



PROPOSED ACTION
MEMORANDUM

Advancing State Innovation Using Section 1332 Waivers

Departments of Health and Human Services and Treasury
December 2020

I. Summary

The Departments of Health and Human Services and the Treasury (Departments) have issued guidance and approved a state waiver request that will have the effect of undermining access to high-quality, affordable health insurance under Section 1332 of the Affordable Care Act (ACA). The current guidance is inconsistent with the ACA and has encouraged states, such as Georgia, to pursue innovation waivers that will lead to coverage losses.

This memorandum proposes that the Departments rescind and replace the current guidance with an interpretation of Section 1332 that is properly aligned with the text and goals of the ACA. If the Trump administration incorporates the current guidance into regulations as it has proposed in the Notice of Benefit and Payment Parameters for 2022 (2022 Notice), at least some changes will need to be adopted via regulation. This memorandum also identifies options to revisit Georgia's approved waiver under Section 1332.

II. Justification

In enacting the ACA, Congress recognized the need to encourage continued state innovation and advance new ideas for expanding access to comprehensive, affordable coverage. State innovation waivers under Section 1332 were designed to enable state policy innovation.¹ Despite the importance of state innovation, most approved Section 1332 waivers have been narrow in scope. The only broader waiver to have been approved followed guidance from the Trump administration to encourage states to seek waivers that flout federal law.

The Departments should adopt a revised interpretation of Section 1332 to encourage state innovation that truly builds on the ACA. Doing so is needed to, at a minimum, rescind Trump-era guidance. But innovative state solutions are likely to remain critical to addressing the pandemic, the rising uninsured rate, and continued high health care costs. As Massachusetts' health reforms served as a model for the ACA, additional state innovation can help lay the foundation for future federal reforms.

III. Current State

The Secretaries have significant discretion in approving Section 1332 waivers. The Secretaries can approve a state's proposal to waive specified ACA requirements, so long as the state's proposal meets certain minimum standards.² States with approved waivers receive federal pass-through funding based on the amount of federal financial assistance that would have been provided in the absence of the waiver. Waivers can extend for up to five years and may be continued by the state, subject to federal disapproval. State innovation waivers became available beginning in 2017.

¹ John E. McDonough, "Wyden's Waiver: State Innovation on Steroids," *J. Health Polit. Policy Law* 39(5): 1099-11 (2014) ("Arguably, the law's biggest impact on state innovation will be section 1332."); *see also* Heather Howard & Galen Benshoof, Section 1332 Waivers and the Future of State Health Reform, *Health Affairs Blog* (Dec. 5, 2014), <https://www.healthaffairs.org/doi/10.1377/hblog20141205.043142/full/> ("1332s offer wide latitude to states for transforming their health insurance and health care delivery systems.").

² 42 U.S.C. § 18052. States can waive ACA requirements related to qualified health plans, the Exchanges, the individual and employer mandates, and premium tax credits and cost-sharing reductions. *See id.* § 18052(a)(2).

The Secretaries can only approve a Section 1332 waiver request that meets the statute’s procedural and substantive “guardrails.”³ These guardrails ensure that waivers are consistent with the ACA’s goals but give states flexibility to achieve those goals while complying with minimum federal standards. *Procedurally*, states and the Departments must provide an opportunity for public comment and comply with a set timeline for review and approval. States must also enact a law that authorizes state action under the waiver. *Substantively*, the Secretaries can only grant waiver requests if they determine that the plan will provide coverage to at least the same number of residents as under the ACA, and that this coverage is at least as comprehensive and affordable as ACA coverage. The waiver also cannot increase the federal deficit.

Congress instructed the Secretaries to promulgate regulations to implement Section 1332 within 180 days of enactment of the ACA. The Departments published a proposed rule on March 14, 2011, and a final rule on February 27, 2012.⁴ This rule, however, was limited to implementing the *procedural* requirements of Section 1332 and did not address the *substantive* guardrails beyond restating the statutory criteria.⁵ The preamble suggested that the Departments would issue future guidance to develop the “substantive component” of the waiver approval process.⁶ The Departments have not promulgated regulations to fully implement Section 1332’s substantive guardrails. But the proposed 2022 Notice would, by reference, incorporate the Trump administration’s interpretation of the substantive guardrails into federal regulations.⁷

