

Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

c/o National Indian Health Board 910 Pennsylvania Avenue, SE Washington, DC 20003 (202) 507-4070 (202) 507-4071 fax

Submitted via Regulations.gov

July 2, 2019

Mr. Randy Pate
Deputy Administrator & Director
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9936-NC2
P.O. Box 8013
Baltimore, MD 21244-1850

RE: Request for Information Regarding State Relief and Empowerment Waivers

Dear Mr. Pate,

On behalf of the Tribal Technical Advisory Group (TTAG),¹ to the Centers for Medicare & Medicaid Services, I write to respond to the Request for Information (RFI) issued by the Centers for Medicare & Medicaid Services (CMS) regarding submission of innovative concepts for state waivers authorized under Section 1332 of the Patient Protection and Affordable Care Act (ACA). Section 1332 permits states to apply for State Innovation Waivers that provide flexible approaches to increase access to high value, affordable health insurance under the ACA.

In order for the Secretaries of the Department of Health and Human Services (HHS) and the Department of the Treasury (Treasury) to be able to grant a request for a Section 1332 waiver, they must determine if the waiver will (i) provide access to health insurance coverage that is at least as comprehensive and affordable as would be provided under the ACA without the waiver, (ii) provide coverage to at least a comparable number of residents of the state as would be provided coverage without the waiver, and (iii) the waiver must not increase the federal deficit. States are required under the statute to enact or amend state laws to apply for and implement state actions under a Section 1332 waiver.² Section 1332, and regulations at 31 CFR 33.112 and 45 CFR 155.1312, require states to provide a public notice and comment period for a waiver application sufficient to ensure a meaningful level of public input prior to submitting an application. As part

¹ The TTAG advises CMS on Indian health policy issues involving Medicare, Medicaid, the Children's Health Insurance Program, and any other health care programs funded (in whole or part) by CMS. In particular, TTAG focuses on providing policy advice to CMS regarding improving the availability of health care services to American Indians and Alaska Natives (AI/ANs) under these federal health care programs, including through providers operating under the health programs of the Indian Health Service (IHS), Tribes, Tribal organizations, and Urban Indian organizations (I/T/Us or Indian health care providers).

² Under 31 CFR 33.108(f)(3)(i) and 45 CFR 155.1308(f)(3)(i), as part of the state's waiver application, the state must include a comprehensive description of the state legislation and program to implement a plan meeting the requirements for a waiver under Section 1332.

of the public notice and comment period, a state with one or more federally recognized Tribes must conduct meaningful consultation with the Tribes.³

Background

The United States has a trust and treaty based responsibility to provide access to health care for American Indians and Alaska Natives (AI/ANs), and that responsibility includes ensuring that health programs mandated under the ACA are accessible to AI/ANs, if so authorized under the law. Congress has declared that “it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians ... to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy.”⁴ This trust responsibility is highlighted recently in the HHS FY 2020 Annual Performance Plan and Report, noting, “The federal government has a unique legal and political government to government relationship with Tribal governments and provides health services for American Indians and Alaska Natives consistent with this special relationship.”⁵ The trust responsibility extends to all federal agencies, not just to HHS. Therefore, HHS *and* Treasury have a duty to fulfill these obligations in administering or advancing the objectives of federal health care programs—for all Tribal members.

In making these comments, we remind you that AI/ANs are among the nation’s most vulnerable populations and that the ACA plays a critically important role in extending coverage to AI/ANs where services fall short due to lack of funding. As a result, it is critically important that HHS and Treasury ensure that states preserve protections for AI/AN Tribal members in all aspects of the Section 1332 waiver application process and, in addition, conduct meaningful Tribal consultation pursuant to agency Guidance.⁶ This is consistent with the United States’ trust and treaty responsibility to Tribal nations.

