



**The State of New Hampshire  
Insurance Department**  
21 South Fruit Street, Suite 14  
Concord, NH 03301

Roger A. Sevigny  
Commissioner

Alexander K. Feldvebel  
Deputy Commissioner

**BULLETIN**  
**Docket No.: INS 13-017-AB**

**TO:** All New Hampshire Licensed Health Carriers and Producers  
**FROM:** Roger A. Sevigny   
**DATE:** August 16, 2013  
**RE:** Market Rules Guidance

**1. Rating factors**

Senate Bill 148, enacted as 2013 N.H. Laws chapter 272, establishes that as of January 1, 2014 the permissible rating factors in New Hampshire's individual and small group markets will be those allowed under the federal Affordable Care Act ("ACA"), including regulations adopted thereunder, except that the state will be considered a single geographic rating area. The statutory provisions of the ACA and the market rules regulation adopted by the U.S. Department of Health and Human Services, Centers for Consumer Information and Insurance Oversight ("CCIIO"), provide extensive guidance on how these rating factors are to be implemented.

Resources:

SB 148: <http://www.gencourt.state.nh.us/legislation/2013/SB0148.pdf> - (see sections 5 and 6)

ACA rating factor provision, 42 USC 300gg: <http://uscode.house.gov/>

CCIIO market rules regulation: <http://www.gpo.gov/fdsys/pkg/FR-2013-02-27/pdf/2013-04335.pdf>

**2. Employee counting/group size**

In determining how to apply the small group rating factors, it is necessary to adopt a method of counting employees for purposes of determining whether a purchaser falls in the individual, small group, or large group market. The ACA's method of counting employees for purposes of

determining market membership is different from the method traditionally used in New Hampshire. If state counting rules prevent the application of any provision of the ACA or are not consistent with the method of applying rating factors set out under the ACA, then under preemption standards and/or SB 148, the federal method shall apply. The Department has obtained guidance from CCIIO and the U.S. Department of Labor specifically on New Hampshire employee counting rules and New Hampshire's definition of a small employer. Considering this guidance, as well as the Department's analysis of preemption standards together with the requirements of SB 148, the Department will enforce the following approach to specific employee counting issues:

- a. May sole proprietors continue to choose between the individual and small group market?** Answer: No. Beginning January 1, 2014, sole proprietors must obtain coverage in the individual market, either on or off the Exchange. Under the common-law definition of employee, which the federal government has adopted for purposes of the ACA, an owner or sole proprietor is not considered an employee. New Hampshire's law allowing owners to be counted as employees is preempted because it is contrary to the federal definition, and thus to the intent of the ACA. Counting the owner as an employee could increase a group that would otherwise have 50 employees to 51, thus moving it into the large group market. Such a result would be contrary to the ACA's statutory purpose of including groups of this size in the small group market.
- b. How will part-time employees be counted?** Answer: For purposes of determining whether an employer falls into the small or large group market, New Hampshire has traditionally used the approach of counting only those part-time employees who are eligible for the employer's health insurance coverage. Federal law defining the small and large group markets requires that all employees, both full time and part time, be counted in some reasonable fashion. The Department's analysis is that the eligible employee counting method does count part time employees in a reasonable fashion and is, on the whole, more protective of insurance consumers than a counting method that counts each full time and part time employee as one or that uses the notion of full time equivalents. In addition, New Hampshire's existing counting method is consistent with the requirement in SB 148 that carriers shall apply the ACA rating factors. Therefore, the existing state counting method that only counts part-time employees if they are eligible for employer-sponsored coverage shall remain in effect.
- c. Will the small employer market include groups with up to 100 employees, or will the maximum group size remain at 50?** Answer: The maximum small group size in New Hampshire will remain at 50 until 2016. Current state law sets 50 employees as the maximum, and this provision of state law is not preempted by federal law until 2016, when the maximum small group size will be required to be set at 100 employees in all states.

### **3. Other ACA Market Reforms**

The following federal requirements applicable to all individual and group policies (both large and small group) will take effect as of January 1, 2014:

- Guaranteed availability of coverage (42 USC 300gg-1)
- Guaranteed renewability of coverage (42 UCS 300gg-2)
- Prohibition on discrimination based on health status (42 USC 300gg-4)
- Prohibition on excessive waiting periods (42 USC 300gg-7)
- Coverage for individuals participating in approved clinical trials (42 USC 300gg-8)
- No lifetime or annual limits (42 USC 300gg-11)
- Prohibition on rescissions (42 USC 300gg-12)
- Coverage of preventive health services (42 USC 300gg-13)
- Patient protections (42 USC 300gg-19a)

The following federal requirements applicable to all individual and small group policies (but excluding large group) will take effect as of January 1, 2014:

- Coverage for essential health benefits (42 USC 300gg-6(a))
- Single risk pool requirement (42 USC 18032(c))
- Limited open enrollment period for individual market (market rules regulation)

Any state law provisions that prevent the application of these federal requirements will be preempted as of January 1, 2014. To the extent necessary to preserve its regulatory authority, the New Hampshire Insurance Department will to enforce ACA provisions that have taken legal effect in New Hampshire.

#### Resources:

Full text of ACA: <http://housedocs.house.gov/energycommerce/ppacacon.pdf>

CCIIO regulations and guidance: <http://www.cms.gov/cciio/resources/regulations-and-guidance/index.html#Regulations>