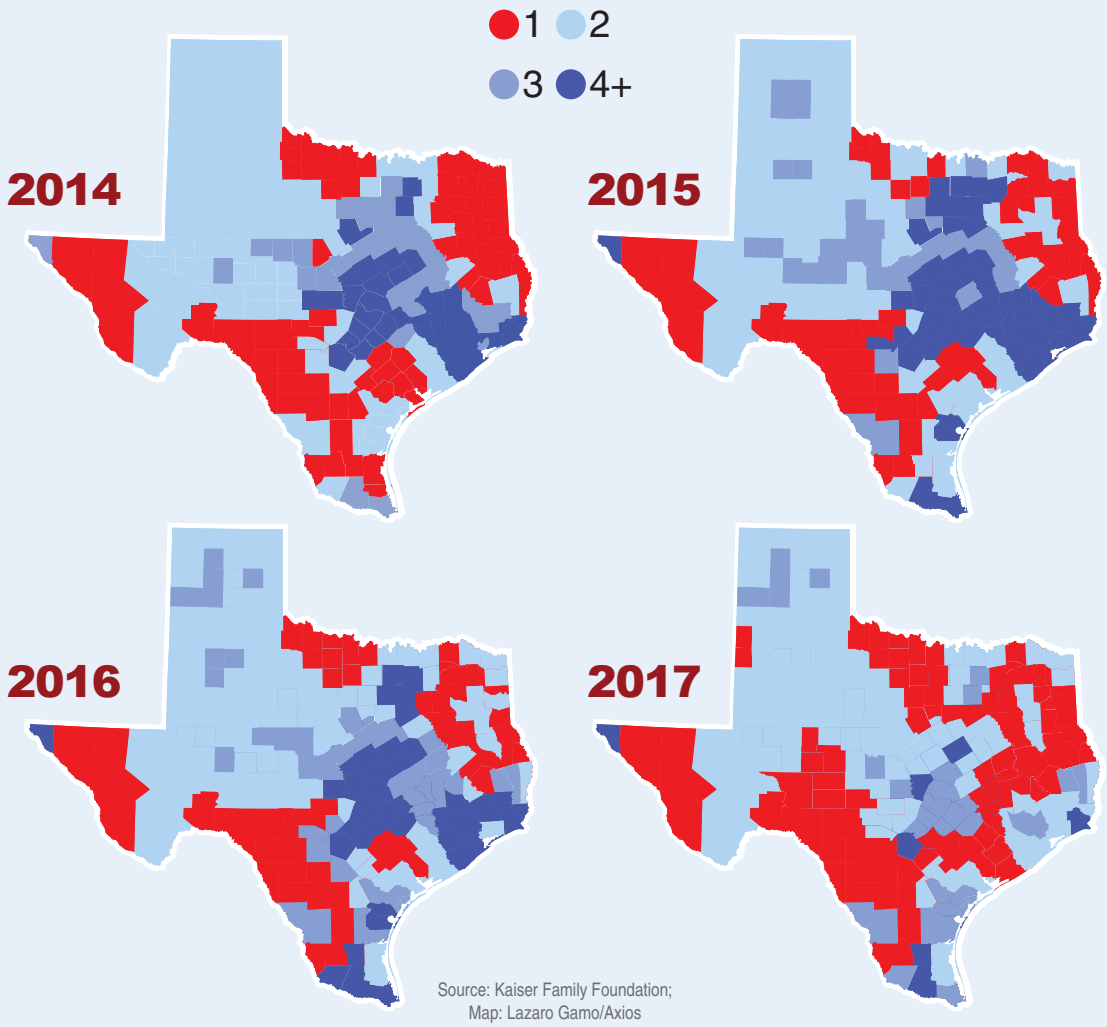
TAHP
The Texas Association of Health Plans

Stabilizing the Texas Insurance Market: 1332 Waivers

While the Affordable Care Act (ACA), signed into law in 2010, has resulted in important gains for millions of Texans and Americans, including expanding coverage to 20 million Americans, it is clear today that many parts of the law are not working as intended. Across the country, a mass exodus of insurance carriers from the individual market is creating serious concerns about accessibility and affordability of health insurance coverage. And Texas is not immune to this trend. Next year, more than 90 counties – more than a third of Texas counties – will only have one insurer offering health coverage in the individual market. This year alone, eight insurers exited the individual market in Texas. These withdrawals demonstrate how unstable the individual market is and are causing confusion and worry for the more than 2 million Texans who purchase health insurance in the individual market. Another glaring example of deep instability is major premium rate increases. Premiums in Texas are expected to increase more than 20 percent in 2018, on top of the double-digit rate increases already experienced in 2017.

