

Congress of the United States
Washington, DC 20515

December 30, 2020

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

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

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
200 Independence Avenue SW
Washington, DC 20201

Dear Secretary Azar, Secretary Mnuchin, and Administrator Verma:

We write to express our serious concerns regarding policies included in the proposed Notice of Benefit and Payment Parameters for 2022 (“Proposed NBPP”), which was published in the *Federal Register* on December 4, 2020.¹ If finalized, these policies threaten to obstruct access to health care for millions of Americans by leaving more consumers uninsured, pushing more people into substandard coverage, and raising enrollees’ out-of-pocket costs. As the coronavirus disease of 2019 (“COVID-19”) continues to devastate the country, we are deeply disappointed that the Administration is continuing its ideological crusade against the Affordable Care Act (“ACA”) instead of helping Americans access the coverage they need to keep their families healthy and financially secure. We urge the Administration to reverse course and to withdraw these proposed policies immediately.

Moreover, we are troubled that in its final weeks in office, the Trump Administration appears to be rushing to finalize a regulation proposing substantial changes that would hamper access to coverage through the ACA’s health insurance marketplaces (also known as exchanges) for years to come. Below, we detail the proposed policies that would be particularly harmful to consumers. Accordingly, we ask that you withdraw these proposed policies. The current Administration should defer any major policy decisions affecting access to marketplace coverage to President-elect Biden and his incoming Administration. The incoming Biden Administration

¹ Department of Health and Human Services, Centers for Medicare and Medicaid Services, Department of the Treasury, Proposed Rule, Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2022 and Pharmacy Benefit Manager Standards; Updates To State Innovation Waiver (Section 1332 Waiver) Implementing Regulations, 85 Fed. Reg. 78572-78682 (Dec. 4, 2020), <https://www.federalregister.gov/documents/2020/12/04/2020-26534/patient-protection-and-affordable-care-act-hhs-notice-of-benefit-and-payment-parameters-for-2022-and>.

deserves an opportunity to consider how such proposed policies would affect health care coverage and the needs of consumers.

Eliminating the use of marketplaces would be unlawful and obstruct access to health care

We are profoundly concerned about the Administration’s proposal to allow states to eliminate the use of health insurance marketplaces—including a federally facilitated marketplace, state-based marketplace using the federal platform, or state-based marketplace—to enroll consumers in coverage.² Instead, under the Proposed NBPP’s so-called Exchange Direct Enrollment option, states would be able to force consumers to enroll in health plans through a decentralized landscape of private entities, including health insurers, agents, and brokers. Marketplaces would still be required to list basic information about plans on their websites and to conduct eligibility and verification activities, but would no longer serve as a single pathway for consumers to shop for, select, and enroll in plans.

The Administration’s proposal is a clear violation of the ACA’s statutory text

This proposal is reckless, harmful, and a blatant violation of federal law. Section 1311 of the ACA is clear that states must “establish an American Health Benefit exchange”³ to “*make available* qualified health plans to qualified individuals and qualified employers.”⁴ Yet, despite this statutory directive, the Administration is proposing to allow states to flout federal law in order to undermine the ACA and push consumers into junk insurance. We have seen this before; this proposal doubles down on your approval last month of Georgia’s request to eliminate Healthcare.gov through a Section 1332 waiver, which we warned would leave tens of thousands of Georgians uninsured.⁵ The Proposed NBPP would amplify these catastrophic effects by allowing *any* state to dismantle Healthcare.gov or a state-based marketplace. Even more shocking is the ease with which states would be able to take up this option. Despite the approval of Georgia’s 1332 waiver, the Proposed NBPP would allow states to adopt direct enrollment *without* even requiring them to submit a Section 1332 waiver request. That means states would not even be asked to demonstrate that these dramatic changes would not lead to coverage losses, higher costs for consumers, and less comprehensive coverage.

