



AMERICAN BENEFITS COUNCIL

December 21, 2018

Submitted electronically via <http://www.regulations.gov>

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9936-NC
P.O. Box 8010
Baltimore, MD 21244-8010

Re: Guidance - State Relief and Empowerment Waivers

Dear Sir or Madam:

I write on behalf of the American Benefits Council ("Council") to provide comment in connection with the Guidance relating to section 1332 of the Patient Protection and Affordable Care Act (PPACA) published in the Federal Register on October 24, 2018 by the Centers for Medicare and Medicaid Services ("CMS"), U.S. Department of Health and Human Services ("HHS") and the Department of the Treasury (83 Fed. Reg. 53575).

The updated Guidance provides supplementary information about the requirements that must be met for the approval of a State Innovation Waiver, the Secretaries' application review requirements, and operational considerations. The Guidance supersedes prior guidance related to section 1332 of PPACA published in 2015. As discussed in the Summary to the Guidance, changes include increasing flexibility with respect to the manner in which a section 1332 state plan may meet section 1332 standards in order to be eligible to be approved by the Secretaries.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to health and retirement plans that cover more than 100 million Americans.

Our members sponsor and administer health plans that cover employees and retirees in multiple states and nationwide, most of which are self-insured and subject to a uniform scheme of federal regulation under the Employee Retirement Income Security Act of 1974 ("ERISA"). Under ERISA, employers that self-fund their benefit plans can offer and administer coverage

across the 50 states that is uniform and tailored to the specific needs of their workforce. This is because ERISA preempts state laws that directly regulate benefit plans (though it preserves the ability of states to regulate insurers and the insured products they offer).

Without ERISA uniformity, employers would have to comply with a patchwork of varying state laws and would need to monitor and adapt to constant state-level changes. This would result in increased administrative burden for employer-sponsored plans and increased costs for employers and plan participants.

The Council has unique concerns with respect to state waivers authorized under section 1332 and submitted comments on the state waiver proposed regulations published in 2011. We are concerned that, unless properly and carefully administered, state waivers could undermine the uniform design and administration of employer plans and could impose excessive costs on employers, particularly in those states where waivers are granted. Such a result would conflict with goals of the Administration to expand access to health care coverage and make it more affordable to consumers.

The Council's public policy strategic plan, [*A 2020 Vision: Flexibility and the Future of Employee Benefits*](#), adopted in 2014, recommended that section 1332 state waivers not allow states to regulate the design and administration of self-funded ERISA plans. To ensure the employer-sponsored system is adequately protected, waivers should only apply to specific PPACA provisions, such as insurance coverage, and not allow states to impose mandates, assessments or new reporting requirements on self-funded group health plans. Otherwise, section 1332 waivers could be a means to circumvent ERISA preemption, which, in turn, could erode long-standing interests in, and recognition of, the need for national uniformity for ERISA-governed plans.

The Council further believes that the opportunity for public input – by employers, consumers and other stakeholders – in the state waiver application and approval process is vital to assuring well-informed decision making with respect to applications for section 1332 state waivers. We appreciate that the Guidance reiterates section 1332 statutory and regulatory requirements that states provide a public notice and comment period of not less than 30 days for a waiver application sufficient to ensure meaningful level of public input prior to submitting an application and that the federal government provide a similar public notice and comment period once the Secretaries receive an application.

We are concerned, however, that the opportunity for public input may be undermined, however, by the updated Guidance with respect to existing statutory requirements (1332(a)(1)(c) of PPACA) that states enact or amend state laws to apply for and implement state actions under a section 1332 waiver. The updated Guidance, would alter this standard by permitting states, in some circumstances, to “use existing legislation if it provides statutory authority to enforce PPACA provisions and/or the state plan, combined with duly-enacted state regulation or executive order to satisfy the requirement that the state enact a law under section 1332(b)(2).” Since state legislative

processes provide an important opportunity for public input we are concerned that the modification as set out in the Guidance could limit that opportunity by permitting states to avoid enacting laws specific to apply for and implementing state actions under a section 1332 waiver.

* * * * *

For the reasons discussed above, we strongly urge HHS and Treasury, as part of its review and approval of state waiver applications, ensure that employer-sponsored coverage - including ERISA preemption - is not weakened by the Section 1332 waiver provisions. While the Guidance is intended to expand state flexibility to empower states to pursue innovative strategies, it is vital that this flexibility be granted and exercised in a manner that does not adversely affect employer-sponsored coverage.

Thank you for considering these comments. If you have any questions or would like to discuss these comments further, please contact us at (202) 289-6700.

Sincerely,

A handwritten signature in black ink that reads "Kathryn Wilber". The signature is written in a cursive, flowing style.

Kathryn Wilber
Senior Counsel, Health Policy
American Benefits Council