DEPARTMENT OF HEALTH and HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information & Insurance Oversight
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**From:** Peter Nelson, Deputy Administrator and Director, Center for Consumer Information & Insurance Oversight

**Title:** Insurance Standards Bulletin Series -- INFORMATION

**Subject:** Offering of off-Exchange-only plans without "CSR loading"

## I. Purpose

On August 3, 2018, the Centers for Medicare & Medicaid Services (CMS) issued a bulletin providing guidance[1] in situations where issuers increase or "load" plan-specific premium rates, usually on silver-level qualified health plans (QHPs), to compensate for the lack of reimbursement of cost-sharing reductions (CSRs), a practice commonly referred to as "CSR loading." The bulletin encouraged states to allow for plan offerings that did not include this load, and that would only be available outside the Exchange.[2] To prepare for the possibility of the continued absence of an appropriation that could be used to fund CSR payments to issuers, and in light of the adverse effect that CSR loading can impose on premiums for unsubsidized consumers, CMS is issuing this bulletin to encourage states that permit CSR loading to consider requiring issuers that load QHP premiums to offer and market unloaded plans that are available exclusively outside the Exchange.

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[1] See CMS Insurance Standards Bulletin Series – INFORMATION; Offering of plans that are not QHPs without CSR "loading" (Aug. 3, 2018), available at https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/offering-plans-not-qhps-without-csr-loading.pdf.
[2] The August 3, 2018, bulletin explained that an issuer could offer a unique, unloaded off-Exchange plan that is similar, but not identical, to a loaded QHP offered on-Exchange. See id. By contrast, this guidance outlines an alternative approach by which an issuer could offer a unique, unloaded plan off-Exchange.

## II. <u>Background</u>

Sections 1402 and 1412 of the Affordable Care Act (ACA) and their implementing regulations at 45 C.F.R. Part 156 established a CSR program for QHPs in the individual market. Under the CSR program, QHP issuers must reduce cost sharing for eligible enrollees (generally, those with household incomes between 100 and 250 percent of the federal poverty level who are also eligible for the premium tax credit and who are enrolled in a silver plan through the Exchange).[3] Under the process set forth at 45 C.F.R. § 156.430, QHP issuers would notify the U.S. Department of Health and Human Services (HHS) of CSRs provided to eligible enrollees, and the Department of the Treasury, after receiving notice from HHS, would have made periodic and timely advance payments to issuers, with reconciliation after the end of the benefit year equal to the value of those reductions.

On October 11, 2017, the Attorney General of the United States provided HHS and the U.S. Department of the Treasury with a legal opinion regarding CSR payments made to issuers of QHPs.[4] In light of that opinion, and the absence of an appropriation that could be used to fund CSR payments, CSR payments to issuers were stopped, and CSR payments are prohibited unless and until a valid appropriation exists.[5] Following this termination of federal CSR payments, and in the absence of Congressional action to fund CSRs, many states have been allowing or instructing their issuers to increase premiums only, or primarily, on silver-level QHPs to compensate for the cost of offering CSRs, since most eligible enrollees receiving CSRs are enrolled in silver plans. For example, some states instruct issuers to add a load factor on exchange silver plans in excess of 40 percent. This load can leave unsubsidized enrollees purchasing coverage both on and off the exchange with silver plan premiums significantly higher than those plan premiums would have been otherwise.

Under the single risk pool regulations at 45 C.F.R. § 156.80(d)(2), when varying premium rates for a particular plan from the market-wide index rate for the relevant state market, issuers may make a plan-level adjustment based on certain actuarially justified plan-specific factors. Under §156.80(d)(2)(i), this may include an adjustment for the actuarial value and cost-sharing design of the plan, including, if permitted by the applicable state authority, accounting for unpaid CSR amounts provided to eligible enrollees.[6] However, the ability to vary premium rates has resulted in some consumers who are not eligible for the premium tax credit or CSRs being enrolled in a QHP for which the issuer applied a load to account for a cessation of federal funding for CSR payments. Those unsubsidized consumers absorb the full impact of the load in the form of higher premiums, despite not being eligible for subsidies.

