

Congress of the United States
Washington, DC 20515

September 16, 2020

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

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

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

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Secretary Azar, Secretary Mnuchin, Administrator Verma, and Commissioner Rettig:

We write to express strong concerns about the State of Georgia’s proposed waiver under Section 1332 of the Affordable Care Act (ACA).¹ The state’s waiver application proposes eliminating Healthcare.gov without replacing it with a State-based Marketplace (SBM).² The proposed waiver is unlawful, will significantly reduce access and enrollment in comprehensive health insurance, and will expose consumers to greater financial risk by encouraging enrollment in junk plans. We urge you to reject the waiver and encourage the State of Georgia to resubmit a waiver proposal that comports with federal law and does not deprive thousands of the state’s residents of comprehensive health insurance coverage.

Congress enacted Section 1332 (State Innovation Waivers) of the ACA to provide states flexibility to experiment with health insurance reforms that could improve the well-being of their residents, but with a clear statutory directive to maintain the levels of benefits, affordability, and coverage provided to state residents by the ACA. To ensure that any waiver achieves these goals, Congress enacted four strict statutory “guardrails” that waiver applications must meet in order to be approved by the Secretaries of the Department of Health and Human Services (HHS) and the Department of the Treasury (Treasury) (jointly, Secretaries). Under Section 1332, states must demonstrate to the Secretaries that their waivers:

1. “will provide insurance coverage that is at least as comprehensive as the coverage defined in section 1302(b) [essential health benefits] and offered through Exchanges...;”

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148.

² The Georgia Department of Community Health, *Georgia Section 1332 State Empowerment and Relief Waiver Application* (July 2020) (www.medicaid.georgia.gov/patientsfirst).

2. “will provide coverage and cost sharing protections against excessive out-of-pocket spending that are at least as affordable as the provisions of this title would provide;”
3. “will provide coverage to a comparable number of its residents as the provisions of this title would provide; and”
4. “will not increase the Federal deficit.”³

The statutory text is clear that coverage provided under a state waiver must meet all four guardrails simultaneously: comprehensiveness, affordability, number of people covered, and deficit neutrality.

Georgia’s proposed 1332 waiver fails to meet these statutory criteria because it would clearly result in a massive loss of health insurance coverage for its residents. The waiver seeks to eliminate state residents’ access to Healthcare.gov without replacing it with a SBM.⁴ Georgia consumers would be required to seek coverage through the websites of private vendors who already exist and currently sell health plans in Georgia.⁵ Thus, the waiver seeks to eliminate a pathway to enrollment while creating no new options for consumers to enroll, nor any new incentives or mechanisms to facilitate enrollment. Despite these barriers to coverage, the state makes the unsubstantiated claim that 33,000 additional consumers will enroll as a result of the waiver based on a flawed baseline and entirely unsupported assumptions.

Georgia’s assertion that only 8,000 people will lose health insurance coverage as a result of the waiver proposal is also unsupported by any evidence. The state fails to provide any plausible explanation of how a vast majority of the more than 80,000 individuals who enrolled in the Marketplace in the most recent enrollment period would avoid a loss of coverage once the state eliminates residents’ access to Healthcare.gov.

Moreover, the waiver proposal does not address how the state would address new potential barriers to Medicaid enrollment. In recent years, roughly 40,000 Georgia consumers have visited Healthcare.gov during open enrollment season and have been determined eligible for Medicaid.⁶ Thousands more likely found Medicaid coverage outside of the open enrollment season through Healthcare.gov. The elimination of Healthcare.gov access would be catastrophic

³ Section 1332(b)(1) of Pub. L. No. 111-148.

⁴ *See* note 2.

⁵ *Id.*

⁶ The Brookings Institution, *Georgia’s Latest 1332 Proposal Continues to Violate the ACA* (Sept. 2020) (www.brookings.edu/research/georgias-latest-1332-proposal-continues-to-violate-the-aca).

for thousands of consumers who access Marketplace and Medicaid coverage through the site each year. One estimate by the Brookings Institution concludes that the waiver proposal would cause 35,000 to 90,000 people to lose coverage in the first year.⁷ The low-end estimate of a 35,000-person coverage loss would still require the state to somehow retain 97 percent of active re-enrollees in Marketplace coverage, 70 percent of Marketplace enrollees through automatic re-enrollment, and 90 percent of all Medicaid enrollees, all without a mechanism to facilitate such enrollment.⁸ HHS and Treasury must reject the state's assertions of minimal coverage losses as they are unsupported by any meaningful economic or actuarial analyses.

The state's waiver application also makes clear the intent to drive consumers into substandard, junk coverage, such as short-term, limited duration plans (STLDI), as well as potentially other plans such as indemnity plans, critical illness plans, and other plans that lack the ACA's consumer protections.⁹ These plans discriminate against individuals with pre-existing conditions, fail to provide consumers with meaningful protection against unexpected health care costs, and often result in consumers being saddled with thousands of dollars in unpaid medical claims.

