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Understanding the Affordable Care Act's State Innovation ("1332") Waivers

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Section 1332 waivers, named for the section of the Affordable Care Act (ACA) that created them, allow states to modify how they implement key elements of the ACA and to adopt alternative ideas that depart from some of its standards and requirements. The waivers are attracting renewed attention as a way states can make changes in their individual health insurance markets, particularly in the wake of failed Republican proposals to repeal the ACA.

Section 1332 waivers are not without limits. The purpose of these waivers is to allow states to undertake different approaches to achieving the ACA's core goals — as long as these approaches are at least as successful at providing access to affordable, good-quality health insurance coverage, and do so at the same or lower cost to the federal government. (These tests are referred to as the Section 1332 “guardrails.”) In addition, many provisions of the ACA cannot be waived, including, for example, its prohibitions on denying coverage or charging higher premiums to people with pre-existing health conditions.

Section 1332 waivers are *not* “superwaivers”: they do not give states sweeping new authority over Medicaid, the Children’s Health Insurance Program (CHIP), or Medicare, as some have suggested. States can, however, coordinate section 1332 and Medicaid waivers: if a state wants to change Medicaid or CHIP at the same time as changing its individual health insurance market, it can simultaneously request approval of a Medicaid or CHIP demonstration project under section 1115 of the Social Security Act.

This paper describes key elements of 1332 waivers as enacted in the ACA, including the changes states may make, the conditions states must satisfy to receive federal approval, the relationship between 1332 waivers and other federal health programs, and some of the changes to section 1332 proposed during the Senate debate over ACA repeal legislation.

The Origins of 1332 Waiver Authority

Federal authority allowing states to vary from the requirements of federal health coverage programs isn’t new. Many states, for example, are using or have used waiver authority under section 1115 of the Social Security Act to test new ways of providing health care in Medicaid. States have used waivers to expand the use of managed care, cover individuals not otherwise eligible for

Medicaid, and obtain federal matching funds for services and activities that Medicaid typically doesn't cover.

Medicare waivers related to delivery system and payment reforms are also available, though in general, they are limited in scope and are usually administered by the federal government rather than the states. The ACA has given states some limited ability to seek Medicare waivers for changes affecting the delivery of care to “dual eligibles” — beneficiaries eligible for both Medicaid and Medicare.¹

Section 1332 allows the Health and Human Services Secretary to waive certain ACA provisions dealing with the health insurance marketplaces, the subsidies available through the marketplaces, the requirement for individuals to have coverage or pay a penalty, and the “shared responsibility” requirement for employers with 50 or more full-time-equivalent workers.² The waiver does *not* apply to other ACA provisions. For example, states cannot use section 1332 to waive the ACA's insurance market reforms, such as the limitations on how much insurers in the individual and small-group markets can charge older people compared to younger people or the ban on denying or charging higher premium rates to people with pre-existing medical conditions. Nor can states waive the ACA's risk adjustment program, designed to protect insurers in the individual and small-group markets from financial harm if they attract enrollees with higher-than-average costs.

States also must show that their proposals meet four guardrails that protect state residents and the federal budget. Waivers must: (1) provide benefits at least as comprehensive as the “essential health benefits” that all plans in the individual and small-group insurance markets must cover; (2) provide cost-sharing protections and coverage at least as affordable as those in the marketplaces; (3) ensure that at least a comparable number of people have health coverage as under current law; and (4) not increase the federal deficit.

How 1332 Waivers Allow States to Vary the Terms of Marketplace Coverage

Under section 1332, states can waive the following provisions:

- **Part I of subtitle D of the ACA's Title I.** This part includes the essential health benefit (EHB) requirements, which both ensure that marketplace plans cover a comprehensive array of medical benefits and limit the cost-sharing charges that enrollees must pay. This part also establishes the “metal” levels (bronze, silver, gold, and platinum) standardizing the plans that insurers may offer based on their relative generosity, sets standards for the catastrophic plans available to certain individuals, and defines which employers are in the small-group market (and thus subject to ACA requirements for small-group plans).

¹ Because existing Medicare waiver authority is more limited in nature and focuses primarily on ways to deliver and pay for care, it's unlikely that states could (or would) request Medicare waivers in combination with 1332 waivers. Therefore, this paper does not address them.

