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## Commentary: Trump Administration Rules on Health Waivers Weaken Pre-Existing Condition Protections

By Sarah Lueck

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. But now, the Trump Administration is using an ACA provision to 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> 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. New guidance that the Administration released last week drastically changes how the federal government will determine that a 1332 waiver proposal meets those statutory guardrails. To meet the comprehensiveness and affordability guardrails, states need only show that a comparable number of residents would have adequate health coverage *available* to them, even if they won’t actually enroll in it.<sup>2</sup>

The new guidance, which will likely face legal challenges, weakens protections and benefits that people with pre-existing health conditions need the most, by encouraging states to:

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<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>.

- **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 meet ACA benefit standards or include all ACA pre-existing condition protections. Administration officials said states can even use the 1332 process to take ACA funding that’s now helping low- and moderate-income people afford marketplace plans and use it to help people buy substandard short-term plans and association health plans.<sup>5</sup> In sharp contrast to 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.

Short-term and association plans offer lower premiums to healthier and younger people than ACA plans and therefore lure healthy enrollees away from the individual and small-group markets, leaving a costlier group behind. By allowing states to devote ACA funding to help people buy skimpier forms of coverage, the new guidance will likely increase this problem, thus raising premiums for ACA plans.

The guidance also allows a state to count people covered by 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. This change will further prod states to expand skimpier coverage options. If states use 1332 waivers to expand short-term or association plans, and even help people pay for such coverage, then people who want comprehensive ACA coverage — particularly people with pre-existing conditions — would likely face much higher costs.

- **Reduce the benefits that plans cover.** Under the new guidance, states won’t have to show that their waiver proposals wouldn’t reduce the number of people enrolled in coverage that provides the essential health benefits (EHBs). Nor will they have to show that their waivers wouldn’t reduce the number of people with coverage of any of the individual EHB categories, such as maternity coverage, mental health care, or habilitative and rehabilitative services. In the past, the federal government would have rejected waiver proposals with such effects. As noted, states must merely show that at least as many people will have “access” to comprehensive coverage — in other words, show that such coverage is available, even if far fewer people will enroll in it.

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<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/>.

The guidance also changes the meaning of “comprehensive,” linking it to separate Trump 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, including people who now have comprehensive EHB coverage.

- **Increase deductibles and other cost-sharing charges.** Until now, states have had to show that their waiver proposals wouldn’t reduce the number of people enrolled in health coverage that’s at least as comprehensive as a bronze plan in the marketplace (with a 60 percent actuarial value<sup>7</sup>) and that also caps yearly out-of-pocket costs, consistent with what the ACA generally requires private plans to do.<sup>8</sup> (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 have helped ensure that people in states with a waiver still have some protection from large, often unforeseen health expenses.

The new guidance removes these standards as requirements for meeting the affordability guardrail. Now, the federal government will consider whether affordable coverage would be available to as many people in the state as under the ACA — not whether as people would enroll in it.

Plus, the new guidance makes clear that the federal government will consider 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 need comprehensive coverage.

- **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, and it explicitly protected those who have pre-existing health conditions or are likely to develop such conditions. The new guidance eliminates these requirements.

Instead, the new guidance says states must show how a proposed waiver would “support and empower those in need.” It specifically identifies people “with low incomes or high expected health care costs” as being in need, but not the elderly and people at greater risk of developing serious health conditions. While it says the government will “consider the changes in

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<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>.

<sup>8</sup> Waivers for State Innovation, guidance, Federal Register, Vol. 80, No. 241, December 16, 2015, <https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31563.pdf>.

affordability for all groups,” such as those with low incomes or high expected health costs, under a proposed waiver, the federal government won’t necessarily reject a waiver because it would have a negative impact on a particular sub-population within a state.

Notably, the guidance also invites states that haven’t adopted the ACA’s Medicaid expansion to use 1332 waivers to offer private coverage to people with incomes below the federal poverty line, even though such coverage would likely require enrollees to pay premiums, deductibles, and other costs they can’t afford — particularly if they have a pre-existing condition.

The Administration claims its new guidance doesn’t reduce protections for people with pre-existing conditions,<sup>9</sup> but the changes clearly pave the way for states to curb protections and increase out-of-pocket costs for people with high-cost health needs, a setback in the progress that the ACA has made possible.

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<sup>9</sup> Seema Verma, “New State Relief and Empowerment Waiver Guidance Gives States Tools to Help Fix Broken Health Insurance Markets,” CMS.gov blog, October 22, 2018, <https://www.cms.gov/blog/new-state-relief-and-empowerment-waiver-guidance-gives-states-tools-help-fix-broken-health-insurance>.