Comment Solicitation

Under Section 1332, states may seek waivers of requirements under: Part I of Subtitle D of Title I of the ACA (re: establishing Qualified Health Plans (QHPs)); Part II of Subtitle D of Title I of the ACA (relating to consumer choices and insurance competition through health insurance Exchanges); Sections 36B of the Internal Revenue Code and 1402 of the ACA (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).⁷ CMS asks, in part, what are the waiver concepts that states could potentially use alone or in combination with

³ 31 CFR 33.112 (Treasury) and 45 CFR 155.1312 (HHS).

⁴ 24 U.S.C. § 1602(a)(1).

⁵ HHS, FY 2020 Annual Performance Plan and Report—Overview (released Mar. 2019), <https://www.hhs.gov/about/budget/fy2020/performance/performance-plan-overview/index.html>.

⁶ Department of Health and Human Services and Department of the Treasury; State Relief and Empowerment Waivers, 83 Fed. Reg. 53,575 (Oct. 24, 2018), <https://www.federalregister.gov/documents/2018/10/24/2018-23182/state-relief-and-empowerment-waivers>.

⁷ Section 1332 waiver authority does not permit states to waive other ACA Title I requirements such as pre-existing condition protections or eligibility determinations under Section 1411 of the ACA for programs outside of the Exchange (such as Medicaid and CHIP determinations).

other waiver concepts, state proposals, or policy changes; and ideas for waiver concepts that could advance some or all of the principles outlined in the October 2018 Guidance.

Tribal Implications

Protections under the Affordable Care Act, Balanced Budget Act and American Recovery and Reinvestment Act

In 2016, TTAG submitted a letter⁸ to respond to Guidance issued by CMS on Section 1332 and the implementing regulations.⁹ In the letter, Tribes expressed their concerns that a State Innovation Waiver could adversely affect American Indians and Alaska Natives—for example, by resulting in AI/ANs having higher cost-sharing or greater premium payments than they would have absent the waiver, potentially reducing their access to quality health care services. In order to secure ACA protections for AI/ANs, TTAG urged CMS—in its approval of Section 1332 waivers—to ensure states considered specific impacts to individual AI/ANs, and that prior to approving waivers, CMS should ensure states intended to preserve protections for AI/ANs under Section 1932 of the Balanced Budget Act (BBA) of 1997 and Section 5006 of American Recovery and Reinvestment Act (ARRA) of 2009. The BBA and ARRA provide a number of Indian-specific protections associated with Medicaid and Medicaid Managed Care.¹⁰ To ensure that a State Innovation Waiver does not adversely affect AI/ANs, the agencies should emphasize the importance of maintaining the Indian-specific protections contained in Section 1932 and Section 5006 under such a waiver. TTAG seeks now, as it did then, to ensure that Indian-specific protections within Section 1932 and 5006 remain in effect under any State Innovation Waiver plan approved by the HHS and Treasury Secretaries.

Meaningful Tribal Consultation

TTAG is concerned that in the final agency Guidance (October 24, 2018), there is no mention of the health care and health insurance concerns unique to American Indian and Alaska Native Tribal members—nor is there mention of Tribes' status as sovereign nations that have a government to government relationship with the U.S. Although TTAG appreciates that HHS and Treasury require states to conduct meaningful Tribal consultation during the Section 1332 public comment period, this is first and foremost a federal obligation under Executive Order (E.O.) 13175, *Consultation*

⁸ TTAG, Comments on CMS-9936-N; Waivers for State Innovation (Feb. 26, 2016), <https://www.nihb.org/tribalhealthreform/wp-content/uploads/2016/02/TTAG-comments-CMS-9936-N-Sec-1332-Waivers.pdf>.

⁹ The guidance released by the agencies on October 24, 2018 superseded the final guidance released in December 2015. See Department of Health and Human Services and Department of the Treasury; Waivers for State Innovation, 80 Fed. Reg. 78131 (Dec. 16, 2015), <https://www.federalregister.gov/documents/2015/12/16/2015-31563/waivers-for-state-innovation>. HHS and Treasury promulgated implementing regulations. See 77 FR 11700, 11711 (Feb. 27, 2012).

