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The ObamaCare Straightjacket

SECTION 1332 WAIVERS ARE A FOOL'S ERRAND, NOT AN OBAMACARE ESCAPE HATCH

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EXECUTIVE SUMMARY

State lawmakers across the country are looking for an escape hatch from ObamaCare. A number of health care consultants have recommended Section 1332 waivers as a cure for ObamaCare's biggest problems, promising that states will gain unprecedented flexibility to implement innovative, state-led reforms. This is a dangerous idea.

Instead of an innovative escape hatch from ObamaCare, Section 1332 waivers create a stranglehold on state-led reform initiatives. Lawmakers exploring these waivers under the false promise of "flexibility" will be disappointed. After all, Washington bureaucrats hold all the cards and they are interested in only one thing: protecting and expanding ObamaCare.

These waivers will only make ObamaCare's impact on states worse, not better. States would be required to provide benefits at least as generous as ObamaCare, cap cost sharing at least as low as ObamaCare, and cover at least as many people as ObamaCare. Worse yet, experimenting with these waivers would put state taxpayers at risk for cost overruns for federal programs.

Section 1332 is not an escape hatch from ObamaCare. As the Obama administration itself stresses, it is a backdoor to implement even more liberal welfare policies.

OBAMACARE CREATED SECTION 1332 WAIVERS

Why are these waivers known as Section 1332 waivers? They were created by Section 1332 of the Patient Protection and Affordable Care Act – also known as ObamaCare.[1] Although some advocates claim states will be able to subvert ObamaCare through these waivers, the truth is they are actually products of ObamaCare itself.

Far from protecting their constituents from ObamaCare's disastrous consequences, legislators who implement Section 1332 waivers will actually trap their states in ObamaCare straightjackets. Section 1332's burdensome requirements make clear that these waivers cannot make ObamaCare better; they can only make it worse. No wonder Obama officials and advisors have stressed that these waivers serve as a back door to implement welfare policies that are even more liberal than ObamaCare.[2] And so far, that is exactly what has been proposed.[3-4]

WHAT CAN SECTION 1332 WAIVERS REALLY DO?

Section 1332 waivers allow states to waive particular ObamaCare provisions. Specifically, states would be able to change certain ObamaCare rules governing the health insurance exchanges, premium tax credits or cost-sharing reduction subsidies, the individual mandate, and the employer mandate.[5]

But states cannot escape any ObamaCare provision that is not specifically listed under Section 1332.[6] Likewise, Section 1332 does not grant any new authority for states seeking waivers of federal Medicaid rules.[7] Although states can apply for a joint waiver under both Section 1332 of ObamaCare and Section 1115 of the Social Security Act, states gain no additional flexibility to waive Medicaid rules or regulations.[8]

Although eliminating as many provisions of ObamaCare as possible is a worthy goal, Section 1332 waivers put states in an ObamaCare straightjacket by imposing burdensome conditions that ensure they can only make the law's impact worse.

THE SECTION 1332 OBAMACARE STRAIGHTJACKET

ObamaCare gives the U.S. Secretary of Health and Human Services complete discretion to approve or reject states' Section 1332 waiver requests.[9] But in order to qualify for these waivers, states must meet four burdensome tests that make meaningful, patient- and taxpayer-focused reform all but impossible.

States must prove that their waivers would provide benefits at least as generous as ObamaCare, cap cost sharing at least as low as ObamaCare, cover at least as many people as ObamaCare, and cost the federal government no more than ObamaCare.[10] In other words, Section 1332 waivers give the illusion of flexibility, but in reality they cement ObamaCare into state law.

SAME OBAMACARE BENEFITS

Advocates promise that Section 1332 waivers will give states more flexibility to design benefit packages under ObamaCare. But in order to qualify for the waiver, states must ensure their waivers will "provide coverage that is at least as comprehensive" as ObamaCare.[11] This makes ObamaCare the benefit benchmark: states can only require benefit plans that meet or exceed those of ObamaCare.

SAME OBAMACARE COST SHARING

Section 1332 waivers will disappoint state legislators looking to increase personal responsibility. In order to qualify for these waivers, states must prove their waivers will "provide coverage and cost sharing protections against excessive out-of-pocket spending that are at least as affordable" as ObamaCare.[12] Simply put, states will have the authority to reduce skin-in-the-game, but no power to create more personal responsibility for enrollees.

SAME NUMBER OF ENROLLEES

Section 1332 hamstrings states by ensuring ObamaCare's massive expansion of welfare dependence continues untouched. The law requires states to prove their waivers will "provide coverage to at least a comparable number of its residents" as ObamaCare.[13] States would have authority to make more people dependent on government, but would be unable to make adjustments to ensure resources are targeted only to the truly needy.

STATE RESPONSIBILITY FOR COST OVERRUNS

Perhaps the most worrisome requirement of Section 1332 is that states seeking a waiver must prove it "will not increase the federal deficit" more than ObamaCare.[14] This requirement applies not just to expenditures, but to revenues as well.