The Departments did, however, issue interpretive guidance in 2015 (2015 Guidance).⁸ The 2015 Guidance provided additional information about the requirements that must be met, the federal application review procedures, the calculation of federal pass-through funding, analytical requirements, and operational considerations. The 2015 Guidance was superseded by new guidance in 2018 (2018 Guidance) that reflected the Trump administration’s waiver priorities and was heavily criticized.⁹ The 2018 Guidance went into effect immediately, although the Departments provided a sixty-day comment period. The Trump administration also encouraged the adoption of its preferred waiver policies by releasing new tools, such as waiver concepts, checklists, and data briefs.¹⁰

Despite the Trump administration’s encouragement and the importance of state innovation, most approved Section 1332 waivers have been relatively narrow. Of the sixteen currently approved waivers, fifteen are for state-based reinsurance programs.¹¹ Though some states have submitted broader waiver requests to the Departments, many have been deemed incomplete or withdrawn by state officials.¹²

To date, only one state—Georgia—has received approval for a broader waiver to restructure its individual market.¹³ Under the Georgia Access Model waiver, Georgia will eliminate HealthCare.gov beginning with plan

³ *Id.* at § 18052(b) (noting that the Secretaries may grant a waiver request “only if” they determine that the state plan complies with four substantive guardrails).

⁴ 77 Fed. Reg. 11700-21 (Feb. 27, 2012).

⁵ *Id.* at 11705. Some of these procedural requirements—those related to public comment—were amended in a recent interim final rule related to the public health emergency for COVID-19. *See* 85 Fed. Reg. 71142-05 (Nov. 2, 2020).

⁶ 77 Fed. Reg. at 11705.

⁷ The proposed 2020 Notice would require states to submit analyses and data so federal officials could assess whether the proposal meets the substantive guardrails “consistent with” the 2018 Guidance. It would make similar changes to existing standards on monitoring and compliance of waivers and periodic evaluation, requiring states to comply with “interpretive policy statements” and the 2018 Guidance unless expressly waived and instructing the Departments to evaluate waiver implementation consistent with the 2018 guidance and the approval’s terms and conditions.

⁸ 80 Fed. Reg. 78131-35 (Dec. 16, 2015).

⁹ 83 Fed. Reg. 53575-84 (Oct. 24, 2018); *see* Joel McElvain, The Administration’s Recent Guidance on State Innovation Waivers under the Affordable Care Act Likely Violates the Act’s Statutory Guardrails, Notice & Comment Blog (Dec. 11, 2018), <https://www.yalejreg.com/nc/the-administrations-recent-guidance-on-state-innovation-waivers-under-the-affordable-care-act-likely-violates-the-acts-statutory-guardrails-by-joel-mcelvain/>.

¹⁰ *See, e.g.*, Centers for Medicare and Medicaid Services (“CMS”), State Empowerment and Relief Waiver Concepts, Fact Sheet (Nov. 29, 2018), <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Waiver-Concepts-Fact-Sheet.pdf>.

¹¹ *See* CMS, Section 1332: State Innovation Waivers (last visited Nov. 18, 2020),

https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_state_innovation_waivers-ter-STCs.pdf [hereinafter *Georgia Waiver Approval*]. Georgia is also authorized to establish a state-based reinsurance program that will begin in plan year

¹² *Id.*

¹³ CMS, Letter to Governor Brian Kemp, (Nov. 1, 2020),

https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-/1332-GA-Approval-Letter-STCs.pdf [hereinafter *Georgia Waiver Approval*]. Georgia is also authorized to establish a state-based reinsurance program that will begin in plan year 2022.

year 2023. This change is expected to lead to consumer confusion and coverage losses.¹⁴ Given these impacts, critics argue that approving the waiver was improper and violated the Section 1332 guardrails.¹⁵

There are currently no pending waiver requests, although the Departments may soon have to consider more progressive state proposals. California developed, but later withdrew, a proposal to enable undocumented individuals to purchase Exchange coverage without subsidies.¹⁶ And state officials and advocates in states such as Colorado and Nevada are expected to pursue new legislation to establish public options that would rely on approval of a Section 1332 waiver.

