

# KEY TAKEAWAY OVERVIEW

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On April 16, 2021, CMS rescinded its approval of Texas' 1115 waiver extension, having determined that CMS "materially erred" in approving Texas' request to exempt the extension application from the usual public notice process. CMS' recission creates uncertainty around the future of the State's uncompensated care pool, which provides billions of dollars to Texas hospitals. Critics have argued the uncompensated care pool disincentivizes Texas from pursuing Medicaid expansion.

# TEXAS 1115 WAIVER BACKGROUND

- On November 30, 2020, Texas submitted an application to CMS to extend its existing Section 1115 Waiver, the Texas Healthcare Transformation and Quality Improvement Program, through September 2027. The waiver had been set to expire on September 30, 2022, with the DSRIP component of the waiver expiring a year earlier on September 30, 2021.
- Texas submitted its request as a “fast track” application, which allows for a CMS review process similar to that used for state plan amendments. The application also sought CMS approval to waive certain public notice requirements due to the COVID-19 public health emergency.
- Texas conducted public hearings based on the waiver extension application as submitted on November 30, but additional components not included in the public hearing materials, such as additional uncompensated care funding, were eventually approved by CMS.

# TEXAS 1115 WAIVER BACKGROUND

- On January 15, CMS approved Texas' request to extend its 1115 waiver.
- Instead of the September 2027 end date requested in the State's November 30<sup>th</sup> application, CMS approved extension of the waiver through September 30, 2030.
- CMS also approved the following funding changes, some of which were not specifically described the State's November 30<sup>th</sup> fast track application or addressed in the public process undertaken by the State:
  - New Public Health Providers Charity Care Pool with up to \$500 million over two years for publicly owned and operated community mental health authorities, local health departments, and public health districts.
  - Resizing the existing Uncompensated Care Pool in 2022, using FY 2019 data, and again in 2027.
  - Rebased budget neutrality effective FY 2023, using FY 2022 data to establish a new without waiver cost. CMS will also allow a one-time adjustment to budget neutrality to account for COVID-19 impacts on enrollment and spending.
  - New state directed payment programs for hospitals, physicians, rural providers, and behavioral health providers, which are subject to additional CMS review and approval prior to implementation.

# TEXAS 1115 WAIVER CMS RESCINDS APPROVAL

- In rescinding its earlier approval of Texas' waiver extension, CMS stated it had "materially erred" by approving Texas' request for an exemption from public comment requirements for its 1115 waiver submission, finding that Texas had not demonstrated sufficient basis for the exemption, which requires "a sudden emergency threat to human lives." CMS found that Texas' extension application contained no program features specifically addressed to the public health emergency, which Texas cited as the reason for an exemption from the public comment process. CMS noted that the state had nearly two years left its waiver approval period at the time of its extension submission, providing ample time for public notice and stakeholder engagement processes.
- CMS concluded that its error deprived both stakeholders of the opportunity to comment on the waiver extension, which includes significant programmatic and funding changes not previously approved by CMS, and deprived CMS and Texas of the benefit of public input that could have influenced the design and approval of the waiver program.
- CMS indicated the program and expenditure authorities in place prior to the state's extension request will remain, set to expire on September 30, 2022.

# TEXAS 1115 WAIVER REACTION

- In a statement issued in response to CMS' letter, Texas Governor Greg Abbott accused the Biden administration of “obstructing health care access” for Texans by rescinding its waiver extension approval. Texas Attorney General Ken Paxton indicated he would use every “legal tool available to regain the assistance Texans need.”
- Although the Texas Hospital Association has and continues to support Medicaid expansion, it nevertheless expressed disappointment in CMS' decision, which creates uncertainty around funding for uncompensated care.
- Some stakeholder groups, including Every Texan, praised CMS for upholding the public comment process. Every Texan was one of three groups that penned a December 2020 letter to CMS, cited in CMS' rescission notice, opposing Texas' request for an exemption from the waiver public comment process.
- On April 21, Senator John Cornyn (R-TX) placed a hold on the nomination of Chiquita Brooks-LaSure for CMS Administrator, citing CMS' action to rescind the Texas waiver.

