidance and other Federal rules established regarding reporting temporary premium credits for purposes of the MLR and risk adjustment programs.

¹¹ See, e.g., 45 CFR 146.121, 147.104(e), 147.110, 156.125, and 156.225.

¹² 86 FR 24140 at 24182 -24183, 24202 – 24203 and 24260 - 24261.

benefit year must report to their EDGE servers adjusted plan premiums that reflect actual premiums billed to employers, taking the premium credits into account as a reduction in premiums. HHS will calculate the plan average premium and statewide average premium under the state payment transfer formula using issuers' adjusted premium amounts, reflective of temporary premium credits provided by small group market issuers in the 2021 benefit year when such credits are offered in the manner outlined in this document.

For the 2021 MLR reporting year,¹³ issuers of small group market plans that elect to offer premium credits in 2021 in the manner outlined in this document must account for temporary premium credits provided to employers during 2021 as reductions in earned premium for 2021, consistent with any technical guidance set forth in the 2021 MLR Annual Reporting Form Instructions.¹⁴ Specifically, the amount of temporary premium credits¹⁵ will constitute neither collected premium nor due and unpaid premium described in the MLR Annual Reporting Form Instructions for purposes of reporting written premium (which is a component of earned premium). Consequently, issuers of small group market plans that offer temporary premium credits in 2021 must report as earned premium for MLR and rebate calculation purposes the actual, reduced premium paid for months in 2021 for which issuers provided these credits.

¹³ The MLR reporting year means a calendar year during which group or individual health insurance coverage is provided by an issuer. See 45 CFR 158.103. Issuers must submit the MLR reports for the 2021 MLR reporting year by July 31, 2022. See 45 CFR 158.110(b).

¹⁴ 2021 MLR Annual Reporting Form Instructions will be available in 2022 at https://www.cms.gov/ccio/resources/forms-reports-and-other-resources#Medical_Loss_Ratio.

¹⁵ MLR rebates provided in the form of premium credits are different than the temporary premium credits outlined in this document. When MLR rebates are provided in the form of premium credits, issuers must continue to report the full amount of earned premium and may not reduce it by the amount of MLR rebates provided in form of premium credits, as required by 45 CFR 158.130(b)(3).