¹⁰ The BBA established Section 1932(a)(2)(C) of the Social Security Act, which provides that no state can require AI/ANs to enroll in a Medicaid managed care system, except in cases in which Indian Health Service/Tribal/urban Indian health services (I/T/U) operate the system. As a supplement to Section 1932(a)(2)(C), Section 5006 of ARRA provides a number of protections for AI/ANs who elect to enroll in Medicaid managed care. See CMS State Medicaid Director Letter: ARRA Protections for Indians in Medicaid and CHIP (Jan. 22, 2010), <https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD10001.PDF>.

*and Coordination with Indian Tribal Governments.*¹¹ Meaningful Tribal consultation, as defined in E.O. 13175, is a cooperative, responsive, mutual exchange between the federal government and Tribes; it is more than a one-off event. Since states have broad flexibility to design Section 1332 waivers, Tribal support will inevitably vary from state to state, as Tribes determine potential impact to their communities. For these reasons, it is critical that the federal trust responsibility and the E.O. obligations provide the backdrop for state interaction with Tribes, as states explore and pursue creative ways to design waivers to extend affordable health care coverage to as great a population as possible.¹²

The 2018 HHS and Treasury Guidance outlines the federal government’s intent to “expand state flexibility, empowering states to address problems with their individual insurance markets and increase coverage options for their residents.”¹³ Likewise, E.O. 13175 encourages “utilizing flexible policy approaches” at the Indian Tribal level, with respect to waiving statutory or regulatory requirements in connection with any program administered by a federal agency. Tribes must therefore not be left out of the conversation providing for “flexibility” in the dissemination of health care and health care insurance options. Moreover, Tribes and Tribal health programs are protected under the Patient Protection and Affordable Care Act. These protections are not the state’s to waive. While state Section 1332 waivers are not to be evaluated by the Secretaries in conjunction with any other category of federal waivers, such as Section 1115 (“Demonstration Waivers”), or are not considered in light of the impact on eligibility for Medicaid or the Children’s Health Insurance Program (CHIP), Tribal nations are impacted by all federal regulatory health policies, and so we must be included in this conversation.

Conclusion

We thank you for the opportunity to provide our comments and recommendations to the Departments of Health and Human Services and the Treasury as they guide states in exploring innovative strategies for improving access to health care under Section 1332 waiver authority. We ask that HHS/CMS and Treasury address Tribal concerns at the federal policy level to avoid state confusion surrounding American Indian and Alaska Native access to the ACA marketplace and corresponding protections, and to save the states from protracted engagement with Tribes over recurring concerns that could have been addressed prior to states applying for a section 1332 waiver.

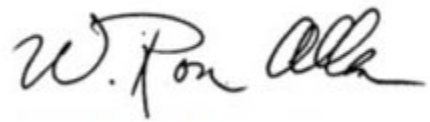
Should you have any questions regarding TTAG’s comments, or for more information, please contact NIHB’s Director of Policy, Devin Delrow, at ddelrow@nihb.org.

¹¹ Executive Order 13175 reaffirms the federal government's commitment to Tribal sovereignty, self-determination, and self-government. Its purpose is to ensure that all Executive departments and agencies consult with Tribes and respect Tribal sovereignty as they develop policy on issues that impact Indian communities, and especially during notice and comment rulemaking, which informs final federal health policies and regulations.

¹² See CMS, Section 1332 State Relief and Empowerment Waiver Concepts: Discussion Paper (Nov. 29, 2018), <https://www.cms.gov/cciiio/programs-and-initiatives/state-innovation-waivers/Downloads/waiver-Concepts-Guidance.pdf> (presenting 4 new innovative state waiver options: account-based subsidies, state specific premium assistance, adjusted plan options, and risk stabilization strategies).

¹³ 83 Fed. Reg. 53,576.

Best regards,

A handwritten signature in black ink that reads "W. Ron Allen". The signature is written in a cursive style with a large, stylized "W" and "A".

W. Ron Allen, Chair
Tribal Technical Advisory Group

cc: Kitty Marx, Director, Division of Tribal Affairs, Centers for Medicare &
Medicaid Services