

## New State Innovation Waiver Guidance Increases Flexibility, Decreases Coverage

On October 22, 2018, the *Department of Treasury* and the *Department of Health and Human Services* (HHS) released new proposed guidance regarding Section 1332 of the *Patient Protection and Affordable Care Act* (ACA), allowing states more flexibility than previous guidelines to lower premiums and increase choices for their health insurance markets.<sup>1</sup> Section 1332, also known as a *State Innovation Waiver* or *State Relief and Empowerment Waiver*, permits a state to waive certain requirements of the ACA in order to pursue innovative strategies, with approval from the Secretaries of HHS and Treasury (Secretaries).<sup>2</sup> These waivers, under the current 2015 guidelines, must stay within the parameters of four statutory requirements (or “guardrails”):

1. *“Must provide coverage that is at least as comprehensive as would be provided absent the waiver;*
2. *Must provide coverage and cost sharing protections against excessive out of pocket spending that are at least as affordable as would be provided absent the Waiver;*
3. *Must provide coverage to at least a comparable number of residents as would be provided absent a Waiver;*
4. *And must not increase the Federal deficit.”*<sup>3</sup>

While there are certain ACA provisions that may not be waived, those that can be waived include: Part I and Part II of Subtitle D of Title I of the ACA (regarding qualified health plans<sup>4</sup>); Section 1402 of the ACA (regarding cost sharing reductions<sup>5</sup>); and Sections 36B, 4980H, and 5000A of the *Internal Revenue Code* (regarding premium tax credits,<sup>6</sup> the Individual Mandate, and employer mandates).<sup>7</sup> State Innovation Waivers, under the current guidelines, have been available to states since the beginning of 2017, and thus far, eight states have had their waivers approved, the majority being for state-based reinsurance programs.<sup>8</sup> However, the *Centers for Medicare & Medicaid Services* (CMS) believes that the 2015 guidance is too strict to allow states to investigate innovative strategies and limits state waiver options to only one type (i.e., reinsurance waivers).<sup>9</sup>

The CMS Administrator, Seema Verma, asserts that “state officials are far better positioned to address their state’s health care challenges than the federal government.”<sup>10</sup> Verma elaborated that the ACA removed state regulatory power over health insurance and led to

negative impacts on state insurance markets.<sup>11</sup> Most notably, according to Verma, once the ACA Exchanges were in full effect, health insurance companies began incurring considerable financial losses, resulting in insurers leaving the individual market and premiums rising for consumers, with average premiums sold through Healthcare.gov rising by 105%.<sup>12</sup> Moving forward, the new proposed guidance aims to increase state power by providing more options for healthcare consumers to receive coverage and for states to improve their individual insurance markets and provide affordable coverage. The new guidance could allow states to expand options including *Association Health Plans* (AHP), allowing businesses to combine and buy health insurance for members, and *short-term, limited-duration insurance* (STLDI), which could be sold for up to a year or renewed for up to three years.<sup>13</sup> Both of these plans are not subject to the same ACA requirements in terms of eligibility and benefits, such as being able to exclude based on pre-existing conditions and not covering mental health or maternity coverage, contrasting with the previously set guardrails on plan comprehensiveness.<sup>14</sup> In addition to the proposed guidelines, CMS is also preparing Waiver Concepts to help states create ideas for innovative strategies and spur conversations to improve state healthcare markets.<sup>15</sup>

The revised guidance for states establishes five new principles for the state waivers:

1. *“Providing increased access to affordable private market coverage;*
2. *Encouraging sustainable spending growth;*
3. *Fostering state innovation;*
4. *Supporting and empowering those in need;*
5. *And, promoting consumer-driven healthcare.”*<sup>16</sup>

Along with these principles, the guidelines expand and differ from the current guardrails. As previously mentioned, a current guardrail is to “provide coverage that is at least as comprehensive as would be provided absent the waiver.”<sup>17</sup> The new guidelines will allow states to provide options that are less than the “*minimum essential coverage*” under the ACA, including AHP and STLDI plans.<sup>18</sup> State departments will be able to evaluate comprehensiveness of their plans by comparing access to coverage under the waiver to the state-selected *essential health benefits* (EHB) benchmark for the plan year.<sup>19</sup> The

Department of Treasury and HHS (Departments) stated that although the innovative coverage in some states might be potentially less comprehensive, the coverage could be better suited for consumer needs and attractive to residents.<sup>20</sup>

