

Section 1332 State Relief and Empowerment Waiver Concepts

Risk Stabilization Strategies Waiver Concept

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Section 1: Executive Summary of Risk Stabilization Strategies Waiver Concept

Overview: Expanding State Flexibility

The Department of the Treasury and the Centers for Medicare & Medicaid Services (CMS) in the Department of Health and Human Services (collectively, the Departments) released the Risk Stabilization Strategies waiver concept to encourage state innovation. The Risk Stabilization Strategies waiver concept is one of four waiver concepts detailed in the November 29, 2018, "[Section 1332 State Relief and Empowerment Waiver Concepts: Discussion Paper](#)" hereafter referred to as the 2018 Discussion Paper.¹ The waiver concepts are part of the Departments' effort to provide states with the ability to tailor health insurance programs to best serve the needs of state residents while still meeting the requirements of federal law, including protections for individuals with pre-existing conditions. The ultimate goal is to empower states and consumers with flexible tools to drive better coverage and increased choice and competition, resulting in more informed and cost-effective healthcare decisions. The four section 1332 waiver concepts may be used alone or in combination with other waiver concepts, state proposals, or policy changes.

Under the Risk Stabilization Strategies concept, states can consider ways to address the costs of individuals with expensive medical conditions to mitigate the impact of those expenses on people who purchase coverage in the individual market. For example, states can implement a state-operated reinsurance program or high-risk pool by waiving the single risk pool under 1312(c)(1) of the PPACA, which can be coupled with the other waiver idea options discussed. Reinsurance programs have lowered premiums for consumers, improved market stability, and increased consumer choice. Some states have chosen to use a claims cost-based model (OR, MN, WI), a conditions-based model (AK), or a hybrid conditions and claims cost-based model (ME) for their reinsurance program. More details about implementing a reinsurance program can be found in the 2018 Discussion Paper.

Under the Risk Stabilization Strategies waiver concept, this paper focuses on a State Complex Care Plan (SCCP) waiver that reimagines a traditional high-risk pool and provides states the opportunity to offer better coverage to people with complex health care needs with the flexibility to adopt innovative strategies similar to those used by self-funded employer plans. This paper provides additional information and details on implementing a SCCP waiver that is not included in the 2018 Discussion Paper.

In developing their waiver plan, states should analyze which, if any, risk stabilization strategy best meets their needs. States may want to consider program funding, administrative feasibility, and immediate versus long-term premium impact in their evaluation of which program may help consumers in their state. States may also want to couple a SCCP waiver with a reinsurance program or other ideas.

Better care for people with complex care needs, lower premiums for everyone

Under the Risk Stabilization Strategies waiver concept, the SCCP waiver, if approved for a state, would enable a state to take advantage of the flexibility provided under section 1332 of the PPACA to design plans for qualified consumers who may have more complex, higher cost healthcare needs often due to a pre-existing condition. States would have additional flexibility to offer new coverage options (in addition to the coverage available through the individual market) that better meet the needs of consumers with complex care conditions than traditional plans offered in the individual market, while potentially reducing overall premium costs for everyone participating in the individual market.

By providing states with the flexibility to offer new coverage options that better meet the needs of consumers with complex care, the Departments seek to give states tools to stimulate more competitive commercial markets, attract additional issuers, and ultimately provide greater choice of affordable plans to consumers. States are free to explore a wide range of plan designs, and the Departments encourage innovation. Innovative examples of how states might apply the Risk Stabilization Strategies waiver concept are outlined below. For more information, please see Section 3. The discussion here assumes all

¹ Centers for Medicare & Medicaid Services. "Section 1332 State Relief and Empowerment Waiver Concepts: Discussion Paper." *CMS.gov*, 29 Nov. 2018, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Waiver-Concepts-Guidance.PDF>

section 1332 waiver guardrails, discussed in Section 2 below, are met. Actual waivers are subject to approval by the Departments and must meet all statutory requirements.

