Texas Department of Insurance

1332 waiver guidance

In 2018, the U.S. Department of Health and Human Services and the U.S. Department of the Treasury released new guidance on Section 1332 waivers. The new guidance changed the federal approach to reviewing Section 1332 waivers and to prior interpretations of the law's guardrails.

In response to the new guidance, TDI has issued a request for proposal (RFP) for an actuarial analysis to examine the costs and options for three possible 1332 waiver strategies:

1. A reinsurance program to cover a portion of claim costs above an attachment point for each insured individual.
2. A high-risk pool, in which high-risk individuals are rated separately and possibly offered different plans from healthy individuals, and waiver funds cover a portion of claim costs for the high-risk pool.
3. An invisible high-risk pool, in which high-risk individuals are offered the same plans and rated the same as healthy individuals, and waiver funds cover a portion of claim costs for high-risk individuals.

Responses are due September 28, 2020.

After TDI awards the contract, the actuary will begin their analysis; this process could take many months. The final analysis could then be used by policy makers and state leadership to inform a waiver application. An existing appropriation can be used to fund the award of an actuarial analysis contract and waiver application expenses.

What are 1332 waivers?

Section 1332 waivers are named for a section of the Patient Protection and Affordable Care Act that allows waivers for state innovation. States, subject to some constraints, can request waivers from certain provisions of the ACA and to capture "pass through" funding to repurpose dollars the federal government would otherwise pay toward tax credits and cost-sharing reductions. The regulations are at 45 CFR Part 155 Subpart N and 31 CFR Part 33. While limits apply, the potential range of waivers is broad.

What can be waived?

- Individual and employer mandates.

- Minimum standards for qualified health plans, including essential health benefits, actuarial value, out-of-pocket maximum, and limits on catastrophic plans.
- Exchange requirements, including open enrollment periods, navigators, and the establishment of single-risk pools for the individual and small group market.
- Federal premium tax credits and cost-sharing reductions.

What cannot be waived?

ACA provisions not specifically included in Section 1332, such as:

- Guaranteed issue and prohibition on preexisting condition exclusions.
- Modified community rating provisions, including limiting age-based variations to a 3:1 ratio and prohibiting variation based on gender or health status.
- Coverage of specified preventive services without cost-sharing.
- Coverage for dependents up to age 26.
- Prohibition of annual and lifetime coverage limits.

Guardrails

Section 1332 has requirements, or guardrails, that a waiver application must meet to be approved. A waiver must:

- Provide coverage that is at least as comprehensive as the coverage defined in Section 1302(b) and offered through the ACA exchanges.
- Provide coverage and cost-sharing protections against out-of-pocket spending that are at least as affordable as the provisions the ACA would provide.
- Provide coverage to at least a comparable number of state residents as the provisions the ACA would provide.
- Not increase the federal deficit.

These guardrails were interpreted in extensive guidance from 2015. The October 2018 guidance makes several major changes to the previous federal guidance.

New principles

The federal agencies will look favorably on a waiver application that advances some or all of these five principles:

- Provide increased access to affordable private market coverage (defined to include association health plans and short-term plans) over public programs, increase insurer participation, and promote competition.
- Encourage sustainable spending growth by promoting more cost-effective coverage, restraining growth in federal spending, and eliminating state regulations that limit market choice and competition.
- Foster state innovation.
- Support and empower those in need (such as those who are low-income or have high health costs and may need financial assistance).
- Promote consumer-driven health care.

Changes in guidance

While the statutory guardrails are unchanged, the new guidance aims to “lower barriers to innovation” by being more permissive in evaluating waiver applications’ compliance with the guardrails. Analysis will now focus on:

- Whether coverage that is both as comprehensive and affordable as currently found in the market will still be available, regardless of whether it is actually purchased.
- Whether a comparable number of lives will be covered, regardless of the comprehensiveness of the coverage they purchase.
- Whether federal deficit neutrality will be maintained in the aggregate over up to a 10-year period.

HealthCare.gov

Under the 2015 guidance, the federal market (HealthCare.gov) could not accommodate different rules for different states. States that wanted to adopt 1332 waivers to make significant changes, such as showing customized plan options, would have to establish their own state-based marketplace. Texas did not create a state exchange.

