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Roger A. Sevigny
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BULLETIN
Docket No.: INS-15-061-AB

TO: All New Hampshire Licensed Health Carriers and Producers

FROM: Roger A. Sevigny
Insurance Commissioner

DATE: October 8, 2015

RE: Guidance on Federal Group Size Amendment, Including REVISED Guidance on Application of Extended Transition to Individual and Group Policies and Employee Counting

I. Federal Group Size Amendment

In a bill signed by the President on October 7, 2015, Congress amended 42 USC 18024(b)(3) to eliminate the requirement under the federal Affordable Care Act (ACA) that, as of January 1, 2016, the small group health insurance market include groups of 1-100 in all states. Under the newly enacted federal law, the small group market will include groups of 1-50, while states will have the option to extend their small group markets to include groups of 51-100.

The purpose of this Bulletin is to amend earlier guidance issued by the New Hampshire Insurance Department (NHID) to address this change in federal law. Under New Hampshire law, the small group market is defined to include groups with 1-50 employees. RSA 420-G:2, XVI. With the federal law mandating the change to include groups of 51-100 no longer coming into effect in January 2016, the maximum small group size will remain at 50 in 2016.

The Department will allow carriers to resubmit small group rate filings as the federal certification process permits. As of the date of issuance of this bulletin, based on CMS requirements, the Department may only permit submissions/resubmissions for rates with effective dates on or after April 1, 2016.

II. Prior Guidance on Transition Policy

On March 5, 2014, the federal Centers for Medicare and Medicaid Services (CMS) issued an Insurance Standards Bulletin providing for an extension of the transition period for non-grandfathered coverage in the small group and individual health insurance markets. Under the transition guidance, certain non-grandfathered health insurance coverage is not considered to be out of compliance with some market reforms under the ACA if specific conditions are met. Health insurance issuers may choose to continue such coverage, and affected individuals and businesses may choose to renew such coverage.

On March 11, 2014, the NHID adopted CMS's extended transitional guidance via the New Hampshire Insurance Department March 11, 2014 Bulletin INS 14-009-AB.[1] On April 20, 2015 and May 13, 2015 the NHID issued Bulletins INS-15-014-AB and INS-15-021-AB ("2015 Bulletins"), which offered additional guidance relating to transition policies, including among other things an explanation of the factors the NHID considers in determining whether coverage has changed so much as to disqualify it from renewal under the transition guidance, and the methodology to be used in New Hampshire for employee counting.[2] The 2015 Bulletins also addressed application of the extended transition period to groups that were eligible to purchase insurance on the large group market in 2015, but that would be considered small groups pursuant to 42 USC 18024(b)(3) starting on January 1, 2016.

III. Legal Authority

The New Hampshire Insurance Commissioner "is charged with the rights, powers, and duties pertaining to the enforcement and execution of the insurance laws" of New Hampshire. NH RSA 400-A:3. The Commissioner has general rulemaking and enforcement authority with respect to regulation of the business of insurance in New Hampshire.

In its March 5, 2014 Insurance Standards Bulletin, CMS granted authority to states to allow health insurance issuers that have sold a policy that meets the extended transitional standards it set forth to renew such policies through October 1, 2016. States were given the option to adopt the transitional policy through October 1, 2016 or for a shorter amount of time and were given the following additional options in adopting the extended transitional policy:

- Adopt for both the individual and small group markets;
- Adopt for the individual market only; or
- Adopt for the small group market only.
- States were also given the option to adopt the transitional relief policy only for large businesses that purchase insurance in the large group currently but will be considered small groups starting on January 1, 2016.

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[1] http://www.nh.gov/insurance/media/bulletins/2014/documents/ins_14_009_ab.pdf

[2] http://www.nh.gov/insurance/media/bulletins/2015/documents/ins_15-014-ab.pdf; http://www.nh.gov/insurance/media/bulletins/2015/documents/ins_15-021-ab.pdf.

IV. Federal Group Size Amendment and New Hampshire Implications

As discussed above, 42 USC 18024(b)(3) has now been amended to eliminate the requirement that the small group market include groups of 1-100 in all states as of January 1, 2016. Under New Hampshire law, the small group market is defined to include groups with 1-50 employees. RSA 420-G:2, XVI. With the federal law mandating the change to include groups of 51-100 no longer in effect, the maximum small group size will remain at 50. Therefore, the transition policy with respect to groups of 51-100 is no longer necessary in New Hampshire, and those portions of the 2015 Bulletins which addressed this transition are rescinded.

