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**DIVISION OF INSURANCE**

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**BULLETIN 2014-07**

To: Commercial Health Insurers, Blue Cross and Blue Shield of Massachusetts, Inc., Health Maintenance Organizations, and Small Employers

From: Joseph G. Murphy, Commissioner of Insurance

Date: October 7, 2014

Re: **Participation Rate Calculation Used in Assessing Guarantee Issue and Renewal for Small Employers under Massachusetts General Laws Chapter 176J**

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The Division of Insurance (“Division”) issues this Bulletin to clarify the permissible underwriting rules for small employers under Massachusetts General Laws Chapter (“Chapter”) 176J and Division regulation 211 CMR 66.00, with respect to the “participation rate” calculation. The underwriting rules are governed by Section 4 of Chapter 176J, which provides that a carrier “shall not be required to issue a health benefit plan to an eligible individual or eligible small business if the carrier can demonstrate to the satisfaction of the commissioner that . . . the small business fails at the time of issuance or renewal to meet a participation requirement established under the definition of participation rate in section 1.” *See* Chapter 176J, Section 4(b)(3)(i). A question has arisen as to whether an employee who has chosen to enroll in another health benefit plan would be factored into the “participation rate” calculation for the small business.<sup>1</sup>

In order to make sure that employers and employees are aware of how certain coverage choices may impact their access to employer-group coverage, and whether an enrollee in one of the Health Connector’s plans would or would *not* be included in the “participation rate” calculation, the Division now states that, notwithstanding the “Participation Rate” definition set forth in 211 CMR 66.04, the

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<sup>1</sup> The definition of “participation rate” is also relevant to the development of “participation rate” rate adjustment factors that have been used in the past in the calculation of certain small employer premiums. Until January 1, 2014, the use of “participation rate” rate adjustment factors was allowed under Chapter 176J, which provided that a carrier could “establish participation-rate rate adjustments that apply only to eligible small groups for any health benefit plan or plans for any ranges of participation rates below the minimum participation requirements established under the definition of participation requirement in section 1, the value of which shall be expressed as a number.” *See* Chapter 176J, Section 3(a)(4). After January 1, 2014, the use of participation rate premium adjustments is no longer allowed under Chapter 176J in accordance with the federal Affordable Care Act, except to the extent permitted under Section 102 of the Chapter 35 of the Acts of 2013 (“Section 102”). Section 102 provides that, notwithstanding Chapter 176J, in calculating the premium to be charged to each eligible small group or eligible individual, a carrier may continue to utilize and apply a “participation rate” rate adjustment factor for a limited time, but only in the manner set forth according to the rules established by the Division. *See e.g.* Division Bulletin 2013-05.

definition of "Participation Rate" as set forth in Chapter 176J, Section 1, supports the Division's conclusion that an employee from an eligible small business who is seeking to enroll in a health benefit plan from another source would *not* be factored into the small business's "participation rate calculation."

In Section 1 of Chapter 176J, the term "Participation Rate" is defined as

the percentage of eligible employees electing to participate in a health benefit plan out of all eligible employees, or the percentage of the sum of eligible employees and eligible dependents electing to participate in a health benefit plan out of the sum of all eligible employees and eligible dependents at the election of the carrier. In either case, the numbers used to compute these percentages shall not include any eligible employee or eligible dependent who does not participate in the eligible small business' health benefit plan, but who is enrolled in a health benefit plan through a source other than the eligible small business.

*See* Chapter 176J, Section 1. The term "Participation Requirement" is defined in Chapter 176J as "a policy provision, or a carrier's underwriting guideline if there is no such provision, which requires that a group attain a certain participation rate in order for a carrier to accept the group for enrollment in the plan. For groups of five or fewer eligible persons, a carrier may require a participation rate not to exceed one hundred percent. For groups of six or more eligible persons, a carrier may require a participation rate not to exceed seventy-five percent." *See* Chapter 176J, Section 1.

