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December 21, 2018

Seema Verma

Administrator

Centers for Medicare & Medicaid Services

Department of Health and Human Services

7500 Security Boulevard

Baltimore, MD 21244

Re: CMS-9936-NC; State Relief and Empowerment Waivers

Dear Administrator Verma:

The American Kidney Fund (AKF) appreciates the opportunity to provide comments on the guidance entitled “State Relief and Empowerment Waivers,” which addresses section 1332 of the Affordable Care Act (ACA) and its implementing regulations.

The American Kidney Fund is the nation’s leading independent nonprofit organization working on behalf of the more than 30 million Americans with kidney disease. For the past half-century, AKF has existed to help people fight kidney disease and live healthier lives. We provide a complete spectrum of programs and services: top-rated education materials; free kidney disease screenings in numerous cities across the nation; clinical research funding; and need-based financial assistance enabling one in five U.S. dialysis patients to access lifesaving medical care, including dialysis and transplantation.

AKF has serious concerns with the guidance, as we believe it conflicts with the congressional intent of section 1332 and the plain reading of the statute. Even more concerning is the adverse impact it will have on the stability of ACA marketplaces, comprehensiveness and affordability of coverage, pre-existing condition protections, and the protection of vulnerable populations in states that pursue and receive approval for a 1332 waiver under this new guidance. We focus our comments below on these policy implications. We urge the Centers for Medicare and Medicaid Services (CMS) to withdraw this guidance due to the negative consequences that would affect the coverage and care of individuals with chronic conditions such as kidney disease.

Impact on the stability of ACA marketplaces and comprehensive and affordable coverage

The new guidance reinterprets the section 1332 guardrails to no longer focus on the actual coverage that is purchased under a 1332 waiver, but instead on whether residents have *access* to comprehensive and affordable coverage. CMS also notes that “a waiver that makes coverage much more affordable for some people and only slightly more costly for a larger number of people” may be approved. Under the new guidance, CMS will “look favorably” on section 1332 applications that promote and expand the availability of non-ACA plans such as association health plans (AHPs) and short-term limited duration insurance (STLDI) plans. States can also potentially direct 1332 pass-through funding to subsidize individuals’ purchase of non-ACA plans.

These new principles in evaluating and approving 1332 applications could contribute to increased instability in the ACA marketplaces and adversely affect the ability of people who need or want comprehensive ACA-compliant insurance to afford their coverage. Specifically, the promotion and expansion of non-ACA plans such as AHPs and STLDI plans will create a bifurcated market for insurance that will be divided between healthier individuals drawn to non-ACA plans and people with chronic conditions who need more comprehensive ACA-compliant coverage.

AHPs can cherry pick enrollees through benefit designs that are attractive to younger and healthier people, but that offer inadequate coverage for people with chronic conditions. STLDI plans can exclude coverage for preexisting medical conditions; do not have to comply with ACA rating rules; can exclude coverage of essential health benefits; can rescind or decline coverage; impose onerous deductibles and cost-sharing obligations beyond the out-of-pocket maximums for ACA-compliant plans; and apply annual and lifetime coverage limits. AHPs and STLDI plans are not a realistic option for individuals with greater health needs. However, these non-ACA plans will siphon healthier individuals from the risk pool, making ACA-compliant insurance more expensive for individuals who need comprehensive coverage.

Allowing states to use a 1332 waiver to subsidize the purchase of non-ACA coverage will also exacerbate the affordability challenges for individuals seeking comprehensive insurance. Because 1332 waivers must be deficit neutral, allowing a state to provide subsidies for the purchase of AHPs and STLDI plans would lead to fewer subsidies being available for the purchase of comprehensive ACA plans. People who rely on subsidies to purchase needed comprehensive insurance and mitigate increasing premiums may then be forced to drop coverage all together if their reduced subsidies no longer make coverage affordable.

Pre-existing condition protections

In its accompanying fact sheet entitled “State Empowerment and Relief Waiver Concepts,” CMS notes that “nothing in the new guidance or the waiver concepts changes the requirements for health insurance issuers to provide protections for people with pre-existing conditions.” While that statement is technically true, the guidance does encourage states to expand and promote STLDI plans in 1332 waiver applications, which as described above can exclude coverage of pre-existing conditions and charge higher premiums for people with pre-existing conditions. Also, as detailed above, segmenting the risk pool and creating an unlevel playing field for ACA-complaint

and non-ACA plans will lead to higher costs for people with pre-existing conditions and whose only realistic insurance options are ACA-compliant plans. Therefore, while issuer requirements regarding pre-existing conditions are not explicitly changed, the guidance and concepts could lead to a de facto weakening of protections for people with pre-existing conditions.

Vulnerable populations

CMS notes that prior guidance “largely prohibited approval of a state plan that made coverage less comprehensive or affordable for any particular group of residents,” including vulnerable populations such as the elderly, low-income individuals, and those with serious and costly health issues. Under the new guidance, states will now have more flexibility “to decide that improvements in comprehensiveness and affordability for state residents as a whole offset any small detrimental effects for particular residents.” CMS notes that states will still have to explain how a waiver may affect those with low incomes or high health costs. However, unlike the prior guidance, adverse impact on these vulnerable populations would not preclude a waiver from being approved.

We are concerned that this new focus on the aggregate effect of a waiver on a state’s residents will undermine the attention that is needed on the potential impact of a waiver on vulnerable populations. States may have waivers approved that increase the number of people with cheaper and less comprehensive non-ACA coverage. But that increased coverage could be at the expense of people with serious health risks, such as those with chronic kidney disease, who could encounter higher costs for ACA-compliant insurance and fewer subsidies to pay for that insurance. A person with chronic kidney disease relies on comprehensive coverage to manage their condition and prevent a progression to end-stage renal disease. A waiver that adversely affects their ability to maintain affordable and comprehensive insurance could lead to them dropping coverage.

AKF appreciates the opportunity to submit comments on the guidance, and we urge CMS to withdraw it due to the negative impact it would have on the coverage and care for people with chronic diseases and pre-existing conditions. Thank you for your consideration of AKF’s comments and concerns.

Sincerely,



Holly Bode
Vice President of Government Affairs