

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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200 Independence Avenue SW
Washington, D.C. 20201



Date: March 17, 2022

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Title: Draft Insurance Standards Bulletin Series – INFORMATION

Subject: Treatment of Recovered Cost-Sharing Reduction Amounts in the Medical Loss Ratio and Rebate Calculations

I. Purpose

Section 2718 of the Public Health Service Act (PHS Act), as added by the Affordable Care Act (ACA), and the implementing regulations at 45 C.F.R. Part 158 require health insurance issuers (issuers) offering group or individual health insurance coverage to submit an annual report to the Secretary of the Department of Health and Human Services (HHS) concerning their medical loss ratio (MLR) and issue an annual rebate to enrollees if the issuer's MLR is less than the applicable MLR standard established in section 2718(b)(1)(A)(i) and (ii).

Sections 1402 and 1412 of the ACA and the implementing regulations at 45 C.F.R. Part 156 established a Cost-Sharing Reduction (CSR) program for qualified health plans (QHPs) in the individual market. Under the CSR program, QHP issuers must make available reduced cost sharing to eligible enrollees (generally, those with household incomes between 100 and 250 percent of the federal poverty level who are also eligible for premium tax credits and who are enrolled in a silver plan through the Exchange).¹ As set forth at 45 C.F.R. § 156.410, the QHP issuer must ensure that any individual enrolled through the Exchange who is eligible for CSRs pays only the cost sharing required for the applicable covered service under the plan variation.

Under the process set forth at 45 C.F.R. § 156.430, QHP issuers would notify HHS of CSRs provided on behalf of eligible enrollees, and HHS would make periodic and timely advance payments to issuers equal to the value of those reductions, with reconciliation after the end of the benefit year. Generally, if the actual amount of CSRs the issuer provided to enrollees is more than the amount of advance payments provided by HHS, and the issuer has timely provided HHS the actual amounts, HHS would reimburse the issuer for the difference. HHS made such advance

¹ 45 C.F.R. § 155.305(g). Cost-sharing reductions also are available to Indians in certain circumstances. See ACA § 1402(d) and 45 C.F.R. §§ 155.305(g)(3) and 155.350.

and reconciliation CSR payments to issuers until October 12, 2017, when HHS directed that all CSR payments be discontinued until an appropriation exists.² As a result, HHS did not reimburse issuers for any underpayments of advance CSRs for the 2017 benefit year and for earlier restated benefit years, and did not make any CSR payments to issuers for 2018 and later benefit years.

A number of issuers brought legal challenges to recover the unpaid CSR payments. In August 2020, the Court of Appeals for the Federal Circuit issued two decisions concluding that section 1402 of the ACA created an enforceable government obligation to make CSR payments to issuers under certain circumstances, without regard to an available HHS appropriation to make such payments.³ On June 21, 2021, the U.S. Supreme Court declined to review the Federal Circuit's CSR decisions.⁴ The United States has since made (and may continue to make) payments from the Judgment Fund to issuers for certain previously unpaid CSR amounts (hereinafter referred to as "recovered CSR amounts").

Under the MLR regulations at 45 C.F.R. Part 158, an issuer's MLR and rebate calculations must account for, among other things, CSR payments. The purpose of this draft guidance is to propose instructions for issuers to report and treat recovered CSR amounts in their MLR and rebate calculations.

The Centers for Medicare & Medicaid Services (CMS) welcomes comments on this proposed guidance. Please send comments on this Bulletin to MLRQuestions@cms.hhs.gov by **April 15, 2022**.

II. Background

Section 2718(b) of the PHS Act and the implementing regulations at 45 C.F.R. Part 158 require an issuer to provide an annual rebate to enrollees,⁵ on a pro rata basis, if the ratio of the amount of premium revenue expended by the issuer on reimbursement for clinical services provided to enrollees under the health insurance coverage and for activities that improve health care quality to the total amount of premium revenue (excluding federal and state taxes and licensing or regulatory fees) is less than 80 percent in the individual and small group markets and 85 percent in the large group market.⁶ The MLR requirements generally apply to all health insurance issuers offering large group, small group, or individual health insurance coverage.⁷

² See Op. Att'y Gen. (October 12, 2017), discussing *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 174 (D.D.C. 2016), which declared CSR payments by HHS impermissible absent an explicit congressional appropriation. Available at <https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf>.