IV. Proposed Action

This memorandum proposes that the Departments revoke the 2018 Guidance and adopt a revised interpretation of Section 1332's guardrails. This memorandum discusses three potential options for doing so: (i) revoking the 2018 Guidance without a replacement, (ii) issuing new guidance that supersedes the 2018 Guidance, or (iii) issuing new regulations to further implement Section 1332 while also revoking the 2018 Guidance. Any of these options would require publication in the *Federal Register*, and options (ii) and (iii) likely require notice-and-comment procedures. If the Trump administration finalizes the proposed 2022 Notice, at least some regulatory changes will be needed. This suggests option (iii) may be most appropriate. This memorandum also identifies options for addressing Georgia's approved waiver.

Relevant to all three options, the Departments have the authority to interpret Section 1332's standards. Doing so is inherent in the Secretaries' discretion to approve waiver proposals that meet the statute's guardrails. Section 1332(a)(4)(B) directed the Departments to promulgate regulations on the procedural guardrails by September 23, 2010. There is no similar requirement to implement the statute's substantive guardrails, but this authority is inherent in the statute.¹⁷

All three options are still viable, even if the Trump administration finalizes the 2022 Notice. Indeed, the comment period on the proposed 2022 Notice presents a renewed opportunity to criticize, via legal arguments and empirical evidence, the 2018 Guidance and Georgia's approved waiver. In rescinding the 2018 Guidance under option (i), the Departments could indicate that they will rely on Section 1332's statutory guardrails, notwithstanding any regulatory references to the 2018 Guidance, and suggest that future rulemaking will be undertaken to revise the regulatory text.¹⁸ The regulatory text must be revised at some point (such as in the next Notice of Benefit and Payment Parameters), but doing so may not be immediately urgent in the absence of the 2018 Guidance itself.

¹⁴ Christen Linke Young & Jason Levitis, Georgia's Latest 1332 Proposal Continues to Violate the ACA, Brookings Institute (Sep. 1, 2020), <https://www.brookings.edu/research/georgias-latest-1332-proposal-%20continues-to-violate-the-aca/> (estimating coverage losses of up to 50,000 Exchange enrollees and 10,000 Medicaid enrollees).

¹⁵ *Id.*; see also Tara Straw, Tens of Thousands Could Lose Coverage Under Georgia's 1332 Waiver Proposal, Center on Budget and Policy Priorities (Sep. 1, 2020), <https://www.cbpp.org/research/health/tens-of-thousands-could-lose-coverage-under-georgias-1332-waiver-proposal>.

¹⁶ See Peter Lee, Letter Re: California's State Innovation Waiver Application (Jan. 18, 2017), <https://hbex.coveredca.com/stakeholders/Covered%20California%201332%20Waiver/1332%20Application%20Withdrawal%20Request%2001%2018.pdf> ("In withdrawing this application, California reserves its right to resubmit its application and its right to submit future State Innovation Waivers under Section 1332 of the Affordable Care Act.").

¹⁷ Section 1332(a)(4)(B)(ii)(II) directs the Secretaries to promulgate "regulations relating to waivers ... that provide ... (ii) a process for the submission of an application that ensures the disclosure of ... (II) the specific plans of the State to ensure that the *waiver will be in compliance with subsection (b)*" (emphasis added). Subsection (b) includes the substantive guardrails of Section 1332. Even if the Secretaries do not have explicit authority to issue regulations to interpret the substantive guardrails in Section 1332(b), the statute directs them to issue regulations regarding state plans and compliance with those requirements.

¹⁸ The Departments might also note that the 2018 Guidance should never have been incorporated by reference in the first place. Doing so was improper under 1 C.F.R. § 51.7(b) and (c)(1). Under § 51.7(b), a publication produced by the same agency that is seeking its approval is assumed to be inappropriate for incorporation by reference. Under § 51.7(c)(1), materials published previously in the *Federal Register*, such as the 2018 Guidance, "are not appropriate for incorporation by reference."

Even if the Departments want to maintain the same general interpretation of the guardrails as in 2015, this memorandum urges *some* changes to the 2015 Guidance to help justify revisions to the 2018 Guidance. Additional changes should be identified but, at a minimum, the Departments could (i) update language around deficit neutrality to reflect that the Cadillac tax has been repealed and the individual mandate penalty has been set to \$0, (ii) eliminate or revise the 2018 Guidance’s principles for waiver approval,¹⁹ and (iii) consider maintaining parts of the 2018 Guidance (such as flexibility for states to cite existing legislation). This memorandum also recommends consulting with key state officials to help ensure that any revised interpretation helps promote progressive state innovation.

