

CANCER LEADERSHIP COUNCIL

A PATIENT-CENTERED FORUM OF NATIONAL ADVOCACY ORGANIZATIONS
ADDRESSING PUBLIC POLICY ISSUES IN CANCER

December 24, 2018

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

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

Re: CMS 9936-C – State Relief and Empowerment Waivers

Dear Secretary Azar and Assistant Secretary Kautter:

The undersigned organizations of the Cancer Leadership Council appreciate the opportunity to comment on the guidance document directed to states considering application for waiver of Section 1332 of the Affordable Care Act (ACA). We have serious reservations about the advice offered to the states regarding their waivers, which we believe would permit the states to ignore the statutory guidelines for waivers and would adversely affect cancer patients' access to adequate and affordable health insurance. We urge the departments to withdraw the guidance document.

The ACA permits states to design their own health insurance programs as long as those states: 1) will provide coverage under the waiver plan that is at least as comprehensive as that offered under ACA standards, 2) will provide coverage and cost-sharing protections against excessive out-of-pocket spending that are at least as affordable as ACA coverage, 3) will provide coverage to at least a comparable number of its residents as it would under ACA standards and 4) will not increase the Federal deficit.

The states pursuing waiver plans have been subject to a guidance document issued in 2015. We understand that the current waiver guidance document, open for comment but already in place for use by the states, is intended to encourage more states to consider waiver applications. This guidance document and the examples of waiver plans that have subsequently been released by

the Centers for Medicare & Medicaid Services in large part ignore the “guardrails” of the ACA and put people with cancer and other serious and life-threatening or chronic diseases at risk of being unable to obtain the care they need because they have no access to affordable and adequate insurance.

Comprehensiveness and Affordability Guardrail and Coverage Guardrail

The guidance document would significantly change the standards that states must meet by requiring only that states make comprehensive and affordable insurance available to residents rather than requiring that states ensure that a comparable number of residents actually enroll in such insurance. By including this provision in the guidance document, the departments are effectively ignoring three key ACA standards: the comprehensiveness and affordability standards and the coverage standard. Supplying the states the waiver option to “make coverage available” is simply not the same as ensuring that the same number of residents purchase and therefore have real access to comprehensive and affordable insurance.

Through the guidance document and also the Discussion Paper, Section 1332 State Relief and Employer Waiver Concepts (dated November 29, 2018), the departments have offered states a range of waiver options that may serve to undermine the adequacy of coverage as well as the number of individuals who purchase insurance.

The departments have clarified that they prefer private coverage options and that they also favor the inclusion of short-term, limited-duration insurance plans and association health plans among the insurance options that states may include in waiver plans. Short-term plans will not meet the 1332 guardrail related to comprehensiveness of coverage; neither will they meet the affordability standard. The failure to meet the 1332 guardrails translates into a failure to meet the needs of people with cancer, who may have significant health care needs during active treatment and long-term health care needs through the period of post-treatment survivorship. For these patients, the “offer” of barebones insurance plans – as states may opt to pursue under the waiver guidance document – does not assure access to insurance that will cover and pay for their cancer care.

The waiver document also tells states that they need only assess the aggregate effects of a waiver plan and that they are not required to consider the impact of a waiver on vulnerable populations. This is a departure from the 2015 guidance, which required states applying for a waiver to assess the impact of the waiver plan on vulnerable populations, including those who are elderly, low-income, or with serious health issues. We oppose this change in the guidance and urge that, in a revised guidance document, the assessment of the impact of waivers on vulnerable populations be included.

The departments also inform the states that they will obtain approval of a waiver if it makes coverage more affordable for some individuals and only slightly costlier for a larger number of people. We are concerned that this new balancing test with regard to affordability will have a negative impact on people with cancer, who may be looking at costlier insurance under the terms of a waiver program.

Changes in the Process for Waiver Approval

The new waiver guidance would permit states to move forward with a waiver application without adopting new legislation to authorize the 1332 waiver application. Instead, the states could rely on a state law that authorizes the implementation of the ACA as the authority for a waiver application. This process change is important to patients and patient advocates, because it will effectively eliminate the opportunity for public comment on state waiver plans. We understand that the departments aim to give states flexibility to design waiver plans, but we maintain that the input of a state's residents helps to ensure that a waiver plan is responsive to the needs of those residents.

The Potential Impact of the Waiver Guidance on People with Cancer

As we maintain in our comments above, the guidance document fails to adhere to the standards of Section 1332 of the ACA, which are aimed at protecting access to comprehensive and affordable health insurance in state waiver applications. If states embrace the weak standards of the guidance document in the design of waiver programs, the impact on people with cancer will be substantial. If a state waiver plan relies significantly on short-term, limited-duration plans, the plan will fail to meet the needs of people with cancer because those plans will not meet their needs. If the state plan permits insurers to sell non-ACA-compliant plans to more people at lower premiums, the remaining ACA market will be destabilized. The plans that will be "offered" to people with cancer and others who rely on the ACA market will not be affordable.

Procedural Flaws in Guidance Document

The departments are proposing a guidance document governing Section 1332 waiver applications without undertaking notice-and-comment rulemaking. The guidance document would make meaningful and substantive changes in the Section 1332 waiver program, and those changes should be proposed through a rulemaking process that adheres to Administrative Procedure Act standards.

We urge that the guidance document be withdrawn because it is at odds with the provisions of Section 1332 of the ACA and will have a serious adverse impact on people with cancer. If the departments propose a new guidance document after withdrawing the recently released version, we urge that the new document be proposed through a notice-and-comment rulemaking process.

We look forward to action by the departments to withdraw the current guidance document and offer a new proposal that will protect the access of vulnerable Americans to affordable and comprehensive health insurance.

Sincerely,

Cancer Leadership Council

CancerCare

Cancer Support Community

The Children's Cause for Cancer Advocacy

Fight Colorectal Cancer

International Myeloma Foundation

The Leukemia & Lymphoma Society

LUNGevity

Lymphoma Research Foundation

National Coalition for Cancer Survivorship

Ovarian Cancer Research Alliance

Prevent Cancer Foundation

Susan G. Komen