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DEPARTMENT OF THE TREASURY

31 CFR Part 33

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 155

[CMS-9936-NC2]

Request for Information Regarding State Relief and Empowerment Waivers

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS; Department of the Treasury

ACTION: Request for information.

SUMMARY: This request for information (RFI) solicits public comment on ideas for innovative programs and waiver concepts that states could consider in developing a 1332 waiver plan. The Department of the Treasury and the Centers for Medicare & Medicaid Services in the Department of Health and Human Services (collectively, the Departments) are seeking feedback and ideas on how states might take advantage of new flexibilities provided in recently published October 2018 guidance. The overarching goal of section 1332 waivers is to give all Americans the opportunity to gain high value and affordable health coverage regardless of income, geography, age, gender, or health status while empowering states to develop health coverage strategies that best meet the needs of their residents. The Departments are committed to empowering states to innovate in ways that will strengthen their health insurance markets, expand choices of coverage, target public resources to those most in need, and meet the unique circumstances of each state.

DATES: Comment Date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on **[**Insert date 60 days after date of publication in the **Federal Register].**

ADDRESSES: Written comments may be submitted to the addresses specified below. Any comment that is submitted will be shared between the Departments. Please do not submit duplicates.

All comments will be made available to the public. Warning: Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments are posted on the internet exactly as received and can be retrieved by most internet search engines. No deletions, modifications, or redactions will be made to the comments received, as they are public records. Comments may be submitted anonymously.

In commenting, refer to file code CMS-9936-NC2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. Electronically. You may submit electronic comments on this regulation to **http://www.regulations.gov**. Follow the "Submit a comment" instructions.

2. By regular mail. You may mail written comments to the following address ONLY:

Centers for Medicare & Medicaid Services,

Department of Health and Human Services,

Attention: CMS-9936-NC2,

P.O. Box 8013,

Baltimore, MD 21244-1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By express or overnight mail. You may send written comments to the following address ONLY:

Centers for Medicare & Medicaid Services,

Department of Health and Human Services,

Attention: CMS-9936-NC2,

Mail Stop C4-26-05,

7500 Security Boulevard,

Baltimore, MD 21244-1850.

For information on viewing public comments, see the beginning of the "SUPPLEMENTARY INFORMATION" section.

FOR FURTHER INFORMATION CONTACT: Michelle Koltov, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (301) 492-4225.

Lina Rashid, Centers for Medicare & Medicaid Services, Department of Health and Human Services, at (202) 260-6098.

SUPPLEMENTARY INFORMATION:

Submission of Comments: All submissions received for this notice must include the Agency file code CMS-9936-NC2.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential

business information that is included in a comment. Comments received before the close of the comment period are posted on the following web site as soon as possible after they have been received: http://www.regulations.gov. Follow the search instructions on that web site to view public comments.

I. Background

One of the Administration's priorities in health care is to empower states by providing tools to address the serious problems that have surfaced in state individual health insurance markets with the implementation of the Patient Protection and Affordable Care Act (PPACA). The Administration is committed to expanding state flexibility and empowering states to address problems with their individual health insurance markets and increase health insurance coverage options for their residents, while at the same time encouraging states to adopt innovative strategies to reduce future overall health care spending. Section 1332 of the PPACA permits a state to apply for a State Innovation Waiver (referred to as a section 1332 waiver or a State Relief and Empowerment Waiver) to pursue innovative strategies for providing their residents with access to higher value, more affordable health coverage. The overarching goal of section 1332 waivers is to give all Americans the opportunity to gain high value and affordable health coverage regardless of income, geography, age, gender, or health status while empowering states to develop health coverage strategies that best meet the needs of their residents. Section 1332 waivers provide states an opportunity to promote a stable health insurance market that offers more choice and affordability to state residents, in part through expanded competition.

