

# Overview of 1332 guidance for State Relief and Empowerment Waivers

*November 2018*

# 1332 Initiatives

- 1332 waivers are one way CMS is providing states with flexibility to establish innovative ways to stabilize the risk pool and meet the needs of their residents in their particular states. These Section 1332 waivers are now called State Relief and Empowerment Waivers to reflect this new direction and opportunity.
- **1332 Guidance:** New guidance that provides greater flexibility for states to pursue waivers under section 1332 to waive certain PPACA requirements;
- **1332 Waiver Concepts:** To help foster discussion with states, and illustrate how states might take advantage of this new opportunity.

# WHAT ARE SECTION 1332 WAIVERS?

- Under Section 1332 of the PPACA, a state can apply for a **State Relief and Empowerment Waiver**, allowing the state to implement innovative ways to provide access to quality health care so long as coverage available under the waiver is at least as comprehensive and affordable as would be available under the PPACA absent the waiver, coverage is provided to a comparable number of residents of the state as would be provided coverage absent a waiver, and the waiver does not increase the federal deficit.
- For a waiver to be approved, it has to meet the four guardrails below. This means that for each year of the waiver, the application must compare measures of **coverage, comprehensiveness, affordability**, and the impact on the **federal deficit** under the waiver to those measures absent the waiver (referred to as the baseline).
- Waivers can be granted for up to a 5 year-period.
- The U.S. Department of Health and Human Services (HHS) and the U.S. Department of the Treasury (collectively, the Departments) are responsible for reviewing waiver applications.



# What Can Be Waived?

- Part I of Subtitle D of Title I of the Patient Protection and Affordable Care Act (PPACA) (relating to establishing Qualified Health Plans (QHPs));
- Part II of Subtitle D of Title I of the PPACA (relating to consumer choices and insurance competition through health insurance Exchanges);
- Sections 36B of the Internal Revenue Code and 1402 of the PPACA (relating to premium tax credits and cost-sharing reductions for QHPs offered within the Exchanges); and
- Section 4980H of the Internal Revenue Code (relating to employer shared responsibility).

# Examples of What Can be Waived

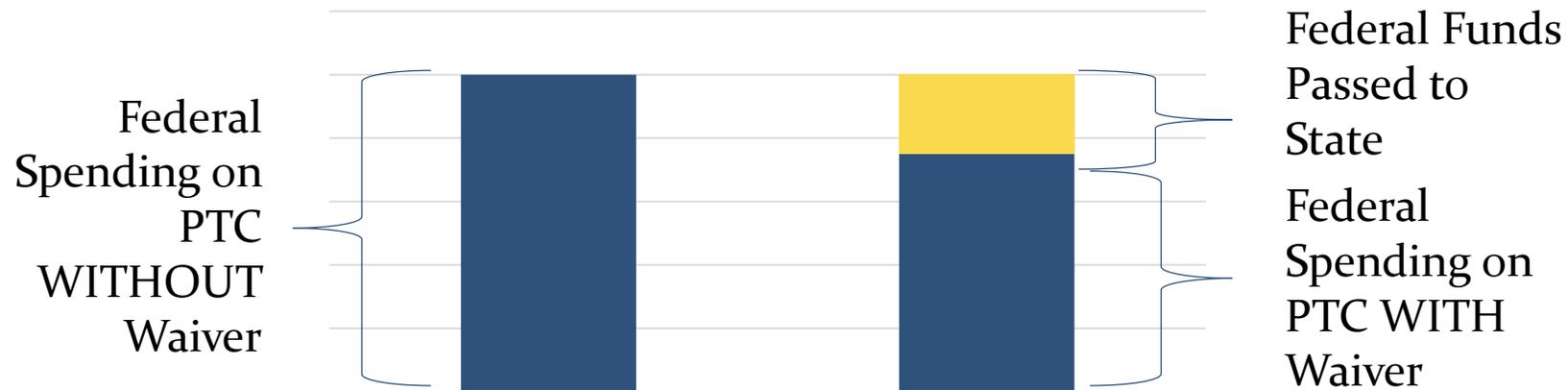
- Examples of Parts I and II of Subtitle D of the PPACA:
  - Establishment of an Exchange
  - Functions of an Exchange, including QHP Certification
  - Enrollment periods, both Open Enrollment and Special Enrollment Periods
  - Essential Health Benefits (EHB)
  - Actuarial Value (AV) metal levels
  - Single Risk Pool

