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Pushing the Limits: Iowa Asks the Administration to Approve ACA Waiver that Would Harm Access to Care and Establish Concerning Precedent

On Monday, June 12, 2017, the Iowa Insurance Division submitted a proposal to the Centers for Medicare and Medicaid Services (CMS) requesting a temporary innovation waiver that would allow the state to make significant changes to its insurance market as constructed under the ACA. These changes could remove protections created by the ACA and negatively impact access to care in Iowa, particularly for the state's most vulnerable. Further, Iowa's proposal does not comply with the procedural requirements of the ACA's waiver authority, known as Section 1332. These procedural requirements were put in place to ensure that state governments would receive input from the stakeholder community prior to implementing such a waiver. If CMS approves this waiver request, it will signal that the Agency is willing to grant states considerable latitude to waive various ACA requirements and to do so with little opportunity for public input.

Advocates should:

1. **Familiarize themselves with Section 1332 of the ACA, particularly its standards for allowable waivers and its procedural requirements.**

2. **Voice their opposition to Iowa's request both to state officials, such as the Iowa Insurance Division and Governor Kim Reynolds, and to CMS.**

3. **Begin developing relationships with state insurance regulators in their own states to voice opposition to any similar waiver requests, and to demand that state officials comply with the procedural requirements of Section 1332 if any such waiver is requested. As Iowa's request may be seen as a model for other states to submit their own proposals, advocates elsewhere should take proactive steps to influence decision makers.**

Section 1332: The ACA's Waiver Authority

Section 1332 of the ACA was designed to offer states flexibility in implementing key ACA requirements. This provision allows states to apply to CMS for "innovation waivers" to implement state-specific health reform policies that may deviate from certain ACA requirements. Under a waiver, states may be granted the authority to modify the ACA's individual and employer mandates, Essential Health Benefits package, premium subsidies and cost-sharing reduction payments, and other requirements related to health plans sold on the Marketplace. If CMS grants a state's waiver, the state may use funds that would have otherwise been paid for premium subsidies and cost-sharing reduction payments to implement its proposed alternatives.

However, Section 1332 was not intended to be a broad escape hatch from the requirements of the ACA. Rather, Section 1332 waivers can only be granted where the state can demonstrate that its proposal will: 1) cover a comparable number of state residents as would be covered absent a waiver; 2) provide coverage that is at least as comprehensive and affordable as would otherwise be provided; 3) provide coverage and cost-sharing protections against excessive out-of-pocket spending at least as affordable as those provided under the ACA; and 4) not increase the federal deficit. Guidance on these substantive requirements highlights that these safeguards are designed to take into account whether a proposed waiver will preserve comprehensive access to care for vulnerable and low-income populations, such as those living with serious health concerns.

Further, Section 1332 includes a series of procedural requirements meant to ensure that states consider stakeholder input on any proposed waiver request. Specifically, states must provide an opportunity for the public to comment on the proposal before submitting their request to CMS. Once CMS certifies that the application is complete, the federal government must provide an additional comment period. This process was designed to ensure that a meaningful level of public input from key stakeholders is considered in the development and potential approval of these waivers. Due to these strict procedural and substantive safeguards, only one 1332 waiver application has been approved to date.

Iowa's 1332 Waiver Request

In the past several months, Aetna and Wellmark Blue Cross and Blue Shield withdrew from Iowa's ACA Marketplace, and another insurer, Medica, has suggested it may leave as well. As a result, Iowa is at risk of having no insurers participating on its ACA Marketplace, leaving nearly 72,000 individuals with no options to purchase health insurance. In response, Iowa developed a proposal intended to shore up the state's insurance markets.

Iowa's Proposal Would Harm Access to Care

Iowa's 1332 waiver proposal, if approved, could significantly undercut affordability and access to health care for vulnerable and low-income populations within the state. Overall, coverage would become less affordable for those with the lowest incomes, and somewhat more affordable for those with higher incomes. Iowa's request seeks to implement a "Proposed Stopgap Measure" (PSM) that would develop a single, standardized health insurance plan that would be the only available option for eligible consumers in 2018. This plan would qualify as a silver level plan, would cover all Essential Health Benefits and Iowa state-mandated benefits, and would have no annual or lifetime limits on benefits provided.

However, Iowa also proposes premium subsidies that would be structured differently than those provided by the ACA. Under the ACA, premium subsidies are scaled based on income and the local cost of coverage, to ensure that insurance is affordable for low- and moderate- income individuals. In contrast, the PSM's proposed subsidies vary based on age and income, and are less generous than the ACA's subsidies, particularly for those with lower incomes and for older individuals. Because the PSM's subsidies do not adjust based on geographic variation in premiums, and less populated rural areas often see higher premiums, enrollees living in rural Iowa are likely to face even higher premiums. Further, it appears from the proposal that income would be determined based on 2017 household income, leaving those who anticipate reduced earnings in 2018 due to a job loss or other circumstance without additional support that would have otherwise been available under the ACA.