The new guidance interpretation will take into account comprehensiveness and affordability together, meaning that it will focus on the aggregate effects of the waiver to offset any detrimental effects on some residents.<sup>21</sup> To evaluate affordability, waivers that make coverage more available for some people while rendering coverage costly for a few will likely be acceptable criteria to meet the new guidance requirement, rather than requiring coverage to be at least as affordable without the waiver for everyone.<sup>22</sup> In addition, waivers will not focus on vulnerable populations as in the current guidelines; rather, they will focus on the comprehensiveness and affordability for the state residents as a whole.<sup>23</sup> However, states will need to include in their plan how they will support low income individuals and those with high expected costs.<sup>24</sup>

Previously, a comparable number of residents would need to purchase insurance under the waiver; however, with the new guidelines, waivers will be evaluated in terms of access to coverage, rather than the actual enrollment numbers.<sup>25</sup> As mentioned by CMS, this change will allow states to incorporate different price points and benefit levels for health insurance coverage, affirming that this shift will still give state residents the option to retain coverage similar to the coverage the ACA outlines.<sup>26</sup> States will need to forecast for each year the number of those individuals that will have healthcare coverage and compare to those that would have had coverage without the waiver; but the Departments will consider private coverage (e.g., employer-based, individual market) in addition to public coverage.<sup>27</sup>

Although these changes grant states more flexibility, the new guidance still requires that the waiver not increase the federal deficit as stated in the 2015 guidance; however, a state's ten year budget plan can now increase the federal deficit in a given year as long as the overall waiver does not increase the federal deficit.<sup>28</sup> In addition to changes in the interpretation of the guardrails, changes have also been expressed in terms of funding and legislation requirements. Pass through funding by the

Secretaries allows states to implement their waiver through federal money that would have been provided to state residents under ACA's financial assistance programs in absence of the waiver.<sup>29</sup> Within an application, a state must provide analysis to support the assistance amount, and the annual amount can now be updated to reflect modifications in state or federal law.<sup>30</sup> There is also increased flexibility on legislation; states will not have to adopt new legislation in order to implement the waiver and can now rely on existing law, duly-enacted state regulations, and state executive orders.<sup>31</sup>

The increased flexibility of the proposed guidelines may have significant implications for state insurance coverage. The ability to have a state waiver approved with less than the "*minimum essential coverage*" as stated in the ACA will likely increase the number of people with coverage, but through offering less comprehensive coverage.<sup>32</sup> Additionally, the lack of emphasis placed on vulnerable populations relative to the old guidelines will likely increase out-of-pocket costs and result in more coverage options that will exclude pre-existing conditions.<sup>33</sup> However, a press release by CMS asserts that people with pre-existing conditions will still be protected, though the method as to the protection remains uncertain.<sup>34</sup> In addition, more states may participate in State Relief and Empowerment Waivers now that new legislation does not need to be adopted to enact the waiver.<sup>35</sup> Although these new guidelines increase state flexibility to modify health insurance offerings, the application process is lengthy, and states will likely need more time to develop their programs.<sup>36</sup>

The new guardrails aim to increase flexibility for states to enact innovative strategies that were largely restricted to reinsurance programs in the previous guidelines. Along with a new set of principles, and a less strict interpretation of the guardrails, more state residents might have access to coverage, but that could mean coverage that is less comprehensive and more expensive for some individuals. The overall hope is that the new guardrails will allow more waivers to be approved and ultimately lower premiums in states; however, it is uncertain how these new guardrails affect the application process and the coverage of state residents.

1 "State Relief and Empowerment Waivers" Federal Register Vol. 83, No. 206 (October 24, 2018), p. 53575-76.

2 "The Center for Consumer Information & Insurance Oversight – Section 1332: State Innovation Waivers" Centers for Medicare & Medicaid Services, [https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-.html#Fact%20Sheets](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html#Fact%20Sheets) (Accessed 10/30/18).

3 *Ibid.*

4 "Qualified Health Plan" HealthCare.gov, <https://www.healthcare.gov/glossary/qualified-health-plan/> (Accessed 11/9/18); Qualified Health Plans are certified by the Health Insurance Marketplace and provide essential health benefits, limits on cost-sharing, and meet ACA requirements.

5 "Cost Sharing Reduction (CSR)" HealthCare.gov, <https://www.healthcare.gov/glossary/cost-sharing-reduction/> (Accessed 11/9/18); Cost sharing reductions are extra savings

through discounts, lowering deductible, copayment, and coinsurance amounts.

