



8421 Wayzata Blvd | Suite 110 | Golden Valley, MN 55426

January 9, 2022

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicaid and Medicaid Services
Department of Health and Human Services
Attention: CMS-9906-P
PO Box 8016
Baltimore, MD 21244-8016

Submitted Electronically to stateinnovationwaivers@cms.hhs.gov

RE: Request for Comment on the Georgia Access Model

Dear Administrator Brooks-LaSure:

The following comments are provided in response to request for comments from the Centers for Medicare & Medicaid Services (CMS) on whether and how the recent changes in law and policy influence whether the Georgia Access Model continues to comply with the statutory guardrails governing waivers from the Affordable Care Act (ACA) under section 1332 of the law. The request for comment references two prior letters to the state of Georgia. While each letter leads by affirming a commitment to work with states in partnership “to advance health care coverage policies,” the substance of the letters and this request for comment suggest otherwise. Rather, CMS is taking these actions outside of their regulatory authority and in violation of the specific terms and conditions (STCs) of the duly approved waiver. Moreover, nothing has changed in law or policy to suggest the Georgia waiver would no longer meet the statutory guardrails.

The first CMS request for updated economic and actuarial analyses on Georgia’s waiver sent on June 3, 2021 revealed there was no genuine interest from the agency in an update and that, rather, the agency was working to land at a predetermined outcome in a potentially illegal effort to revoke the waiver. It is noteworthy that, while this request for public comment provides 60 days to respond, CMS only provided Georgia 30 days to provide updated economic and actuarial analyses. Based on the agency’s prior work with Georgia on these analyses, CMS must have known 30 days would be too short of a time to provide such an update. Moreover, CMS certainly knew updates depended on data—e.g., special enrollment period data and navigator versus enhanced direct enrollment data—the state would depend on CMS to provide. To the best of our knowledge, these data were not made available to the state or the public. Yet CMS

demanded updates in 30 days. Without there being any substantive data to update these analyses, the first CMS request reveals the agency was not, in fact, interested in an update. Instead, the agency was interested in advancing a different goal to end the partnership, in violation of the STCs.

Not only did CMS fail to act in good faith in its request for updated economic and actuarial analyses from Georgia, even if such data were made available, it would not give CMS any basis to re-open approval of the waiver, a final agency decision reflected in the contract between Georgia and CMS.

Both CMS's first and second letter inappropriately threatened Georgia that CMS may find the state in violation of the STCs if they failed to provide the requested updates. The first letter referenced STCs that might be relevant, but without giving Georgia a clear basis for the agency's authority and what was expected. This suggests the agency was itself not clear on their authority and was still considering this issue.

Despite the failure of CMS to provide a clear legal basis, the letter suggested the agency relied on STC 7 and 15 to demand the update. In response, Center of the American Experiment published a report in July 2021 explaining why neither of these STC's give CMS the authority to request updated analyses. Instead, the STCs, which are legally binding on both CMS and Georgia, obligated CMS to implement the waiver. The report is attached to this letter as part of the official record for this request for comment. Georgia appropriately responded to the first letter on July 2, 2021 expressing their understanding that the STCs do not give CMS authority to make these requests, asked for clarification, and affirmed their intent to comply with the statutory guardrails.

In response to these objections to the legality and usefulness of these updated analyses, CMS sent a second letter to Georgia on July 30, 2021 which again failed to provide a sufficient legal or regulatory basis for its request. Instead, the letter made vague references to the STCs and federal regulations for their authority without providing much detail on how they apply. As such, the second letter represents further evidence the agency is not interested in dialogue or partnering in good faith with Georgia to help its citizens access health coverage.

Without receiving a valid or constructive response from CMS, Georgia replied on August 26, 2021 with an in-depth legal analysis focused on outlining why STCs 7 and 15 do not give CMS authority to reevaluate the waiver. The letter further explained how nothing in the changes to federal law cited by CMS "changes the fact that Georgia's 1332 Waiver remains in compliance with the guardrails."

CMS then issued this request for comment on November 9, 2021 which again failed to articulate a sound legal basis to request these updated analyses and reevaluate the waiver.

On top of their being no legal basis to reevaluate the waiver, there is no legal basis for opening this comment period. CMS regulations provide a detailed framework for federal and state procedures to collect public comment and input. Regulations clearly require the state and federal

governments to provide for 1) input to inform the approval of the waiver¹ and 2) input for after the waiver is implemented.² If CMS wants to gather public input outside this regulatory process, the agency must do so by amending these federal regulations through the notice and comment rulemaking process governed by the Administrative Procedures Act (APA).