States may structure the SCCP waiver as a state-authorized, self-funded plan offered outside of the individual market risk pool that would be administered by the state, a third-party administrator, or other private health insurance issuers that meet the parameters of the program. As state-authorized plans are offered outside of the individual market, there is more flexibility to better tailor the plans to specific health conditions because the plans would not need to meet all federal requirements that apply to the individual market. Using this flexibility, states can leverage innovative care and cost management tools, similar to those utilized by self-funded employer plans, to promote quality and decrease cost for these qualified consumers. Additionally, when people choose a complex care plan outside the individual market risk pool, their higher-cost claims are also moved outside individual market risk the pool, which improves the claims experience and reduces premiums for people who remain in the individual market. As a result, people with complex care needs or pre-existing conditions and healthier people who remain in the market can both benefit.

Section 1332 Waiver Funding Options

For all section 1332 waivers, a state may receive funding equal to the amount of federal financial assistance that would have been provided to its residents absent the waiver. This funding, known as federal pass-through funding, must be used by the state for implementation and administration of the approved section 1332 waiver. States may use federal pass-through funding in addition to state contributions to fund the Risk Stabilization Strategies waiver concept to enhance affordability or comprehensiveness of benefits.

Take the Initial Step – Start Discussion with the Departments

The Departments are committed to empowering states to take full advantage of new opportunities to innovate in ways that will strengthen their health insurance markets and meet their unique needs. The goal is to make it significantly easier for states to apply and gain approval for all section 1332 waiver concepts, including the Risk Stabilization Strategies waiver concept. State engagement with CMS on section 1332 waiver concepts and applications is encouraged and welcomed.

Where to Find Out More Information

CMS encourages states that are interested in section 1332 waivers to contact the Center for Consumer Information and Insurance Oversight (CCIO) to discuss goals and to receive technical assistance. Interested parties may send an email to StateInnovationWaivers@cms.hhs.gov for more information.

Section 2: Section 1332 Waiver Background

Section 1332 of the PPACA permits states to request waivers of certain rules governing Exchanges under federal law to pursue innovative strategies for providing their residents with access to high quality, affordable health insurance. These waivers can be used to modify certain PPACA provisions including those related to EHBs, QHPs, the duties of a state Exchange, federal financial assistance, and the individual and employer mandates. The following table outlines the specific provisions that may be waived beginning on or after January 1, 2017.

Specific Provisions That May Be Waived	
Part I of Subtitle D of Title I	Sections 1301-1304: QHP and EHB requirements; Requirements for QHP issuers; Special rules related to abortion services; Insurance related definitions
Part II of Subtitle D of Title I	Sections 1311-1313: Exchange requirements
Subpart A of Part I of Subtitle E of Title I	Section 1402: Cost sharing reductions
Internal Revenue Code of 1986	Sections 36B, 4980H and 5000A: PTC; Large employer coverage requirement; Individual coverage requirement

Section 1332 of the PPACA permits states to apply for waivers. The Departments may grant a waiver if a state's section 1332 waiver meets four statutory requirements (or "guardrails"). The section 1332 waiver must:

1. Provide coverage that is at least as comprehensive as the coverage defined in section 1302(b) as would be provided absent the waiver;
2. Provide coverage and cost-sharing protections against excessive out-of-pocket spending that are at least as affordable as coverage absent the waiver;
3. Provide coverage to at least a comparable number of residents as would be provided absent the waiver; and
4. Not increase the federal deficit.

The Departments finalized regulations for the section 1332 statutory waivers on February 27, 2012², with additional guidance issued December 16, 2015 (2015 Guidance).³ On October 24, 2018, the Departments issued updated guidance (2018 Guidance) related to section 1332 of the PPACA to expand

² *Application, Review, and Reporting Process for Waivers for State Innovation*. Department of Health and Human Services and Department of the Treasury, 27 Feb. 2012, <https://www.govinfo.gov/content/pkg/FR-2012-02-27/pdf/2012-4395.pdf>.

³ "Waivers for State Innovation Guidance." *Federal Register*, Departments of Health and Human Services and the Department of the Treasury, 16 Dec. 2015, <https://www.federalregister.gov/documents/2015/12/16/2015-31563/waivers-for-state-innovation>.

state flexibility, empower states to address their unique insurance markets, and increase coverage options for their residents.⁴ The 2018 Guidance, which supersedes the 2015 Guidance, provides additional flexibility on how states may meet the four guardrails. Specifically, the 2018 Guidance permits a state to meet the comprehensiveness, affordability and coverage guardrails for its residents in aggregate and by assessing the availability of affordable, comprehensive coverage, rather than only looking at the coverage people purchase. A state's waiver application will not be denied, for example, simply because people may choose a plan that is more affordable for them rather than opting to buy more expensive (but perhaps more comprehensive) coverage under current law.

