

**MEMORANDUM**

June 23, 2017

**To:**

[REDACTED]  
[REDACTED]

**From:**

[REDACTED]

**Subject:** Questions Related to ACA Section 1332 - State Innovation Waivers and Section 206 of the draft bill, Better Care Reconciliation Act of 2017

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This memorandum addresses three questions you posed to Congressional Research Service (CRS) related to state innovation waivers and how they could be modified by Section 206 of the Senate's discussion draft, Better Care Reconciliation Act (BCRA) of 2017.<sup>1</sup> The specific questions addressed in this memorandum are:

1. Under current law, which provisions of the Patient Protection and Affordable Care Act (ACA; P.L. 111-148, as amended) may a state waive under Section 1332?
2. Under current law, which ACA private health insurance market reforms may be waived under a Section 1332 waiver?
3. How would BCRA Section 206 modify what a state could waive under a Section 1332 waiver?

## **Background**

ACA Section 1332 allows states to apply for waivers of specified provisions of the ACA. In the absence of these requirements, the state is to implement its own plan to provide health insurance coverage to state residents that meets the ACA's terms. The earliest a state innovation waiver could go into effect was January 1, 2017. For more information about Section 1332 waivers, see CRS Report R44760, *State Innovation Waivers: Frequently Asked Questions*.

## **Under Current Law, Which Provisions of the ACA May a State Waive Under Section 1332?**

A state may apply to waive *any or all* of the ACA provisions included in Parts I and II of Subtitle D of the ACA, ACA Section 1402, and Internal Revenue Code (IRC) Sections 36B, 4980H, and 5000A.<sup>2</sup> Each part and section is comprised of many provisions, which makes the scope of provisions that can be

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<sup>1</sup> Discussion Draft ERN17282, as posted on the Senate Budget Committee's website on June 22, 2017, at <https://www.budget.senate.gov/imo/media/doc/SENATEHEALTHCARE.pdf>.

<sup>2</sup> ACA §1332(a)(2) codified at 42 U.S.C. §18052(a)(2).

waived under a Section 1332 waiver quite broad. Each part and section is described in more detail below. The descriptions identify some, but not all, specific provisions included in each part or section.

**Part I of Subtitle D of the ACA:** Part I of Subtitle D of the ACA comprises Sections 1301-1304. In general, the provisions in Part I relate to the establishment of qualified health plans (QHP). For example, Section 1301 defines the term *qualified health plan* and provides that a QHP offer the essential health benefits (EHB) package. Per Section 1302, the EHB package has three parts: (1) coverage of the EHB; (2) application of cost-sharing limits; and (3) requirement to meet a certain generosity level based on actuarial value. Section 1303 includes rules related to QHPs and coverage of abortion, and Section 1304 provides health insurance-related definitions (e.g., the definition of large group market) that apply to Title I of the ACA (unless otherwise specified).

**Part II of Subtitle D of the ACA:** Part II of Subtitle D of the ACA comprises Sections 1311-1313, which largely include provisions related to establishment of health insurance exchanges and related activities. For example, Section 1311 provides that a health insurance exchange, including a Small Business Health Options Program (SHOP) exchange, must be established in every state. Section 1311 directs the Secretary of the Department of Health and Human Services (HHS) to establish criteria for certifying health plans as QHPs, provides requirements with which exchanges must comply (e.g., exchanges cannot offer any plan that is not a QHP except a stand-alone dental plan), and lists functions which exchanges are expected to carry-out. Section 1312 includes, but is not limited to, provisions relating to consumer choice in obtaining health insurance coverage and the single risk pool requirement—the requirement that health insurance issuers consider all enrollees in a particular market segment (e.g., the individual market) to be part of a single risk pool. In general, the provisions included in Section 1313 apply requirements related to financial accounting procedures to exchanges.

**Section 1402 of the ACA:** ACA Section 1402 establishes cost-sharing subsidies for eligible individuals who purchase individual market coverage through a health insurance exchange. The section includes, but is not limited to, provisions that define who is eligible for cost-sharing subsidies and specify the extent to which the subsidies are to reduce eligible individuals' cost-sharing requirements.

**IRC Section 36B:** IRC Section 36B establishes premium tax credits for eligible individuals who purchase individual market coverage through an exchange. Among the provisions included in IRC Section 36B are provisions defining eligibility for premium tax credits and determining the amount of tax credits received.

**IRC Section 4980H:** IRC Section 4980H establishes the shared responsibility requirement for large employers (often called the *employer mandate*). The section includes, but is not limited to, provisions that identify employers that could be subject to the shared responsibility requirement and the penalty amounts that could apply to employers for not complying with the requirement.