The federal agencies now say that HealthCare.gov can support additional state-specific variation as part of a Section 1332 waiver. States could create state-specific websites to replace consumer-facing aspects of HealthCare.gov. This could allow states and web brokers to customize plan information, verify eligibility for state-specific eligibility determinations, and access enrollee data outside of the marketplace context. The guidance makes clear that states would be responsible for funding a customized technical build and supporting year-round customized operations for their waivers.

Pass-through funding

If, because of a waiver, the amount of premium tax credits and cost-sharing reductions that individuals and small businesses would otherwise qualify for is less than the amount that would be paid if the state did not have the waiver, the aggregate amount of the savings may be transferred to the state to implement the waiver. This number could be significant, because the total Advance Premium Tax Credit amount for Texas in 2018 was approximately $5.2 billion. ACA enrollment in Texas, including those insured through small groups totaled 1.6 million in 2020.

Authority to act and funding

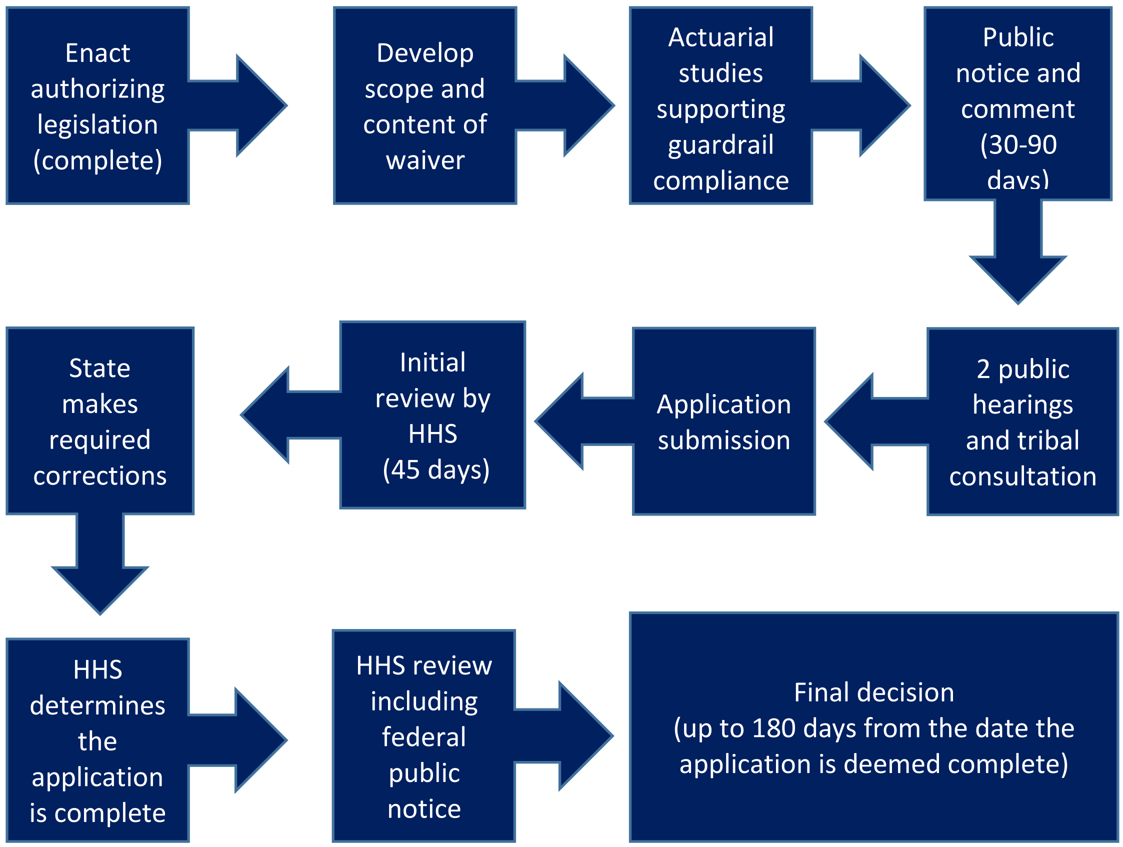
The new guidance relaxes requirements requiring state legislation authorizing a 1332 waiver. In 2017, Texas passed two pieces of legislation authorizing waiver applications:

- SB 1406 allows TDI to apply for a 1332 waiver of the actuarial value requirements and related levels of health plan coverage requirements for small employer health benefit plans.
- SB 2087 allows TDI to pursue one of three options:
    1. Apply for any federal funds made available under federal law, regulation, or executive action after March 1, 2017, to establish and administer a temporary health insurance risk pool (this could encompass reinsurance).
    2. Apply for a waiver under Section 1332.
    3. Apply for a waiver, under any applicable provision of federal law enacted on or after May 1, 2017, consistent with providing a temporary mechanism for maximizing available federal funding to improve access to health care.
- In 2019, SB 1940 was passed, extending the expiration date of the SB 2087 provisions until August 31, 2021.