An investigation of STLDI plans by the House Committee on Energy and Commerce found that STLDI insurers systematically exclude coverage for most major medical conditions resulting from pre-existing conditions, as well as coverage of basic medical services that consumers would reasonably expect to be covered by health insurance.¹⁰ The Committee's investigation also found that most STLDI plans often deny claims for medical care after putting consumers through an extensive and invasive claims review process, and also often rescind coverage, leaving consumers uninsured and with large medical bills.¹¹ Indemnity plans also offer bare-bones coverage and impose significant limitations on the benefits covered.¹² Any waiver application that increases enrollment in substandard coverage at the expense of comprehensive coverage clearly violates the statutory requirement that a 1332 waiver must "provide insurance coverage that is at least as comprehensive as the coverage defined in section

⁷ *Id.*

⁸ *Id.*

⁹ The Georgia Department of Community Health, *Patients First Act Portal* (July 2020) (www.medicaid.georgia.gov/patientsfirst).

¹⁰ Majority Staff, House Committee on Energy and Commerce, *Shortchanged: How the Trump Administration's Expansion of Junk Short-Term Health Insurance Plans is Putting Americans at Risk* (www.drive.google.com/file/d/1uiL3Bi9XV0mYnxpyaIMeg_Q-BJaURXX3/view)

¹¹ *Id.*

¹² *Id.*

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1302(b) [essential health benefits] and offered through Exchanges.”¹³ Additionally, the state entirely fails to account for the reality that increased enrollment in these plans necessarily will result in higher premiums in the market for comprehensive coverage, thereby failing the statutory requirement that coverage must be “at least as affordable” as it is under current law.¹⁴

We previously wrote raising concerns about the Departments’ 2018 guidance on 1332 waivers, which disregards both the plain text of the statute as well as clear congressional intent behind Section 1332 of the ACA.¹⁵ The 2018 guidance allows states to simply show that a comparable number of residents have *access* to “meaningful” coverage, regardless of whether they actually have it or not, thereby allowing the Secretaries to approve waivers that do not provide coverage that is as affordable or as comprehensive as under the ACA.¹⁶ Having “access” to coverage is not the same thing as having coverage, and as we wrote in 2018, “the Administration’s attempt to read ‘access’ into the statute is transparently motivated by an ideological opposition to the benefits and protections afforded by the ACA.”¹⁷ But even under the agencies’ “reinterpretation” of Section 1332 in their 2018 guidance, the application fails to meet the statutory guardrails because it will clearly result in a significant coverage loss.

We also note that Georgia has not satisfied the federal criteria for a complete waiver application under Section 1332’s final regulations.¹⁸ Federal regulations require a state to enact authorizing legislation that would provide the state with the authority to implement a 1332

¹³ See note 3.

¹⁴ *Id.*

¹⁵ Letter from Sen. Ron Wyden, Ranking Member, Senate Committee on Finance, Sen. Patty Murray, Ranking Member, Senate Committee on Health, Education, Labor and Pensions, Sen. Robert P. Casey, Jr., Senate Special Committee on Aging, Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce, Rep. Richard Neal, Chairman, House Committee on Ways and Means, to Secretary Alex M. Azar, Department of Health and Human Services et. al (Nov. 16, 2018); Letter from Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce and Rep. Richard Neal, Chairman, House Committee on Ways and Means, to Secretary Alex M. Azar, Department of Health and Human Services et. al (Nov. 29, 2018).

¹⁶ Department of Health and Human Services and Department of the Treasury, *State Relief and Empowerment Waivers*, 83 Fed. Reg. 53575 (Oct. 22, 2018).

¹⁷ Letter from Rep. Frank Pallone, Jr., Chairman, House Committee on Energy and Commerce and Rep. Richard Neal, Chairman, House Committee on Ways and Means, to Secretary Alex M. Azar, Department of Health and Human Services et. Al (Nov. 29, 2018).

¹⁸ Department of Treasury and Department of Health and Human Services, *Application, Review, and Reporting Process for Waivers for State Innovation*; Final Rule, 77 Fed. Reg. 38, Part 155 (February 27, 2012).

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waiver.¹⁹ However, Georgia has not enacted any legislation that would allow the state to implement the proposed waiver. Federal regulations also require that the state provide “actuarial analyses and actuarial certifications to support the state’s estimates that the proposed waiver will comply with the comprehensive coverage requirement, the affordability requirement, and the scope of coverage requirement.”²⁰ However, Georgia’s assertion that 33,000 new individuals will enroll in coverage is based on entirely unsupported assumptions and the state fails to provide sound actuarial analysis. Lastly, federal regulations require a state to specify a “list of the provisions of law that the state seeks to waive including a description of the reason for the specific requests.”²¹ Georgia’s waiver proposal fails to make specific requests for the provisions it seeks to waive, nor does it demonstrate how the state will be in compliance with other provisions of the law. Therefore, Georgia’s application is incomplete based on the criteria specified by the final regulations, and as such the decision by your Departments to deem the application complete was inappropriate.

A decision to approve this waiver based on unsupported assertions that are not based on any realistic actuarial analysis and by relying on claims that defy both logic and common sense would represent a gross abdication of the agencies’ responsibility. We urge you to reject this unlawful waiver proposal as it fails to meet the statutory requirements of Section 1332 of the ACA and is woefully inadequate to meet the health care needs of Georgia’s residents.

Sincerely,



Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce



Robert C. “Bobby” Scott
Chairman
Committee on Education
and Labor



Richard E. Neal
Chairman
Committee on Ways and Means



Patty Murray
Ranking Member
Senate Committee on Health, Education,
Labor, and Pensions



Ron Wyden
Ranking Member
Senate Committee on Finance

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*