³ *Sanford Health Plan v. United States*, 969 F.3d 1370 (Fed. Cir. 2020); *Community Health Choice v. United States*, 970 F.3d 1364 (Fed. Cir. 2020).

⁴ *Maine Community Health Options v. United States*, No. 19-2102 (Fed. Cir. Aug. 14, 2020), *cert. denied* No. 20-1162 (U.S. June 21, 2021); *Common Ground Healthcare v. United States*, No. 20-1286 (Fed. Cir. Sept. 30, 2020), *cert. denied* No. 20-1200 (U.S. June 21, 2021). See Orders List (U.S. June 21, 2021).

⁵ For the sole purpose of determining who is entitled to receive an MLR rebate, the term "enrollee" means the subscriber, policyholder, and/or government entity that paid the premium for health care coverage received by an individual during the respective MLR reporting year. See 45 C.F.R. § 158.240(b).

⁶ States have the option to set higher MLR thresholds. See PHS Act § 2718(b)(1)(A) and 45 C.F.R. § 158.211.

⁷ 45 C.F.R. § 158.102.

In order to determine whether its MLR met the applicable standard, an issuer is required to submit to CMS, by July 31st of the year following the end of an MLR reporting year, an Annual MLR Reporting Form concerning premium revenue and expenses related to the group and individual health insurance coverage that it issued in the MLR reporting year.⁸ Under 45 C.F.R. § 158.140(b)(1)(iii), CSR payments received by an issuer, to the extent not reimbursed to the provider furnishing the item or service, are subtracted from the incurred claims in the MLR numerator, reducing the MLR, and potentially increasing rebates.

In recognition of the fact that HHS discontinued advance and reconciliation CSR payments beginning October 12, 2017, beginning with the MLR Annual Reporting Form Filing Instructions for the 2017 MLR Reporting Year, CMS instructed issuers to report only the total amount of CSR payments actually received from HHS.⁹ As a result of the Court of Appeals rulings, issuers may recover certain previously unpaid CSR amounts. For issuers that reported payments of less than the full value of the CSRs provided on behalf of their eligible enrollees that receive recovered CSR amounts as a result of the litigation, the MLR reports filed for the affected reporting years will no longer accurately reflect the CSR amounts received. Because the MLR and rebate calculations are based on three years of data,¹⁰ the omission of any recovered CSR amounts for a given benefit year impacts the MLR and rebate calculations for that year and the two subsequent reporting years.¹¹

CMS is issuing this draft guidance to propose instructions consistent with 45 C.F.R. § 153.710(h)(3) to guide issuers on how to revise affected MLR Annual Reporting Forms to include recovered CSR amounts.¹² Further, if the issuer's updated MLR calculations for the individual market using the recovered CSR amounts do not meet or exceed the applicable MLR standard, the issuer may now owe a rebate for the affected reporting years, or the rebate owed may be greater than the rebate previously calculated for the respective reporting year.¹³ This draft guidance therefore also proposes instructions regarding payment of additional rebates owed as a result of recalculating an issuer's MLR to include the recovered CSR amounts.

III. Proposed Guidance

CMS proposes the following instructions to guide the reporting of the recovered CSR amounts and the issuance of additional rebates.

⁸ 45 C.F.R. § 158.110(b).

⁹ MLR Annual Reporting Form Filing Instructions for 2017, <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/2017-MLR-Form-Instructions.pdf>.

¹⁰ See PHS Act § 2718(b)(1)(B)(ii).

¹¹ The MLR reporting form for a given year collects information for each of the two prior reporting years. For example, the 2017 data is reported on the 2017, 2018, and 2019 reporting forms.