Waiver application process and timeline

CMS has a seven-page checklist describing the waiver process. Waiver applications must include analysis from a member of the American Academy of Actuaries and supporting data that shows the guardrails are met and identifies the impact the waiver will have on various types of individuals.

A waiver application must compare comprehensiveness, affordability, coverage, and net federal spending and revenues under the waiver and absent the waiver for each year of the waiver. The maximum term of a waiver is five years, which may be renewed.



Potential waiver opportunities

To date, CMS has approved waivers for 15 states: Alaska, Colorado, Delaware, Hawaii, Maine, Maryland, Minnesota, Montana, New Hampshire, New Jersey, North Dakota, Oregon, Pennsylvania, Rhode Island, and Wisconsin. With the exception of Hawaii's narrow waiver about small business exchange and tax credits, most have pursued a reinsurance program designed to stabilize individual market premiums and capture pass through funding to offset the cost of providing reinsurance. Many other states have considered waivers, and some have submitted unsuccessful waiver applications.

Other state actions

State	Description	Status	People covered	Federal dollars	State dollars
Alaska	Allow federal pass through funding to partially finance the state's reinsurance program.	Approved 7/7/2017	22,900	$58.5 million	$59 million

State	Description	Status	People covered	Federal dollars	State dollars
California	Allow undocumented immigrants to purchase coverage through the state's marketplace, Covered California, without premium subsidies.	Withdrawn 1/18/17			
Colorado	Create a reinsurance program for 2020 and 2021 and waive the single-risk pool requirement in the individual market.	Approved 7/31/19	223,173	$169.5 million	$87 million
Delaware	Create a reinsurance program for 2020 through 2024 and waive the single-risk pool requirement in the individual market.	Approved 8/20/19	22,600	$21.7 million	$6.9 million
Georgia	Create a reinsurance program for 2021 through 2025, coupled with phase 2 beginning in 2022 to transition from FFE to the Georgia Access Model, use web-brokers instead of the marketplace for enrollment, allow subsidies for non-QHPs, replace PTCs with state-operated financial assistance, and cap financial assistance with a waitlist for financial assistance when cap is reached.	Under Review	389,307	$306 million	$101 million

State	Description	Status	People covered	Federal dollars	State dollars
Hawaii	Hawaii's waiver freed the state from the ACA requirement to operate a Small Business Health Options Program and redirect the associated funding to support a state fund for small businesses health coverage tailored to Hawaii's unique needs. Does not affect the individual market. Approved through 2021.	Approved 12/30/16			
Idaho	Aims to provide people with incomes between 100% and 138% FPL to be eligible for insurance through the state exchange or Medicaid.	Incomplete 8/29/19			
Iowa	Create a Proposed Stopgap Measure plan that would be the only plan offered in the marketplace; replace advanced premium tax credits with flat premium subsidies based on age and income and eliminate cost-sharing subsidies; and establish a reinsurance program. Federal pass through funds would finance the new premium subsidies and the reinsurance program.	Withdrawn 10/23/17			
Maine	Create a reinsurance program for 2020 through 2023 and waive the single-risk pool requirement in the individual market.	Approved 7/30/19	62,100	$26.3 million	$22.6 million

State	Description	Status	People covered	Federal dollars	State dollars
Maryland	Create a reinsurance program for 2019 through 2023 and waive the single-risk pool requirement in the individual market.	Approved 8/22/18	181,522	$373.4 million	N/A
Massachusetts	Waive CSR payments and establish a Premium Stabilization Fund to provide direct issuer reimbursement.	Incomplete 10/23/17			
Minnesota	Create a reinsurance program for 2018 through 2022 and waive the single-risk pool requirement in the individual market.	Approved 9/22/17	170,000	$130.7 million	$271 million appropriated, $120.5 million spent
Montana	Create a reinsurance program for 2020 through 2024 and waive the single-risk pool requirement in the individual market.	Approved 8/16/19	46,888	$22.5 million	$12.9 million
New Hampshire	Create a reinsurance program for 2021 through 2025 and waive the single-risk pool requirement in the individual market.	Approved 8/05/20	42,000	Estimated $32.9 million	Estimated 13.4 million
New Jersey	Create a reinsurance program for 2019 through 2023 and waive the single-risk pool requirement in the individual market.	Approved 10/5/18	331,000	$180.2 million	$105.8 million
North Dakota	Create a reinsurance program for 2020 through 2024 and waive the single-risk pool requirement in the individual market.	Approved 7/31/18	38,897	$21.5 million	$21.2 million
Ohio	Waive the individual and employer mandates as directed by legislation	Incomplete 5/17/18			

