

Health Affairs Blog Post: 1332 Waivers and the Future of State Health Reform

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The Affordable Care Act (ACA) turbocharges state innovation through a number of provisions, such as the creation of the Center for Medicare & Medicaid Innovation, funding for states to establish customized insurance exchanges, and Medicaid initiatives such as health homes. Yet, another component of the law holds even more potential for broad reform. Buried in section 1332 of the law is a sparkplug for innovation called the Waiver for State Innovation program.¹

Also known as 2017 waivers or Wyden waivers, 1332s offer wide latitude to states for transforming their health insurance and health care delivery systems. According to the statute, states can request that the federal government waive basically every major coverage component of the ACA, including exchanges, benefit packages, and the individual and employer mandates. But the cornerstone of 1332 waivers is the financing. To fund their reforms, states can receive the aggregate amount of subsidies—including premium tax credits, cost-sharing reductions, and small business tax credits—that would have otherwise gone to the state’s residents. Depending on the size of the state, the annual payment from the federal government for alternate coverage reform could reach into the hundreds of millions or even billions of dollars.

A better name for this program might be Waivers for State Responsibility, because they do not exempt states from accomplishing the *aims* of the ACA, but give them the ability (and responsibility) to fulfill them in a different manner, while staying between certain guardrails. State reforms must ensure that coverage and cost-sharing protections are “at least as affordable,” cover a “comparable” number of people as statutory ACA implementation would have, and not increase the federal deficit.² So far, the Health and Human Services (HHS) and Treasury

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1. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1332, 124 Stat. 120, 203 (codified as amended at 42 U.S.C. § 18052 (2012)).

2. *Id.*

Departments have issued guidance on the application process³ but little on the substance of 1332s. How HHS and Treasury define affordability and comparability, and which computational models they use to assess budget neutrality, will shape how states can use these waivers.

Nevertheless, some states are already pressing forward. In Hawaii, the legislature created a task force to explore how the state could better provide individual insurance coverage through a 1332 waiver, with fruitful discussions already underway. Minnesota has also expressed interest in a waiver to build on the state's Basic Health Plan to smooth out the coverage continuum for low-income residents and support the state's broader delivery system reforms. Vermont considered using 1332 waivers to implement single-payer,⁴ but recently put those plans on hold given funding and sustainability concerns.⁵

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1332 waivers may also appeal to states with alternate Medicaid expansions, such as Arkansas and Iowa. So far, these so-called private option expansions, which enroll Medicaid-eligible individuals into private coverage, operate through Section 1115 waivers,¹¹ which predate the ACA. But states may find the budget

3. 45 C.F.R. § 155.1308 (2014).

4. Chris Kardish, *With Innovation Waivers, States Can Go Their Own Way on Obamacare*, GOVERNING (Sep. 2014), <http://www.governing.com/topics/health-human-services/gov-innovation-obamacare-waivers.html>.

5. The Official Website of the Governor of Vermont, *Gov. Shumlin Details Health Care Financing Report To Business and Consumer Advisory Councils*, VERMONT.GOV, <http://governor.vermont.gov/node/2163> (last accessed Dec. 24, 2014).

6. *HB2851 HD3 SD2 CDI*, HAW. STATE LEGISLATURE (July 2014), http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2581&year=2014 (last visited Nov. 18, 2014).

7. *Meeting 2 Draft Minutes*, STATE INNOVATION WAIVER TASK FORCE (Oct. 2014), http://governor.hawaii.gov/wp-content/uploads/2014/12/Meeting-2_Meeting-Minutes-Approved.pdf.

8. John E. McDonough, *Wyden's Waiver: State Innovation on Steroids*, 39 J. HEALTH POL. POL'Y & L. 1,9 (2014).

9. Kardish, *supra* note 4.

10. VERMONT.GOV, *supra* note 5.

11. Robin Rudowitz, Samantha Artiga, & MaryBeth Musumeci, *The ACA and Recent Section 1115 Medicaid Demonstration Waivers*, KAISER FAM. FOUND. (Nov. 24, 2014),

neutrality requirements of 1115 waivers to be overly restrictive. The ACA calls for a streamlining of the waiver process, whereby states can ask for 1115 and 1332 waivers in one application. As John McDonough wrote earlier this year, this combined waiver process could give states much more flexibility.¹² For example, an 1115 waiver proposal that would not be independently budget-neutral could become acceptable in conjunction with a related 1332 waiver proposal. States will have greater ability to craft applications that meet the needs of their intended reforms.

But next year's Supreme Court term could have major ramifications on alternate expansion states and for 1332s more broadly. The innovation waivers offer states unparalleled flexibility in large part because they let them repurpose hundreds of millions of dollars in tax credits. In *King v. Burwell*, though, the Court will determine the availability of tax credits to residents of states that have not established exchanges.¹³ A ruling in favor of the plaintiffs would decimate the funding source for 1332-based reforms in those states.

Thus, such a ruling would hamstring red states in particular. Policymakers seeking conservative, market-oriented changes to ACA at the state level would be stymied even before their reforms get off the ground. Only states that have established their own exchanges would have the freedom and funding to undertake broad 1332-based reforms.

In the past, President Obama expressed support for legislation moving up 1332 waivers, which the statute authorizes to take effect January 1, 2017, in order to give states more time to innovate.¹⁴ That timing has not been changed, but 1332 waivers still give the administration the opportunity to engage more states in reforms during the president's final years in office, in spite of a hostile Congress. Anticipated regulations from HHS and Treasury will signal the extent of state flexibility. Before 2017, states will need to build in sufficient time for legislative and stakeholder engagement, as well as negotiations with the federal government over the contours of a waiver proposal. The handful of states with biennial sessions have even less time, as their legislatures would need to pass authorization next year, in 2015. For innovative state-level reform, the clock is ticking.

<http://kff.org/medicaid/issue-brief/the-aca-and-recent-section-1115-medicare-demonstration-waivers/>.

12. McDonough, *supra* note 7.

13. *King v. Burwell*, No. 14-1158 (4th Cir. 2014), cert. granted (U.S. Nov. 7, 2014) (No. 14-114).

14. Kathleen Sebelius, *Empowering States to Innovate*, WHITE HOUSE BLOG (Feb. 28, 2011), <http://www.whitehouse.gov/blog/2011/02/28/empowering-states-innovate>.