The Shrinking ACA Insurance Market in Texas: 2014-2017

Number of Insurers in the Marketplace



Source: Kaiser Family Foundation;
Map: Lazaro Gamo/Axios

To ensure Texans continue to have access to quality health coverage, remain covered, and receive the benefits and care they need, the State must act now to help stabilize the insurance market in Texas. Failure to stabilize the market is resulting in increased health care costs, lost coverage, and fewer options for Texans.

Other states are attempting to get in front of the problem by proposing state-based solutions to address the stability of the market before the situation goes from bad to worse. While Texas is one state where every county has access to at least one health insurance option, there is no guarantee this access will continue, especially when we look at national trends. Thus far, Congress has been unable to get a consensus on various proposed alternatives to the ACA, and prospects remain dim for any traction on health reform on the federal front. Major questions remain for repeal of the ACA, enforcement of the individual mandate, and cost-sharing reduction payments. As a result of the federal government's failure to act, Texas policymakers must be proactive and examine state-based solutions to an increasingly unstable insurance market.

State-Based Solutions to Market Instability

With federal health reform negotiations continuing to stall, increasing attention is being given to a little-known provision of the health care law: the state innovation waiver program, or Section 1332. This program provides a way for states to design their own pathways to meet the law's coverage and affordability goals. The Administration sent states a letter earlier this year encouraging them to use Section 1332 waivers to modify the existing ACA framework according to their state's needs, along with a checklist designed to expedite that process. A bipartisan group of governors has demonstrated interest in the waivers and has subsequently encouraged the Administration to further streamline the waiver submission process.

Various factors make Texas a prime candidate for the waiver program, and state lawmakers should consider beginning an analysis as soon as possible into how a 1332 waiver could provide Texas with more flexibility and autonomy in attempting to stabilize the individual health insurance market and in creating more affordable health plan choices in the state.

Why the Individual Market Faces Sustainability Challenges in Texas

Since the inception of the ACA, the individual insurance market has faced a number of sustainability challenges. Chief among them have been:

- **Low Enrollment** – Not enough healthy enrollees in the market
- **Churn** – Lack of persistency of enrollment throughout the year
- **Lack of Competition & Choice** – Limited coverage options for consumers
- **Lack of Affordable Benefit Packages**
- **Too much Rigidity** – Limited ability of the state to tailor, design and implement policies and procedures according to Texas' needs

Background: What is the Individual Market?

When individuals do not have coverage through an employer, they must purchase health insurance on their own for themselves and their families in what is often referred to as the "individual market," through the ACA Marketplace (exchange) directly from the insurer. By creating the Marketplace, the authors of the ACA intended to provide greater choices and variety for Americans who purchase their own insurance. But because the ACA also implemented numerous patient protections and benefit mandates, these provisions have ultimately achieved the opposite: higher-priced premiums and fewer choices for consumers.

The intention was for any American needing to buy health insurance, regardless of pre-existing conditions, to be able to do so through the Marketplace. But because of the right to obtain coverage even with pre-existing conditions and burdensome regulations, prices soared and choices dwindled, and younger and healthier Americans either declined to purchase coverage or opted out of the market. Under the framework of the ACA, these younger, healthier individuals were needed to offset the costs of covering Americans with costly, chronic conditions. The result? The individual market has a high number of individuals with costly, chronic conditions and a low number who are young and healthy. The vicious cycle that ensues: more and more healthy people drop out, leaving more expensive individuals in the market and resulting in higher premiums and insurers deciding to leave the Marketplace.

National research firm Oliver Wyman found that ACA mandates led to a 54 percent increase in the average cost of coverage in 2015, which breaks down to an extra $744 per person for that year.

