



**THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

21 SOUTH FRUIT STREET SUITE 14
CONCORD, NEW HAMPSHIRE 03301

Roger A. Sevigny
Commissioner

Alexander K. Feldvebel
Deputy Commissioner

May 24, 2013

The Honorable Andy Sanborn, Chairman
and Committee Members
Senate Commerce Committee
Legislative Office Building, Room 101
Concord, New Hampshire 03301

Re: HB 668 – Individual and Small Group Market Rules

Dear Chairman Sanborn and Committee Members:

At the March 26, 2013 hearing on HB 668, I offered written and oral testimony about the importance of passing this bill, whose purpose is to prevent federal preemption of state insurance regulatory authority by aligning the market rules for New Hampshire's individual and small group health insurance markets with the requirements that will take effect in 2014 under the federal Affordable Care Act ("ACA"), and giving the New Hampshire Insurance Department authority to enforce these newly-aligned standards. I am writing now to provide you with more specific information about the likely consequences for the state if HB 668 does not pass.

1. HB 668 is not just about the Exchange. As my staff and I have explained repeatedly, the ACA market reforms apply to the entire individual and small group health insurance markets, both inside and outside the Exchange. Currently, these markets are governed by detailed state law requirements set forth in RSA chapter 420-G. The new federal standards, which differ in many significant respects from current New Hampshire law, will apply to **all** policies issued in the individual and small group markets on or after January 1, 2014. The market reforms are neither limited to, nor dependent upon, the Health Exchanges established under the ACA. Regardless of when the Exchange set up for New Hampshire by the federal government is operational, the ACA market reforms will still apply to **all** individual and small group policies issued in 2014.

2. Failure to pass HB 668 will result in the federal government taking over regulation of New Hampshire's entire individual and small group markets. If the state's market rules are not aligned with ACA requirements through the passage of HB 668 during the 2013 legislative session, the federal government will take over responsibility for enforcing those market rules for the individual and small group health insurance markets in New Hampshire. The ACA is binding on the insurance carriers, whether or not HB 668 passes, because whenever there is a conflict between state and federal law, federal law will preempt state law. Moreover, the Insurance Department lacks general authority to enforce the ACA. Without the passage of HB 668, wherever there is a federal requirement that is not contained in state law, even if it does not conflict with any state law, the Insurance Department will be without authority to enforce that

law, subjecting the health carriers throughout these two markets to federal regulatory jurisdiction.¹

3. The uncertainty about what rules will govern the state's health insurance markets in 2014 has a direct impact on New Hampshire small businesses, insurance carriers, producers and consumers. New Hampshire health carriers are currently in the process of designing insurance products and setting rates for their 2014 ACA-compliant policies. Similarly, insurance producers are trying to understand the governing rules so they will be prepared to advise their clients. Without passage of HB 668, these carriers and producers will not know who the market regulator will be, or what market rules will apply to 2014 products, either within or outside of the Exchange. In addition to the carriers and producers, consumers and small employers who are beginning now to plan for 2014 are already experiencing ambiguity and confusion about the insurance products that will be available to them next year. Legislative guidance on New Hampshire's 2014 market rules will help to alleviate this confusion.

Passage of HB 668 is an opportunity to give clarity to New Hampshire businesses, health insurance carriers, producers and consumers, and to retain New Hampshire's long-standing regulatory authority over health insurance rather than ceding that authority to the federal government. I urge you to vote for it.

Thank you for your careful consideration of this important bill. I would be glad to answer any questions you may have.

Very truly yours,



Roger A. Sevigny

Cc: Senate Commerce Committee Members

Attachments:

Letter to CCIIO (Gary M. Cohen) - March 15, 2013
Letter to Senate Commerce Committee - March 26, 2013
Outline of HB 668 Market Rules Bill – March 26, 2013

¹ On March 15, 2013, I sent the attached letter to the U.S. Department of Health and Human Services indicating that if HB 668 passed, New Hampshire would be in a position to substantially enforce the market rules and other provisions of the ACA that go into effect in 2014 and that, for this reason, HHS would not have to assume enforcement responsibility in New Hampshire for these provisions of federal law. If HB 668 does not pass, I will be required to inform the US DHHS that New Hampshire does not have the ability to enforce the market rules provisions of the ACA. In that event, the federal agency will take over regulation of New Hampshire's individual and small group markets.