**IRC Section 5000A:** IRC Section 5000A establishes the requirement for individuals to maintain health insurance coverage (often called the *individual mandate*). IRC Section 5000A includes, but is not limited to, provisions that define the term *minimum essential coverage*, set the penalty for noncompliance with the mandate, and provide for exemptions from the mandate and its associated penalty.

## Under Current Law, Which ACA Private Health Insurance Market Reforms May be Waived Under Section 1332?

ACA establishes federal requirements that apply to private health insurance, which are generally referred to as market reforms.<sup>3</sup> Table 1 shows which market reforms could be waived under a 1332 waiver because

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<sup>3</sup> For an overview of the ACA market reforms, see CRS Report R42069, *Private Health Insurance Market Reforms in the Patient Protection and Affordable Care Act (ACA)*.

they fall under the parts or sections that may be waived under Section 1332. It should be noted that neither Table 1 nor this memorandum more generally contemplate how a Section 1332 waiver could alter the application of a market reform even if the specific market reform is not waived.

**Table 1. ACA Market Reforms That May Be Waived Under a Section 1332 Waiver**

ACA Section	Statute	Provision	May It Be Waived Under a 1332 Waiver? <sup>a</sup>
1201	42 U.S.C. §300gg-1	Guaranteed Issue	No
1201	42 U.S.C. §300gg-4(a)	Prohibition on Using Health Status for Eligibility Determinations	No
1001	42 U.S.C. §300gg-14	Extension of Dependent Coverage	No
1001	42 U.S.C. §300gg-16	Prohibition of Discrimination Based on Salary	No
1201	42 U.S.C. §300gg-7	Waiting Period Limitation	No
1201	42 U.S.C. §300gg-2	Guaranteed Renewability	No
1001	42 U.S.C. §300gg-12	Prohibition on Rescissions	No
1201	42 U.S.C. §300gg	Rating Restrictions	No
1003	42 U.S.C. §300gg-94	Rate Review	No
1312	42 U.S.C. §18032	Single Risk Pool	Yes
1302	42 U.S.C. §18022	Coverage of Essential Health Benefits (EHB)	Yes
1001	42 U.S.C. §300gg-13	Coverage of Preventive Health Services Without Cost Sharing	No
1201	42 U.S.C. §300gg-3	Coverage of Preexisting Health Conditions	No
1302	42 U.S.C. §18022	Limits for Annual Out-of-Pocket (OOP) Spending	Yes
1302	42 U.S.C. §18022	Minimum Actuarial Value Requirements	Yes
1001	42 U.S.C. §300gg-11	Prohibition on Lifetime Limits	No
1001	42 U.S.C. §300gg-11	Prohibition on Annual Limits	No
1001	42 U.S.C. §300gg-15	Summary of Benefits and Coverage	No
1001	42 U.S.C. §300gg-18	Medical Loss Ratio	No
1001	42 U.S.C. §300gg-19	Appeals Process	No
1001	42 U.S.C. §300gg-19a	Patient Protections	No
1201	42 U.S.C. §300gg-8	Nondiscrimination Regarding Clinical Trial Participation	No
1201	42 U.S.C. §300gg-5	Nondiscrimination Regarding Health Care Providers	No
1001	42 U.S.C. §300gg-17	Reporting Requirements Regarding Quality of Care	No

**Source:** CRS analysis of 42 U.S.C. §18052(a)(2) and ACA Sections 1001, 1003, 1201, 1302, and 1312.

**Notes:** ACA = Patient Protection and Affordable Care Act (P.L. 111-148, as amended). For more information about the provisions listed in the table, see CRS Report R42069, *Private Health Insurance Market Reforms in the Patient Protection and Affordable Care Act (ACA)*.

- a. Whether or not a listed provision can be waived is based on whether the provision is included in the ACA parts or sections that can be waived under ACA Section 1332: Parts I and II of Subtitle D of the ACA; ACA Section 1402; IRC Sections 36B, 4980H, and 5000A.

### **How Would BCRA Section 206 Modify What a State May Waive Under Section 1332?**

BCRA Section 206 would not expressly modify the list of ACA provisions a state can waive under a 1332 waiver. As such, BCRA Section 206 does not expressly change what may be waived under a Section 1332 waiver. Other sections of BCRA would alter provisions that can be waived under a 1332 waiver, which could have an effect on what may be waived. Specifically, BCRA Sections 104 and 105 would zero out the penalties associated with the individual and employer mandates, respectively. BCRA Section 210 would eliminate the cost-sharing subsidies established under ACA Section 1402 effective in 2020. How these changes and changes made by other sections of BCRA could affect what may be waived under a 1332 waiver is beyond the scope of this memorandum, as is a discussion of the ways in which BCRA Section 206 would modify ACA Section 1332.