The Administration’s proposal would cause consumer confusion, push people towards junk plans, and block access to Medicaid and the Children’s Health Insurance Program (CHIP)

If finalized, the consequences of this option for Americans would be devastating. Eliminating a centralized enrollment pathway for consumers would leave millions of Americans uninsured or underinsured, obstructing their access to health care and leaving them vulnerable to financial ruin in the middle of an unprecedented public health and economic crisis. The Administration justifies this proposal by claiming that privatizing and decentralizing enrollment will promote innovation.⁶ Yet, it provides no evidence of how direct enrollment will actually

² 85 Fed. Reg. at 78619.

³ Section 1311(b)(1) of the ACA.

⁴ Section 1311(d)(2)(A) (emphasis added).

⁵ <https://www.finance.senate.gov/imo/media/doc/111220%20GA%20waivers%20letter.pdf>

⁶ 85 Fed. Reg. at 78619.

improve consumers' ability to select plans that meet their health care needs. In fact, direct enrollment will make it harder for consumers to compare plans since these private entities would be able to withhold critical information about plan options. For example, private brokers could withhold information about premiums or cost sharing for plans offered by insurers with which they do not have a financial interest.⁷ Private direct enrollment entities can also push consumers into junk insurance, such as short-term limited duration plans, that weaken the risk pool and are not subject to the ACA's consumer protections requirements, including protections for people with pre-existing conditions.⁸ This means higher premiums in the individual market and more consumers who find themselves denied coverage for basic and essential services like prescription drugs, mental health services, and maternity care, forcing more families to pay out of pocket for medical expenses during a time marked by severe economic uncertainty.

This misguided direct enrollment proposal would also obstruct access to Medicaid and CHIP, which have helped ensure that millions of Americans can access health care during the COVID-19 crisis. This is because, under the Proposed NBPP, private entities would not be required to evaluate consumers for Medicaid or CHIP eligibility. Instead, state exchanges would still be responsible for those determinations and for referring individuals to state Medicaid agencies.⁹ This means fewer consumers will know whether they are Medicaid or CHIP eligible, making it more likely that they forgo needed health coverage or needlessly enroll in junk plans that expose them to high out-of-pocket costs. There is also evidence that some private direct enrollment entities actively steer consumers away from Medicaid or CHIP coverage by ignoring their or their family members' eligibility for these programs and encouraging them to sign up for higher-cost and less comprehensive coverage instead.¹⁰

Delaying direct enrollment translation requirements would exacerbate health inequities

We are also deeply concerned by the Administration's proposal to allow private direct enrollment entities to take up to a year to translate their website content into languages spoken by limited English proficient residents in their state.¹¹ The Proposed NBPP inexplicably justifies this by claiming that this will give insurers and direct enrollment entities additional incentives to enter markets with high numbers of limited English proficient individuals, even though these consumers will face high barriers to enrollment without faster translation requirements.¹² In reality, this proposal threatens to further exacerbate underlying racial and ethnic disparities in health coverage, outcomes, and access, particularly among immigrants who currently have lower rates of health insurance, use less health care, and receive lower quality care than U.S.-born populations.¹³

⁷ <https://www.cbpp.org/blog/trump-proposal-threatens-coverage-of-healthcaregov-enrollees>;
<https://www.healthaffairs.org/doi/10.1377/hblog20201127.118789/full/>

⁸ <https://www.cbpp.org/research/health/direct-enrollment-in-marketplace-coverage-lacks-protections-for-consumers-exposes>.

⁹ 85 Fed. Reg. at 78620/

¹⁰ <https://www.cbpp.org/research/health/direct-enrollment-in-marketplace-coverage-lacks-protections-for-consumers-exposes>.

¹¹ 85 Fed. Reg. at 78673-74.

¹² 85 Fed. Reg. at 78659.