It is important to note that people who qualify for federal premium subsidies under the act are at least partially insulated from the premium increases, but government spending on those subsidies has also increased because subsidy amounts are tied to market-average premium amounts, which are up across the board.

Because of the current shaky status of the individual market, many governors and state insurance commissioners have called for more flexibility and control over their own markets. As mentioned, one possible vehicle for this increased flexibility is the ACA's Section 1332 waiver process.

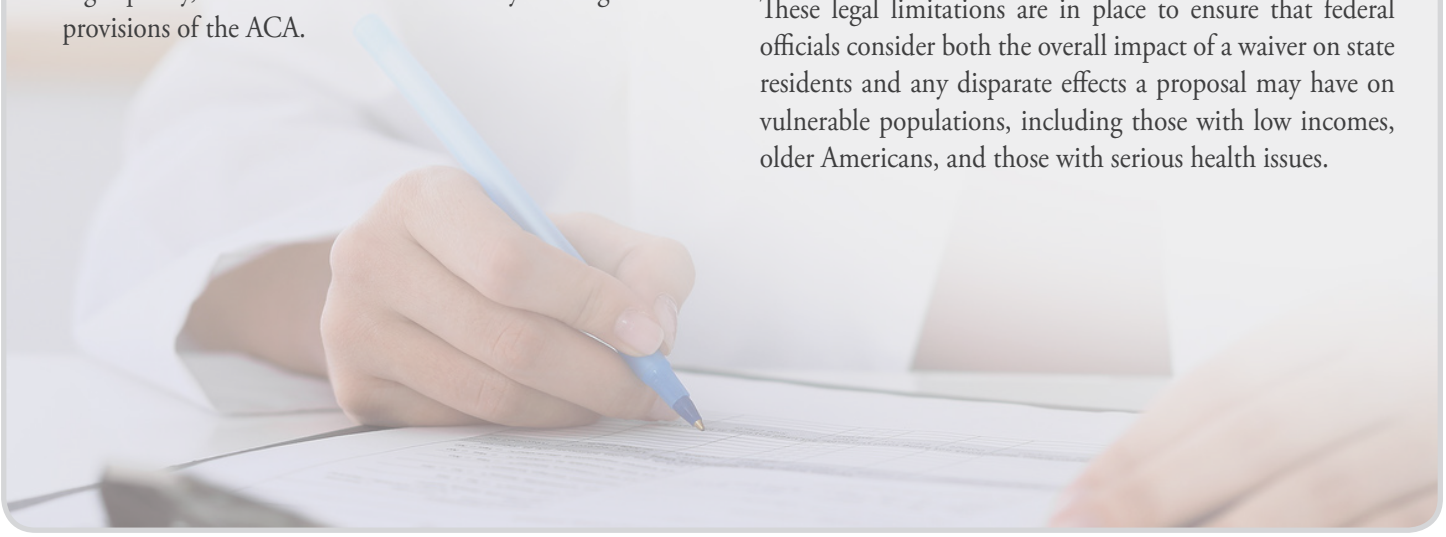
What is a 1332 Waiver?

As Congress remains deadlocked on health care reform, one option for states to increase stability in their individual markets is the creation of innovative, alternative reform proposals under the ACA's Section 1332 State Innovation waiver processes. Section 1332 waivers, also called "state innovation waivers," allow states, beginning in 2017, to pursue innovative strategies for providing greater access to high-quality, affordable health insurance by waiving certain provisions of the ACA.

What Criteria Must be Met?

For some, the idea of "waiving provisions of the ACA" may sound extremely appealing, but this directive has fine print. A state must demonstrate that its proposal to improve coverage meets four conditions in order to be approved for a waiver. Coverage under the waiver must be at least as comprehensive and affordable as without it, cover a comparable number of residents, and not add to the federal deficit.

These legal limitations are in place to ensure that federal officials consider both the overall impact of a waiver on state residents and any disparate effects a proposal may have on vulnerable populations, including those with low incomes, older Americans, and those with serious health issues.



What Can be Accomplished With Waivers?