² Other federal agencies will likely also be involved in reviewing and approving 1332 state waiver requests because they have authority over provisions within the scope of section 1332. For example, the Treasury Department and the Internal Revenue Service administer the shared responsibility provisions for individuals and employers and jointly administer the provision of premium tax credits with HHS.

- **Part II of subtitle D of the ACA’s Title I.** This part includes minimum federal standards for marketplace plans, such as a requirement that plans include a sufficient choice of health care providers in their networks and receive accreditation on quality measures. It also includes a list of functions that marketplaces must perform, including providing a telephone hotline and website for consumers and informing people about eligibility for various health programs such as Medicaid. And it establishes a “single risk pool” requirement under which each insurer in the individual or small-group market must consider all of its enrollees in all of its plans (within each respective insurance market) when setting premiums. This part also requires insurers to submit a variety of enrollment and claims data to the marketplaces.
- **Section 1402 of the ACA.** This section establishes the cost-sharing reductions available to low- and modest-income people in marketplace plans. These subsidies reduce the deductibles, copayments, and overall annual out-of-pocket costs that eligible people pay under marketplace plans.
- **Section 36B of the Internal Revenue Code (IRC).** This section establishes the premium tax credit that helps people buying marketplace plans to afford their premiums, including how the credit is calculated, who is eligible, and the premium contributions that people at different income levels must make toward marketplace coverage. This section also specifies that the premium tax credit is only available to someone who has purchased a plan through the marketplace. And it establishes the procedure for increasing or reducing the credit at tax filing for people whose income or household size has changed since their eligibility for advance payments of the credit was determined.
- **Section 4980H of the IRC.** This section establishes penalties for employers of 50 or more full-time-equivalent workers that either do not offer health coverage or offer coverage that fails to meet certain standards. This section also defines which employers are subject to this requirement, the standards that employer-sponsored coverage must meet to be considered affordable and adequate, and the penalties for employers that do not provide coverage.
- **Section 5000A of the IRC.** This section includes the individual mandate, which requires most individuals to have health coverage or pay a penalty. It specifies the amount of the penalty and the categories of people who are exempt from paying it. It also defines what types of health coverage constitute “minimum essential coverage” for purposes of determining whether someone has coverage (and thus doesn’t have to pay a penalty).

Many important components of the ACA are not in these sections and thus can’t be waived. For example, as noted above, the ACA’s reforms to the individual, small-group, and large-group markets and/or self-insured plans are in subtitles A, B and C of Title I of the ACA, which can’t be waived. This means a state couldn’t use section 1332 to waive the ACA’s prohibition against insurers denying coverage or charging higher premium rates to people with pre-existing health conditions, its ban on annual and lifetime coverage limits in most plans, its requirement to cover certain preventive medical care at no charge to enrollees, or its requirement to cover adult dependents up to age 26. Nor could a state use a 1332 waiver to eliminate an array of ACA provisions that bar discrimination against people based on health status, disability status, race, age, or sex, or other factors.

Waiver Guardrails Protect Consumers and Ensure That Waivers Meet ACA Coverage Goals

States must satisfy several requirements specified in statute to obtain 1332 waiver approval. In general, the waiver can't leave state residents worse off than they would be without the waiver. In 2015, the Centers for Medicare & Medicaid Services (CMS) issued guidance providing additional information on how the agency would evaluate section 1332 waiver applications:³

- **Coverage must be comprehensive.** While states could use a 1332 waiver to make changes to EHB requirements or change which plan is used as a benchmark for determining the advance premium tax credit amount, a state must demonstrate that coverage under its waiver would be “at least as comprehensive” as marketplace coverage.⁴

CMS' guidance states that this requirement generally would be met if the scope of benefits provided under the waiver meets EHB requirements. A waiver application would fail to meet this requirement if the waiver would leave fewer individuals with coverage at least as comprehensive as the benchmark for all ten EHB categories. CMS indicated that its review would focus on how the waiver affects vulnerable populations, including low-income individuals, seniors, and those with serious health issues. To demonstrate compliance with this requirement, the waiver application must explain how the benefits offered under the waiver differ from those under current law, and how the state determined that the benefits provided under the waiver would comply with the requirement.

- **Coverage must be affordable.** Section 1332 waiver authority allows changes to the minimum requirements for marketplace plans regarding the generosity of coverage provided and how much enrollees must pay in premiums and cost-sharing charges. However, the statutory language is clear that states must continue to provide people with comprehensive benefits and protect them from excessive out-of-pocket costs, so that coverage is at least as affordable as under current law.