On November 29, 2018, CMS released a discussion paper entitled "Section 1332 State Relief and Empowerment Waiver Concepts."[1] These waiver concepts are intended to foster discussion with states by illustrating how states might take advantage of new flexibilities provided in guidance related to section 1332 published on October 24, 2018 (referred to as the 2018 guidance)[2], which replaced the previous guidance published on December 16, 2015.[3] The 2018 guidance aims to lower barriers to innovation for states seeking to reform their health insurance markets, increases flexibility with respect to the manner in which a section 1332 state plan may meet section 1332 approval requirements, clarifies the adjustments that the Secretary of the Department of the Treasury and the Secretary of the Department of Health and Human Services (collectively, the Secretaries) may make to maintain federal deficit neutrality, and clarifies that states may use existing state legislative authority to authorize section 1332 waivers in certain scenarios. The Departments are committed to empowering states to innovate in ways that will strengthen their health insurance markets, expand choices of coverage, target public resources to those most in need, and meet the unique circumstances of their state.

As noted in the 2018 guidance, the Secretaries will consider favorably section 1332 waiver applications that advance some or all of the following five principles as elements of a section 1332 waiver application. The principles are as follows:

- *Provide increased access to affordable private market coverage.* Making private health insurance coverage more accessible and affordable should be a priority for a section 1332 waiver. A section 1332 state plan should foster health coverage through competitive private

[1] https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Waiver-Concepts-Guidance.PDF
[2] 83 FR 53575, https://www.federalregister.gov/documents/2018/10/24/2018-23182/state-relief-and-empowerment-waivers
[3] 80 FR 78131, https://www.federalregister.gov/documents/2015/12/16/2015-31563/waivers-for-state-innovation

coverage, including Association Health Plans and short-term limited-duration insurance plans, over public programs. Additionally, the Departments will look favorably upon section 1332 applications under which states increase issuer participation in state insurance markets and promote competition.

- *Encourage sustainable spending growth*. Section 1332 waivers should promote more cost-effective health coverage and be fair to the federal taxpayer by restraining growth in federal spending commitments. For example, states should consider eliminating or reducing state-level regulation that limits market choice and competition in order to reduce prices for consumers and reduce costs to the federal government, as part of their section 1332 waiver applications.

- *Foster state innovation.* States are better positioned than the federal government to assess and respond to the needs of their citizens with innovative solutions. We encourage states to craft solutions that meet the needs of their consumers and markets and innovate to the maximum extent possible under the law.

- *Support and empower those in need*. Americans should have access to affordable, high value health insurance. Some Americans, particularly those with low incomes or high expected health care costs, may require financial assistance. Policies in section 1332 waiver applications should support state residents in need in the purchase of private coverage with financial assistance that meets their specific health care situations.

- *Promote consumer-driven healthcare.* Section 1332 waivers should empower Americans to make informed choices about their health coverage and health care with incentives that encourage consumers to seek value. Instead of only offering a one-size-fits-all plan proposal, a section 1332 state plan should focus on providing people with the resources and

information they need to afford and purchase the private insurance coverage that best meets their needs.

Consistent with the principles laid out above, the Secretaries intend to provide states with maximum flexibility within the law to innovate, empower consumers, and expand higher value and more affordable coverage options.

Under a section 1332 waiver, states may seek waivers of requirements under Part I of Subtitle D of Title I of the 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). For example, a state may seek to waive requirements under parts I and II of Subtitle D of the PPACA, including the requirement that an Exchange operate in the state; that the Exchange in the state performs certain minimum functions, including QHP certification, administration of annual and special enrollment periods; as well as requirements related to essential health benefits (EHB) and actuarial value (AV) metal levels. The Departments' waiver authority does not permit states to waive other PPACA title I requirements such as pre-existing condition protections; allowable premium rating factors, including age bands; guaranteed availability and renewability of health coverage; risk adjustment; and eligibility determinations under section 1411 of the PPACA for programs outside of the Exchange (this applies to determinations for Medicaid, the Children's Health Insurance Program (CHIP), and the Basic Health Program (BHP)). Under section 1332 of the PPACA, the Departments have no authority to waive any provision of the Employee Retirement Income Security Act (ERISA).

