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Commentary: House Bill Would Block Trump Administration Rules on Health Waivers That Weaken Pre-Existing Condition Protections

By Sarah Lueck

Trump Administration guidance changed how the federal government will evaluate so-called 1332 waiver proposals from states in ways that would weaken protections for people with pre-existing conditions and other vulnerable groups. The House is expected to vote today on a bill to roll back the Administration's changes.

Under section 1332 of the Affordable Care Act (ACA), states can request federal waivers to modify how they implement key elements of the law, provided that they meet four "guardrails."[1] 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.

But under guidance the Administration released in October, 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.[2] Meanwhile, in assessing the coverage guardrail, the Administration would count as coverage substandard plans that often exclude essential health benefits (such as maternity, mental health, and prescription drug coverage) and impose annual limits on coverage.[3]

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[1] 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.

[2] Katie Keith, "Feds Dramatically Relax Section 1332 Waiver Guardrails," *Health Affairs* blog, October 23, 2018, https://www.healthaffairs.org/do/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.

[3] State Relief and Empowerment Waivers, guidance, *Federal Register,* Vol. 83, No. 206, October 24, 2018, https://www.govinfo.gov/content/pkg/FR-2018-10-24/pdf/2018-23182.pdf.

The Administration also released a "waiver concepts" paper[4] that promotes an overall vision for 1332 waivers similar to ACA repeal legislation the House passed in 2017. That legislation would have replaced the ACA's income-based tax credits and cost-sharing reductions with a flat tax credit that would vary only with age, and would have allowed states to roll back the ACA's pre-existing condition protections and benefit standards.[5]

The Administration has insisted that its 1332 guidance doesn't affect ACA pre-existing condition protections,[6] and in fact, certain of those provisions are not waivable under section 1332. However, the guidance and discussion paper promote waivers that would weaken protections and benefits that people with pre-existing health conditions need the most, by encouraging states to promote plans that lack ACA pre-existing condition protections; reduce the benefits that plans cover; increase net premiums, deductibles, and other cost-sharing charges; and rescind protections for vulnerable populations.

The guidance promotes plans that lack ACA pre-existing condition protections. The Administration will "consider favorably" state proposals promoting short-term health plans[7] and association health plans,[8] which are exempt from certain ACA benefit standards and other protections for people with pre-existing conditions. 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 (EHBs). 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.

As noted, the guidance 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.

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[4] The paper is not official regulation or guidance, but it illustrates how the Administration thinks states could implement the changes in guidance. "Section 1332 State Relief and Empowerment Waiver Concepts," discussion paper, Centers for Medicare & Medicaid Services, Center for Consumer Information & Insurance Oversight, November 29, 2018, https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Waiver-Concepts-Guidance.PDF.

[5] "American Health Care Act, Congressional Budget Office Cost Estimate," Congressional Budget Office, March 13, 2017, https://www.cbo.gov/system/files?file=115th-congress-2017-2018/costestimate/americanhealthcareact.pdf.

[6] "Remarks by Administrator Seema Verma at the CMS National Forum on State Relief and Empowerment Waivers," CMS press release, April 23, 2019, https://www.cms.gov/newsroom/press-releases/speech-remarks-administrator-seema-verma-cms-national-forum-state-relief-and-empowerment-waivers.

[7] 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.

[8] 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/.

The discussion paper encourages states to allow ACA subsidies to be used to purchase short-term health plans, which opens the door to waiver proposals that would unravel the insurance markets where people can access health coverage that is subject to ACA market reforms. ACA subsidies, as currently structured, ensure that healthy people remain in ACA plans, even if substandard plans are made available. If healthy people could use tax credits for plans that can reject applicants or charge more based on health status, this could unleash an "death spiral" in the ACA market. Healthier people would shift to lower premium plans, leaving only the very sickest people in ACA plans as premiums rise. While such a waiver should not be allowable even under the Administration's guidance (because it would not maintain access to coverage as adequate and affordable as is available today), the concept paper makes clear that Administration seeks to promote this type of waiver.

The guidance allows states to reduce the benefits that plans cover. Under the guidance, states don't have to show that their waiver proposals wouldn't reduce the number of people enrolled in coverage that provides the EHBs. Nor do they have to show that their waivers won'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.

The guidance also changes the meaning of "comprehensive," linking it to separate Trump Administration EHB changes that take effect in 2020.[9] 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.

The Administration's policies let plans increase net premiums, 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[10]) and that also caps yearly out-of-pocket costs, consistent with what the ACA generally requires private plans to do.[11] (In 2019, $7,900 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 guidance removes these standards as requirements for meeting the affordability guardrail. Under it, 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 many people would enroll in it.

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[9] 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.

[10] 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.

[11] 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.

Plus, the 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, for example to healthy people, even if that increases costs for those who are less healthy and need comprehensive coverage. The discussion paper also encourages states to replace the ACA's subsidies with a flat tax credit based on age but not income. But flat tax credits, unlike ACA subsidies, fail to account for the fact that people at lower incomes cannot afford to pay as much for health coverage as people with greater incomes and shift support away from those who need it most.

The guidance rescinds 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 offered strong protection for those who have pre-existing health conditions or are likely to develop such conditions. The Administration's guidance eliminates these requirements.

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

Despite the Administration's claims that the guidance doesn't reduce protections for people with pre-existing conditions, its changes clearly encourage state proposals that would 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. The House proposal to roll back the guidance would reinstate protections for the groups the ACA was meant to help.