CMS has warned Georgia that it may consider the state to be in violation of the STCs if it does not provide the requested updated analyses. To the contrary, CMS is demanding these updates and opening public comments outside the prescribed regulatory process in violation of the STCs.

If CMS continues to follow this path of delay and obfuscation, it will only be undermining access to coverage for the people of Georgia. Good faith collaboration has always been necessary to deliver the best outcome for Georgia, but CMS is not currently working in good faith. Increasing enrollment in comprehensive coverage has always been the goal of the Georgia waiver.

The ACA included waivers from certain requirements to give states flexibility to try alternatives, so long as the alternatives met certain statutory guardrails. CMS determined the approved waiver would meet these guardrails and approved the waiver in 2020. In their August 26, 2021 letter, Georgia affirmed their intent to meet these guardrails and explained how the waiver would continue to meet the guardrails despite the changes in law and policy CMS cited.

Georgia's response is sound and demonstrates why the waiver continues to meet the guardrails. There is no impact on the comprehensiveness guardrail because Georgia will implement the same benefit standards for qualified health plans as federal rules require. There will be no impact on the affordability guardrail because Georgia will implement the same advanced premium tax credits and cost sharing reductions as federal rules require. There will be no impact on the deficit because any increase in APTCs due to higher subsidized enrollment will be offset by lower premiums under the waiver's reinsurance program.

The CMS request for updated analyses suggest the waiver may no longer meet the coverage guardrail based on changes in law and the amount of funding provided for navigators and outreach. As CMS knows, the changes in law that temporarily expands eligibility for and increased the value of premium tax credits will expire before the waiver is implemented. Therefore, this change in law is clearly irrelevant to the coverage guardrail. As the CBO explains, enrollment "would gradually return to current law levels by 2024."³ Even if enrollment stayed higher for longer or if the law became permanent, this does not implicate the way the waiver operates to boost enrollment by taking better advantage of private sector enrollment pathways.

Increased funding for navigators and outreach also fails to counter the expanded enrollment projected with shifting to private sector enrollment. Despite generous federal funding for navigators in prior years, navigators accounted for less than 1 percent of enrollments through the

¹ 45 CFR § 155.1312 and 45 CFR § 155.1316.

² 45 CFR § 155.1320.

³ Congressional Budget Office, Reconciliation Recommendations of the House Committee on Ways and Means, February 15, 2021, available at <https://www.cbo.gov/publication/57005>.

Federally-Facilitated Exchange (FFE).⁴ There's no reason to think reviving funding levels will measurably increase enrollment. Likewise, there's no clear link between federal outreach funding and enrollment. When outreach funding increased to \$100 million for the 2017 benefit year, enrollment declined.

By comparison, enrollments through private agents and brokers have been growing. Nearly half of all enrollments through the FFE were assisted by private agents and brokers for the 2020 benefit year.⁵ Enrollment through enhanced direct enrollment (EDE)—the pathway most similar to the Georgia Access Model—increased from 8 percent for the 2020 benefit year to 17 percent for 2021.⁶ Georgia's waiver to take advantage of these proven enrollment platforms is projected to increase enrollment. Increasing CMS funding for approaches that failed to deliver enrollment results in the past do not undermine the benefits of shifting to the Georgia Access Model.

The people of Georgia deserve a fair chance to let the Georgia Access Model prove its worth. CMS should continue to work in good faith with the state of Georgia to put the waiver on solid footing to improve Georgia's individual health insurance market for every Georgia citizen who depends on it.

Sincerely,

/s/

Peter Nelson
Senior Policy Fellow

⁴ Press Release, Centers for Medicare & Medicaid Services, "CMS Announces New Funding Opportunity Announcement for the Federally-Facilitated Exchange Navigator Program," July 10, 2018.

⁵ Centers for Medicare & Medicaid Services, Agents and Brokers in the Marketplace (October 30, 2020).

⁶ Centers for Medicare & Medicaid Services, Impact of Enhanced Direct Enrollment During the Open Enrollment Period for 2021 Coverage (January 2021).