# Examples of What Can't be Waived

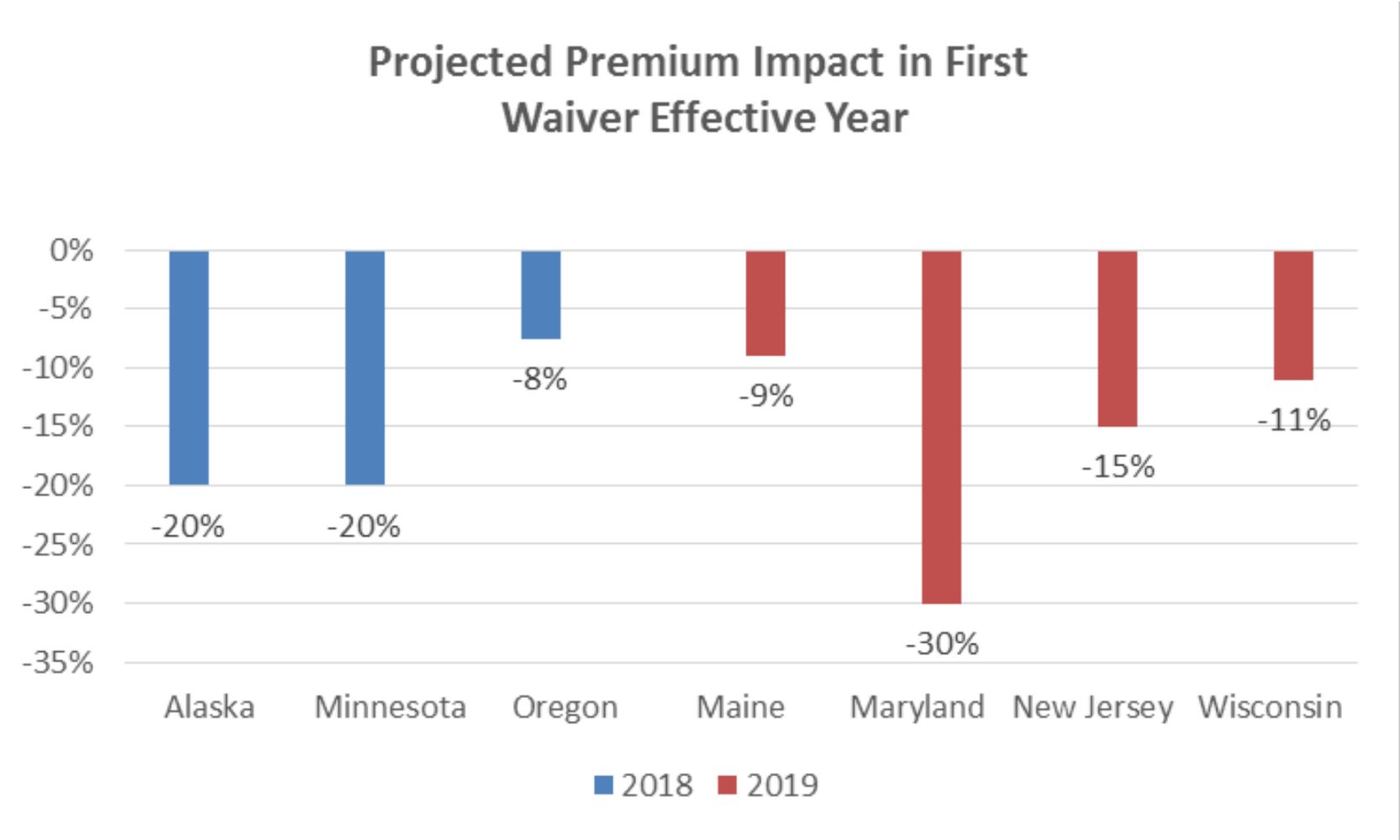
- Pre-existing condition protections
- Allowable premium rating factors, including age bands
- Guaranteed availability and renewability of health coverage
- Risk adjustment
- Eligibility determinations under section 1411 of the PPACA
  - This applies to determinations for premium tax credits (PTC), cost-sharing reductions (CSR), Medicaid, CHIP, and BHP

# Pass-through Funding

- If a waiver saves the federal government money on PTCs, small business tax credits, or CSRs, the savings (called pass-through savings) can be passed to the state for implementation of the state's waiver plan.
  - Note: Pass-through amount will be reduced if necessary to ensure federal deficit neutrality



# Projected Impact of Approved Waivers



# New 2018 Guidance: Flexibility with respect to Section 1332's Guardrails

- On October 22, 2018, the Departments issued new guidance on Section 1332 waivers which replaced the previous guidance issued on December 16, 2015.
- The 2015 guidance imposed significant additional hurdles on states in meeting the guardrails. The goal of the revised guidance is to loosen excessive restrictions that limit state flexibility and consumer choice, while maintaining the requirements of the statute.
  - Comprehensiveness
  - Affordability
  - Coverage
  - Federal Deficit Neutrality
- The Secretaries retain their discretionary authority under section 1332 to deny waivers when appropriate, given consideration of the application as a whole, even if an application meets the statutory guardrails.
- Note: This guidance does not change the approval or calculation of pass-through funding for approved 1332 waivers to implement a reinsurance program.