¹³ <https://www.rwjf.org/en/library/research/2017/09/immigration-status-and-health.html>

Slashing user fees would further undermine marketplace operations and outreach

We are also strongly opposed to the Administration's proposal to substantially reduce marketplace user fees. To justify continued efforts to promote direct enrollment, the Proposed NBPP argues that health insurance marketplaces are costly to create and operate.¹⁴ This funding argument rings hollow in light of the Administration's prior funding cuts to ACA marketplace and enrollment activities, including cuts of 90 percent to open enrollment advertising and outreach and 40 percent to navigator programs.¹⁵ Moreover, the Proposed NBPP offers no solution to these financial barriers and instead proposes funding cuts to Healthcare.gov by reducing the user fee charged to states by 25 percent.¹⁶ We urge the Administration to reconsider this fee reduction as it would further weaken support for Healthcare.gov's enrollment operations and call center as well as marketing and outreach efforts.¹⁷

Codifying the Administration's Section 1332 guidance would be illegal and detrimental to consumer access to comprehensive coverage

In addition, we have serious concerns about the Proposed NBPP's codification of this Administration's unlawful 2018 guidance on Section 1332 waivers.¹⁸ As we wrote following its publication, this unlawful guidance contravenes congressional intent and significantly undermines the federal statutory safeguards for states to receive 1332 waivers under the ACA.¹⁹ These statutory guardrails include the requirements that states provide coverage that is as comprehensive, as affordable, and to as many residents as under the ACA, and provided without increasing the federal deficit.²⁰ Among other changes, the Administration's guidance undercut these guardrails by allowing states to count junk insurance plans as coverage to satisfy these safeguards, and by allowing states to leave more consumers uninsured. Codifying this guidance through regulation is both unlawful and makes it more likely that states will be able to adopt policies that undermine Americans' access to comprehensive health coverage.

The Administration should not raise premiums and out-of-pocket expenses for consumers

Finally, we have concerns with this Administration's proposal to continue calculating premium assistance for marketplace coverage using a formula that leaves consumers paying more out of pocket for their care. This methodology, which the Administration adopted in plan year 2020 and proposes continuing for 2022,²¹ would raise premiums by 4.7 percent for most subsidized marketplace consumers after accounting for their tax credits.²² For a family of four

¹⁴ 85 Fed. Reg. at 78619.

¹⁵ <https://www.healthaffairs.org/doi/10.1377/hblog20170901.061790/full/>

¹⁶ 85 Fed. Reg. at 78630.

¹⁷ <https://www.cbpp.org/blog/trump-proposal-threatens-coverage-of-healthcaregov-enrollees>

¹⁸ <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23182.pdf>

¹⁹ <https://www.finance.senate.gov/imo/media/doc/111618%201332%20guidance%20letter%20final.pdf>

²⁰ Section 1332(b)(1) of the ACA.

²¹ <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/CMS-9926-F-Fact-Sheet.pdf>; 85 Fed. Reg. at 78633.

²² <https://www.cbpp.org/blog/trump-proposal-threatens-coverage-of-healthcaregov-enrollees>

making \$80,000 a year, this would mean a \$360 annual premium increase.²³ This methodology also increases the annual limit on total out-of-pocket expenses for both marketplace and employer-sponsored plans. Under the Proposed NBPP formula, this limit would be \$400 higher for an individual and \$800 higher for families than if the Administration reversed course and adopted its pre-2020 methodology.²⁴ We urge the Administration to end its use of this methodology in order to make health care more affordable and accessible for patients.

As the nation continues to grapple with COVID-19, protecting access to comprehensive and affordable coverage will be critical to supporting the health and well-being of families across the country. We strongly urge the Administration to immediately withdraw these policies that jeopardize access to health care.

Sincerely,



Ron Wyden
Ranking Member
Senate Committee on Finance



Patty Murray
Ranking Member
Senate Committee on Health,
Education, Labor, and Pensions



Richard E. Neal
Chairman
Committee on Ways and
Means



Frank Pallone, Jr.
Chairman
Committee on Energy and
Commerce



Robert C. "Bobby" Scott
Chairman
Committee on Education and
Labor

²³ <https://www.cbpp.org/blog/trump-proposal-threatens-coverage-of-healthcaregov-enrollees>

²⁴ <https://www.cbpp.org/blog/trump-proposal-threatens-coverage-of-healthcaregov-enrollees>