

How Section 1332 Waivers Could Impact Health Care Reform

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With the collapse of congressional efforts to pass comprehensive health care reform, the question arises: What's next? There are undeniable challenges in the current health care system. In some states, the exchanges that were set up under the Affordable Care Act that allow individuals and small businesses to purchase health insurance are not working effectively. Insurers are concerned about a disproportionately sick "risk pool" and insufficient government support for the exchanges. These circumstances have caused the price of health insurance offered on exchanges to rise dramatically in some instances. Some insurers have refused to continue offering health insurance on exchanges altogether. That has created a situation in which some states are facing the prospect of exchanges with a small number of insurance plans available — or none at all in some counties.

Last week, the U.S. Department of Health and Human Service approved its first Section 1332 "State Innovation Waiver," an application submitted by Alaska. This approval potentially signals a new approach to health care reform. ACA Section 1332 allows states to receive HHS's permission to deviate from some (but not all) of the ACA's regulations and to experiment with different models to subsidize health care. The ACA authorized HHS to begin approving Section 1332 waivers at the start of this year.

Although Alaska's Section 1332 waiver was the first to be approved by the Trump administration, it almost certainly will not be the last. The Trump administration has been actively encouraging states to apply for these waivers. In the absence of comprehensive health care reform, the Trump administration is likely to promote Section 1332 waivers as a means of devolving certain health care regulations to the state level (without the need for congressional approval) and furthering the role of states as health care reform laboratories.

Below, we discuss Section 1332 waivers and their potential ramifications for health care industry subsectors.

How Do Section 1332 Waivers Work?

Section 1332 allows states to seek HHS's permission to do the following:



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- Receive a lump sum from the federal government corresponding to the amount the federal government would otherwise have paid for premium tax credits and cost sharing reductions. Those funds could be used to create new mechanisms to fund the purchase of health care.
- Eliminate or alter the requirement that qualified health insurance plans must satisfy one of the specified tiers of coverage (currently a health plan must be rated platinum, gold, silver or bronze depending on the percentage of health care costs covered by the premium). This would give insurers more flexibility in plan design.
- Eliminate or alter the minimum essential benefits that health insurance plans offered on the exchanges must cover.
- Eliminate or alter the individual mandate or employer mandate.
- Eliminate or alter the regulations governing state health care exchanges.

Section 1332 waivers, however, do not provide states with unlimited flexibility. States cannot receive waivers allowing them to eliminate the ACA's requirements that insurers must offer health insurance to anyone and that the cost of health insurance cannot be higher for people who have pre-existing conditions. Section 1332 also has four guardrails that any waiver plan must meet:

- Coverage must be as comprehensive as it is under the ACA;
- Coverage must be at least as affordable as it is under the ACA;
- Coverage must be offered to a similar number of state residents as under the ACA; and
- The waiver must not increase the federal deficit.

These guardrails, however, are potentially malleable. If HHS wants to promote Section 1332 waivers as a means of achieving health care reform without Congressional approval, it may change existing guidance around these guardrails and may decide to forgo careful scrutiny of state applications to see if they meet these criteria. For example, HHS might decide that a waiver that made health insurance somewhat cheaper for young, healthy people and somewhat more expensive for older people was at least as affordable in the aggregate.

How Does Alaska's Section 1332 Waiver Work?

Last year, Alaska developed a reinsurance program to stabilize its ACA exchange. Under this program, the state government provided insurers with additional funding to cover the cost of 33 specific diseases that are anticipated to result in significant medical expenses. As a result of the program, the cost of exchange plans, which were anticipated to rise by 42 percent, rose instead by only 7 percent.

Under Alaska's Section 1332 waiver, federal funding will now cover a significant portion of this program. Alaska states that this program is revenue-neutral. Without this program, insurance premiums would have risen by 20 percent in 2018. Federal subsidies, which are pegged to health insurance premiums, would have risen by a corresponding amount.

Instead, the amount the federal government saves on subsidies will be used to fund the reinsurance plan (along with additional funding from Alaska). A waiver is required under this program because the ACA requires a state to treat everyone on the exchange as if they were in a single-risk pool. The waiver allows a reinsurance program that segregates out those people with unusually high medical costs.

What Other Section 1332 Waivers Are in the Pipeline?

There are two other waiver applications that are currently pending before HHS. One is from Minnesota, which proposes a reinsurance plan that is similar to the one offered by Alaska. The most significant difference between the programs is that under Minnesota's plan, reinsurance would be triggered when individual health care costs exceed specified thresholds rather than by certain diagnoses. Minnesota anticipates that implementation of this program would result in insurance premiums being 20 percent lower than they otherwise would be.