State	Description	Status	People covered	Federal dollars	State dollars
Oklahoma	Create a new state reinsurance program to be funded with a combination of federal pass through funds and state appropriations.	Withdrawn 9/29/17			
Oregon	Create a reinsurance program for 2018 through 2022 and waive the single-risk pool requirement in the individual market.	Approved 10/20/17	204,162	$54.5 million	$36 million
Pennsylvania	Create a reinsurance program for 2021 through 2025 and waive the single-risk pool requirement in the individual market.	Approved 7/24/20	413,700	$95.1 million	$44.2 million
Rhode Island	Create a reinsurance program for 2020 through 2024 and waive the single-risk pool requirement in the individual market.	Approved 8/26/19	42,834	$5.2 million	$8.3 million
Vermont	Continue to allow small employers to enroll directly with health insurance carriers rather than through an online SHOP web portal.	Incomplete 6/9/16			
Wisconsin	Create a reinsurance program for 2019 through 2023 and waive the single-risk pool requirement in the individual market.	Approved 7/29/18	202,957	$127.7 million	$72.3 million

Based on CMS website Section 1332: State Innovation Waivers

Under the new guidance, it is easier for other types of waivers to meet the guardrails. For example, the guidance suggests that a waiver could promote enrollment in association health plans or short-term limited duration policies, which do not have ACA protections, without violating the guardrails, if more comprehensive coverage remains available.

Developing waivers remains complicated and using reinsurance to stabilize the market may conflict with any approach that promotes coverage outside of the single-risk pool. Ultimately, clear guidance about waiver goals and priorities would be needed to evaluate potential waiver opportunities.

Waiver concepts

The four waiver concepts that CMS described in its most recent fact sheet are described below.

Account-based subsidies

States could waive the advance premium tax credits (APTCs) provided under the ACA and direct that pass-through funding into state-administered consumer-directed accounts that individuals could use, potentially along with employer contributions, to pay for health insurance premiums or other health care expenses. This approach would allow individuals more flexibility in choosing a health plan, such as a high deductible plan with lower premiums.

State-specific premium assistance

States could waive the APTCs provided under the ACA, and direct that funding into their own state-administered subsidy programs that might better address the needs of their populations. For example, such a program could provide subsidies based on age, rather than income.

Adjusted plan options

States could provide subsidies for a wider variety of health plans, including those that do not fit the definition of qualified health plans (QHPs). This could be done by allowing non-QHPs to be sold on the exchange to provide subsidies in counties where no QHP is available in the exchange, although this might require a state to operate its own exchange. Alternatively, states could provide subsidies for non-QHPs generally, such as for short-term health plans. States could also expand eligibility for enrolling in catastrophic plans beyond just those under age 30. This waiver concept could be combined with the account-based subsidies concept, where individuals are provided subsidies in the form of account contributions.

Risk stabilization strategies

This waiver concept gives states more flexibility in implementing reinsurance programs or high-risk pools. For example, a state could implement its own reinsurance program, as some states discussed above have done. A state could create a high-risk pool to take high-risk individuals out of the general pool, resulting in a decrease in premiums. If the state can show an expected reduction in federal APTCs, it can receive federal pass-through funding to help fund its high-risk pool or reinsurance program.

If a state wants to implement one of these concepts, it must still ensure that the waiver plan meets the four guardrails of comprehensiveness, affordability, coverage, and federal deficit neutrality. Whether these concepts would do so is not clear and would require extensive actuarial analysis. As with any 1332 waiver, a state must submit a proposal for federal review to assess whether the guardrails are met. In addition, nothing in the new guidance or the waiver concepts changes the existing requirements for health insurers as applicable to providing protections for individuals with pre-existing conditions.

Questions: Call TDI Government Relations at 512-676-6605.