# TEXAS 1115 WAIVER IMPLICATIONS

- **How has CMS' view of supplemental funding methodologies, such as DSRIP and the uncompensated care pool, evolved over the life of Texas' 1115 waiver?**
  - Texas was one of the first states to include both DSRIP and uncompensated care funding in its 1115 waiver when it was first approved in 2011. Since then, CMS has increasingly taken on the view that DSRIP and similar funding should be a one-time investment and a bridge to sustainable system reforms. At the same time, it has sought to phase out or phase down uncompensated care funding aimed at the population that would be covered by the ACA Medicaid expansion.
- **What is the significance of the uncompensated care pool in Texas?**
  - The current 1115 waiver includes up to **\$2.3 billion** annually in uncompensated care funding. Hospitals in Texas, particularly rural hospitals, rely heavily on this funding.
- **What are the implications of losing uncompensated care funding?**
  - On top of the already expiring DSRIP funding, loss of uncompensated care funding could weaken Texas's safety net by causing hospitals to close.

# TEXAS 1115 WAIVER IMPLICATIONS

## ▪ **What happens next?**

- Texas must resubmit its waiver extension application in order to preserve its existing delivery system. The current waiver will expire on September 30, 2022, giving the State less than 18 months to resubmit and obtain CMS approval for its extension request.
- Negotiations may be more complex if CMS is no longer willing to approve the State's uncompensated care pool as it is currently constructed.
  - Texas must engage in a stakeholder outreach and public comment process.
  - Once CMS accepts the waiver application as complete, it will be subject to a 30-day federal public comment period.
  - Assuming CMS will not allow Texas to use the fast-track process, the 1115 application process generally takes at least 12 months.

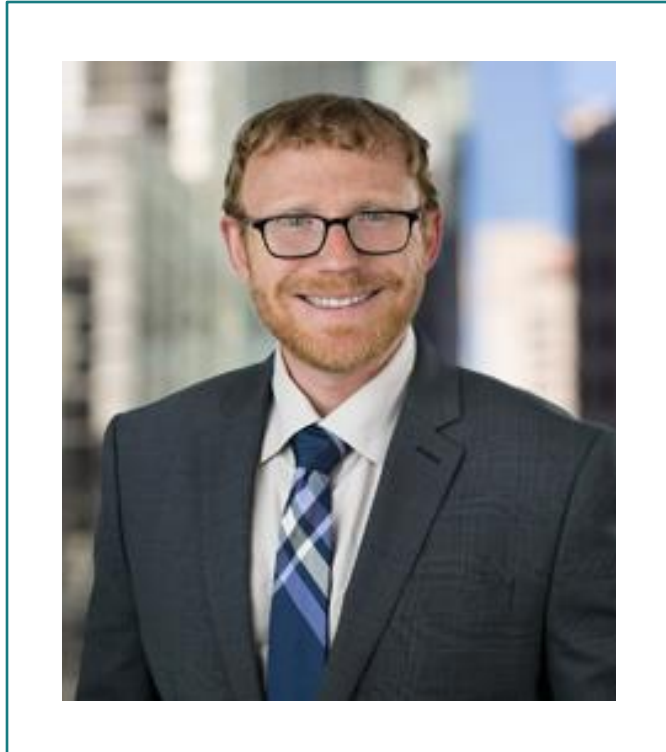
# TEXAS 1115 WAIVER IMPLICATIONS

- **How does this relate to Medicaid expansion?**

- Texas has not expanded Medicaid. It is unclear the Biden administration will approve the State's uncompensated care pool as currently constructed, which critics have argued runs counter to the administration's goal of promoting Medicaid expansion in states that have not yet expanded.
- The Biden Administration has signaled it will work to encourage more states to expand Medicaid. Section 9814 of the American Rescue Plan Act provides states that have not yet expanded Medicaid with a temporary five percentage point increase in the state's FMAP if the State expands Medicaid coverage to newly eligible (i.e., expansion) adults. States expanding after enactment will receive the enhanced FMAP for eight fiscal quarters (i.e., two fiscal years).



# CONTACT



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