



December 18, 2018

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

The Honorable Seema Verma
 Administrator
 Centers for Medicare & Medicaid Services
 P.O. Box 8016
 Baltimore, MD 21244-1850

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

The Honorable David J. Kautter
 Assistant Secretary for Tax Policy
 U.S. Department of Treasury
 1500 Pennsylvania Avenue, NW
 Washington, DC 20220

Dear Secretary Azar, Secretary Mnuchin, Assistant Secretary Kautter and Administrator Verma:

The 23 undersigned organizations represent millions of patients and consumers facing serious, acute and chronic health conditions across the country, including individuals who rely on states' individual marketplaces to obtain their healthcare coverage. Together and separately, our non-profit, non-partisan organizations are dedicated to working on a bipartisan basis with the Administration, Members of Congress and state governments to protect the health and wellbeing of the patients and consumers we represent.

In March of 2017, our organizations agreed upon three overarching principles¹ as a guide for any efforts to help reform and improve the nation's healthcare system. These principles state that: (1) healthcare

should be accessible, meaning that coverage should be easy to understand and not pose a barrier to care; (2) healthcare should be affordable, enabling patients to access the treatments they need to live healthy and productive lives; and (3) healthcare must be adequate, meaning healthcare coverage should cover treatments patients need, including all the services in the essential health benefit package.

Our organizations are deeply concerned about new guidance issued by the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services (HHS) and Department of Treasury (Treasury) regarding state waivers under Section 1332 of the Affordable Care Act (ACA). We are similarly concerned about the related Section 1332 State Relief and Empowerment Waiver Concepts Discussion Paper. In short, the policies that states could pursue under the new guidance would significantly undermine quality and affordable healthcare for patients with pre-existing conditions and clearly conflict with the statutory language that both authorizes these waivers and protects patients with pre-existing conditions. We filed comments urging CMS, HHS and Treasury to rescind this guidance, and we urge state leaders to refrain from using 1332 waivers, as envisioned by this new guidance, to undermine quality and affordable healthcare in their state.

Concerns with New Guidance

Section 1332 of the ACA outlines four clear guardrails that any waiver application must meet to be approved: coverage must be as affordable as it would be without the waiver; coverage must be as comprehensive as it would be without the waiver; a comparable number of people must be covered under the waiver as would be without it; and the waiver must not add to the federal deficit. Under the new guidance, HHS and Treasury will consider the number of people who have *access* to affordable, comprehensive coverage, rather than the number who *enroll* in this coverage. These agencies will also rely on a broad regulatory definition of insurance coverage that is not derived from the ACA.

This gross misinterpretation of the guardrails will have real consequences for patients, steering people into substandard coverage, such as short-term, limited-duration plans and association health plans, which often do not cover the full range of benefits and services that patients rely upon to manage their conditions. As a result, people who find themselves with substandard coverage would – in the event of a serious diagnosis – likely encounter massive medical bills. Further, policies that could be implemented under this new interpretation could fundamentally alter the risk pool for a state’s individual marketplace, making comprehensive coverage unaffordable for the patients who rely on it and jeopardizing the stability of the state’s marketplace. The resulting lack of access to care could have devastating short- and long-term consequences for the millions of patients we represent.

The ACA defines ten categories of Essential Health Benefits (EHBs), including hospitalization, preventive care, maternity and newborn care, emergency room services and prescription drugs. Access to the EHBs is critical for patients with pre-existing conditions. Under the new guidance, states will be able to design EHB benchmark plans that provide less generous coverage for individuals and yet still satisfy the coverage guardrail regarding comprehensiveness. Again, patients with serious and chronic conditions rely on coverage that includes EHBs to access the preventive services, medications, visits with primary care and specialist providers and other benefits and services that they need to manage their conditions. Allowing states to establish skimpier coverage requirements would seriously harm patients’ care and health outcomes.

