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**Date:** April 9, 2018  
**From:** Samara Lorenz, Director, Oversight Group  
**Title:** Insurance Standards Bulletin Series—INFORMATION  
**Subject:** CCIIO Technical Guidance: Question and Answer Regarding the Medical Loss Ratio (MLR) Reporting and Rebate Requirements

I. Purpose

The purpose of this bulletin is to supplement Q&A #18 in the July 18, 2011 CCIIO Technical Guidance<sup>1</sup> and other prior guidance<sup>2</sup> regarding the employee counting method for determining market size for purposes of Medical Loss Ratio (MLR) reporting and calculation requirements under section 2718 of the Public Health Service Act (PHS Act).

II. Question and Answer

**COUNTING EMPLOYEES FOR DETERMINING MARKET SIZE (45 CFR §158.103, §158.120, §158.210)**

Question #68:

When reporting experience related to MLR, what method should health insurance issuers use for counting “employees” in determining whether the data from a group policy should be reported as being issued in the large group market or small group market, as required by 45 CFR §158.120, and for determining the minimum MLR required by 45 CFR §158.210?

Answer #68:

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<sup>1</sup> CCIIO Technical Guidance (CCIIO 2011-004), Q&A #18 (July 18, 2011), available at: [https://www.cms.gov/CCIIO/Resources/Files/Downloads/20110718\\_mlr\\_guidance.pdf](https://www.cms.gov/CCIIO/Resources/Files/Downloads/20110718_mlr_guidance.pdf)

<sup>2</sup> CCIIO Technical Guidance (CCIIO 2012-002), Q&A #27 & 28 (April 20, 2012), available at: <https://www.cms.gov/CCIIO/Resources/Files/Downloads/dwnlds/mlr-qna-04202012.pdf>; CCIIO Technical Guidance (CCIIO 2012-003), Q&A #39 (May 24, 2012), available at: <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/mlr-guidance-5-24-2012.pdf>; and FAQ 15450 (April 12, 2016), available at: [https://www.regtap.info/faq\\_viewu.php?id=15450](https://www.regtap.info/faq_viewu.php?id=15450). Also see Frequently Asked Questions on the Impact of the PACE Act on State Small Group Expansion (December 17, 2015), available at: <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQ-on-the-Impact-of-the-PACE-Act-on-State-Small-Group-Expansion-12-17-15.pdf>.

The large group and small group markets are defined as those where health insurance coverage is obtained through a large or small employer, respectively. A large employer and small employer are defined by the number of employees; a small employer has up to 50 employees, but a State may substitute “100” employees for “50” employees. *See* 45 CFR §158.103.

Q&A #18 specifies that, for MLR purposes, an employer’s number of employees is determined by averaging the total number of all employees employed on business days during the preceding calendar year, in accordance with PHS Act §2791(e)(2) and (4), and that each full-time, part-time and seasonal employee should be included, in accordance with PHS Act §2791(d)(5). However, this approach differs from the method utilized for purposes of the HHS-operated risk adjustment program established under section 1343 of the Patient Protection and Affordable Care Act (PPACA), as well as the methods utilized for rating and other purposes in many States. This has led to increased complexity and reporting burden for issuers.

Therefore, beginning with MLR reports filed in the 2018 calendar year (i.e., for the 2017 MLR reporting year), health insurance issuers may elect to use either the same employee counting method as that used for the HHS-operated risk adjustment program (described below) or the employee counting method specified in Q&A #18. Pursuant to section 2718 of the PHS Act, the MLR report and calculation must account for risk adjustment program payments and receipts; therefore, we believe it is appropriate to allow issuers the option to elect to use the same counting method for both the MLR and risk adjustment programs. We are providing this flexibility to reduce issuer burden and to support alignment of the MLR counting method with other PPACA programs and State approaches.

As stated in the 2015 Payment Notice Final Rule<sup>3</sup>, the HHS-operated risk adjustment program defers to the applicable State counting method, unless the State method does not take into account non-full-time employees. In that circumstance, the risk adjustment program utilizes the full-time equivalent method described in section 4980H(c)(2) of the Internal Revenue Code. In addition, consistent with FAQ 15450<sup>4</sup>, when a small employer participating in a SHOP ceases to be a small employer solely by reason of an increase in the number of its employees and the employer continues to be treated as a small employer for purposes of SHOP participation under section 1304(b)(4)(D) of the PPACA and 45 CFR §155.710(d), an employer should be treated as a small employer for purposes of the MLR program if the issuer elects to use the risk adjustment program’s counting method.

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<sup>3</sup> Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015; Final Rule, 79 FR 13743 at 13744 (March 11, 2014).

<sup>4</sup> Available on REGTAP at: [https://www.regtap.info/faq\\_viewu.php?id=15450](https://www.regtap.info/faq_viewu.php?id=15450)