The PSM proposal notes that the cost-sharing reduction subsidies, which lower the amount of out-of-pocket spending on

health care for lower-income enrollees, will not be available for consumers enrolling in the PSM standard plan. Eliminating these important subsidies will push more costs onto those with lower incomes, forcing these individuals to potentially forego needed services and treatment due to the increased financial burden. Just under 28,000 Marketplace enrollees in Iowa currently enjoy the benefit of these reduced out-of-pocket expenditures, accounting for about 51% of the state's Marketplace consumers.

Due to these concerns, it is difficult to see how Iowa's PSM proposal complies with the requirements of Section 1332 as outlined above, namely, that a waiver must provide coverage that is at least as affordable as under the ACA and cover a comparable number of state residents. Removing the cost-sharing reduction subsidies and implementing a less generous premium subsidy structure will necessarily make coverage less affordable, particularly for those who use the health system more frequently, such as people living with chronic illnesses and disabilities. These affordability concerns are likely to cause reduced enrollment as consumers find the reduced financial support insufficient to defray the cost of premiums and out-of-pocket expenditures.

Given these serious access to care and affordability concerns, advocates in Iowa should voice their opposition to the PSM proposal with relevant state officials, including the Iowa Insurance Division and Governor Reynolds. As CMS may provide a federal comment period, advocates should watch here for an opportunity to weigh in. Further, because Iowa's proposal may be seen as a model for other states to submit their own proposals that reduce access to care, advocates elsewhere should begin developing relationships with their governors and insurance regulators, in order to influence the development of waivers and hold these officials accountable to the strict requirements of Section 1332.

Iowa Fails to Allow Stakeholder Input

The timing of Iowa's proposal is unfortunate, as it comes just a week before the state's deadline for insurers to decide whether or not they will participate in the ACA's Marketplace in 2018. Due to this tight timeline, Iowa has asked that CMS waive many of the procedural requirements of Section 1332, or in the alternative, simply grant its request pursuant to President Donald Trump's January 20 executive order[1] without any express legal or regulatory authority to do so.

Contrary to the requirements of Section 1332, Iowa did not provide an opportunity for the public to comment on the proposal before submitting it to CMS. Instead, the proposal says that Iowa intends to hold public hearings after it receives feedback from CMS. Additionally, Section 1332 waiver applications are required to include extensive data demonstrating how the proposal will comply with the substantive legal requirements of the law, as outlined above. Iowa's proposal, however, argues that because the request is for an emergency situation and is only to be in effect for 2018, this data is not necessary. As such, not only would CMS need to overlook the substantive drawbacks of the proposal, it would also have to broadly waive the required process for considering Section 1332 waivers.

Iowa has apparently discussed this proposal with CMS previously, although the waiver application indicates that this was only with "senior level management." Typically, once a state submits its waiver application, CMS conducts a preliminary review within 45 days of receipt to determine whether the application is complete. However, stressing the "emergency" nature of their proposal, Iowa officials have asked that CMS provide feedback within 14 days. Further, Iowa seems to

[1] For a discussion of the President's executive order, please see our previous *Health Care in Motion* piece here.

acknowledge its own failure to satisfy the requirements for a 1332 waiver, expressing concern that career staff conducting this review may conclude that the proposal does not satisfy the requirements of Section 1332. Indeed, Iowa requested that "staff who may review this proposal [be] apprised of the conversations with [CMS] senior level management." This somewhat brazen suggestion indicates that Iowa anticipates that CMS political appointees will intervene to overrule career level staff and approve the state's request regardless of whether it satisfies substantive and procedural legal standards.

These procedural lapses are concerning as they have eliminated the opportunity for key stakeholders to inform and influence the development of Iowa's proposal. Patients, providers, and advocates have not had any say in a proposal that would dramatically alter the insurance landscape in the state. Furthermore, because Iowa has not included the required data that demonstrates how the proposal will meet the coverage and affordability requirements of Section 1332, advocates have little information on the expected impact on vulnerable and low-income populations.

In light of these concerns, advocates should carefully review the standards for Section 1332 waiver submission and approval, and monitor their state for any early discussion of potential waiver requests. Should the Administration grant this proposal, despite the serious process violations, advocates in Iowa may consider taking legal action to challenge the implementation of the waiver on these grounds.

A Problematic Precedent

While the individual Marketplaces are surely struggling under the substantial uncertainty created by efforts to repeal and replace the ACA, short-term stability for 2018 should not come at the cost of access to care. Allowing states to essentially re-write the ACA without express legal or regulatory authority, while giving states federal money to do so, raises serious concerns. Under the Obama Administration, advocates could rely on CMS to deny waivers that were problematic from an access to care perspective. However, the current Administration has repeatedly stressed state flexibility as the linchpin of its health policy agenda. President Trump's executive order, as well as statements by Secretary of Health and Human Services Tom Price, indicates that Trump's CMS will be much more likely to approve waivers submitted by states seeking this flexibility, even if they undermine the ACA and access to care. If the Administration decides to overlook the insufficiency of Iowa's proposal and grant its waiver request, this will send a clear message that the Administration is willing to give states the flexibility to dismantle much of the ACA.

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