¹² As specified in 45 C.F.R. § 153.710(h)(3), in cases where HHS reasonably determines the reporting instructions in § 153.710(g)(1) or (2) would lead to unfair or misleading reporting, issuers must correct their data submissions in a form and manner to be specified by HHS.

¹³ The inclusion of the recovered CSR amounts will reduce the MLR numerator. However, it is possible that the recalculated MLR, which is rounded to the third decimal place, will be unchanged. In this case, the issuer's rebate obligation will be unchanged.

Issuers that recover CSR amounts must submit a revised MLR reporting form for each state and reporting year in which the issuer has a new or greater rebate obligation based on inclusion of the recovered CSR amounts. To determine whether the issuer has a new or greater rebate obligation, the issuer should recalculate its MLRs and rebates to include the recovered CSR amounts for the year for which the issuer received recovered CSR amounts and the two subsequent MLR reporting years. For example, if an issuer received recovered CSR amounts in 2021 for the 2017 benefit year, the issuer may need to submit a revised MLR reporting form and pay rebates for the 2017, 2018, and/or 2019 MLR reporting years based on whether the inclusion of the recovered CSR amounts for the 2017 benefit year impacts the rebate obligation for those year(s). Issuers do not need to submit a revised MLR reporting form for any state or reporting year for which the inclusion of the recovered CSR amounts does not result in a new or greater rebate obligation.

If recovered CSR amounts result in an issuer having a new or greater rebate obligation, such issuer must pay the outstanding rebate amounts to the enrollees who were enrolled in the respective MLR reporting year.¹⁴ CMS has authority to enforce compliance with the MLR reporting and rebate requirements, including compliance with the directions in the final version of this guidance to submit revised MLR reporting forms and to pay any rebates owed as a result of receiving recovered CSR amounts.¹⁵

Issuers must revise their MLR and rebate calculations and pay the additional rebate amounts based on the full recovered CSR amounts, even if issuers do not receive the full amounts, for example as a result of paying legal fees or having sold the rights to receive all or a portion of the recovered CSR amounts to a third party.

If an issuer has been acquired by a new company and the acquired issuer's rebate obligation based on the inclusion of recovered CSR amounts is greater than the rebate amount paid in the respective reporting year, the acquiring company is responsible for submitting the revised MLR reporting form(s) and paying the additional rebate amount to the acquired entity's enrollees in the respective MLR reporting year(s).¹⁶ Similarly, if an issuer has transferred the block of business that was subject to the requirements of 45 C.F.R. Parts 153 and 158 via a 100% assumption reinsurance agreement, the assuming entity is responsible for submitting the revised MLR reporting form(s) and providing rebates owed on the assumed business.¹⁷

When revising the MLR reporting form(s), issuers must use the MLR Annual Reporting Form Filing Instructions that were applicable for the respective reporting year, except that Part 2, Line 2.18 or 2.19, as applicable, and Part 3, Line 1.4 (Reconciled Payments of Cost-sharing Reductions) must reflect the total CSR amount received by the issuer (that is, the CSR amount received from HHS plus any recovered CSR amount) for the relevant state, market, and reporting year. All calculated amounts impacted by the inclusion of the recovered CSR amount must be updated accordingly, including in the prior year (PY2 and PY1) columns of the MLR reporting

¹⁴ 45 C.F.R. § 158.240(b).

¹⁵ See PHS Act § 2718(b)(3); see also 45 C.F.R. §§ 153.710(h)(3), 158.401, 158.402, 158.501, and 158.502.

¹⁶ 45 C.F.R. § 158.110(c).

¹⁷ *Id.*

form(s) for subsequent years. Similar to the standard MLR filing process, affected issuers will need to upload the complete zip file in the Health Insurance Oversight System (HIOS) that includes MLR reporting form(s) for all states, including unmodified copies of the original templates for states where the rebate amounts would not be impacted by inclusion of the recovered CSR amounts.¹⁸ Issuers should also complete a new attestation statement. Issuers should email MLRQuestions@cms.hhs.gov prior to uploading the zip file in HIOS.