In order for the Departments to be able to grant a request for a section 1332 waiver, the Departments must determine that the waiver will provide access to health insurance coverage that is at least as comprehensive and affordable as would be provided under the PPACA without the waiver, will provide coverage to at least a comparable number of residents of the state as would be provided coverage without the waiver, and will not increase the federal deficit. These statutory criteria are referred to as the "guardrails." Before submitting a section 1332 waiver application, a state must have enacted a law providing for implementation of the waiver, provided public notice and a period for public comment, and held public hearings sufficient to ensure a meaningful level of public input.

Under a section 1332 waiver, a state may receive pass-through funding associated with the resulting reductions in federal spending on Exchange financial assistance (that is, spending on PTC under section 36B of the Internal Revenue Code, Small Business Tax Credits (SBTC) under section 45R of the Internal Revenue Code, or Cost-Sharing Reductions (CSRs)[4] consistent with the statute and the state's waiver plan. Pass-through funding may only be used to implement the approved state waiver plan.

The waiver concepts in the discussion paper released in November 2018 were offered to spur innovative ideas that could be utilized by individual states seeking approval for section 1332 waivers that could help improve their health care markets. The four waiver concepts addressed in that discussion paper are summarized below:

- **Account-Based Subsidies**: Under this waiver concept, a state can create its own subsidy structure and direct public subsidies into a defined-contribution, consumer-directed account that an individual uses to pay for health insurance premiums or other health care

[4] So long as there is no available appropriation to support federal CSR payments, states may not receive pass-through funds based on federal savings in CSR payments.

expenses. The account could be funded with pass-through funding made available by waiving federal spending on Exchange financial assistance, such as the PTC under section 36B of the Internal Revenue Code (IRC) or SBTC under section 45R of the IRC, or by waiving other provisions as described above, thereby resulting in reduced federal financial assistance spending. The account could also allow individuals to aggregate funding from additional sources, including individual and employer contributions. An account-based approach could give beneficiaries more choices and require beneficiaries to take responsibility for managing their health care spending. This approach could also provide consumers with a greater ability to select a plan based on their needs, or their family's needs, including a higher deductible plan with lower premiums.

- **State-Specific Premium Assistance**: States can use the State-Specific Premium Assistance waiver concept to create a new, state-administered subsidy program. A state may design a subsidy structure that meets the unique needs of its population in order to provide more affordable health care options to a wider range of individuals, attract more young and healthy consumers into their market, or to address structural issues that create perverse incentives, such as the subsidy cliff. States may receive federal pass-through funding by waiving federal spending on Exchange financial assistance, such as the PTC under section 36B of the IRC to help fund the state subsidy program, or by waiving other provisions as described above, thereby resulting in reduced federal financial assistance spending.

- **Adjusted Plan Options**: Under this waiver concept, states could provide financial assistance for different types of health insurance plans, including non-QHPs, potentially increasing consumer choice and making coverage more affordable for individuals. For example, states could choose to expand the availability of catastrophic plans beyond the current eligibility

limitations by waiving section 1302(e)(2) of the PPACA. Used in conjunction with the account-based subsidy waiver concept, states could provide subsidies in the form of contributions to consumer-directed accounts, allowing individuals to use the funds to purchase coverage that is right for them and use any remaining funds in the account to offset out-of-pocket health care expenses.

- **Risk Stabilization Strategies**: To address risk associated with individuals with high health care costs, this waiver concept gives states more flexibility to implement reinsurance programs or high risk pools. For example, a state can implement a state-operated reinsurance program or high-risk pool by waiving the single risk pool requirement under section 1312(c)(1) of the PPACA. Reinsurance programs established through section 1332 waivers have lowered premiums for consumers, improved market stability, and increased consumer choice. To date, states have chosen to use a variety of models to operate their state-based reinsurance programs, using flexibility available under section 1332. These models include a claims cost-based model, a conditions-based model, and a hybrid conditions and claims cost-based model. For approved 1332 waivers, if the Departments determine that the waiver will reduce federal spending on Exchange financial assistance, the state will receive federal pass-through funding to help fund the state's high risk pool/reinsurance program.