Iowa's waiver involves a "Proposed Stopgap Measure" that would apply only for 2018 (with the state having an option to renew it in 2019). Iowa currently anticipates that in most of the state there will be no plans sold on the exchanges in 2018. This development follows increases in premiums on Iowa exchange plans of 70 to 100 percent over the first three years of the ACA. To address this problem, Iowa proposes that any participating insurers will be required to offer in all counties a standardized plan that is designed by the state. In lieu of the premium tax credits and cost sharing reductions, Iowa would provide flat monthly credits that vary only by age and income level. These monthly credits would be available not only to those that currently qualify for premium tax credits (those making under 400 percent of the federal poverty level), but credits would be available to people making over 400 percent of the federal poverty as well. The Iowa program also would include a reinsurance program that is similar to the one offered in Minnesota and would apply only to insurers offering the standardized plan.

Other states are also considering Section 1332 waivers. Eight other states have enacted laws that facilitate Section 1332 applications (California, Texas, Oklahoma, Kentucky, Ohio, Vermont, Massachusetts and Rhode Island). Of note, Oklahoma's Section 1332 task force issued a white paper in March. It included a detailed set of recommendations that, if implemented, could lead to significant changes in health care regulation in that state. In six states (Washington, Colorado, New Mexico, Arkansas, Georgia, South Carolina and Maine), bills have been filed related to Section 1332 programs but to date they have not passed.

What Do Section 1332 Waivers Mean for Health Care Industry Subsectors?

Section 1332 waivers present both opportunities and risks for the health care industry.

The current instability in many state ACA exchanges has significant downsides for health insurers. Some insurers are having difficulty selling profitable exchange plans due to the combination of high enrollment in exchange plans among sick people and low enrollment among healthy people. This instability also has a negative impact on health care providers, pharmaceutical companies and device manufacturers. To the extent health insurance is unavailable or unaffordable, fewer people are likely to be insured — with the result being that fewer people can purchase health care goods and services. The opposite is true as well: States that enact successful waiver programs will provide opportunities for nearly everyone in the health care industry.

To the extent that Section 1332 waivers allow states to establish reinsurance programs that reverse the

current instability in the exchanges, everyone will benefit. However, it is yet far from certain that simply instituting reinsurance programs will be sufficient to stabilize states' individual markets. HHS touted the reinsurance waiver model based on one year of experience in Alaska. Alaska is unique because of its small population. It remains to be seen how such reinsurance programs will work in other states. In particular, reinsurance programs may not have sufficient funding to offset other market forces that cause premiums to rise. Such factors may include healthy people declining to purchase insurance on the exchanges and uncertainty as to whether the federal government will continue funding cost sharing reductions.

While some states may simply use Section 1332 waivers to establish reinsurance programs, others may use the waivers to seek more comprehensive reform. To the extent states are open to significant reforms, Section 1332 waivers create opportunities for strategic decision-making. Health care companies that are located in states that are receptive to Section 1332 waivers have a unique opportunity to shape the development of waiver applications. As many states may lack the sophistication to develop wholesale changes to their health care programs, health care companies may be able to offer their expertise in accomplishing those objectives. Additionally, companies that are willing to develop innovative models for providing insurance, offering care or selling products may find unique opportunities to develop or invest in states that use Section 1332 waivers to develop new mechanisms for financing and delivering health care.

That being said, Section 1332 waivers also create potential downsides. The possibility exists for significant changes to health insurance regulations that are harmful to the interests of particular industry subsectors. For example, a state might consider a waiver that would allow insurers to offer low-cost plans that would be attractive only to young, healthy individuals. Such plans could segment the market between healthy people enrolled in low-cost plans and sick people enrolled in "traditional" ACA plans. Health insurers have recently warned that such market segmentation would be damaging to their business operations. A similar risk would arise if a state is considering a waiver that would allow insurers to omit a particular essential health benefit. Providers that offer the now-omitted benefit could experience significant business losses as a result. At the very least, the possibility that states may adopt waivers that would harm particular business interests may complicate decisions about investing in potentially impacted businesses in those states.

Section 1332 waivers present an additional challenge. The ACA currently provides uniform subsidies and uniformity in many aspects of insurance regulations across the country. This uniformity can allow for businesses to operate consistently across different markets. If Section 1332 waivers result in a patchwork of regulatory schemes and government subsidies, it may require both insurers and providers to invest extra effort to tailor their operations to the newly designed regulations in specific markets.

At the very least, health care companies operating in states that are considering applying for Section 1332 waivers should carefully monitor developments in the application process because they may have profound effects on health care regulation and corresponding business opportunities and risks.

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