In a volatile federal environment for health care policy, innovation waivers present an opportunity for states to pursue tailored and unique solutions, and an ability to accommodate preferred timelines and budget priorities. The waivers are good for 5 years and are renewable. They can allow for minor modifications to the ACA or sweeping changes, such as changing the way tax credits or subsidies are delivered within a state. The Section 1332 framework provides a great deal of opportunity to return flexibility to states to implement delivery system and payment reforms based on local conditions, reduce administrative burden on states and the health care industry, ease requirements that are driving up the cost of coverage for younger and healthier individuals, and support small business' and families' access coverage. The waivers may allow states to adopt new market reforms or transition away from provisions that may be stressing the market sooner than federal reform timelines will allow.

How do Waivers Impact Funding?

States are entitled to the same federal funding they would have received without an innovation waiver. This includes funds originally intended for financial assistance in the form of tax credits or cost-sharing reductions. States can reallocate these funds to accomplish the health care goals outlined in an approved waiver. The Departments of Health and Human Services and the Treasury have publicized their interested in working with states on Section 1332 waivers that would lower premiums for consumers, improve market stability, and increase consumer choice. They state that they particularly "welcome the opportunity to work with states to pursue Section 1332 waivers incorporating a high-risk pool/state-operated reinsurance program. State-operated reinsurance programs have a demonstrated ability to help lower premiums, and if the state shows a reduction in federal spending on premium tax credits a state could receive Federal pass-through funding to help fund the state's reinsurance program." [1]

What Key Elements of the ACA Can Currently be Waived?

The following ACA requirements can be waived under an approved 1332 waiver:

- **Benefits:** Essential Health Benefits and "Metal Tiers"
- **Single risk pool**
- **Subsidies:** States seeking to reallocate premium tax credits and cost-sharing reductions may receive the aggregate value of those subsidies to implement their alternative approaches.
- **Exchange and Qualified Health Plans:** States may replace their marketplaces or plan certification process with alternative ways to provide health plan choice, determine eligibility for subsidies, and enroll consumers in coverage.
- **The Individual Mandate:** States may modify or eliminate the requirement that individuals maintain minimum essential coverage.
- **The Employer (LG) Mandate:** States may modify or eliminate the requirement that large employers offer affordable coverage to their full-time employees.

What Key Elements of the ACA Cannot Currently be Waived?

Some ACA provisions specifically cannot be waived under current law, including:

- **Rating bands**
- **Three-month grace period**
- **Taxes**
- **Market reforms** - guarantee issue; preexisting conditions; discrimination
- **No-cost Preventive Services**