In its guidance, CMS indicated it would evaluate whether the waiver complies with this requirement by examining the waiver's impact on affordability “on average” across the population subject to the waiver as well as among specific populations, such as individuals with large health care spending relative to their incomes, seniors, low-income individuals, and people with serious health issues. Waivers that would leave more individuals with large health care spending burdens wouldn't satisfy this requirement. Nor would waivers that would leave fewer people with coverage with an actuarial value of at least 60 percent and an out-of-pocket maximum that complies with ACA requirements. To demonstrate compliance with this condition, states must include information on estimated individual out-of-pocket costs by income, health status, and age group under current law and under the waiver.

- **A comparable number of people must have coverage.** States must ensure that the number of people receiving coverage under a 1332 waiver is at least comparable to the number who would have had coverage without the waiver. This means that, at a minimum,

³ The Departments of Treasury and Health and Human Services, “Guidance: Waivers for State Innovation,” December 16, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31563.pdf>.

⁴ Section 1332 requires that states provide sufficient data for the CMS Office of the Actuary to certify the comprehensiveness of waiver coverage.

states must ensure that the waiver doesn't result in more uninsured individuals relative to current law.

When evaluating compliance with this requirement, CMS indicated in its guidance that it would consider the waiver's impact on enrollment in various types of coverage (including Medicaid) for all state residents, particularly among certain vulnerable populations such as low-income individuals, seniors, and those with serious health issues. To demonstrate compliance with this requirement, states must include data on the number of individuals covered — by income, health status, and age group — under current law and under the waiver.

- **The waiver must not increase the federal deficit.** While a 1332 waiver's initial duration is five years, a state seeking a waiver must demonstrate that it will be deficit-neutral to the federal government over ten years. Under the waiver, states could use federal funds in ways that may not otherwise be permissible — for example, to provide premium subsidies to people at higher income levels than the ACA allows. But states would have to offset the added cost with savings in other areas.

Waiver applications must describe the estimating model used to demonstrate deficit neutrality, including data sources and quality, key assumptions and parameters, and other information supporting the necessary actuarial and economic analyses.

States Can Receive Federal “Pass-Through” Payments Under a Waiver

If a state's 1332 waiver reduces the federal premium tax credits, cost-sharing reductions, or small business tax credits a state's residents qualify for, relative to what they would have received without the waiver, the state may receive “pass-through” funding equaling the financial assistance its residents would have received. The state can use those funds to implement its waiver plan. Federal guidance specifies that the waiver application must provide information needed to estimate the pass-through funding amount, including data on enrollment, premiums, and the amount of financial assistance state residents would have received, based on age, income, and type of health plan.

How Are States Using 1332 Waivers?

Two states have won approval for 1332 waivers so far: Hawaii and Alaska. Hawaii's waiver allows the state to retain its longstanding “Prepaid Health Care Act,” which requires employers with at least one full-time employee to provide health coverage to their workers. The coverage is more generous and costs workers less out of pocket than would be the case under minimum ACA requirements, and under the waiver, the state continues to have a very high insured rate.

Hawaii's waiver also allows the state to forgo setting up a Small Business Health Options Program (SHOP), the marketplace for small businesses otherwise required under the ACA. Under the waiver, Hawaii is scheduled to receive an estimated \$2.8 million over five years in pass-through funding, which is the amount that small businesses in the state would have received from the ACA's small business health care tax credit but cannot because the credit is only available to small businesses that purchase a plan through the SHOP.⁵

⁵ “Hawaii's Proposal to Waive Certain Provisions of the Patient Protection & Affordable Care Act,” revised August 10, 2016, https://governor.hawaii.gov/wp-content/uploads/2014/12/REVISED-Hawaii-1332-Waiver-Proposal_-August-

Alaska's 1332 waiver facilitates the state's new reinsurance program, which aims to reduce premiums in the individual market by having the state pick up part of the costs of covering high-cost patients. Alaska projected that this program would reduce premiums by about 20 percent in 2018, thereby increasing the number of residents with coverage. (Premera, the state's only individual-market insurer, recently proposed a rate decrease of more than 20 percent for 2018, largely due to the reinsurance program.⁶) Because the reinsurance payments would reduce marketplace premiums, the waiver would lower the cost of premium tax credits, generating federal savings, which Alaska will receive as pass-through funding under the waiver and will use to help cover the costs of the reinsurance program.⁷