# New 2018 Guidance: Principles

- The Secretaries will favorably consider waiver applications that advance some or all of these five principles as elements of a State Relief and Empowerment Waiver application. States should explain in their waiver applications how their proposals would advance some or all of these principles:
  - Provide more affordable private market coverage
  - Encourage sustainable spending growth
  - Foster state innovation
  - Support and empower those in need
  - Promote consumer-driven healthcare

# New 2018 Guidance: Flexibility with respect to Section 1332's Guardrails

- **Affordability and Comprehensiveness:** The comprehensiveness and affordability guardrails are evaluated based on whether the waiver provides *access* to coverage that is at least as comprehensive and affordable as coverage to a comparable number of people as would have access absent the waiver.
  - In contrast, the previous rule considered whether the same number of people *actually* purchase or take up coverage that is at least as comprehensive and affordable.

# New 2018 Guidance: Flexibility with respect to Section 1332's Guardrails

- **Number Covered:** The state can demonstrate that a comparable number of state residents eligible for coverage under title I of PPACA will have health care coverage absent the waiver.
  - This guidance on the coverage guardrail continues to consider the number of state residents who are actually receiving coverage. As long as a comparable number of residents are projected to be covered as would have been covered absent the waiver, the coverage guardrail will be met.
  - The definition for coverage under the coverage guardrail is expanded from Minimum Essential Coverage (MEC) to MEC and the federal definition of insurance under the PPACA/Public Health Service Act. This change allows short term limited duration plans to count under the coverage definition for section 1332 waivers.

# New 2018 Guidance: Examples of Approach to Guardrails

- *Example:* In the baseline without the waiver, 100 consumers have access to a plan that includes EHB and is affordable. With the waiver in effect, 100 people still have *access* to a plan that includes EHB and is as affordable as without the waiver but only 85 people still purchased that plan, while 15 people choose other plans that meet the coverage definition but are not QHPs and/or might not cover EHB and/or be as affordable.

*Note: This is an illustrative example but the Departments would need to analyze the details of the specific waiver proposal to see if it meets the statutory guardrails.*

# New 2018 Guidance: Flexibility with respect to Section 1332's Guardrails

- **Aggregate Effect:** Assessment of the guardrails will consider the effects of the waiver on coverage in the aggregate across all state residents. However, an application should address how the waiver will impact those with low incomes or high health care costs in alignment with the principles for each of the guardrails.
  - For the comprehensiveness and affordability guardrails, the Departments will take into account access to affordable, comprehensive coverage available to all state residents, regardless of the type of coverage they would have had access to in the absence of the waiver. In addition to considering the number of state residents for whom comprehensive coverage has become more or less affordable, the Departments will take into account the magnitude of such changes.

# New 2018 Guidance: Flexibility with respect to Section 1332's Guardrails

- **Deficit Neutrality:** The projected federal spending net of federal revenues under the section 1332 waiver must be equal to or lower than projected federal spending net of federal revenues in the absence of the section 1332 waiver. The effect on federal spending includes all changes in Exchange financial assistance and any other spending that result from the section 1332 waiver.
- Waivers must not increase the federal deficit over the period of the waiver (which may not exceed 5 years unless renewed) or in total over the 10-year budget plan submitted by the state as part of the application.
  - We have revised the 2015 guidance to clarify that the ten-year budget plan should describe the changes in projected federal spending and changes in federal revenues attributed to the waiver for each of the ten years.
  - The Departments will continue to evaluate the deficit neutrality guardrail on a yearly basis. A waiver that increases the deficit in any one year is less likely to be approved.

# New 2018 Guidance: Pass-through Funding

- Explicitly allows the Departments to make adjustments necessary to ensure federal deficit neutrality such as reductions in pass-through funding to account for increases in spending or decreases in revenue.
- The amount is calculated annually by the Departments and will be updated to reflect changes in federal or state law.
  - E.g. A state law that changes the structure of the waiver program, eliminates a program, makes eligibility changes in Medicaid or changes another program that impacts the size of the pass-through payment under the waiver.

# Actuarial and Economic Analysis

- The actuarial and economic analyses must compare comprehensiveness, affordability, coverage, and net federal spending and revenues under the waiver to those measures absent the waiver (the baseline) for each year of the waiver including:
  - Analysis and supporting data such as enrollment, premiums, and Exchange financial assistance by age, income, and type of policies.
  - Description of the models used to produce these estimates, including data sources and quality of the data, key assumptions, and parameters for the section 1332 state plan.
  - All modeling assumptions used, sources of state-specific data, and the rationale for any deviation from federal forecasts.