How to Apply For a 1332 Waiver

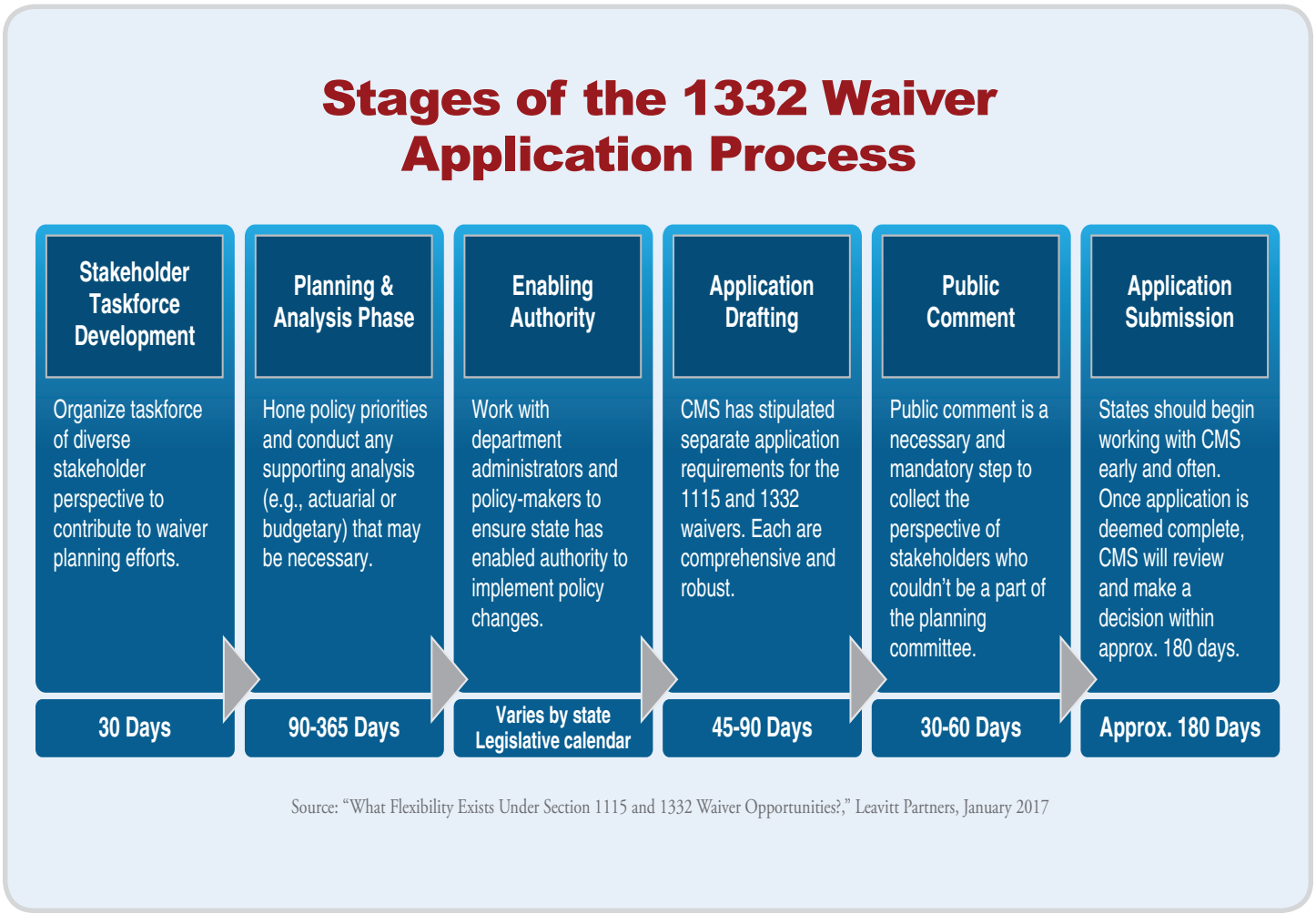
When applying for a 1332 waiver, a state must provide CMS with a list of ACA provisions it seeks to waive, along with the rationale for the specific requests. Critical elements of the waiver application include (but are not limited to):

- Data, assumptions, targets, actuarial analysis and other information sufficient to determine that the waiver will provide coverage that is at least as comprehensive, affordable, and accessible as would be provided absent the waiver
- A detailed 10-year budget plan that is deficit neutral to the federal government;
- A detailed analysis of the waiver's impact on health insurance coverage in the state;
- Enacted state legislation providing the necessary authority to implement the proposed waiver; and
- A detailed plan for implementation, including a timeline.
- A plan for quarterly and/or annual reporting of data to demonstrate that the waiver remains in compliance with the scope of coverage, affordability, comprehensiveness and deficit requirements.[2]

Before submitting a Section 1332 waiver application, a state must also provide a public notice and comment period, including public hearings, sufficient to ensure a meaningful level of public input (including a separate process for Indian tribal input in applicable states, including Texas).

Once a waiver request has been submitted, HHS and the Department of the Treasury work with the state on the review and approval process. Within 45 days, CMS conducts a preliminary review and notifies the state that the application is complete or identifies elements missing from the application. Following this preliminary determination, HHS and the Department of the Treasury provide for a public comment period. The final decision of the Secretaries of HHS and the Treasury is issued no later than 180 days after the determination the preliminary review.

The 1332 waiver application, review and approval process can take up to 12-18 months (or even longer) due to the requirements for state enabling legislation and for public hearing and a comment period. It is important to keep in mind that health plans need sufficient time to develop products and prepare and submit form and rate filings with regulators. Health plan filings for 2019 coverage offerings will be due in June 2018. Additionally, a 1332 waiver application may be filed with an 1115 waiver application but each must stand on its own.