The new guidance removes key language from previous guidance on 1332 waivers that protects vulnerable populations. The 2015 guidance recognized that the ACA prohibits states from using the Section 1332 waiver program in a manner that would harm vulnerable residents, including older

Americans, individuals with low incomes and those with serious health issues or who have a greater risk of developing serious health issues. It is deeply troubling that the new guidance purports to do away with this safeguard. Additionally, the new guidance does not include language from the 2015 guidance which stated that waiver applications would not be approved if they reduced the number of people with coverage that both provides an actuarial value equal to or greater than 60 percent and includes a maximum out-of-pocket limit compliant with the ACA. In effect, this omission invites waiver applications that would leave patients responsible for excessive cost-sharing and jeopardize their health and financial wellbeing.

Concerns with Waiver Concepts Paper

The Administration's waiver concepts discussion paper provides additional detail on proposals that, under the new guidance, could endanger patients with pre-existing conditions. For example, it invites states to make changes to the ACA's subsidy structure, which provides financial assistance to individuals with incomes between 100 and 400 percent of the federal poverty level (FPL). This means a state could change the current subsidy structure to, among other approaches, a fixed per-member-per-month contribution to a healthcare account based on age. If healthcare premiums were to increase, such an approach would provide no financial protection to patients (as the current subsidy structure does) and could drastically change the affordability of coverage for low-income populations. States could also use new flexibility to customize healthcare.gov to promote non-ACA-compliant plans like short-term, limited-duration and association health plans side-by-side with ACA-compliant plans, increasing confusion about the coverage provided and costs associated with different plans. Further, the discussion paper also invites states to apply for waivers to establish high risk pools, which have a long history of failing to provide adequate coverage for patients with serious and chronic conditions. Our organizations are deeply concerned about these changes and the risks they pose to the individuals we represent.

Additional Considerations for States

States that choose to pursue these policies will, as a direct result, not only jeopardize quality and affordable healthcare for patients and consumers in their states but also take on significant financial and administrative burdens. As the waiver concepts discussion paper outlines, making the technical changes necessary for many policies under this waiver will require significant time and cost.

There are also serious questions about the legality of this guidance. Any policy changes of this magnitude should go through a full rulemaking process, including a robust comment period.ⁱⁱ The guidance clearly defies many of the Section 1332 guardrails in ways that are inconsistent with the statute and congressional intent. Allowing a state to use a law that provides general authority to enforce the ACA in combination with a more specific executive branch action (a regulation or executive order) authorizing a waiver, rather than enacting a specific law authorizing the waiver, is at odds with the plain language of the ACA. States that rely on this guidance to pursue Section 1332 waivers are therefore exposing themselves to material litigation risk.

Our organizations represent millions of patients, individuals, caregivers and families who need access to quality and affordable healthcare coverage. In short, we are deeply concerned that the new guidance undermines the Section 1332 statutory language and its protections for patients with serious, acute and chronic conditions. We urge HHS and Treasury to immediately withdraw this guidance and urge state leaders to refrain from using these waivers, as envisioned by the new guidance, to undermine quality and affordable healthcare in their state. Again, we stand ready to work with you to protect the health and wellbeing of the patients and consumers we represent.

Sincerely,

Adult Congenital Heart Association
American Heart Association
American Liver Foundation
American Lung Association
Arthritis Foundation
Chronic Disease Coalition
Cystic Fibrosis Foundation
Epilepsy Foundation
Global Healthy Living Foundation
Hemophilia Federation of America
Immune Deficiency Foundation
Leukemia & Lymphoma Society
Lutheran Services in America
March of Dimes
Mended Little Hearts
Muscular Dystrophy Association
National Alliance on Mental Illness
National Hemophilia Foundation
National Multiple Sclerosis Society
National Organization for Rare Disorders
National Patient Advocate Foundation
Susan G. Komen
WomenHeart: The National Coalition for Women with Heart Disease

CC: Governors and Insurance Commissioners

ⁱ American Heart Association website, "Healthcare reform principles." Available at:

http://www.heart.org/idc/groups/heart-public/@wcm/@adv/documents/downloadable/ucm_495416.pdf.

ⁱⁱ Christen Linke Young, Brookings Institution, "The Trump administration side-stepped rulemaking processes on the ACA's State Innovation Waivers—and it could make their new section 1332 guidance invalid." Available at:

<https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2018/11/28/the-trump-administration-side-stepped-rulemaking-processes-on-the-acas-state-innovation-waivers-and-it-could-make-their-new-section-1332-guidance-invalid/>.