State Planning for a Section 1332 Waiver

As with all new insurance program changes, states must carefully plan and design their section 1332 waiver application to meet the needs of their residents. As states design and apply for a section 1332 waiver, a thorough planning process will be critical to the waiver's approval and successful implementation. The Departments, specifically the Center for Consumer Information and Insurance Oversight (CCIIO) within CMS, will work closely with states during the comprehensive planning process. Initial planning activities, which may occur in any order, include:

- **Complete Insurance Market Study** – The Departments encourage states to leverage data-based profiles of their current health insurance market to develop effective waiver solutions. A market study may be completed by an independent vendor, or internally, and states may reach out to issuers to collect claims data. States may also look at a variety of federal and non-federal resources to gather information on their market.
- **Conduct Preliminary Stakeholder Engagement** – The Departments encourage states to begin informal conversations with issuers, consumers, providers, legislators, and other key stakeholders before finalizing a waiver approach to build consensus around goals and objectives.
- **Begin Routine Contact with CMS/CCIIO** – The designated state 1332 waiver team should establish points of contact at CMS/CCIIO, schedule periodic meetings to assess section 1332 waiver application progress and begin collaborative problem solving on key issues.
- **Draft a Section 1332 Waiver Application** – The Departments encourage states to draft a section 1332 waiver application that identifies the state's customized approach. This should include a description of challenges the waiver will address and how the waiver will alleviate those challenges. The state should also consider the implementation and section 1332 waiver application review timelines.
- **Determine Section 1332 Waiver Application Governance** – The state should determine the entity with responsibility for drafting the section 1332 waiver and administering the application phases. States may wish for this responsibility to reside in the Department of Insurance, with the State Exchange entity, the Governor's Office, or another state agency.
- **Obtain Necessary State Authority to Implement Waiver** – A key driver of waiver success is the ability to obtain timely authority to implement the waiver. States are required under the statute to enact or amend state laws to apply for and implement state actions under a section 1332 waiver. In addition, per the 2018 Guidance, the Departments clarify that in certain circumstances, existing state legislation that provides statutory authority to enforce PPACA provisions and the section 1332 waiver, combined with a duly-enacted state regulation or executive order, may satisfy the requirement that the state enact a law under section 1332(b)(2).

⁴ "Waivers for State Innovation." Federal Register, Departments of Health and Human Services and the Department of the Treasury, 24 Oct. 2018, <https://www.federalregister.gov/documents/2018/10/24/2018-23182/state-relief-and-empowerment-waivers>

Section 3: Risk Stabilization Strategies Waiver

Concept Description

Under the Risk Stabilization Strategies waiver concept, the SCCP waiver offers states the ability to tailor a plan for qualified consumers who may have more complex, higher-cost healthcare needs often due to a health condition that result in high-cost claims. This option provides states with additional flexibility to make new coverage options available that better meet the needs of these consumers while at the same time reducing overall premium costs in the individual market.

For state-authorized, self-funded⁵ plans offered outside of the individual market, there is more flexibility to better tailor the plans to specific health conditions because the plans would not need necessarily need to meet all of the federal requirements that apply to the individual market. Using this flexibility, a state can leverage and implement care and cost management tools similar to those utilized by self-funded employer plans to promote quality and decrease cost. For example, in the employer market, self-funded plans can be used to design methods to control costs, tailor plan design, and directly see claims to consider improvements. In addition, when people choose a complex care plan outside the individual market risk pool, their higher-cost claims are also moved outside the pool, which improves the claims experience and reduces premiums for people who remain in the individual market. As a result, people with pre-existing conditions and healthier people who remain in the individual market can both benefit.