Source: "What Flexibility Exists Under Section 1115 and 1332 Waiver Opportunities?," Leavitt Partners, January 2017

How Are Other States Thinking About Innovation Waivers?

Earlier this year, federal administration officials sent states a letter encouraging them to use these "Section 1332" waivers to modify the ACA framework. A number of states have either applied for a 1332 waiver or are in the process of applying. Generally speaking, these states are hoping to use the waivers to address the challenges they are facing in the commercial individual market, such as an imbalanced risk pool and increasing premium rates, as well as the reduced number of health plans offered on the exchanges for 2018.

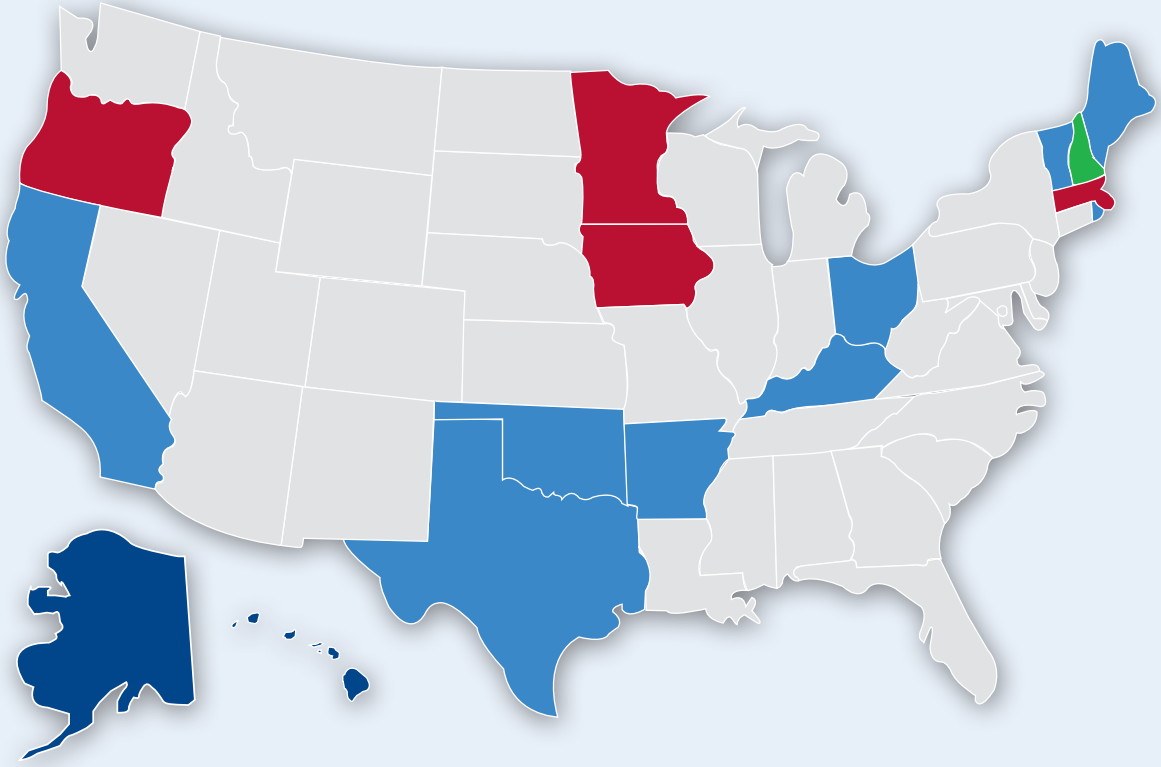
In 2016, Alaska created a state reinsurance program to cover claims for high-cost individual market enrollees and encourage insurers to participate in its marketplace. The program is projected to lead to premiums that are 20 percent lower in 2018 than they would be without it. By lowering premiums, the reinsurance system saves federal dollars (that otherwise would be spent on ACA subsidies), and so the state sought to capture those cost savings and use them to help fund the program through a 1332 waiver. The Obama Administration endorsed this approach and in 2016 Trump officials pointed to it as an example for other states before formally approving the plan this July.[3]

Three other states (Minnesota, Oklahoma and Oregon) have recently submitted reinsurance-focused waiver applications that follow Alaska's lead. Another state (Maine) has enacted legislation specifically to pursue a reinsurance waiver, while two others (Iowa and New Hampshire) are developing reinsurance programs.