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Roger A. Sevigny
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March 15, 2013

Gary M. Cohen, Deputy Administrator and Director
Center for Consumer Information and Insurance Oversight
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dear Mr. Cohen:

I am writing in response to your February 15, 2013 letter inquiring about the status of New Hampshire's enforcement authority with respect to the Affordable Care Act ("ACA").

As noted in your letter, on August 24, 2010 New Hampshire Governor John Lynch indicated that the New Hampshire Insurance Department had full authority to enforce the consumer protections and market reforms that took effect prior to January 1, 2014 under the ACA. This remains true with respect to the portions of the ACA that are presently in effect.

With respect to the market reforms that take effect January 1, 2014, I expect that we will also have full enforcement authority. New Hampshire HB 668, which was passed by the New Hampshire House on March 13, 2013, would align New Hampshire's market rules for the individual and small group markets with those that will take effect in 2014 under the ACA, including the new rating parameters for health insurance premiums, the extension of guaranteed availability protections to the individual market, and coverage of essential health benefits. In addition, in order to be able to address unanticipated inconsistencies as they materialize between state law and federal standards under the ACA, the bill would reestablish the authority of New Hampshire's Joint Health Reform Oversight Committee to allow the Insurance Commissioner to enforce provisions of federal law on a temporary basis where there is a conflict between state and federal law. A copy of HB 668 is attached.

As you know, New Hampshire has been granted conditional approval for a partnership exchange. Through the partnership process, my office will keep CCIIO apprised of the status of HB 668 and of other efforts to align New Hampshire's enforcement authority with ACA requirements. With the passage of HB 668 by the end of the current legislative session, New Hampshire will have the authority and ability to substantially enforce the additional consumer protections that go into effect on January 1, 2014.

Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Sevigny".

Roger A. Sevigny
Commissioner

cc: Lisa M. Campbell
Acting Director, Compliance and Enforcement Division
Office of Oversight
HHS/CMS/CCIIO



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March 26, 2013

The Honorable Andy Sanborn, Chairman
Senate Commerce Committee
Room 101 LOB
Concord, NH 03301

Re: HB 668, Relative to Group and Individual Health Insurance Market Rules

Dear Chairman Sanborn:

The New Hampshire Insurance Department ("Department") strongly supports HB 668, Relative to Group and Individual Health Insurance Market Rules, as amended by the House. The bill, which was filed at the Department's request, has as its primary goal preservation of the Department's regulatory authority over health insurance. After the new market rules under the federal Affordable Care Act ("ACA") take effect on January 1, 2014, state insurance laws will be preempted if their enforcement would prevent the application of the federal law. Importantly, the federal law preserves state regulatory authority where state law does not conflict with federal law.

As amended, HB 668 makes the minimal changes required to preserve state regulatory authority, while retaining longstanding New Hampshire-specific provisions that do not conflict with the ACA. Preserving the State's authority as the primary insurance regulator promotes clarity for the regulated market. A system of dual regulation in which both the State and the federal government assert jurisdiction would be difficult to navigate for consumers, regulators and the regulated community. Such inefficiencies could lead to delays in enforcement actions and varying opinions and interpretations of rules.

The bill, as amended by the House, reflects changes recommended by the Department in view of input from stakeholders. Since producing our first draft of the bill, the Department has met with carriers, producers, consumer organizations and other interested parties about this bill. The Department found strong support among stakeholders for those provisions of the bill that are necessary to align New Hampshire's market rules with the ACA, thereby preserving the state's regulatory authority. However, there was not always stakeholder consensus about the best public policy approach in those areas where the ACA gives states flexibility to adopt one of several possible approaches.