6 "Premium Tax Credit" HealthCare.gov, <https://www.healthcare.gov/glossary/premium-tax-credit/> (Accessed 11/9/18); Premium tax credits are available to individuals whose income is in between the 100% and 400% of the federal poverty level in order to lower monthly premiums when enrolling in a plan through the Health Insurance Marketplace.

7 "Feds Dramatically Relax Section 1332 Waiver Guardrails" By Katie Keith, Health Affairs, October 23, 2018, <https://www.healthaffairs.org/doi/10.1377/hblog20181023.512033/full/> (Accessed 10/30/18).

8 *Ibid.*; "Reinsurance" HealthCare.gov, <https://www.healthcare.gov/glossary/reinsurance/> (Accessed 11/9/18); Reinsurance is a reimbursement system meant to stabilize the insurance market, protecting insurers from high

- claims through a third party paying part of the insurer's claims when they pass a certain amount.
- 9 "Trump Administration announces State Relief and Empowerment Waivers to give states the flexibility to lower premiums and increase choices for their health insurance markets" Centers for Medicare & Medicaid Services, Press Release, October 22, 2018, <https://www.cms.gov/newsroom/press-releases/trump-administration-announces-state-relief-and-empowerment-waivers-give-states-flexibility-lower> (Accessed 10/30/18).
  - 10 "Letter to States on State Relief and Empowerment Waiver Guidance" By Seema Verma, Letter to States Governor, October 22, 2018, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/SignedSREWaiverDearGovLetter.pdf> (Accessed 10/30/18), p. 1.
  - 11 *Ibid.*
  - 12 *Ibid.*
  - 13 Federal Register Vol. 83, No. 206 (October 24, 2018), p. 53576; "Marketplace Subsidies May Be Option In 2020 For Plans That Skirt Obamacare" By Phil Galewitz, et al., Kaiser Health News, October 22, 2018, <https://khn.org/news/section-1332-waiver-marketplace-subsidies-aca-2020-health-plans/> (Accessed 10/30/18).
  - 14 Galewitz, October 22, 2018.
  - 15 Verma, October 22, 2018, p. 2.
  - 16 "CMS issues new guidance for states applying for Section 1332 waivers" American Hospital Association, October 22, 2018, [https://www.aha.org/news/headline/2018-10-22-cms-issues-new-guidance-states-applying-section-1332-waivers?utm\\_source=newsletter&utm\\_medium=email&utm\\_content=10272018-at-pub&utm\\_campaign=aha-today](https://www.aha.org/news/headline/2018-10-22-cms-issues-new-guidance-states-applying-section-1332-waivers?utm_source=newsletter&utm_medium=email&utm_content=10272018-at-pub&utm_campaign=aha-today) (Accessed 10/30/18).
  - 17 CMS (Accessed 10/30/18).
  - 18 Federal Register Vol. 83, No. 206 (October 24, 2018), p. 53579; Keith, October 23, 2018.
  - 19 Federal Register Vol. 83, No. 206 (October 24, 2018), p. 53578.
  - 20 *Ibid.*
  - 21 *Ibid.*, p. 53577-78.
  - 22 *Ibid.*, p. 53579.
  - 23 Keith, October 23, 2018.
  - 24 Federal Register Vol. 83, No. 206 (October 24, 2018), p. 53579.
  - 25 *Ibid.*, p. 53578.
  - 26 "FACT SHEET: State Relief and Empowerment Waiver Guidance" Centers for Medicare & Medicaid, October 22, 2018, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/SRE-Waiver-Fact-Sheet.pdf> (Accessed 10/30/18), p. 2.
  - 27 Federal Register Vol. 83, No. 206 (October 24, 2018), p. 53579.
  - 28 *Ibid.*, p. 53580; Keith, October 23, 2018.
  - 29 Federal Register Vol. 83, No. 206 (October 24, 2018), p. 53580.
  - 30 Keith, October 23, 2018.
  - 31 "Six Things to Know About the New Section 1332 Waiver Guidance" Mintz, October 25, 2018, <https://www.mintz.com/insights-center/viewpoints/2018-10-six-things-know-about-new-section-1332-waiver-guidance> (Accessed 1/1/18); "State Relief and Empowerment Waivers" Federal Register Vol. 83, No. 206 (October 24, 2018), p. 53578.
  - 32 Keith, October 23, 2018.
  - 33 *Ibid.*
  - 34 CMS, Press Release, October 22, 2018.
  - 35 Keith, October 23, 2018.
  - 36 *Ibid.*




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