States are not required to use these concepts in their waiver applications; states may use these waiver concepts alone or in combination with other waiver concepts, state proposals, or policy changes. States may also submit applications that do not use any of the waiver concepts outlined above. A state's use of any of these waiver concepts, in whole or in part, does not guarantee approval. The Departments will continue to evaluate all section 1332 waiver applications received on an individual basis in a manner consistent with the requirements of

section 1332 of the PPACA and its implementing regulations at 31 CFR part 33 and 45 CFR part 155.

II. Solicitation of Public Comments

The Departments are committed to empowering states to innovate and as such are interested in waiver ideas for states to consider that will strengthen their health insurance markets, expand choices of coverage, target public resources to those most in need, and meet the unique circumstances of each state. This RFI is intended to solicit ideas and spur additional thinking and innovation as states consider developing section 1332 waiver plans.

In this RFI, the Departments solicit public comments on ideas for other innovative waiver concepts. The Departments seek public comments on ideas that states may be able to use to develop innovative waiver programs that meet the section 1332 guardrails. The Departments are soliciting comments on waiver concepts that states could potentially use alone or in combination with other waiver concepts, state proposals, or policy changes. In this RFI, the Departments also seek public comments on ideas for waiver concepts that could advance some or all of the principles outlined in the October 2018 guidance and Background section above.

The Departments are also soliciting public comments on ideas for waiver concepts that incorporate the entire range of waivable requirements allowed under section 1332. The Departments are also interested in how states might align these flexibilities under section 1332 with other flexibilities under federal law, including regulatory flexibility, section 1115 Medicaid waivers, as well as state law.

The Departments may consider the ideas received in response to this RFI to develop additional waiver concepts in the future.

III. Collection of Information Requirements

Please note, this is a request for information (RFI) only. In accordance with the implementing regulations of the Paperwork Reduction Act of 1995 (PRA), specifically 5 CFR 1320.3(h)(4), this general solicitation is exempt from the PRA. Facts or opinions submitted in response to general solicitations of comments from the public, published in the Federal Register or other publications, regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition of the agency's full consideration, are not generally considered information collections and therefore not subject to the PRA.

Respondents are encouraged to provide complete but concise responses. This RFI is issued solely for information and planning purposes; it does not constitute a Request for Proposal (RFP), applications, proposal abstracts, or quotations. This RFI does not commit the U.S. Government to contract for any supplies or services or make a grant award. Further, CMS is not seeking proposals through this RFI and will not accept unsolicited proposals. Responders are advised that the U.S. Government will not pay for any information or administrative costs incurred in response to this RFI; all costs associated with responding to this RFI will be solely at the interested party's expense. Not responding to this RFI does not preclude participation in any future procurement, if conducted. It is the responsibility of the potential responders to monitor this RFI announcement for additional information pertaining to this request. Please note that CMS will not respond to questions about the policy issues raised in this RFI. CMS may or may not choose to contact individual responders. Such communications would only serve to further clarify written responses. Contractor support personnel may be used to review RFI responses. Responses to this notice are not offers and cannot be accepted by the U.S. Government to form a binding contract or issue a grant. Information obtained as a result of this RFI may be used by the

U.S. Government for program planning on a non-attribution basis. Respondents should not include any information that might be considered proprietary or confidential. This RFI should not be construed as a commitment or authorization to incur cost for which reimbursement would be required or sought. All submissions become U.S. Government property and will not be returned. CMS may publically post the comments received, or a summary thereof.

Signed at Washington DC, this 5th day of April, 2019

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David J. Kautter,

Assistant Secretary (Tax Policy),

Department of the Treasury.

Dated: March 19, 2019.

Seema Verma,

Administrator,

Centers for Medicare & Medicaid Services.

Dated: April 26, 2019.

Alex M. Azar II,

Secretary,

Department of Health and Human Services.

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