Before passage of the PPACA, state-operated high-risk pools were a coverage source of last resort for people who did not have employer-sponsored coverage, were not Medicaid- or Medicare-eligible, and had a pre-existing condition that either priced them out of individual market coverage or caused insurers to deny them coverage. These programs enrolled thousands nationwide but often at prices that were difficult for customers to pay. The SCCP waiver concept reimagines how to provide better coverage to individuals with certain health care needs and people with pre-existing conditions and provides states with the flexibility to adopt innovative strategies similar to those used by self-funded employer plans. To be clear, the PPACA's pre-existing condition protections for persons who want individual market coverage cannot be waived, and the Departments are committed to ensuring that people with pre-existing conditions are protected. Under the SCCP waiver, states would have the flexibility to offer self-funded coverage that is specifically designed to meet the needs of state residents with pre-existing conditions, augmenting the individual market coverage options already available to these residents.

A primary goal of the SCCP waiver is to provide better coverage than is currently available for people who have more complex care needs, including those with pre-existing conditions. People who are in generally good health typically purchase health insurance coverage to help finance unexpected health costs that may arise in the future. By contrast, people with a pre-existing condition can expect a certain, and often higher, level of health care costs related to their condition and use health insurance coverage to finance these expected costs, in addition to any unexpected costs that may surface. Unfortunately, health insurance coverage in the individual market generally offers the same design regardless of health status and is, therefore, not tailored to recognize the differences in how people with pre-existing conditions use health insurance coverage. The SCCP waiver provides states an opportunity to tailor plans to address these differences.

The SCCP waiver would shift the market focus to quality services and cost management as a way to create better care options for qualified consumers. In developing the plan created under the SCCP waiver, such innovative cost containment and care management strategies include:

- **Cost Containment:** As an example, states may pursue direct contracting with a set of providers at a negotiated price. This is akin to a "health home" that may consist of direct primary care and hospital "centers of excellence" that agree to significant price concessions in exchange for preferred or even exclusive network status.

⁵ Self-funded in this context refers to a plan where the liability to pay health benefits on behalf of an enrollee in excess of the enrollee's premium is covered by state, private, or other funding sources rather than insurance. To the extent the plan does not rely on a regulated health insurance product but instead has its own, separate funding arrangement, the plan sponsor assumes the financial risk of paying claims under the plan like sponsors of self-funded employer plans.

- Value-Based Insurance Design: States may develop a value-based insurance design plan designed to specifically meet the needs of certain populations including high-cost individuals or those with certain chronic diseases. These types of plans can increase health care quality and potentially decrease costs by using financial incentives to promote cost efficient health care services while potentially improving health outcomes.
- **Care Management:** States may leverage patient advocates and other care management tools that:
 - Enable patients to navigate through health events to avoid unnecessary readmissions;
 - Allow for deployment of holistic patient strategies, from prevention to discharge assistance, to improve health outcomes; and
 - Allow for direct patient engagement to assess specific patient needs, such as medication adherence, home safety, and other needs.
- **Subsidy for Enrollment in Coverage Under a SCCP Waiver Concept:** States may develop a separate state subsidy structure for coverage under a SCCP waiver, or a combined state subsidy structure for coverage under both Exchange QHPs and a SCCP waiver.

The SCCP waiver does not alter the consumer protections outlined within the PPACA. For example, consumers with pre-existing conditions are still guaranteed access to coverage on the individual health insurance market. Participation in a plan created under the SCCP waiver is voluntary; consumers may opt instead to enroll through the individual market. However, plans created under the SCCP waiver may provide consumers with an alternative that may better meet their needs and be more appealing to many than enrollment in a more general QHP. In addition, states may choose to provide enhanced financial assistance to SCCP waiver consumers to make enrollment in these plans more attractive. Ultimately, the SCCP waiver is available to states to provide more tailored plans to better fit and support designated populations with more complex health care needs.

Design and Implementation Approaches

For implementation of the SCCP waiver a state could:

Option #1: Continue to have the Federally-facilitated Exchange (FFE) operate as it currently does and have coverage available under a self-funded plan created under the SCCP waiver that is offered outside of the individual market risk pool. Consumers purchasing a QHP on the FFE would continue to be eligible for premium tax credits (PTC) as they are currently. Consumers would be incentivized to enroll in coverage available under a SCCP waiver based on the plan itself, including care management, provider network, benefits, etc.

