

Submitted via <http://www.regulations.gov>

To:

**Centers for Medicare & Medicaid Services,  
Department of Health and Human Services,  
Attention: CMS-9936-NC**

The undersigned organizations, all committed to improving access to affordable, comprehensive health care coverage for Texans, write today to signal our opposition to the proposed changes to official guidance governing the minimum standards for quality of benefits, affordability, and coverage of pre-existing conditions under coverage waivers approved under Section 1332 of the Affordable Care Act (ACA). For several reasons, we believe these proposed policies will weaken access to affordable comprehensive health care for Texans, and will especially jeopardize our most vulnerable residents.

The Affordable Care Act (ACA) has helped millions of people with pre-existing health conditions enroll in affordable, comprehensive health coverage, including by barring insurers from denying them coverage and establishing new standards for premium rating and benefits. Texas, which has both the largest number and percentage of uninsured in the nation, had a first-ever reduction in our uninsured percentage from 2013-2016 of over 5 percentage points. We are deeply concerned that the new Section 1332 proposal will let states weaken or eliminate protections for this same group.

Under section 1332 of the ACA, states can request federal waivers to modify how they implement key elements of the law, provided that they meet four “guardrails.”<sup>[1]</sup> Guidance prior to the 10/22/2018 release required that Section 1332 waiver proposals must:

- (1) provide coverage that’s at least as *comprehensive* as the coverage defined in the ACA’s “essential health benefits” provision and offered through ACA marketplaces;
- (2) provide coverage and protections from excessive out-of-pocket spending that are at least as *affordable* as in the marketplaces;
- (3) ensure that at least a comparable *number of residents* have health coverage as would have it without the waiver; and
- (4) not increase the federal deficit.

The new guidance titled “State Relief and Empowerment Waivers” released on October 22 by the U.S. Departments of Health and Human Services (HHS) and Treasury profoundly changes the real-life effects of those statutory guardrails. For example, the new guidance only would require states to show that a comparable number of residents would have adequate health coverage “*available*” to them, even if the benefits offered are weak and expose them to medical debt or lack of access care, and even if the coverage to which they have “access” is unaffordable. <sup>[2]</sup>

The new guidance weakens protections and benefits for Texans with pre-existing health conditions by encouraging states to:

**Promote plans that lack ACA pre-existing condition protections.** The Administration will “consider favorably” state proposals promoting short-term health plans<sup>[3]</sup> and association health plans,<sup>[4]</sup> neither of which are required to meet minimum ACA benefit standards or include all ACA pre-existing condition protections. Of special concern, Administration officials have said states can even use the 1332 process to take ACA funding that’s currently helping low- and moderate-income people afford

marketplace plans, and instead use it to help people buy substandard short-term plans and association health plans with these weaknesses.<sup>[5]</sup>

To be specific, unlike today's ACA plans, short-term plans can:

- deny coverage or charge higher premiums based on people's health status and pre-existing conditions;
- they also can, and typically do, exclude coverage of any care related to a pre-existing condition.
- Both short-term and association plans can charge far higher rates to older people than ACA plans can, and neither type of plan must cover the ACA's essential health benefits.

When short-term and association plans offer lower premiums to healthier and younger people than ACA plans, healthy enrollees may be lured away from the individual and small-group markets, leaving a costlier group behind. By allowing states to redirect ACA funding to help people buy skimpier forms of coverage, the new guidance will accelerate the problem, resulting in higher premiums for comprehensive ACA plans. In addition, the individuals who enroll in skimpy plans may be exposed to medical debt and inability to receive the care they need if they are ill or injured in mid-year.

**Reduce the benefits that plans cover.** The guidance also allows a state to count people covered by skimpy short-term and association plans as having health coverage for purposes of evaluating whether a waiver proposal would provide coverage to a comparable number of people. It eliminates the requirement that 1332 waivers won't reduce the number of people with coverage of any one of the individual EHB categories, such as maternity coverage, mental health care, or habilitative and rehabilitative services, which could cause the re-emergence of major gaps in coverage for Texans in need.

The guidance also changes the meaning of "comprehensive" coverage, linked to separate Administration EHB changes that take effect in 2020.<sup>[6]</sup> This could open the way for states to scale back the benefits covered under many people's plans, not only for Texans with skimpy coverage, but also for people who now have comprehensive EHB coverage.

**Increase deductibles and other cost-sharing charges.** The ACA was designed to provide unprecedented protections and income-based caps on out-of-pocket costs for health care. These were reflected in the original 1332 guardrails, requiring that waiver proposals wouldn't reduce the number of people with coverage as comprehensive as a bronze plan in the marketplace (a 60 percent actuarial value<sup>[7]</sup>) and with caps on yearly out-of-pocket costs (in 2018, \$7,350 is the yearly cap for each individual's in-network, out-of-pocket costs, though low-income people qualifying for subsidies have lower caps and lower cost-sharing in general through marketplace plans). These standards would help protect Texans from large, often unforeseen health expenses.