JULY 2021

CMS Impermissibly Seeks to Reopen Georgia's 1332 Waiver Application and Approval Process

PETER J. NELSON • SENIOR POLICY FELLOW

Introduction

On June 3, President Biden's new Centers for Medicare & Medicaid Services (CMS) Administrator, Chiquita Brooks-LaSure, sent a letter to Gov. Brian Kemp of Georgia requesting an updated analysis of the state's waiver of certain Affordable Care Act (ACA) provisions that was approved by the Trump Administration last Fall.¹ CMS gave the state a 30-day deadline. Georgia responded on July 2 expressing concerns that the request falls outside the Specific Terms and Conditions (STCs) governing the waiver and that it suggests the Biden administration "wish[es] to reopen approval of the waiver—an action not permitted by the STCs." As the request does not appear to fit the process, Georgia asked for a meeting with CMS for further clarification.

Georgia's concerns are well-founded. Administrator Brooks-LaSure's request openly declares that the state's updated analysis will be subject to new 30-day federal public comment period and then be used to further evaluate whether the waiver meets certain statutory requirements. This certainly appears to be a reopening of the application as these are all key elements of the application and approval process

the state already completed last Fall. Given how the request effectively requires the state to reopen the application, its premature timing, the tight 30-day deadline, and a dubious reference to authority to terminate the waiver, this appears to be the Biden administration's first step toward undoing Georgia's waiver. While Administrator Brooks-LaSure claims to be "committed to working in partnership with states," this is not how a good faith partner operates.

This analysis assesses both the legal and practical basis for the CMS request. Though CMS cites to the STCs for authority to request these updated analyses, a close examination shows these STCs are not relevant to the current situation. Therefore, there does not appear to be any legal basis for the CMS request. Even if there were a legal basis, any updated analyses would be premature. The changed cir-

cumstances CMS cites—including the temporary expansion of premium tax credits in the American Rescue Plan Act (ARPA), increased federal funding for Navigators, and the COVID special enrollment period—are just now taking shape in the insurance market and the data necessary to make a meaningful assessment of these changes is not yet available. Moreover, though some circumstances may

“There does not appear to be any legal basis for the CMS request. Even if there were a legal basis, any updated analyses would be premature.”

have changed, the underlying dynamics driving the results in the actuarial and economic analyses have not changed. Thus, there's little reason to think the changes would upset the positive forces the Georgia waiver will introduce to increase affordability and access to health coverage.

Background

Section 1332 of the ACA provides for a "Waiver for State Innovation," which allows states to waive certain provisions of the law to implement innovative new State health care plans. This ACA provision clearly recognizes the value in giving states flexibility to experiment with different approaches to providing access to health coverage through the individual health insurance market. The law allows these waivers so long as the waiver meets specific criteria, often called guardrails, to help ensure a comparable number of people retain access to coverage that is as comprehensive and affordable as without the waiver. In addition, a waiver must be deficit neutral to the federal government.

In 2019, Georgia applied for a Section 1332 Waiver to address serious challenges the state's individual market was facing, including "drastic premium increases, low carrier participation in several counties across the state, and declining enrollment."² After ongoing discussions and deliberations with CMS and stakeholders, the state eventually settled on a waiver that included two main parts. Part I implements a state reinsurance program to lower premiums. This is similar to programs in other states that fund claims for people with high costs, which removes the cost from the risk pool and lowers premiums for everyone in the market. Part II implements the Georgia Access Model, which will transition Georgia from relying on HealthCare.gov to a new health insurance delivery mechanism that takes advantage of private market resources to expand consumer access and enrollment by delivering a better consumer experience.

"There is no other provision in statute or regulation giving CMS the authority to make these demands."

CMS approved Georgia's 1332 waiver plan last Fall after concluding the plan met the law's guardrails. This conclusion was based on a finding that the state's economic and actuarial analyses provided reasonable projections establishing how the waiver will meet the comprehensiveness, affordability, coverage, and deficit neutrality guardrails.

CMS Request for Updated Analyses

The transition from the Trump administration to the Biden administration brought a substantial shift in policies and priorities, and so it is no surprise that CMS is now underway reviewing all agency actions as directed by Executive Order 14009.³ Citing this order, CMS sent a letter to Gov. Kemp requesting an updated analysis of the waiver by July 3, just 30 days from the date of the letter.

The letter requests that the updated analysis account for recent changes in federal law under ARPA, the increase in federal funding for outreach marketing and navigators, and the COVID special enrollment period. Upon submission, CMS states they will provide a 30-day federal comment period and then evaluate whether the waiver continues to satisfy the guardrails.