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[3] 45 C.F.R. § 155.305(g). CSRs also are available to Indians enrolled in any metal tier in certain circumstances. See ACA section 1402(d) and 45 C.F.R. §§ 155.305(g)(3) and 155.350.
[4] See Op. Att'y Gen. (Oct. 11, 2017), discussing *US. House of Reps. v. Burwell,* 185 F. Supp. 3d 165 (D.D.C. 2016).
[5] See Memorandum from Eric Hargan, Acting Secretary, to Seema Verma, CMS Administrator, Payments to Issuers for Cost-Sharing Reductions (CSRs) (Oct. 12, 2017), available at https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf.
[6] 90 FR 4424, 4488 (Jan. 15, 2025).

## III. Off-Exchange-Only Option

Given that many issuers continue to load plans to account for the cessation of federal CSR payments, CMS encourages states to require issuers to offer and market plans in the individual market that will be available exclusively off-Exchange and will not include any CSR load. Because plan-level adjustments to the market-wide index rate are permitted but not required under federal law,[7] an issuer may, subject to applicable state law, choose not to apply any CSR load to plans that are sold exclusively off-Exchange since such plans will not include enrollees who receive CSRs.

Requiring issuers to offer and market plans that are available exclusively off-Exchange that do not include the CSR load would allow unsubsidized enrollees to purchase a plan at a lower premium. Offering lower premium options that are available exclusively off-Exchange would have many potential benefits, including allowing consumers who do not qualify for the premium tax credit to purchase coverage that would otherwise be unaffordable; promoting consumer choice by increasing the number of affordable, high actuarial value plans that are available for purchase; and reducing the number of unsubsidized individuals that forgo comprehensive health insurance coverage, thereby improving the individual market risk pool, which could lead to further premium reductions for plans offered through and off an Exchange.

Because section 1301(a)(1)(C)(ii) of the ACA, as implemented by 45 C.F.R. § 156.255,[8] requires an issuer to charge the same premium rate without regard to whether a plan is offered through an Exchange, or whether the plan is offered directly from the issuer or through an agent, the issuer would need to offer a unique plan, with a unique Health Insurance Oversight System (HIOS) plan identifier, sold exclusively off-Exchange without the CSR load.[9] The definitions at 45 C.F.R. § 144.103 provide that a "plan" is the pairing of the health insurance coverage benefits under a "product" with a particular cost-sharing structure, provider network, and service area. Under this framework, where plans under a product have a different cost-sharing structure, the plans are not considered the same plan.

CMS interprets these definitions to allow a plan sold exclusively off-Exchange without a CSR load to be recognized as offering a different cost-sharing structure than an otherwise identical plan with a CSR load that provides CSR payments. This reflects the fact that plans that provide CSR payments include plan variations under 45 C.F.R. § 156.420 with a mix of separate cost-sharing structures to administer CSRs. Without federal CSR payments to cover the difference in cost-sharing to the issuer, these plan variations of the standard plan effectively result in an actuarial value and cost-sharing design that are different than a plan that does not provide CSRs. Therefore, a plan sold exclusively off-Exchange without a CSR load would constitute a unique plan relative to an otherwise identical plan with a CSR load and would receive a unique HIOS plan identifier.

[7] See 45 C.F.R. § 156.80(d)(2).
[8] See also PHS Act section 2701 and ACA section 1312(c); 45 C.F.R. §§ 147.102 and 156.80.
[9] CMS has interpreted the guaranteed availability requirements of section 2702 of the PHS Act to mean that a QHP offered through an Exchange generally must be available outside the Exchange. Accordingly, even if an issuer offers a unique unloaded plan exclusively off-Exchange, the issuer generally must continue to ensure that a loaded plan offered through an Exchange is available at the same premium rate outside the Exchange.

Off-Exchange plans that are not CSR-loaded are essential to providing individuals and enrollees who are not eligible for subsidized coverage access to affordable, comprehensive coverage that is not beyond their financial reach due to CSR loading. CMS urges states to consider requiring issuers to offer and market plans in the individual market that will be available exclusively off-Exchange and will not include any CSR load.

**Where to get more information**

If you have any questions regarding this bulletin, please contact the Center for Consumer Information & Insurance Oversight at marketreform@cms.hhs.gov.