Insight

Proposed Reforms to the ACA's 1332 Waivers

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Introduction

The Affordable Care Act (ACA) set substantial new federal requirements for health insurance plans and the insurers that provide them. These requirements significantly altered the way insurance is regulated, which was traditionally left to the states. The ACA included in Section 1332 the option for states to apply for a waiver from many of these regulations. However, the myriad stipulations tied to these 1332 State Innovation Waivers limit states' ability to regain control of their own insurance regulations. Further, states have no guarantee they will be granted a waiver, even if they meet all of the ACA's requirements for obtaining one.

In response to these issues, two Senate committees have introduced (or at least drafted) legislation that would solve many of the problems that states have had obtaining 1332 waivers. In addition to easing some standards and shortening timeframes for decisions, the bills also provide a standard path for states to gain these waivers in certain circumstances.

Background

The Senate Health, Education, Labor and Pensions (HELP) Committee recently held multiple hearings on reforming the requirements for the 1332 waivers and the process to obtain them. The HELP Committee heard from multiple state insurance commissioners, governors, and insurance executives about the challenges they were facing both under existing ACA regulations and in obtaining a waiver from those regulations.

The witnesses expressed several common complaints and concerns. Many governors expressed frustration with the length of time it took to obtain a waiver. The frustration was particularly pronounced over states' ability to obtain waivers identical to or highly similar to waivers already granted to other states. For instance, several states have sought waivers to establish a reinsurance program. Alaska was first granted such a waiver in July of this year, but Minnesota had to wait four months for approval for its reinsurance program, even after Alaska received theirs.[1] The wait was so long that the deadline for insurers to file premium rates for next year was only five days away at the time of approval, leaving the state's insurers little time to adjust their filings. Oklahoma sought a similar waiver, but eventually had to pull their request because the rate filing deadline had passed and the state would not have had time to implement the changes soon enough to have an impact on premiums. Iowa also had to cancel their waiver request due to the lengthy waiver consideration process.

Governors also expressed concerns with the requirement that states must pass legislation approving such a waiver and detailing how it would be implemented. While many support the intended outcome—ensuring there is support within a state for the changes sought and a plan to implement those changes—the specific requirement to pass legislation is particularly burdensome for those states whose legislatures meet for only a few months every other year. If a state decides it wants to apply for a waiver in a year when the legislature is not scheduled to meet, or in the months after the legislative session has already ended for the year, the governor would have to call for a special session to meet this requirement.

Finally, there were concerns with the requirements of the waiver itself. For instance, the ACA prohibits a waiver from being granted if it will increase the federal deficit. While this principle is widely supported, the current regulations implementing this provision implicitly require the plan be budget neutral in each year it is in effect, as opposed to simply over the course of the waiver.[2] Many governors and insurance commissioners noted that this adds complexity, as greater costs are typically incurred in the first few years of implementing a new program. Governors expressed similar frustration about their inability to apply cost reductions that might occur in other programs as a result of the changes made by a 1332 waiver to help offset the waiver's cost increases. For example, a state might have an existing 1115 Medicaid waiver, and the 1332 waiver might cause interactions between the ACA Exchange and Medicaid populations that saves money in the Medicaid program. However, as the rules are currently written, those savings would not be considered part of the 1332 waiver's budgetary impact.

Legislative Reform Proposals

In response, the Senate HELP and Finance Committees are seeking to make several changes to reduce these burdens and simplify the waiver approval process.

Approval Process

The legislation from both the HELP and Finance Committees would remove the requirement that a state enact legislation granting authority for such a waiver to be implemented in the state. The HELP legislation would permit the governor to certify that the authority exists within the state, while the Finance legislation would simply remove the requirement for state legislation (so long as state law does not prohibit such action). Both would still require a state to submit information regarding its plan for implementation. The Finance legislation specifically requires a state to explain how it will fund the implementation and address the needs of individuals with pre-existing conditions.

Both pieces of legislation would shorten the timeframe for the Secretary of Health and Human Services to approve or deny a waiver application. Under the HELP bill, the length of time for a standard application would be shortened from 180 days to 90 days. In instances where a state submits a waiver that is the same or "substantially similar" to a waiver already approved for another state, or if the Secretary determines that a state is at risk for "excessive premium increases or having no health plans offered" and urgently needs a waiver, the approval timeline is further reduced to 45 days. These "urgent" waivers would be provisional and only effective for three years, however, unless the Secretary agrees to extend them. Regular waivers will be approved for six years and available for unlimited renewals if the state continues to meet the requirements.