Option 1: Revoke the 2018 Guidance Without A Replacement

The Departments could rescind the 2018 Guidance, which is not legally binding, without having to comply with notice-and-comment-rulemaking requirements. Notice-and-comment procedures are not required for *rescinding* guidance.²⁰ HHS can rescind a guidance document, such as the 2018 Guidance, by not maintaining its posting on the HHS guidance repository.²¹ The Departments could then publish a memorandum or notice in the *Federal Register* that formally revokes the 2018 Guidance, briefly explains why the guidance is being withdrawn, and specifies the effective date for this decision. So long as HHS does not issue a *replacement* policy, it should be able to rescind the 2018 Guidance without first having to offer a notice-and-comment period. To avoid implicating the “good guidance” rule, HHS should explicitly state that it is only rescinding the 2018 Guidance.

In lieu of replacement guidance, the Departments could defer to the substantive guardrails in statute and the procedural guardrails already laid out in regulations. Interpretive guidance is not *necessary* to the administration of Section 1332 waivers. The only potential risk is that a gap in guidance could have an inadvertent chilling effect if states interested in pursuing a Section 1332 waiver proposal (other than for reinsurance) wait for more information on the Departments’ intended approach.²²

Option 2: Issue New Guidance that Supersedes the 2018 Guidance

Alternatively, the Departments could issue new guidance that expressly supersedes the 2018 Guidance. In doing so, the Departments may need to use notice-and-comment procedures. In general, HHS must provide a public notice and comment period of at least thirty days before issuing a “significant guidance document.”²³ This includes publishing a notice in the *Federal Register* and HHS guidance repository, and responding to major commenter concerns before issuing the significant guidance document. The Departments could argue that

¹⁹ The 2015 Guidance did not include similar principles. In new guidance, the Departments might adopt principles such as advancing health equity, protecting people with preexisting medical conditions, and reducing enrollee premiums and out-of-pocket costs. Waiver proposals that advance some or all of these principles could be considered favorably by the Departments—and provide an additional basis for denying waiver requests that do not meet these principles.

²⁰ 85 Fed. Reg. 78770, 7877, 78781 (Dec. 7, 2020) (noting that “HHS will not use a notice-and-comment process for rescinding significant guidance documents” and “HHS is free to elect to stop relying on or using a guidance document, including without soliciting public feedback”).

²¹ 45 C.F.R. § 1.4(a)(2), (3)(ii); *see also id.* (“Operating divisions remain free to announce when they are rescinding or replacing a guidance document, and we encourage operating divisions to do so. But regardless of whether they do, under the new process, the public will also be able to know that HHS has rescinded a guidance document, because the guidance document will not appear in, or will cease to appear in, the guidance repository.”).

²² The delay in issuing the 2018 Guidance has been cited by former federal officials as one of the reasons why so few states pursued broader Section 1332 waivers under the Trump administration.

²³ *See* 85 Fed. Reg. at 78778; *see also* Exec. Order No. 13891 of October 9, 2019, 84 Fed. Reg. 55235-38 (Oct. 15, 2019)

new guidance should not be considered a “significant guidance document”²⁴ but, if it is, notice-and-comment procedures should be followed.

Superseding guidance was used by the Trump administration in rescinding and replacing the 2015 Guidance. Indeed, the Departments maintained much of the same verbiage from the 2015 Guidance but identified the major changes between the two documents,²⁵ noted empirical evidence on the state of the ACA markets,²⁶ stated the intent of the revised interpretation,²⁷ cited the Departments’ experience since 2015,²⁸ and connected the results of this experience to the policy goals of lowering barriers to innovation and strengthening health insurance markets.²⁹

A new administration should provide at least similar justifications for overall changes to the 2018 Guidance. The new guidance should identify the major changes, note empirical evidence, identify the goals of a revised interpretation, cite experience since 2018, and connect that experience to the policy goals. The new guidance could cite the rising uninsured rate and high health care costs—coupled with the pandemic and economic crisis—as evidence of the need for further state innovation on comprehensive coverage options and health care costs. The Departments should also state the new view that the 2018 Guidance’s interpretation of the substantive guardrails is inconsistent with the text and goals of Section 1332 and the ACA, and could draw from comments on the proposed 2022 Notice.