The following is an overview of the key provisions of the bill:

The bill aligns New Hampshire's market rules for the individual and small group markets with those of the ACA by eliminating underwriting and preexisting condition waiting periods and adopting the ACA's allowable rating factors and employee counting rules. The rating rule change with the greatest potential for controversy is that of geographic rating. The ACA allows states to decide whether to allow state-specific geographic rating areas, and the original draft of the bill would have given the Department authority to adopt geographic rating areas by county. As amended, based on our discussions with stakeholders, the bill would retain the status quo which prohibits geographic rating. The bill as amended by the House would also require the Department to prepare a report highlighting alternative approaches to geographic rating and their likely impacts. This would facilitate legislative consideration of the issue in a future session.

The bill aligns employee counting rules by adopting the federal definition of employee. One result of this change is to eliminate "groups of one" or sole proprietors from the small group market. The bill retains the existing definition of a small employer as one having 50 or fewer employees until January 1, 2016, the latest date allowed under the ACA. As of 2016, the bill would align the definition of small employer with the federal standard of 100 or fewer employees.

The bill addresses adverse selection concerns in a manner that is consistent with federal law. It provides for a limited open enrollment period in the individual market for both Exchange and non-Exchange sales. The bill leaves in place the minimum participation requirements in current law for the small employer market; however, these provisions have been extended to apply to the SHOP exchange, and modified to address concerns we heard at our various stakeholder meetings.

One significant issue not addressed in this bill is what to do with the various market mechanisms (including the state and federal high risk pools and the state risk subsidy mechanism) that were previously set up to address excess risk in the individual market. This bill does not address these issues because they are addressed in HB 526, also pending before this committee.

Thank you for your consideration of HB 668, which would accomplish the critically important role of preserving the state's primary regulatory authority on health insurance matters as the ACA's core reforms take effect in 2014. The attached outline provides more detail about the changes made by the bill. My staff stands ready to answer any questions, or to provide any other assistance that would promote clarity on these issues.

Sincerely,



Roger A. Sevigny
Commissioner

cc: Senate Commerce Committee Members

Outline of HB 668 (Market Rules Bill)

Overall Purpose of HB 668

- Align the market rules for New Hampshire's individual and small group health insurance markets with the requirements that will take effect in 2014 under the Affordable Care Act ("ACA")
- Avoid federal preemption
- Avoid dual and conflicting regulatory requirements
- Insurance Department-requested bill

Key Changes Made By HB 668 to Align State and Federal Market Rules

- **Rating factors** – as of 2014, ACA allows 4 rating factors in individual and small group markets:
 - o tier/family v. self-only coverage;
 - o geographic rating area;
 - o age; and
 - o tobacco use

HB 668 moves to the ACA rating factors, which is a change from the status quo for both markets.
- **Limited open enrollment periods** in individual market
 - o under the ACA, the individual market both inside and outside the exchange must limit enrollment to certain specified periods
 - o the goal is to discourage people from waiting until they need health care to purchase insurance.
- **Definition of employee** for purposes of determining whether an employer belongs in the small or large group market
 - o currently the state and federal definitions used for this purpose are different
 - state only counts "eligible" employees – e.g., full-time
 - federal definition includes all employees
 - o state could retain its separate definition, but this would likely cause confusion
 - o Bill adopts the federal definition and counting methodology.
 - o Using federal definition results in **the elimination of "groups of one"** in the small group market, because self-employed individuals are not considered employees.
- **List billing v. composite billing** for small employer groups
 - o under ACA, carriers must use list billing to calculate bills in the small group market

