

**Congress of the United States**  
Washington, DC 20510

November 16, 2018

The Honorable Alex M. Azar  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

The Honorable Seema Verma  
Administrator  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard  
Baltimore, MD 21244

The Honorable Steven Mnuchin  
Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Dear Secretary Azar, Administrator Verma, and Secretary Mnuchin:

We write to express our serious concerns that the Administration's new guidance on Section 1332 of the Affordable Care Act (ACA) is inconsistent with Congressional intent, will raise costs for consumers, and will undermine protections for individuals with pre-existing conditions. Therefore, we request that you immediately rescind this guidance and work with stakeholders to implement Section 1332 in a manner that supports Americans' ability to access quality, affordable health care.

Congress enacted Section 1332 (State Innovation Waivers) of the ACA to provide states with the flexibility to *improve* coverage, affordability, and comprehensiveness of benefits. In order, to ensure that any waiver achieves these goals, Congress established four strict "guardrails" that waiver applications must meet in order to be considered for approval by the Secretaries of Health and Human Services (HHS) and the Department of the Treasury (Treasury). Under Section 1332, states must prove that their waivers will:

1. provide insurance coverage that is at least as comprehensive as provided under the ACA;
2. provide coverage and cost-sharing protections at least as affordable as it would be under the ACA;
3. provide coverage to a comparable number of people as would have been covered under the ACA; and
4. not increase the Federal deficit.<sup>1</sup>

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<sup>1</sup> Section 1332(b)(1) of the ACA.

On October 22, 2018, the Centers for Medicare & Medicaid Services (CMS) and Treasury issued new guidance for Section 1332 waivers that upends the prior Administration's interpretation of the guardrails to conform to goals that are inconsistent with Congressional intent. Worse still, this guidance explicitly rescinds protections for people with pre-existing conditions. Under previous guidance issued in 2015,<sup>2</sup> states were required to show that, in addition to ensuring comprehensive, affordable coverage for their residents as a whole, a proposed waiver would not weaken coverage for vulnerable subpopulations, such as low-income families, seniors, and people with serious health conditions. Under the Administration's new 2018 guidance, the Secretary may approve waivers that will result in less coverage, fewer protections, and higher costs for older, sicker, and low-income residents. This could severely impact many Americans' ability to get affordable health care and re-open the door for insurance companies to discriminate against people with pre-existing conditions – all on the taxpayer's dime.

The revised 2018 guidance will also increase costs for Americans with pre-existing conditions, seniors, and women by expanding the use of “junk” short-term plans. Under the 2018 guidance, states will be able to count short-term, limited-duration insurance (STLDI) as actual health insurance for the purposes of meeting the requirement that residents are covered. These junk plans often do not cover basic, essential health care, such as prescription drugs, maternity care, substance use disorder treatment, and mental health services. These plans may also discriminate against people with pre-existing conditions, older Americans, and women by excluding needed benefits, charging them higher premiums, and even denying coverage altogether. These plans can impose arbitrary annual and lifetime limits on how much care they will cover, and often consumers do not realize what they are purchasing due to deceptive practices and fine print.

When this Administration proposed expanding access to short-term plans earlier this year, 98 percent of comments opposed the rule.<sup>3</sup> Shockingly, under the 2018 guidance, states can provide federal taxpayer dollars for these plans, expanding the use of junk plans even further.

The 2018 guidance also undermines access to coverage. Under the previous guidance, states needed to show the proposed waiver would provide comprehensive, affordable coverage to a comparable number of their residents. The new 2018 guidance allows states to increase the number of uninsured in the short term and simply show that a comparable number of residents have *access* to such coverage, regardless of whether they actually have it or not. In a joint letter about a similar proposal by Congressional Republicans, America's Health Insurance Plans and the Blue Cross Blue Shield Association stated that allowing junk coverage to be sold alongside plans that meet Federal patient protections will make “coverage unaffordable for the millions of people who need or want comprehensive coverage” and “will lead to far fewer, if any, coverage options for consumers who purchase their plan in the individual market.”<sup>4</sup>

Additionally, this guidance allows states to further weaken essential health benefits, increase annual out-of-pocket maximums and reduce the minimum value of coverage, and make changes

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<sup>2</sup> <https://www.federalregister.gov/documents/2015/12/16/2015-31563/waivers-for-state-innovation>

<sup>3</sup> <http://www.latimes.com/politics/la-na-pol-trump-insurance-opposition-20180530-story.html>

<sup>4</sup> <https://www.ahip.org/wp-content/uploads/2017/07/Joint-AHIP-BCBSA-Consumer-Freedom-Option-Letter-FINAL-071417.pdf>

that increase costs for *most* if they lower costs for *some*. Taken together, these changes will reduce the quality and affordability of coverage.

We are also concerned that this sub-regulatory guidance may exceed the Secretary's statutory authority. It changes the Administration's interpretation of the guardrails and has exactly the opposite effect of what Congress intended, enabling insurers to sell more "junk" plans that discriminate against people with pre-existing conditions and forcing patients to pay more for critical health care services. For this reason, we believe the new guidance exceeds the Secretary's statutory authority. Additionally, unlike the previous Section 1332 guidance issued in 2015, this 2018 guidance is effective immediately with no meaningful opportunity for public comment.

We urge you to rescind this guidance and work with stakeholders and Congress to give states the flexibility to innovate without raising costs or harming people with pre-existing conditions who need quality, affordable health care the most.

Sincerely,



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RON WYDEN  
Ranking Member  
Senate Committee on Finance



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PATTY MURRAY  
Ranking Member  
Senate Committee on Health, Education,  
Labor, and Pensions



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ROBERT P. CASEY, JR.  
Ranking Member  
Senate Special Committee on Aging



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FRANK PALLONE, JR.  
Ranking Member  
House Committee on Energy and Commerce



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RICHARD E. NEAL  
Ranking Member  
House Committee on Ways and Means



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ROBERT C. "BOBBY" SCOTT  
Ranking Member  
House Committee on Education and the  
Workforce