As the basis for this request, CMS primarily cites two provisions of the Specific Terms and Conditions (STCs) of the waiver. These STCs operate as the contract between CMS and the state of Georgia for the administration of the waiver. CMS cites authority under STC 15 to request further information for ongoing monitoring and oversight of a waiver and authority under STC 7 to "amend, suspend, or terminate the waiver ... as necessary to bring the waiver ... into compliance with changes to existing applicable federal statutes enacted by Congress or applicable new statutes enacted by Congress." Neither of these provisions, however, provides the authority CMS asserts. Moreover, there is no other provision in statute or regulation giving CMS the authority to make these demands.

STC 15 Is Not Yet Relevant

Federal law provides that all 1332 waivers must undergo periodic evaluations by CMS and the Department of the Treasury (the Departments).⁴ Federal regulations go on to require the Departments to “periodically evaluate the implementation of a program under a Section 1332 waiver.”⁵ As CMS recently characterized this requirement in preamble to proposed ruling making, the Departments are responsible “for conducting evaluations to determine the impact of the section 1332 waiver.”⁶ CMS Regulations further require states to “fully cooperate” with the Departments on an evaluation and provide them with all requested data and information.⁷ This cooperation is formalized in the agreement between Georgia and the Departments in STC 15.

Under this framework, STC 15 focuses on information related to the actual implementation and impact of the waiver to ensure the waiver is working as intended. Indeed, the clear purpose of a “periodic evaluation” is to regularly review the impact of an activity after it starts. At this point, there is nothing to evaluate because the waiver will not be implemented until 2023 and, therefore, STC 15 is not yet relevant to the process outlined in federal regulation or the STCs.

Request Impermissibly Asks Georgia to Reopen the Waiver Application and Approval Process

If CMS were able to exercise the authority they assert, then they would effectively have authority to reopen the waiver application and approval process, which it clearly does not have authority to do under the statute, regulations or the STCs. The agency’s explanation of what it plans to do with the information lays bare its intent to reopen the application and approval process. On top of requesting updated actuarial and economic analyses, the CMS

request notifies Georgia that the federal government will then provide another 30-day public comment period on the state’s updated analyses to inform whether the already approved waiver should begin. Actuarial and economic analyses, comment periods, and responses to comments form the substance of a final and complete application. As such, redoing all of these elements would, as a process matter, function to reopen the application and approval process.

Leading up to the approval of the waiver, the state engaged in a rigorous application process to ensure the waiver met all of the necessary standards for approval. The application process included four

state and federal public comment periods, providing the public an opportunity to comment for over 100 days. Both the Departments and the state carefully considered these comments in approving the waiver. In response to comments, Georgia initially modified the waiver after the initial rounds and then updated the waiver with additional detail and clarifications after later rounds. The process also included independent analyses and affirmation by the Department of Treasury and the Office of the Actuary of CMS.

“Leading up to the approval of the waiver, the state engaged in a rigorous application process to ensure the waiver met all of the necessary standards for approval.”

The STCs operate as a signed, binding contract between the federal and state governments and there is no provision with the STCs for any party to unilaterally reopen and amend the contract. As stated in STC 17, the Departments may only amend the waiver in cases where the state fails to comply with the STCs or fails to meet the guardrails. Neither of these events have occurred. The state is in full compliance with the STCs and, until 2023, there will be no experience from implementing the waiver to demonstrate failure. Moreover, the state’s response to the CMS request affirms that “Georgia has every intention of complying with the guardrails throughout the life of the waiver.” Therefore, there is no avenue for CMS to reopen and amend the waiver at this time.

The binding nature of this contract, and the reliance the state of Georgia places on this contract for moving forward and investing in this new and innovative state health program, would be entirely undermined if CMS could continually revisit all of the work that went into the application and approval process. Yet, that is exactly what CMS is asserting it can do, which is not permissible under the STCs negotiated between the Departments and the state.

ARPA Does Not Trigger STC 7

Because there is no clear path to reopen and amend the waiver under STC 17, CMS cites STC 7 to claim discretion to amend, suspend, or terminate the waiver to bring it into compliance with a change in federal law. Like STC 15, STC 7 is not relevant to these circumstances. STC 7 is clearly directed at circumstances where a change in federal law adds or changes requirements on states or contravenes the policies established by the waiver. In the current circumstance, there has been no change in federal requirements that would trigger state action to comply.

Following the approval of a waiver, federal regulations require that “a State must comply with all applicable Federal laws ... unless expressly waived.”⁸ The regulation goes on to require that “[a] State must ... come into compliance with any changes in Federal law ..., unless the provision being changed is expressly waived.”⁹ In other words, while a state can waive certain provisions of federal law, a state must still comply with the rest of the law under a waiver, even if the law changes after the waiver is approved. This requirement is formalized in STC 7. Helpfully, STC 7 provides examples of requirements a state may need to change to ensure compliance, such as rate review and consumer noticing requirements. Since approval of the waiver, there has been no change in such federal requirements.