Where the new guidance deviates significantly from the 2018 Guidance, the Departments should acknowledge the change and briefly explain why the revised interpretation is (i) appropriate based on the Departments’ experience since 2018, and (ii) consistent with Section 1332. To address state reliance interests, the new guidance should only apply to waivers submitted after the publication date of the guidance.³⁰ Waivers approved *before* publication of the guidance—including Georgia’s waiver—will not be reconsidered based on the revised interpretation.³¹ But the Departments should make clear that states with pending Section 1332 waivers, or where new proposals are under consideration, can no longer rely on the 2018 Guidance. This should be emphasized even if the 2022 Notice is finalized as proposed, and the Departments should indicate that they intend to undertake future rulemaking to eliminate references to the 2018 Guidance.

²⁴ 45 C.F.R. § 1.2 (defining a “significant guidance document” as a document “that may reasonably be anticipated to lead to an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights or obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles of Executive Order 12866.”).

²⁵ See 83 Fed. Reg. at 53575 (“Changes include increasing flexibility with respect to the manner in which a section 1332 state plan may meet section 1332 standards in order to be eligible to be approved by the Secretaries, clarifying the adjustments the Secretaries may make to maintain federal deficit neutrality, and allowing for states to use existing legislative authority to authorize section 1332 waivers in certain scenarios.”).

²⁶ See *id.* at 53576 (raising concerns about insurer losses and participation as well as enrollment declines among unsubsidized individuals as evidence of the need to adopt a new approach for Section 1332 waivers).

²⁷ *Id.* (“This guidance intends to expand state flexibility, empowering states to address problems with their individual insurance markets and increase coverage options for their residents, while at the same time encouraging states to adopt innovative strategies to reduce future overall health care spending.”).

²⁸ *Id.* at 53577 (“In light of the Departments’ experience since 2015 in considering State waiver applications and communicating with states considering such applications, the Departments have reviewed the statutory guardrails to determine whether the interpretations set forth in the previous guidance could be revised to provide more flexibility to the states.”).

²⁹ *Id.*

³⁰ Doing so is consistent with the 2018 Guidance. See 83 Fed. Reg. at 53583 (“This guidance will be in effect on the date of publication and will be applicable for section 1332 waivers submitted after the publication date of this guidance (including section 1332 waivers submitted, but not yet approved).”).

³¹ See *id.* (“Applications for waivers approved under section 1332 before the publication date of this guidance will not require reconsideration of whether such applications meet these updated requirements of section 1332.”).

Option 3: Issue New Regulations that Supersede the 2018 Guidance

The Departments could accomplish many of these same goals by revising the implementing regulations for Section 1332. The use of regulatory notice-and-comment rulemaking procedures could delay adoption of new standards. But there are several reasons why the Departments should consider updating current regulations to include revised interpretations of the statutory guardrails.

First, the rule to implement the procedural guardrails was adopted in 2012, long before waivers became available. The Departments could use this opportunity to bolster or update any procedural standards. Second, the Departments have now had sufficient experience in reviewing and approving Section 1332 waivers to implement the substantive guardrails in binding regulations. Doing so would not have been appropriate in 2015 before waivers were under consideration, but the Departments have now approved sixteen waivers and deemed many others incomplete. Third, codifying the Departments' interpretation while revoking the 2018 Guidance will help provide stability in the standards and promote consistency across administrations. Fourth, at least some rulemaking on the Section 1332 guardrails will be required if the 2022 Notice is adopted as proposed. It may be more efficient for the Departments to update all their regulations on Section 1332 at one time rather than only eliminating references to the 2018 Guidance (although that remains a possibility). The Departments could also draw from comments on the proposed 2022 Notice.

Much of the content of the regulatory preamble would be the same as the new proposed guidance discussed above. To the extent that the Departments are largely reverting to the 2015 Guidance standards, a shorter thirty-day comment period may be appropriate.

Addressing Georgia's Approved Waiver

The Departments have several options to address the Georgia Access Model waiver. Relevant to all of these options, Section 1332's implementing regulations and the 2018 Guidance confirm that the Secretaries "reserve the right to suspend or terminate a waiver, in whole or in part, any time before the date of expiration, if the Secretaries determine that the state materially failed to comply with the terms" of the waiver.³² Georgia's waiver agreement includes Special Terms and Conditions (STCs) that limit the Departments to suspending or terminating Georgia's waiver "only if" Georgia "materially failed to comply" with the STCs *or* failed to meet the statute's substantive guardrails.³³

The most straightforward way to address Georgia's waiver assumes there will be litigation challenging the *approval* of the Georgia Access Model under the Administrative Procedure Act (APA) and the ACA. There are several grounds on which to challenge approval of the waiver, including that Georgia and the Departments failed to comply with procedural requirements. Assuming that a lawsuit is filed on procedural grounds, the Departments could reopen a comment period to solicit further public feedback on the Georgia Access Model proposal.³⁴ The Departments could cite concerns about the adequacy of the prior comment periods and the absence of an opportunity for public comment on the full proposal, as revised by Georgia on October 9.