A state wishing to waive the employer mandate, for example, would have to find a way to make up for the added costs of employers dumping their workers into the waiver program, as well as the lost revenue from the employer mandate's penalty. A state wishing to change premium subsidies, benefit levels, or cost-sharing requirements would need to prove those changes would not cost the federal government more than ObamaCare.

If the proposed waiver would, on net, increase costs or reduce revenues, states applying for the waivers must make up the difference. States would also be on the hook for any and all cost overruns, even though the federal government would pay for the entire ObamaCare subsidy scheme absent the waiver.

NO OPPORTUNITY FOR MEANINGFUL REFORM

Given this ObamaCare straightjacket, it is no wonder lawmakers have found little opportunity for meaningful reform. Even the Obama administration, which has tried to feign interest in state flexibility, has had trouble thinking up "reforms" states could access through Section 1332. The administration's idea for replacing the individual mandate, for example, involved automatically enrolling all eligible individuals in ObamaCare plans.[15]

Obama officials and advisors assured their liberal allies that these waivers serve as a backdoor to implement welfare policies even more liberal than ObamaCare.[16] Not surprisingly, that is exactly what states have proposed doing under Section 1332 so far.

VERMONT

Vermont proposed using Section 1332 to create "Green Mountain Care," a new universal, single-payer health insurance plan for all residents.[17] Under this plan, all Vermont residents would automatically be enrolled in the new government-sponsored program.[18] The new government-sponsored plan would have been far more generous than ObamaCare, with a minimum actuarial value somewhat between 80 and 87 percent.[19] (For comparison, this means the minimum actuarial value would fall somewhere between the Gold and Platinum ObamaCare plans.)

The state later sought to increase the actuarial value to 94 percent, which is even more generous than the most generous ObamaCare plans on the health insurance exchange.[20] The state even hired ObamaCare architect Jonathan Gruber to help design the new single-payer system.[21]

After nearly four years of trying to find a way to make single-payer work in Vermont, Democratic Gov. Peter Shumlin was forced to abandon the plan altogether.[22] Even if the proposed waiver could have kept costs in line with official estimates, it would have required a new 11.5 percent payroll tax on businesses and a new income tax on individuals topping out at 9.5 percent.[23]

ARKANSAS

A comprehensive report prepared for Arkansas' ObamaCare exchange shows just how little flexibility states could hope to achieve. Republican state Sen. David Sanders, a key legislative architect of the "Private Option" ObamaCare expansion, asked the Arkansas Health Insurance Marketplace to draft a report of waiver options.[24] Sanders sought waiver options that would "reduce dependence on entitlement programs" and "save taxpayer dollars," among other things.[25]

The subsequent report detailed a number of meaningless tweaks Arkansas could seek through the Section 1332 waiver process:[26]

- Allow the ObamaCare exchange to actually set premiums for exchange plans;
- Make more individuals eligible for ObamaCare premium subsidies;
- Make more individuals eligible for ObamaCare cost-sharing reduction subsidies;
- Apply cost-sharing reduction subsidies to all exchange plans, rather than just Silver plans;
- Make individuals with employer-sponsored insurance eligible for ObamaCare premium subsidies;
- Make individuals with employer-sponsored insurance eligible for cost-sharing reduction subsidies;
- Allow insurers to sell Catastrophic, Bronze or Platinum plans even if they do not sell Silver or Gold plans;
- Administer ObamaCare subsidies at the family-level, rather than the member-level;
- Administer ObamaCare cost-sharing reduction subsidies through health savings accounts;
- Eliminate the ObamaCare open enrollment period;

- Provide health insurance agents or brokers with ObamaCare navigator grants; and
- Allow more businesses to participate in the ObamaCare SHOP exchange.

In fact, the report's biggest proposal is to allow the state's Medicaid agency to negotiate directly with insurers for Medicaid-only health plans.[27] The state would pay those plans a single fixed rate, rather than the premiums and cost-sharing reduction subsidies paid under the existing "Private Option" waiver.[28] If this sounds familiar, it should: it is no more than a rebranded version of Medicaid managed care, which states have been using for nearly 50 years. In fact, more than 29 million Medicaid enrollees receive benefits through risk-bearing Medicaid managed care entities.[29]

Policymakers should note that not one of the options listed in the report would reduce government dependency. Of course, that should be expected: the law creates an ObamaCare straightjacket that ensures no Section 1332 waiver ever could.

CONCLUSION

Rather than provide states more flexibility or an escape hatch from ObamaCare, Section 1332 waivers create a stranglehold on state-led reform initiatives. Lawmakers exploring these waivers under the false promise of "flexibility" will be disappointed. Washington bureaucrats hold all the cards and they are interested only in protecting and expanding ObamaCare.

These waivers make ObamaCare's impact worse. States would be required to provide benefits at least as generous as ObamaCare, cap cost sharing at least as low as ObamaCare, and cover at least as many people as ObamaCare. Worse yet, experimenting with these waivers would put state taxpayers at risk for cost overruns for federal programs.

Section 1332 is not an escape hatch from ObamaCare. As the Obama administration itself stresses, it is a backdoor to implement welfare policies that are even more liberal than ObamaCare itself.

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