Several other states have proposed 1332 reinsurance waivers, using an approach similar to Alaska's. Minnesota has applied for a 1332 waiver and Oklahoma and New Hampshire have released draft proposals for public comment. Additional states may also seek similar 1332 waivers as they consider ways to reduce premiums and encourage insurer participation in their marketplaces.⁸

Iowa has submitted a 1332 waiver application that includes a reinsurance proposal but also includes more sweeping changes that likely do not meet the 1332 guardrails.⁹ The state proposes to replace the premium tax credit with a flat tax credit based on income and age and to replace the various types of plans now available with a single plan. Anyone purchasing that plan could receive the tax credit, regardless of income, including people with incomes above the ACA's cutoff of 400 percent of the poverty line. But to help finance that expansion, Iowa's waiver would also eliminate ACA cost-sharing reductions (CSRs), which reduce deductibles and other cost-sharing charges for about 30,000 Iowa marketplace enrollees with incomes at or below 250 percent of the poverty line. The result would be far higher out-of-pocket costs for many low-income people who would no longer benefit from CSRs. They would have to enroll in plans with a \$7,350 yearly deductible for individuals, instead of plans that now have deductibles ranging from hundreds to thousands of dollars per year depending on their incomes.¹⁰ Finally, Iowa's waiver proposal would make it harder

[10-2016.pdf](#); approval letter from CMS and Treasury to the State of Hawai'i, January 3, 2017, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Hawaii-1332-Letter-final-and-signed.pdf>.

⁶ Erica Martinson, "Premera expects big cut in health insurance premiums on Alaska's individual market," Alaska Dispatch News, August 2, 2017, <https://www.adn.com/alaska-news/health/2017/08/01/premera-expects-a-21-6-percent-decrease-in-individual-market-premiums-for-2018/>.

⁷ "Alaska: State Innovation Waiver under Section 1332 of the PPACA," CMS, July 11, 2017, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Fact-Sheet.pdf> and approval letter from CMS and Treasury to the State of Alaska, July 17, 2017, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Approval-Letter.pdf>.

⁸ "And Then There Were Five: New Hampshire and Oklahoma Join Alaska, Iowa, and Minnesota in Proposing Reinsurance for Individual Market," State Health Access Data Assistance Center, August 3, 2017, <http://www.shadac.org/news/and-then-there-were-five-new-hampshire-and-oklahoma-join-alaska-iowa-and-minnesota-proposing>.

⁹ "Iowa Stopgap Measure," Iowa Insurance Division, August 21, 2017, <https://iid.iowa.gov/documents/state-of-iowa-1332-waiver-submission>.

¹⁰ Iowa initially released a draft of its 1332 proposal when it expected that no insurers would offer marketplace coverage in the state, characterizing it as a "stopgap" approach so that Iowans would have some coverage available. Now, at least one insurer is proposing to offer coverage through the marketplace in all Iowa counties. Timothy Jost, "Iowa Submits 1332 Waiver Request, Claiming It Is Necessary to Avoid an Individual Insurance Market Collapse," Health Affairs blog,

for people to enroll in coverage because the new application and enrollment process would prevent consumers from selecting and enrolling into coverage at time of application.

Failed Senate Repeal Bills Proposed Significant Changes to Section 1332

Recent Senate bills to repeal and replace the ACA included numerous changes to section 1332. While none of these proposed changes passed, they continue to be discussed.

For example, the Better Care Reconciliation Act (BCRA) would have given states near-automatic approval to eliminate or weaken virtually all consumer protections and standards related to how health plans are designed in the individual and small-group markets. It did so by eliminating the first three 1332 guardrails: those ensuring that coverage would be at least as comprehensive and affordable as without the waiver and would cover a comparable number of people. This change would have allowed waivers to weaken or eliminate the essential health benefits standard, vastly increase enrollees' deductibles and other out-of-pocket costs, and bring back annual and lifetime limits, including in employer-sponsored plans. In practice, the bill's broadened 1332 provision would have permitted states to use waivers to virtually restore the pre-ACA individual market by gutting protections for people with pre-existing medical conditions, leaving them without access to needed services or facing unaffordable out-of-pocket costs.

The BCRA also would have required the HHS Secretary to approve any waiver that doesn't add to the federal deficit, eliminating federal discretion to reject harmful waivers. And it barred the Secretary from revoking a waiver after it has been approved, even if a state failed to comply with the terms of the waiver.