# New 2018 Guidance: Operational Considerations

- **Federally-Facilitated Exchange (FFE):** Allows the FFE platform to use new data-sharing functionality to share information with states, and work with private industry partners to create their own Web sites with capability that could replace the consumer-facing aspects of HealthCare.gov for their state, while allowing the state to utilize aspects of the back-end technology that supports the FFE. This could also be used to accommodate different eligibility and enrollment rules for state subsidies in different states.
  - States should engage with the Departments early in the process to determine whether federal infrastructure can accommodate technical changes that support their requested flexibilities.
  - If CMS is providing services in support of the state's section 1332 waiver plan including but not limited to eligibility determinations for participation in State waiver programs as authorized by the Intergovernmental Cooperation Act (ICA). States must reimburse CMS for all costs and those costs will not be considered as part of the deficit neutrality requirement.

# New 2018 Guidance: Operational Considerations

- **Internal Revenue Service (IRS):** At this time, the IRS generally is not able to administer different sets of tax rules for different states. But IRS may be able to accommodate small adjustments to the existing system for administering federal tax provisions. For example, a state that has not expanded its Medicaid program may wish to expand eligibility for APTC and PTC to individuals under 100 percent of the Federal Poverty Level (FPL).
  - States contemplating to waive any part of a federal tax provision should engage with the Departments early in the section 1332 application process to assess feasibility.

# New 2018 Guidance: Enacted State Legislation Requirement

- The guidance clarifies that in certain circumstances, states may use existing legislation if it provides statutory authority to enforce PPACA provisions and/or the state plan, combined with a duly-enacted state regulation or executive order, may satisfy the requirement that the state enact a law.
  - States should engage with the Departments early in the process to discuss whether their state authority meets the requirement to enact a law.
  - This guidance does not eliminate the requirement for a state to enact a law, or encourage state executives to bypass their legislatures. It simply recognizes that state legislation can come in different forms.

# New 2018 Guidance: Enacted State Legislation Requirement

- *E.g.* The state wants to pursue a waiver to implement a high risk pool. The state has an existing law that provides statutory authority for the DOI to implement the PPACA. The state's governor then does an executive order providing for the state DOI to pursue a waiver, and the DOI then puts out regulations to re-enact their high risk pool which already has the ability to do an assessment.
- *E.g.* The state wants to pursue a waiver to implement a reinsurance program. The state has an existing law that provides the state the authority to implement the PPACA. The DOI issues regulations to implement a reinsurance program, and the state passes new legislation to provide funding for the state share of the program which is contingent upon approval of the waiver.

*Note: This is an illustrative example but the Departments would need to analyze the details of the specific waiver proposal to see if it meets the statutory guardrails.*

# New 2018 Guidance

- **Public Input Process:** Consistent with the previous guidance, states must provide for a meaningful level of public input prior to submitting an application. Including consultation with federally recognized tribes if applicable; the state and federal comment period should both be no less than 30 days.
- **Impact of Other Programs on Assessment of a Waiver Proposal:** Consistent with the previous guidance, savings accrued under either proposed or current Section 1115 Medicaid or CHIP demonstrations are not factored into the assessment of whether a proposed State Relief and Empowerment Waiver meets the deficit neutrality requirement.

# Additional Resources

- **CCIIO website**

[https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_state\\_Innovation\\_Waivers-.html](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_state_Innovation_Waivers-.html)

- **45 CFR 1300-1328**

<https://www.ecfr.gov/cgi-bin/text-idx?SID=c3aofa8ofd8oad165d9f7d9af7ecef4f&mc=true&node=sp45.1.155.n&rgn=div6>

- **Guidance - December 2015**

<https://www.federalregister.gov/documents/2015/12/16/2015-31563/waivers-for-state-innovation>

- **Guidance- October 2018**

<https://www.federalregister.gov/documents/2018/10/24/2018-23182/state-relief-and-empowerment-waivers>

*Note: The guidance has a 60 day comment period which ends December 24, 2018.*

- **Secretary Letter to States - March 2017**

[https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/March-13-2017-letter\\_508.pdf](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/March-13-2017-letter_508.pdf)

- **Checklist for States on State Reinsurance Waivers - May 2017**

<https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Checklist-for-Section-1332-State-Innovation-Waiver-Applications-5517-c.pdf>

# QUESTIONS?

- We encourage states interested in applying for Section 1332 waivers to reach out to HHS and Treasury (the Departments) as soon as possible.
- Email [stateinnovationwaivers@cms.hhs.gov](mailto:stateinnovationwaivers@cms.hhs.gov) for assistance in formulating and enacting a plan that meets the requirements of Section 1332.