

**Spotlight**

# Recent Federal Guidance on State Health Insurance Waivers Threatens Important Consumer Protections for Older Adults

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In October 2018, the Centers for Medicare and Medicaid Services (CMS) released new federal guidance for how it will approve State Innovation Waivers, also known as Section 1332 waivers, authorized under the Affordable Care Act (ACA).<sup>1</sup> The recent federal guidance signals a significant departure from previous guidance from the Obama administration, threatening key ACA consumer protections and encouraging waivers that could hurt older adults.

Intended to foster state innovation in delivering health coverage, 1332 waivers are authorized under the ACA to allow states to alter some of the law's requirements. However, states are not allowed to make unlimited changes, as important guardrails are included in the law in order to maintain the ACA's core consumer protections.<sup>2</sup> These guardrails require that coverage under state waivers must not increase the federal deficit and must be at least as comprehensive, be at least as affordable, and cover at least a comparable number of people as coverage without the waiver.

Generally, the Department of Health and Human Services (HHS) and Department of the Treasury interpret these guardrails and provide states with guidance on how to meet them. The latest guidance reinterprets the guardrails, making significant changes to the way waivers will be granted in the

future and raising concerns about protections for consumers, including older adults.

## Putting Vulnerable Groups at Risk

Under the previous guidance, state waiver applications had to demonstrate that they would cause no harm to vulnerable groups, such as people with disabilities and older adults, before they could be approved by the federal government.<sup>3</sup> However, the recent guidance removes this requirement. Instead, states can now simply consider the effect of waivers on residents as a whole rather than assess its impact on specific populations. That means a waiver that increases costs for older adults could be approved as long as it improves affordability overall.

## Allowing Higher Costs for Older Adults

The updated 1332 waiver guidance also promotes the expansion of health insurance plans that don't meet the ACA's key requirements (also known as non-

### SECTION 1332 GUARDRAILS

- Comprehensiveness
- Affordability
- Coverage
- Federal deficit neutrality

## KEY CONCERNS



Removes protections for vulnerable groups



Could increase costs for older adults



Promotes expansion of plans without ACA consumer protections

compliant plans). Under the ACA, insurers cannot deny consumers or charge them more based on their health, which is a critical protection for older adults since 40 percent of them have a declinable preexisting condition.<sup>4</sup> The ACA also limits age rating by prohibiting insurance companies from charging older adults more than three times the premium they charge younger people. Under the recent guidance, states could make changes to their health insurance rules to drive consumers into non-compliant plans that exclude coverage for essential services, can charge older adults premiums that are five times higher or more than those for younger people, and can discriminate based on age and preexisting condition.

The updated guidance also encourages states to consider proposals that could reduce premium tax credit assistance for some older adults. Under the ACA, states can use 1332 waivers to make changes to the tax credit subsidies available to help lower-income people afford health insurance premiums. Recently, some states have submitted proposals that, if approved, would reduce tax credit assistance for some older adults and lead to significant premium increases (similar to the 2017 House-

passed American Health Care Act<sup>5</sup>). The updated rules explicitly allow for these types of changes, as illustrated in a set of waiver concepts, or waiver options, released by CMS.<sup>6</sup>

### Promoting Problematic Health Plans

The recent 1332 waiver guidance also encourages the sale of, and could allow subsidies to be used for, non-compliant health plans, including short-term limited-duration plans and association health plans. While short-term plans may be appropriate in certain situations, such as when an individual is between jobs but does not otherwise qualify for a special enrollment period, they are meant to be short-term and are not a replacement for comprehensive health coverage.<sup>7</sup> Unfortunately, some healthy people may opt for short-term or other substandard health plans with lower premiums and subsequently could face large medical bills when an unexpected health issue or emergency arises. Promoting these types of plans could also mean higher premiums for everyone who is covered by an ACA-compliant plan by reducing the number of people in the individual and small group insurance pools.<sup>8</sup>

### Recent Waiver Policy Threatens to Weaken ACA Protections for Older Adults

The recent 1332 waiver guidance opens the door for higher premiums and weaker consumer protections for older Americans and other vulnerable groups, as well as the millions of Americans with preexisting conditions. These policy changes are troubling and warrant close attention, but states are not obligated to pursue waivers that go in this direction. Instead, they can decide to continue ensuring the strong protections provided to older adults and people with preexisting conditions under the ACA.

#### What are ACA Tax Credits?

Tax credits help people with lower- to moderate-incomes afford health coverage purchased through the Marketplace by lowering monthly health insurance premiums.

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**“The recent 1332 waiver guidance opens the door for higher premiums and weaker consumer protections for older Americans and other vulnerable groups.”**

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- 1 State Relief and Empowerment Waivers, 45 C.F.R. § 155 (2010), <https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-23182.pdf>.
- 2 Jan Greene, “Consumer Protections under the ACA,” [healthinsurance.org](https://www.healthinsurance.org/obamacare/more-aca-protections/), August 20, 2013, <https://www.healthinsurance.org/obamacare/more-aca-protections/>.
- 3 “Waivers for State Innovation,” *Federal Register* 80, no. 78131 (2015): 78131-78135, <https://www.federalregister.gov/documents/2015/12/16/2015-31563/waivers-for-state-innovation>.
- 4 Claire Noel-Miller and Jane Sung, “In Health Reform, Stakes are High for Older Adults with Preexisting Health Conditions,” *Insight on the Issues* 117, AARP Public Policy Institute, Washington, DC, March 2017, <https://www.aarp.org/ppi/info-2017/affordable-care-act-protects-millions-of-older-adults-with-pre-existing-conditions.html>.
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- 6 “Section 1332 State Relief and Empowerment Waiver Concepts,” Discussion Paper, Centers for Medicare and Medicaid Services, Washington, DC, November 19, 2018, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Waiver-Concepts-Guidance.PDF>.
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- 8 CBO, “How CBO and JCT Analyzed Coverage Effects of New Rules for Association Health Plans and Short Term Health Plans”, Publication 54915, (January 2019), <https://www.cbo.gov/publication/54915>.

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