The "skinny" repeal bill, which the Senate ultimately voted down, included less sweeping changes to section 1332. It did not eliminate the guardrails outright, but it did include a small wording change that could be interpreted as allowing the Secretary to approve waivers that do not meet the guardrails, which would significantly (though probably unintentionally) weaken these protections. Similar to the BCRA, it also barred the Secretary from revoking an approved waiver. And it required, rather than allowed, the Secretary to approve waivers that meet the guardrails.

See: Sarah Lueck, "Senate Health Bill Waivers Would Undermine Key Consumer Protections for People with Pre-Existing Conditions," Center on Budget and Policy Priorities, July 19, 2017, <https://www.cbpp.org/research/health/senate-health-bill-waivers-would-undermine-key-consumer-protections-for-people-with>. See also Jason Levitis, "Changes to state innovation waivers in Senate's 'skinny bill' still raise serious concerns," Brookings Institution blog, August 11, 2017, <https://www.brookings.edu/blog/up-front/2017/08/11/changes-to-state-innovation-waivers-in-senates-skinny-bill-still-raise-serious-concerns/>.

1332 Waivers Don't Replace Existing Medicaid Waivers

Some have suggested that states can use 1332 waivers to make sweeping changes to both the ACA and Medicaid. However, section 1332 doesn't give states any new authority to change Medicaid and CHIP. Any changes affecting beneficiaries of those programs would need to be instituted under existing Medicaid waiver authority. In fact, CMS' 2015 guidance on 1332 waivers clearly states that consideration of a 1332 waiver application would not take into account changes to Medicaid or CHIP that require separate federal approval. It also states that CMS would not factor budget savings accrued under proposed or current Medicaid and CHIP waivers into its assessment of whether the state's 1332 waiver application meets the statutory requirement of deficit neutrality.¹¹

June 12, 2017, <http://healthaffairs.org/blog/2017/06/12/iowa-submits-1332-waiver-request-claiming-it-is-necessary-to-avoid-an-individual-insurance-market-collapse/> /

¹¹ Departments of Treasury and Health and Human Services, "Guidance: Waivers for State Innovation."

While 1332 waivers alone can't change a state's Medicaid program, states may apply jointly for a 1332 waiver and a Medicaid waiver to make changes affecting both programs. For example, a state may seek to waive certain requirements for marketplace plans and corresponding Medicaid managed care rules to achieve better continuity of care between plans offered in the marketplace and Medicaid. Such an approach could allow more managed care companies participating in a state's Medicaid program to offer coverage in the marketplace, or vice versa.

TABLE 1

Select State 1332 Proposals

State	Status (as of August 31 st)	Major elements
Hawaii	Approved	Maintain existing employer premium assistance program in lieu of ACA's Small Business Health Options Program (SHOP)
Alaska	Approved	Operate reinsurance program in individual market
Minnesota	Proposed	Operate reinsurance program in individual market
Iowa	Proposed	<p>Includes several provisions, such as:</p> <ul style="list-style-type: none"> • Operating reinsurance program in individual market • Creating new premium credit available to higher-income people • Eliminating cost-sharing reductions for people up to 250 percent of poverty line • Using premium tax credits and cost-sharing reductions to fund reinsurance and new premium credit • Conducting enrollment directly through insurers, not ACA marketplace <p>Eliminating plans other than standard silver plan</p>
Oklahoma	Proposed	Operate reinsurance program in individual market
New Hampshire	Proposed	Operate reinsurance program in individual market
Massachusetts	Proposed	<p>Includes several proposals, such as:</p> <ul style="list-style-type: none"> • Replacing cost-sharing reductions with state stabilization fund • Implementing state-level requirement for employers to provide coverage instead of federal employer mandate <p>Permitting workers without job-based health coverage to buy individual-market plans through exchange with pre-tax dollars.</p>

Sources: <http://www.shadac.org/news/and-then-there-were-five-new-hampshire-and-oklahoma-join-alaska-iowa-and-minnesota-proposing>; https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_state_Innovation_Waivers.html

To facilitate such complementary approaches, section 1332 allows states to submit a single application for Medicaid and CHIP waivers *and* a 1332 waiver. As noted, the single application doesn't confer new waiver authority; it merely simplifies the application process by consolidating the various waiver requests into one document.¹²

¹² There are some differences in application requirements, particularly around the public notice and comment process.