Option #2: In addition to continuing to have the FFE operate as it currently does, and have coverage through a self-funded plan created under the SCCP waiver that is offered outside of the individual market risk pool (as described in implementation option 1 above), the state could also implement a separate state subsidy structure to reduce premiums and cost-sharing for enrollees with coverage under the SCCP waiver, making these plans more attractive to those with high-cost or complex conditions.

Option #3: The state could implement a state subsidy structure as described in the State Specific Premium Assistance (SSPA) waiver concept and structure the state subsidy for both QHPs on the Exchange and for enrollees with coverage under a plan created under the SCCP waiver outside of the individual market risk pool.

In options 1 and 2, implementation of the SCCP waiver would not require a state to change its current Exchange model. States currently using the FFE can work with CMS to determine methods for displaying the coverage available under a SCCP waiver as another off-Exchange enrollment choice for those individuals eligible to enroll under the terms of the 1332 waiver. The state should consider how this new

option will be displayed to consumers, so they understand the difference between the coverage under a SCCP waiver and a QHP. States would need to make sure there is an eligibility/enrollment system, adequate provider networks, claims processing and operations, and customer service and communications system in place. To determine eligibility for a plan created under the SCCP waiver, a state may administer its own information technology system or contract out for services.

In option 3, a state could waive federal PTC and implement a new state subsidy structure entirely that would include state subsidies for both QHPs and for enrollees with coverage under a plan created under the SCCP waiver.

Under the SCCP waiver, the state, or entity designated by the state to implement the waiver, would receive all premium payments from consumers and pay all claims for its members. Assuming the SCCP waiver uses a health insurance issuer as a third-party administrator to process claims and perform other functions, the issuer would receive an administrative fee as sole compensation and would assume no risk. States would also need to determine a governance structure, requirements for contracting with carriers, etc.

States may be able to leverage existing high-risk pool authority, particularly if a high-risk pool is still operating. States may need to establish authority to set standards for products that are not health insurance and/or amend current standards depending on the types of products the state wants to sell to consumers under the SCCP waiver.

States would also need to consider how consumers will learn about these new options and what outreach and education efforts would be a part of the state plan if eligible. States could consider a new landing page or state website that provides information on the complex care program and/or HealthCare.gov.

States also need to consider if the coverage offered under the SCCP waiver would meet the definition of coverage in the 1332 guidance released in October 2018 so that persons who will enroll in the coverage may be counted toward the waiver plan's satisfaction of the coverage guardrail.⁶ Under the 2018 Guidance, the coverage refers to minimum essential coverage (MEC) as defined in 26 U.S.C. 5000A(f) and 26 CFR 1.5000A-2, and health insurance coverage⁷ as defined in 45 CFR 144.103.⁸ State may want to consider applying for the MEC designation so the individuals in the SCCP plan can potentially count under the coverage guardrail.

A state can also consider pairing an SCCP waiver with a more traditional reinsurance program, whether new or existing, to help meet a state's desired level of premium reduction. Both an SCCP and reinsurance program reduce premiums for coverage on the individual market by moving people with higher healthcare costs into a separate risk pool. However, because participation in a self-funded plan created under the SCCP is voluntary, it may be hard to project the number of people who may choose to enroll in the self-funded plan created under the SCCP and move to the separate risk pool. Pairing an SCCP with a reinsurance program may help the combined programs cover the number of people necessary to reduce premiums in the state by the desired level.

Section 1332 Waiver Administration Options

In deciding how to implement and administer their section 1332 waiver, states have a range of options. In some cases, the federal government may be able to offer support in implementing the waiver. In other cases, states may wish to leverage private sector technology and resources to create a more flexible platform for carrying out the waiver. States should work with CMS to determine the level of the FFE operations that can be utilized for the state plan based on the specifics of the state's section 1332 waiver proposal. Subject to the requirements of the Intergovernmental Cooperation Act (ICA) and OMB Circular

⁶ <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/minimum-essential-coverage.html>

⁷ Health insurance coverage means benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise) under any hospital or medical service policy or certificate, hospital or medical service plan contract, or HMO contract offered by a health insurance issuer. Health insurance coverage includes group health insurance coverage, individual health insurance coverage, and short-term, limited-duration insurance.