- List billing requirement applies to small groups both inside and outside of the Exchange.
 - The bill includes language requiring carriers to provide employers with a billing statement that shows premiums on both a list bill and a composite bill basis.
- **Other “Clean Up” changes:**
- **Essential Health Benefits** –all policies issued in the individual and small group markets must cover specific services listed in the ACA; NHID will enforce requirement.
 - **Grandfathered health plans** –plans that were in effect on March 23, 2010 and that have not been substantially changed are considered “grandfathered” and will remain subject to the current rating rules even after 2014.
 - **Medical underwriting** –the bill prohibits medical underwriting in the individual and small group markets (except for grandfathered individual plans). Large group products continue to have medical underwriting.
 - **Guaranteed issue and renewal** - the bill requires guaranteed issue and renewal in the individual and small group markets (except for grandfathered individual plans).
 - **Preexisting condition exclusion** –the bill prohibits preexisting condition exclusions in the individual and group markets (except for grandfathered individual plans).
 - **Prohibition on Lifetime and Annual Limits**– the bill prohibits lifetime and annual limits in the individual, small group and large group markets (except for grandfathered individual plans).
 - **Coverage of Preventive Health Services** - the bill requires coverage of preventative health services without any cost-sharing in the individual, small group and large group markets (except for grandfathered individual plans).
 - **Repeal of NH Health First** - This benefit product is underutilized and is inconsistent with the ACA’s single risk pool requirement.

Specific Issues Where There May Be Questions

- **Geographic rating zones**
 - Federal regulations allow states to establish geographic rating zones, based on regional cost differences.
 - Currently, New Hampshire law does not allow geographic rating.
 - Allowing geographic rating could more accurately reflect actual regional cost differences, but could also potentially result in higher costs in areas where gaining access to health care is already challenging.

- The bill would keep the status quo of not allowing geographic rating; the state would be considered a single geographic zone.
 - The bill would require the Department to study and issue a report on the potential approaches to geographic rating and their likely impacts.
- **Uniform age rating levels**
 - Federal regulations establish a specific methodology for age rating
 - States may deviate from this methodology under certain circumstances as long as the ceiling and floor are maintained.
 - The bill adopts the federal methodology, and makes it mandatory for all carriers.
- **Tobacco rating in small group market**
 - Tobacco use is presently a permissible rating factor in the individual but not the small group market.
 - Under the ACA, tobacco is a permissible rating factor in both markets. However, under a proposed federal regulation, the rating factor may be used in the small group market only in connection with a wellness program that allows any individual participating in a tobacco cessation program to fully offset the rate increase that is due to the tobacco rating factor.
 - The bill would make tobacco a permissible rating factor in the small group market, and keep it as a permissible factor in the individual market.
 - The bill would have the Insurance Department study whether to require carriers to link use of the tobacco rating factor to wellness programs in the individual market.
- **Size of employers in small group market**
 - The ACA defines the small group market as 1-100 employees, but allows states whose small group is defined as 1-50 employees to keep that definition until 2016.
 - As of 2016, small group will be defined as 1-100 employees in all states.
 - The bill would keep the 1-50 small group size until 2016, and then change to 1-100.
- **Participation requirements**
 - The bill retains the state's existing 75 percent (37.5 percent for multiple plans) employee participation requirement in the small group market.
 - The bill excludes from the calculation employees who leave the employer coverage because it is unaffordable, and who qualify for a tax credit on the exchange. It also excludes employees (or their dependents) covered by another health plan, including a government plan such as Medicaid.

- The bill would require the SHOP exchange to use the same 75 percent participation requirement, calculated with respect to participation in the SHOP as a whole.
- **Special open enrollment period for individuals where employer coverage is unaffordable** – Because the employer’s open enrollment period may not mirror the enrollment period in the individual market, the bill would allow the department to adopt rules creating a special open enrollment period in the individual market (including the exchange) for employees whose employer-offered coverage is unaffordable.
- **Health reform oversight committee consistency language**
 - The bill readopts RSA 420-N:6, which enables the oversight committee to declare a conflict of law and authorize the Department to enforce a federal law provision on a temporary basis pending legislative action.
 - Given that the federal standards are complex and still evolving, this provision is needed to avoid preemption of state law and to preserve the state’s role as the primary regulator of insurance.
- **Requirement that carriers provide small employers with composite as well as list billed premiums.**
 - The original bill gave employers the option to request composite as well as list billed premium rates.
 - Based on concern that employers would believe they were required to use the list bill rates, the bill as amended by the House makes it mandatory for carriers to provide both types of rates.