For purposes of revising the MLR reporting form(s), issuers should treat the taxes attributable to the recovered CSR amounts in accordance with established accounting principles and tax guidelines, and using allocation methods consistent with 45 C.F.R. § 158.170, including ensuring that any such tax amounts are not double-counted in multiple reporting years.

For purposes of revising the MLR reporting form(s), issuers should not include any adjustments to risk adjustment payments that were not paid in the prior years. Such adjustments must be reported on the MLR reporting form(s) for the same reporting year in which such adjustments are paid or approved by CMS, consistent with 45 C.F.R. § 153.710(h)(2).

Timing of Submission of the Revised MLR Annual Reporting Form(s)

Issuers with a new or greater rebate obligation based on the inclusion of the recovered CSR amounts for one or more of the applicable reporting years must submit the revised MLR reporting form(s) to CMS and disburse additional rebate payments to enrollees in the respective year within 150 days of receiving recovered CSR amounts or publication of the final guidance, whichever is later, except as directed otherwise by CMS in conjunction with an open MLR examination or audit. If an issuer fails to pay the additional rebates by the required deadline, rebate payments must then include late payment interest amounts at the Federal Reserve Board lending rate or ten percent annually, whichever is higher, on the total amount of the additional rebate, accruing from the date on which the additional rebate was due as outlined in this guidance.¹⁹

Affected issuers should contact CMS at MLRQuestions@cms.hhs.gov for instructions on how to submit the applicable prior year MLR reporting form(s) in HIOS.

Rebate Disbursement

The pro-rata rebate amount, the form of the rebate, and the rebate recipient must be determined in accordance with 45 C.F.R. §§ 158.240, 158.241, and 158.242 and be based on the year in which health insurance coverage was received and not based on the year in which the issuer receives the recovered CSR amounts or when the additional rebate is paid. Consistent with 45 C.F.R. § 158.250, rebate disbursements must include a notice explaining to enrollees why they are receiving a rebate or an additional rebate. On May 29, 2015, CMS

¹⁸ While issuers are not required to revise the MLR reporting form(s) for states where the rebate amounts would not be impacted by inclusion of the recovered CSR payment amounts, they are allowed to make such revisions.

¹⁹ 45 C.F.R. § 158.240(f).

published standard rebate notices.²⁰ Issuers may either use the standard notices accompanied by an explanatory cover letter or appropriately modify the standard notices, similar to the examples attached to the Final Risk Corridors Guidance CMS issued on December 30, 2020 and located at <https://www.cms.gov/files/document/mlr-guidance-rc-recoveries-and-mlr-final.pdf>.

For the purposes of determining whether a rebate amount is considered *de minimis* pursuant to the threshold established at 45 C.F.R. § 158.243(a)(2), the issuer must use the full rebate amount in the respective reporting year and not just the additional rebate amount owed as a result of recovered CSR amounts.

Consistent with 45 C.F.R. § 158.244, issuers must make a good faith effort to locate and deliver to an enrollee the additional rebate amount owed. To the extent that issuers' contact information for the recipients of the additional rebates may be outdated, to demonstrate a good faith effort, issuers should pursue alternative means, if necessary, in addition to steps they ordinarily take to locate rebate recipients. An issuer would be considered to have made a good faith effort if the issuer contacted former enrollees at the last known phone number or email address and performed a search on the internet or social media, or if the issuer utilized other methods that the issuer would use to pursue debt collection for an older debt. If, after making a good faith effort, an issuer is unable to locate a former enrollee, the issuer must comply with any applicable State law regarding the disposition of unclaimed rebates.²¹

IV. Where to Get More Information

If you have any questions regarding this Bulletin, please contact CMS by email at MLRQuestions@cms.hhs.gov.

²⁰ See Notice to Subscribers in the Individual Market (Notice #1), available at <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/mlr-notice-1-to-subscribers-in-individual-market-20150528.pdf>; and Instructions for Notices 1, 2, and 3, available at <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/mlr-rebate-noticeinstructions-20150528.pdf>. According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0938-1164.

²¹ 45 C.F.R. § 158.244.