⁸ <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/minimum-essential-coverage.html>

A-97, if a waiver requires CMS to make technical changes to the federal eligibility and enrollment platform, the state will be responsible for reimbursing CMS for any costs incurred for certain technical and specialized services covered under the ICA (either with 1332 federal pass through funds and/or funds provided by the state to fully reimburse CMS). A state may administer its own information technology system, contract with a vendor(s) to outsource functions for eligibility and enrollment that the Exchange currently performs, or, where feasible, continue to utilize FFE functions that are not modified by the section 1332 waiver. States have the flexibility to structure the Risk Stabilization Strategies waiver concept, including a SCCP waiver, based on the extent the state can manage the additional tasks related to direct state administration of subsidies. States on the FFE can work with CMS to determine methods for displaying the SCCP waiver as another enrollment choice for those individuals eligible to enroll under the terms of the section 1332 waiver.

Under the SCCP waiver, a state would establish and authorize new complex care plans that could be administered by the state, a third-party administrator, or other private health insurance issuers that meet the parameters of the program, and could or could not conform with all of the PPACA provisions. The Departments understand that states will have questions about the potential cost and complexity of administering an SCCP waiver that varies from HealthCare.gov. CMS is prepared to work with states to discuss this model and lay out the range of potential options available in carrying out the waiver. While states may decide to establish their own, State-based Exchanges (SBEs) in order to implement the waiver, it is important to remember that the Exchanges themselves may be waived under section 1332, and that the Exchange concept may be altered to be more tailored to the state's waiver plan. States may also access FFE services in administering their waiver; any fees for accessing FFE services to carry out the 1332 waiver would be determined with each state and would depend on the requested support or changes needed.

Policy Choices for States

As states begin to think through how to design and implement a Risk Stabilization Strategies waiver concept, including the SCCP waiver, it will be important to fully understand the desired objectives, available resources, and potential overlap with existing state programs; these factors will drive the policy choices that will be necessary to effectively design a waiver. Policy decisions may include, but are not limited to:

- The state subsidy structure;
- Criteria for plan offerings;
- Allowable use of state subsidies;
- Administrative platform;
- Provider networks;
- Third-party administration;
- Care and cost management criteria; and/or
- Potential coordination with Medicaid.

Maximizing State Flexibility to Design Innovative Waivers

States are encouraged to look at options under the Risk Stabilization Strategies waiver concept in conjunction with other innovative approaches introduced by CMS in the 2018 Discussion Paper. These include the flexibility to design a state's own subsidy structure; the ability to permit consumers to choose from a wider variety of plan options to optimize value; and the ability to administer a defined contribution model that features a Health Expense Account (HEA). The Risk Stabilization Strategies waiver concept could be paired with any of the other concepts, as well as other innovative policies initiated by the state. States are also encouraged to look at additional flexibilities for section 1332 waivers as outlined in the

2018 Guidance.⁹ The Departments are committed to empowering states to innovate in ways that will best protect people with pre-existing conditions, strengthen their health insurance markets, expand affordable choices of coverage, target public resources to those most in need, and meet the unique circumstances of each state.

Administrative Expenses

States may use pass-through funding resulting from premium reductions and reduced federal subsidies as a result of the waiver to help pay for the Risk Stabilization Strategies waiver concept, including the SCCP waiver. Under a SCCP waiver, by more actively managing these higher-cost consumers there's also the potential that the high-risk pool has lower expenditures. In addition, states may elect to contribute funding to the SCCP waiver to enhance affordability or comprehensiveness of benefits. Use of federal pass-through funding may also be used to cover administrative costs for the program. For example, the administrative cost for high risk pools established by the state in lieu of the federal Pre-existing Condition Insurance Plan program over the life of the program was about 5% of total spend (vs. 7% for the federal PCIP), but the range was between 2% - 15%. Administrative costs do typically go down over the life of the program.

As a reminder, a state must ensure that the waiver meets the four statutory guardrails of affordability, comprehensiveness, coverage, and federal deficit neutrality. Any additional costs to fund waiver would be the state's responsibility.

⁹ "State Relief and Empowerment Waivers." *Federal Register*, 24 Oct. 2018, <https://www.federalregister.gov/documents/2018/10/24/2018-23182/state-relief-and-empowerment-waivers>