The Finance bill would shorten a standard application approval timeframe to 100 days. Waivers would be approved for five years, unless the state requests a shorter period. States may renew their waivers for unlimited five-year periods if the state continues to meet the original requirements and submits a renewal application and retrospective independent evaluation of the program's performance. The approval timeframe would also be shortened for consolidated waiver applications, which permit a state to combine a 1332 waiver with a waiver for its Medicare, Medicaid, or CHIP programs, such as 1115 or 1915 waivers. The ACA required that the Secretary provide a coordinated and consolidated process for states wishing to apply for multiple federal health care waivers, which must include allowing states to submit a single combined waiver. The Finance bill would encourage states to use consolidated waivers by modestly shortening the approval timeframe for these waivers from 180 days to 160 days. If a waiver is submitted in response to a public health emergency, including natural disasters, the Secretary must make a decision within 60 days upon receiving the application.

In response to states' requests to have a menu of available options, the HELP bill requires that HHS provide states examples of models that would meet the requirements, such as plans to establish reinsurance or high-risk pools; plans to expand consumer choices; plans encouraging use of value-based insurance designs; and plans allowing for significant variation in benefit design. In a similar vein, the Finance bill would require the Secretary to create application templates for certain types of waivers, which would receive speedier approval. Such template applications will be deemed approved if the requirements described below are met; if the Secretary does not believe these conditions have been met, he or she must notify the state in writing within 60 days.

Waiver Requirements

Both pieces of legislation would provide additional flexibility regarding the coverage requirements for such waivers, though the Finance bill provides much greater flexibility than the HELP bill. The HELP bill would amend the law's current language requiring that any plan provided under such a waiver be "at least as affordable," to instead be "of comparable affordability." The language further stipulates that the comparable affordability requirement must be true "for low-income individuals, individuals with serious health needs, and other vulnerable populations." The Finance bill, on the other hand, removes all the current requirements that coverage be at least as comprehensive, affordable, and provided to at least as many people. Instead, a waiver may be granted if it will not increase the federal deficit, and "in the judgment of the Secretary, such waiver is likely to assist in promoting the objectives of affordability, market-based coverage for individuals seeking it, and consumer choice."

Budget Neutrality

Both the HELP and Finance bills would reform the budget neutrality requirements such that states will no longer have to meet this requirement in each year but rather over the term of the waiver and in the budget window (which the Finance bill would reduce to 5 years while the HELP bill would maintain the standard 10-year window). Additionally, both pieces of legislation would allow impacts on other sources of federal spending (such as Medicaid) to be taken into account in determining the budgetary effect of the waiver. The Finance bill, specifically, would permit this consideration only with respect to any consolidated waiver application and the budgetary impacts directly resulting from those waivers. The HELP bill would permit any expected impacts from other sources to be considered, regardless of whether a consolidated waiver has been submitted. The HELP bill would also allow funds states are receiving for the Basic Health Program to be passed through the waiver and considered for budgetary purposes.

Additional Provisions

Both bills would protect many of the ACA's most popular provisions, as explained here. Neither bill would allow for medical underwriting or change other protections for people with pre-existing conditions. The ACA's restrictions on premium variations would remain intact. Preventive services would still be required to be covered without any cost-sharing. The prohibition on annual and lifetime limits would also not be able to be waived; though, because these prohibitions only apply to limits on coverage of the essential health benefits (EHBs), which may be changed, there could be some impact in this regard.

Included in the HELP legislation is appropriated funding for the ACA's cost-sharing reduction subsidies for the remainder of 2017, as well as 2018 and 2019; funding for outreach and assistance activities; and a provision allowing anyone to purchase a catastrophic "copper" plan and for those individuals to be considered as part of the same risk pool as the rest of the individual market within a state.

The Finance Committee introduced a separate legislative framework that would provide funding for the cost-sharing reduction subsidies (CSRs) through 2019; repeal the individual mandate from 2017-2021; retroactively repeal the employer mandate from 2015-2017; and increase the maximum contribution limit for health savings accounts (HSAs).

Conclusion

The Section 1332 waiver program promised to give states the flexibility to experiment with approaches to ensure their residents have access to health care, but the program has proven ineffectual. The proposed legislation from the Senate Finance and HELP Committees would remove a number of obstacles to states gaining the waivers, allowing them to try various ways to ensure broad coverage and market competition. These legislative proposals, combined with a sympathetic administration, promise to give states much of the freedom they are seeking from the ACA's regulations.

[1] https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html#Section 1332 State Waiver Applications

[2] https://www.federalregister.gov/documents/2015/12/16/2015-31563/waivers-for-state-innovation