According to 211 CMR 66.05(1)(f), a "carrier may deny an eligible individual or a group of five or fewer eligible employees enrollment in a health benefit plan unless the eligible individual or the group enrolls through an intermediary or through the Connector," provided that the carrier complies with certain requirements. Within 211 CMR 66.04, the term "Participation Rate" is defined as:

the percentage of eligible employees electing to participate in a health benefit plan out of all eligible employees, or the percentage of the sum of eligible employees and eligible dependents electing to participate in a health benefit plan out of the sum of all eligible employees and eligible dependents, at the election of the carrier. In either case, the numbers used to compute these percentages may not include any eligible employee or eligible dependent who does not participate in the eligible small business' health benefit plan, but who is enrolled in another health benefit plan as a spouse or dependent.

Under 211 CMR 66.04, the term "Participation Requirement" is defined as:

a policy provision, or a carrier's underwriting guideline if there is no such policy provision, that requires that a group attain a certain participation rate in order for a carrier to accept the group for enrollment in the health benefit plan. For groups of five or fewer eligible persons, a carrier may require a participation rate not to exceed 100%. For groups of six or more eligible persons, a carrier may require a participation rate not to exceed 75%.

Under the provisions of Chapter 176J, the numbers used to compute the Participation Requirement percentages do *not* include any eligible employee or eligible dependent who does not

participate in the eligible small business' health benefit plan, but who is enrolled in a health benefit plan "through a source other than the eligible small business."<sup>2</sup>

Under the regulation 211 CMR 66.00, the numbers used in the "participation rate calculation" do *not* include any eligible employee or eligible dependent who does not participate in the eligible small business' health benefit plan, but who is enrolled in a health benefit plan "as a spouse or dependent." Assuming that the employee from an eligible small business who is seeking to get to enroll in a health benefit plan from another source is *not* as a "spouse or dependent," then it appears that, under the regulation, the employee from an eligible small business who is seeking to get coverage from another source *would* be factored into the "participation rate calculation" for determining whether a carrier may deny the eligible small employer of five or fewer eligible employees enrollment in a health benefit plan.

As noted above, under the regulation 211 CMR 66.00, the numbers used in the "participation rate calculation" do *not* include any eligible employee or eligible dependent who does not participate in the eligible small business' health benefit plan, but who is enrolled in a health benefit plan "as a spouse or dependent." Under Chapter 176J, however, the numbers used in the "participation rate calculation" do *not* include any eligible employee or eligible dependent who does not participate in the eligible small business' health benefit plan, but who is enrolled in a health benefit plan "through a source other than the eligible small business." As such, the "Participation Rate" definition set forth in 211 CMR 66.04 is more restrictive than, and in conflict with, the definition of "Participation Rate" set forth in Chapter 176J, Section 1. Therefore, under Massachusetts law, the definition of this term as set forth in Chapter 176J would take precedence over definition of this term as set forth in the regulation 211 CMR 66.00.<sup>3</sup>

Because the statutory definitions set forth in Chapter 176J, Section 1, would govern here, an employee from an eligible small business who is seeking to enroll in a health benefit plan through a "source other than the eligible small business," including an employee seeking subsidized coverage or other coverage from the Health Connector, would *not* be factored into the "participation rate calculation" for determining whether a carrier may deny the eligible small employer of five or fewer eligible employees enrollment in a health benefit plan.

Any questions regarding this Bulletin should be directed to: Robert A. Whitney, Deputy Commissioner and General Counsel, (617) 521-7308, robert.a.whitney@state.ma.us; or Kevin P. Beagan, Deputy Commissioner of the Health Care Access Bureau, (617) 521-7323, kevin.beagan@state.ma.us.

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<sup>2</sup> For example, under Chapter 176J, the term "source" would include an entity such as the Commonwealth Health Connector ("Health Connector"). As such, under the statute, the employee from an eligible small business who is seeking to enroll in a health benefit plan from the Health Connector would *not* be factored into the "participation rate calculation" for determining whether a carrier may deny the eligible small employer of five or fewer eligible employees enrollment in a health benefit plan.

<sup>3</sup> The Division is in the process of preparing a proposed amendment to regulation 211 CMR 66.00 that would revise the regulation's definition of "Participation Rate" to conform to the definition of that term as set forth in Chapter 176J.