The portions of the 2015 Bulletins that do not relate to the transition in small group size from 51 to 100 remain in effect. For purposes of clarity, these portions are consolidated and appear below.

V. Definition of Coverage Change

For individual market coverage and for groups that were in the small group market in 2013, only coverage that was in effect as of October 1, 2013 may qualify for the extended transitional relief. In defining whether a current policy was in effect on October 1, 2013, the NHID will look to the following relevant legal standards:

- **Standards for Grandfathered Plans**. 45 CFR 147.140 states that to maintain grandfathered status, the health plan coverage cannot:
    - eliminate all or substantially all benefits to diagnose or treat a particular condition;
    - increase a percentage cost-sharing requirement (such as an individual's coinsurance requirement);
    - increase a fixed-amount cost-sharing requirement other than a copayment (for example, deductible or out-of-pocket limit), by an amount that exceeds the maximum percentage increase as defined by 45 CFR 147.140 (g)(3)(ii);
    - increase a fixed-amount copayment by the greater of:
        - An amount equal to $5 increased by medical inflation, as defined in paragraph 45 CFR 147.140(g)(3)(i) (that is, $5 times medical inflation, plus $5), or
        - An amount that exceeds the maximum percentage increase as defined by 45 CFR 147.140 (g)(3)(ii);
    - Experience for any tier of coverage for any class of similarly situated individuals (as described in 45 CFR 146.121(d)) a decrease in the contribution rate by the employer or employer organization calculated by either the cost of coverage as defined by 45 CFR 147.140(g)(3)(iii)(A) or a formula by more than 5 percentage points;
    - Add an annual or lifetime limit on the dollar value of benefits; or
    - Decrease an annual limit on the dollar value of all benefits.

In this case, relative increases or decreases are measured against the amounts in place on October 1, 2013. Carriers should consult 45 CFR 147.140 for the detailed standards.

- **Regulatory Parameters for Uniform Modifications of Coverage –** Under the standards for recertification for plan years beginning in 2016, a plan will be considered the same plan under 45 CFR 147.106 only if:
    - Changes made are solely pursuant to applicable Federal or State requirements;
    - The product is offered by the same health insurance issuer;
    - The product is offered as the same product network type;
    - The plan covers a majority of the same counties in its service area;
    - Changes in cost-sharing are solely related to changes in cost and utilization of medical care or to maintain the same metal tier level or coverage;
    - The plan provides the same covered benefits except for changes in benefits that cumulatively impact the A/V by no more than 2 percent.

  Carriers should consult 45 CFR 147.106 for the detailed standards.

The NHID will review these standards cumulatively, meaning that a plan will be considered to no longer qualify for transitional status if it violates any requirement in either of the standards noted above. In addition, the NHID interprets the above standards to prohibit the following types of changes by transitional plans:

- The addition of pediatric dental coverage; and
- Changing the product line under which the coverage is offered.

For both individual and small group plans, relative increases or decreases permitted within the Grandfathered standards will be measured against the amounts in place on October 1, 2013.

VI. Cancellation of Transitional Plans

In compliance with applicable state and federal standards, an issuer may terminate a transitional plan prior to coverage years beginning October 1, 2016 and replace the plan with ACA compliant coverage.

VII. Employee Counting

The ACA's method of counting employees for the purposes of determining whether a purchaser falls in the individual, small group or large group market is different from the method traditionally used in New Hampshire. During the initial implementation period, the NHID issued

Bulletin INS 13-017-AB[3] on August 16, 2013, stating that New Hampshire rules for the counting of employees would continue to be used in certain circumstances.

However, in view of federal preemption and in the interest of clarity and uniformity, federal counting rules should be used in all cases starting with policies that are issued or renewed on or after January 1, 2016. Specifically, the federal counting methodology that will apply is the methodology codified in 45 CFR 155.20.

VIII. Notification

Issuers intending to renew coverage under the transition policy must notify the NHID of their intention. The notice to the NHID shall include copies of all associated consumer notices, which must comply with the standards in CMS guidance. Send the notice to Marlene Sawicki at marlene.sawicki@ins.nh.gov with the subject line of "Transition Policies."

IX. Contact Information

Questions related to this bulletin should be directed to Jennifer Patterson, Health Policy Legal Counsel, at 603-271-2261 ext. 215, or email at jennifer.patterson@ins.nh.gov; or Michael Wilkey, Director of Compliance and Consumer Services at the New Hampshire Insurance Department, at michael.wilkey@ins.nh.gov or by phone at (603)-271-2261 ext. 330.

[3] http://www.nh.gov/insurance/media/bulletins/2013/documents/ins_13-017-ab-mktrules.pdf