United States Senate

WASHINGTON, DC 20510

December 20, 2018

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

The Honorable Seema Verma
Administrator
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

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

Dear Secretary Azar, Administrator Verma and Secretary Mnuchin:

We write to express concern with the Administration's October 22 guidance and November 29 discussion paper on new options for states pursuing a Section 1332 waiver under the Patient Protection and Affordable Care Act (ACA). The new guidance and discussion paper promote health plans that lack protections for people with pre-existing conditions and low-income families enshrined in the Centers for Medicare and Medicaid Services (CMS) guidance released in 2015 and adopt new principles that were not envisioned by Congress. We have serious concerns they will increase health care costs for millions of consumers while weakening protections for individuals with pre-existing conditions. In light of substantive concerns that we have with the impact on patients, and procedural concerns that we have with the manner in which these significant policy changes have been promulgated, we ask that you immediately withdraw this guidance and re-engage with stakeholders, states, and Congress.

Section 1332 of the ACA gives states additional flexibility to implement state-specific improvements that expand coverage, reduce costs and provide more comprehensive benefits. In fact, Congress enacted so-called "guardrails" that waiver proposals must meet in order for the Secretary to approve them. Specifically, waivers must ensure 1) health coverage is at least as comprehensive as it would be under the ACA, 2) cost-sharing and premiums are as affordable as they would be under the ACA, 3) the number of individuals with coverage remains comparable to the number of individuals covered under the ACA, and 4) the waiver does not increase the Federal deficit.

The Administration's recent guidance significantly changes enforcement of these four important guardrails, undermining Congressional intent and posing a significant risk to consumers that now have affordable and comprehensive health coverage. The "waiver concepts," published after the release of the recent guidance, suggests that the Secretary will permit states to use Federal subsidies for the purchase of short-term, limited-duration (STLDI) "junk plans" that do not meet Federal patient protections. The new guidance will also allow states to count junk plans as health insurance when determining how many individuals are enrolled in coverage.

This change will allow states to enroll more individuals in subpar plans that do not offer essential health benefits such as mental health care, maternity care, prescription drug coverage or substance use disorder treatment. Additionally, these subpar plans can discriminate against individuals with pre-existing conditions, older Americans and women by excluding these essential benefits. These plans may also charge certain customers more for their coverage, deny coverage entirely, impose annual and lifetime limits on care, and other anti-consumer practices. This use of federal tax dollars for subpar, often deceptively-marketed insurance that barely provides coverage at all is completely unacceptable.

It is important to note that hospitals, insurers, patient groups and independent health experts have all agreed that the increased use of these junk plans will increase the cost of health care coverage for many Americans, undercut protections for individuals with pre-existing conditions and erode stability in the health insurance markets.

In addition to the increased use of junk plans, the discussion paper makes clear that the Secretary will also give states more flexibility to increase out-of-pocket maximums and reduce the value of coverage, weaken essential health benefits, and implement changes that increase health care costs for those who need it most if a state can demonstrate costs will be lower in the aggregate. We have serious concerns about how these changes will impact the quality and affordability of coverage, especially for vulnerable sub-populations.

Furthermore, we are concerned that this guidance may exceed the Secretary's legal authority by not requiring Congressional approval to change existing law and by subverting the full notice and comment rule-making process. The guidance violates the statute by allowing states to provide "access to" instead of "provision of" affordable and comprehensive coverage to at least the same number of residents. It also redefines "health insurance" to include plans that lack the ACA's consumer protections. In addition, by forgoing Congressional approval and the rule-making process the Administration has excluded an opportunity for public comment from millions of Americans and other stakeholders that will be impacted by these changes. In contrast, the Department finalized the 2015 guidance only after taking into account feedback from stakeholders and experts. The Department finalized this new guidance immediately, without getting any vital input from affected stakeholders.

For these reasons, we ask that you immediately withdraw this guidance and work with us and other stakeholders on policies that maintain protections for individuals with pre-existing conditions and improve affordability. Thank you for your consideration of our letter and we look forward to your response.

Sincerely,

Mark R. Warner
United States Senator

Benjamin L. Cardin
United States Senator

Tammy Baldwin
United States Senator

Jeanne Shaheen
United States Senator

Thomas R. Carper
United States Senator

Tim Kaine
United States Senator

Amy Klobuchar
United States Senator

Margaret Wood Hassan
United States Senator

Richard Blumenthal
United States Senator

Jeffrey A. Merkley
United States Senator

Christopher A. Coons
United States Senator

Robert P. Casey, Jr.
United States Senator

Christopher S. Murphy
United States Senator

Michael F. Bennet
United States Senator

Elizabeth Warren
United States Senator

Kamala D. Harris
United States Senator

Debbie Stabenow
United States Senator

Robert Menendez
United States Senator

Ron Wyden
United States Senator

Gary C. Peters
United States Senator

Chris Van Hollen
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Edward J. Markey
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Mazie K. Hirono
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Tina Smith
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Patty Murray
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Angus S. King, Jr.
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Cory A. Booker
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Bernard Sanders
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Richard J. Durbin
United States Senator

Jack Reed
United States Senator

Maria Cantwell
United States Senator

Sherrod Brown
United States Senator

Doug Jones
United States Senator

Tammy Duckworth
United States Senator

Martin Heinrich
United States Senator

Patrick J. Leahy
United States Senator

Tom Udall
United States Senator

Kirsten Gillibrand
United States Senator

Sheldon Whitehouse
United States Senator

Dianne Feinstein
United States Senator

Catherine Cortez Masto
United States Senator

Brian Schatz
United States Senator