The new guidance removes these standards, again simply counting the offer of available coverage without regard for the adequacy or affordability, or whether Texas consumers can actually purchase and enroll in it.

Of enormous concern, the October guidance considers a waiver proposal affordable if it "makes coverage much more affordable for some people and only slightly more costly for a larger number of people." This means states could offer lower-premium but much less comprehensive plans, especially to

healthy people, even if that increases costs for those who are less healthy and who need comprehensive coverage. This is not a desirable or acceptable outcome for Texas.

**Rescind protections for vulnerable populations.** Until now, states have had to show that, for the three guardrails related to coverage enrollment, affordability, and comprehensiveness, certain “vulnerable populations” wouldn’t be any worse off due to the waiver. **Specifically, prior guidance said the federal government would consider a proposed waiver’s impact on people who have low incomes, are elderly, or have serious health issues or a greater risk of developing serious health issues.** This is consistent with the ACA’s emphasis on helping populations that typically have faced barriers to affordable health coverage. It explicitly protected those who have pre-existing health conditions or are likely to develop such conditions. **The new guidance eliminates these requirements.**

The new guidance directs states to show how a proposed waiver would “support and empower those in need,” but it identifies only people “with low incomes or high expected health care costs” as being in need. It fails to include the elderly and people at greater risk of developing serious health conditions as protected in Section 1332 waivers. It only requires CMS to “consider the changes in affordability for all groups,” but does not assure that a waiver that has a negative impact on a particular vulnerable sub-population within a state will be rejected.

Finally, as one of the states that has failed to adopt the ACA’s Medicaid expansion, which if enacted would cover an estimated 1.2 to 1.3 million uninsured Texans, we oppose the approach encouraged in the guidance for states to use 1332 waivers to offer private coverage to Texans in the Coverage Gap with incomes below the federal poverty line. The premiums, deductibles, and other out-of-pocket costs of this coverage will not be affordable for many below the poverty line, particularly if they have a pre-existing condition.

For all of these reasons, our organizations respectfully oppose the adoption of these new standards, and urge the agency to withdraw them and retain the former 1332 “guardrails” that ensure that Texans have access to care that includes comprehensive benefits and is truly affordable.

If you have any questions about this comment, please contact Anne Dunkelberg or Stacey Pogue at Center for Public Policy Priorities, [dunkelberg@cphp.org](mailto:dunkelberg@cphp.org), [pogue@cphp.org](mailto:pogue@cphp.org).

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**End Notes**

<sup>[1]</sup> Sarah Lueck and Jessica Schubel, “Understanding the Affordable Care Act’s State Innovation (“1332”) Waivers,” Center on Budget and Policy Priorities, updated September 5, 2017, <https://www.cbpp.org/research/health/understanding-the-affordable-care-acts-state-innovation-1332-waivers>.

<sup>[2]</sup> Katie Keith, “Feds Dramatically Relax Section 1332 Waiver Guardrails,” *Health Affairs* blog, October 23, 2018, <https://www.healthaffairs.org/doi/10.1377/hblog20181023.512033/full/> and Timothy S. Jost, “Using the 1332 State Waiver Program to Undermine the Affordable Care Act State by State,” Commonwealth Fund, October 30, 2018, <https://www.commonwealthfund.org/blog/2018/using-1332-state-waiver-program-undermine-affordable-care-act-state-state>.

<sup>[3]</sup> Sarah Lueck, “Key Flaws of Short-Term Health Plans Pose Risks to Consumers,” Center on Budget and Policy Priorities, September 20, 2018, <https://www.cbpp.org/research/health/key-flaws-of-short-term-health-plans-pose-risks-to-consumers>.

<sup>[4]</sup> Sabrina Corlette, “What’s in the Association Health Plan Final Rule? Implications for States,” State Health & Value Strategies blog, June 22, 2018, <https://www.shvs.org/whats-in-the-association-health-plan-final-rule-implications-for-states/>.

<sup>[5]</sup> Phil Galewitz and Julie Appleby, “Marketplace Subsidies May Be Option In 2020 For Plans That Skirt Obamacare,” Kaiser Health News, October 22, 2018, <https://khn.org/news/section-1332-waiver-marketplace-subsidies-aca-2020-health-plans/>.

<sup>[6]</sup> Sarah Lueck, Tara Straw, and Shelby Gonzales, “Health Care Rule Changes Will Harm Consumers,” Center on Budget and Policy Priorities, April 12, 2018, <https://www.cbpp.org/research/health/health-care-rule-changes-will-harm-consumers>.

<sup>[7]</sup> Sarah Lueck, “What Level of Coverage Will Health Reform Likely Provide? The Basics of Actuarial Value,” Center on Budget and Policy Priorities, October 13, 2009, <https://www.cbpp.org/research/what-level-of-coverage-will-health-reform-likely-provide-the-basics-of-actuarial-value>.