The Departments could consider these new comments in reevaluating approval of the Georgia Access Model. If the Departments conclude that the proposal fails to satisfy the substantive guardrails, they would have grounds to amend, suspend, or terminate Georgia's waiver, so long as certain procedures are followed.

³² See 31 C.F.R. § 33.120(d), 45 C.F.R. § 155.1320(d); 83 Fed. Reg. at 53577; 80 Fed. Reg. at 78132.

³³ *Georgia Waiver Approval*, Specific Terms and Conditions #17 at 12.

³⁴ The Trump administration used this strategy in response to an adverse court decision over its approval of Medicaid work and community engagement requirements. See Dan Diamond & Rachana Pradhan, "CMS Plots Path Forward for Kentucky Work Requirements After Court Setback," *Politico* (Jul. 18, 2018).

The Departments can suspend or terminate the waiver but cannot simply withdraw waiver approval in an immediate, *ex parte* fashion. Under the STCs, the Departments would have to notify Georgia promptly of the determination, an effective date, and the reasons for the amendment, suspension, or termination. This notice should include a robust explanation as to why, in the Departments' view, the waiver proposal fails to satisfy Section 1332's substantive guardrails.³⁵

The Departments must then give state officials ninety days to respond, with the possibility of providing a corrective action plan to bring the waiver into compliance with the STCs.³⁶ This could present an opportunity to encourage state officials to establish a state-based Exchange with some continued flexibility. The Departments must also provide Georgia with an opportunity to be heard and challenge the suspension or termination.

Any waiver disapproval should acknowledge the potential reliance interests of state officials, insurers, agents and brokers, and consumers. But the Departments should emphasize that the Georgia Access Model would not have gone into effect until plan year 2023. Given how recently the waiver was approved—even before Georgia has allocated necessary state funding for the waiver—there are minimal reliance interests and thus no need to develop a transition period as otherwise required under the STCs.³⁷

Alternatively, the Departments could wait and regularly assess and closely monitor Georgia's compliance with the STCs and its progress, or lack thereof, in implementing the Georgia Access Model. The STCs identify many requirements that Georgia must meet, including budgetary requirements, reporting and evaluation requirements, post-award forums, programmatic requirements (such as development of an outreach and communications plan), and operational standards for eligibility determinations. Georgia's waiver approval also includes many standards for annual, quarterly, budget, and operational reports.³⁸ In monitoring for compliance, the Departments will need to account for the Georgia-specific procedural requirements outlined in the STCs.³⁹

But if the Departments find that Georgia has failed to satisfy any STC, they would have grounds to amend, suspend, or terminate the waiver in whole or in part using the procedures outlined in the STCs. This option is still viable, even if the Trump administration finalizes the 2022 Notice regarding waiver monitoring and compliance, and periodic evaluation. The Departments and Georgia are still bound by the STCs over the 2018 Guidance. This option also remains a possibility if there is litigation over the approval of Georgia's waiver.

³⁵ Many of these concerns have been documented by observers. *See, e.g.*, Linke Young & Levitis, *supra* note 14; Straw, *supra* note 15.

³⁶ *Georgia Waiver Approval*, #17(b) at 13.

³⁷ The STCs require the Departments to take “all reasonable measures ... to mitigate any disruption to enrollees, the state, and other relevant stakeholders.” *Id.* at #17(e) at 13.

³⁸ One of the STCs for an annual report includes a catch-all provision for “[a]ny other relevant data or information requested by the Departments.” This provision could be used to collect additional data from Georgia to assess ongoing compliance with Section 1332's guardrails. *Id.* at #12 at 8.

³⁹ For instance, the Departments must allow the state to challenge any determination that a change to state law “materially impacts” the ability to satisfy the statute's guardrails. *Id.* at #2 at 2. If a federal evaluation reveals that the waiver is not meeting the statute's guardrails, the Department must submit a report to the state with recommendations to bring the waiver into compliance. *Id.* at #15 at 10.