Oklahoma recently withdrew its application for a 1332 state innovation waiver for 2018, complaining that the Trump administration didn't approve its proposal in time to help with premiums for next year. The proposal would have established a reinsurance program aimed at reducing premiums in the Individual market. In addition to reinsurance, authorities were working on an expansive plan that by 2019 would affect covered benefits, subsidy eligibility, marketplace plan offering requirements, and enrollment rules, and create a state version of health savings accounts.

In Iowa, officials have sought special approval of an application that would, among other things, limit plan offerings to a single standardized silver tier plan and replace the ACA's premium and cost-sharing subsidies with a state premium credit. While Iowa and Oklahoma are working creatively to respond to challenges in their markets and to ongoing uncertainty at the federal level, their proposals need to be closely analyzed to assess whether they can deliver on promises of improved coverage, including for the vulnerable. In the case of Iowa, both the irregular process pursued by the state, as well as the content of its proposals — for example, to eliminate cost-sharing assistance for lower income residents — raise red flags that suggest the application may not comply with federal protections.[4]

Status of State ACA Innovation Waivers



Waiver approved by federal government (AK, HI) Waiver under review by federal government (IA, MA, MN, OR)
State has released draft of waiver (NH) State has enacted legislation specifically authorizing waiver submission (9 states) No waiver

Sources: Center on Health Insurance Reforms, Georgetown University Health Policy Institute, September 2017; "States See Opportunities for Flexibility in the ACA's Innovation Waiver Program," The Commonwealth Fund, September 2017

How has Texas Responded to the Possibility of Using Waivers?

During the 2017 session, the Texas Legislature adopted Senate Bill 1406 and Senate Bill 2087, authorizing the commissioner of insurance to apply for 1332 waivers.

- SB 1406 authorizes a waiver request to allow modifications of the actuarial value requirements and related levels of health plan coverage requirements for small employer health benefit plans [imposed under 42 U.S.C. Section 18022(d)(3) (3)].]
- SB 2087 authorizes TDI to apply for federal funds (to the extent they become available) and use the funds to establish and administer a temporary health insurance "risk pool" whose exclusive purpose is "to provide a temporary mechanism for maximizing available federal funding to assist residents of this state in obtaining access to quality health care at minimum cost to the public." Subject to requirements for obtaining federal funds, TDI may use pool funds:

  (1) to provide alternative individual coverage to eligible individuals that does not diminish the availability of traditional commercial health care coverage;

  (2) to provide funding to individual health benefit plan issuers that cover individuals with certain health or cost characteristics in exchange for lower enrollee premium rates; or

  (3) to provide a reinsurance program for the individual market in exchange for lower enrollee premium rates.

Innovation Waivers: Right for Texas?

Innovation waivers present a unique opportunity for Texas to direct and shape its health care landscape. It is important for Texas leaders to identify the most pressing needs and goals for health care coverage in our state and then study how innovation waivers would help accomplish these goals. Leaders must keep in mind that while 1332 waivers offer greater flexibility, they do have limits and do not apply to all ACA provisions. It is the responsibility of the state to develop a plan that is at least as affordable and comprehensive as the ACA, without increasing the federal deficit. This is a significant undertaking that will require extensive planning and coordination. TAHP encourages state officials to immediately begin assessing Texas health care goals and determining if the innovation waivers align with those goals and would help make health care more accessible, affordable and valuable for all Texans.

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

2 Section 1332: State Innovation Waivers - Centers for Medicare & Medicaid Services. [cited 2017 Jan 24] Available from: https:// www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_state_Innovation_Waivers-.html

3 J. Giovannelli and K. Lucia, "States See Opportunities for Flexibility in the ACA's Innovation Waiver Program," To the Point, The Commonwealth Fund, Sept. 13, 2017.

4 J. Giovannelli and K. Lucia, "States See Opportunities for Flexibility in the ACA's Innovation Waiver Program," To the Point, The Commonwealth Fund, Sept. 13, 2017.

TAHP
The Texas Association of Health Plans