“In the current circumstance, there has been no change in federal requirements that would trigger state action to comply.”

Nonetheless, CMS suggests STC 7 is implicated because ARPA temporarily changed federal law to expand eligibility for and enhance the value of premium tax credits for plan years 2021 and 2022. This change in federal law only changed the benefits available to individuals and did not add requirements that require compliance or amend any statutory language in section 1332. Moreover, the change is temporary and ends on December 31, 2022 before Part II of the Georgia waiver starts.

Regardless, CMS suggests the change in federal law is relevant to STC 7 because it may implicate enrollment during the waiver period, suggesting enrollment gains can “persist” after the federal policy changes end. But this is only a change in the circumstances driving the market dynamics, which is no different from any change in the economy or otherwise that changes market dynamics. If this change implicates STC 7, then nearly any change in federal law that impacts the economy implicates STC 7. Clearly that is not the intent behind STC 7.

Furthermore, while the Congressional Budget Office (CBO) agrees enrollment gains may persist somewhat, they estimate enrollment “would gradually return to current law levels by 2024.”¹⁰ Thus, according to CBO, enrollment would only be impacted in the first year of the Georgia Access Model, hardly the persistence that requires a reopening of the waiver as CMS asserts.

Any Analysis is Premature

While there is no authority for CMS to request these updated analyses from Georgia, it would be premature for anyone to begin this type of analysis because it aims to account for policies that are just starting to take shape. At the time CMS requested the updated analyses, CMS had released some data on SEP plan selections for the period covering February 15 to April 30, which covered only the first month of the availability of enhanced premium tax credits under ARPA.¹¹

In addition, the data released by CMS indicates only new enrollments and does not account for dropped enrollments, which can only be gleaned publicly from CMS reports on effectuated enrollment—the actual number of people enrolled in a given month who paid premium—that will be released later this year.¹²

To truly understand new market dynamics, it would also be important for any new analysis to incorporate data that reflects the transition to this new post-lockdown period when the economy is reopening and people are re-entering the workforce. Indeed, as we learned last year, insurance coverage responses to COVID-19 have been unpredictable. A recent report published by the Department of Health and Human Services admits that the “shift in coverage was smaller than originally expected” and offers several points as to why.¹³ Considering the difficulty in projecting the 2020 impact of COVID-19, it’s not reasonable to expect anyone to provide an informed analysis on what to expect for 2021 and beyond without at least some preliminary data points on the impact of the new policies and the response to lockdowns lifting.

Even if the STCs authorized CMS to request this information, without new data there is no reason to think there will be any material changes to the actuarial and economic analyses. Even if new data shows enrollment increased and market dynamics changed, there is no compelling reason to anticipate this would materially change the results either. CMS theorizes that changes in federal law and policy may lead to a smaller base of uninsured consumers to enroll, which would thereby reduce incentives for

private sector entities to participate and enroll people. However, what matters to the private sector is the entire base of possible consumers, including the already insured and the uninsured. In fact, if there is higher enrollment, then that will only increase the incentives for the private sector to participate so long as they know their efforts won’t be crowded out and duplicated by HealthCare.gov.

CMS Should Withdraw the Request and Move Forward in Good Faith

Ultimately, there is no provision to reopen an approved waiver based on conjecture regarding future impacts of changes in law or policy that might influence future market dynamics. This is true even if there were adequate data immediately available to update the actuarial and economic analyses that accompanied and supported an approved waiver. Under the process outlined in regulation and the STCs, CMS must allow the waiver to go forward and, following implementation, evaluate the waiver’s effects to ensure that it complies with the section 1332 guardrails. If future evaluations show the waiver is not working as expected, there are provisions in the STCs for working with the state to bring the waiver into compliance.

CMS and the Department of the Treasury made a good faith agreement with the state and they are bound to follow through on that agreement. CMS should withdraw the request and continue working with the state to ensure their innovative waiver succeeds. A withdrawal of the request would send the appropriate signal that the Departments continue to be willing to work with Georgia in good faith. ■

“CMS and the Department of the Treasury made a good faith agreement with the state and they are bound to follow through on that agreement.”

Endnotes

1 Letter, Administrator Chiquita Brooks-LaSure to Governor Brian Kemp, June 3, 2021, available at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-Request-Updated-GA-Analysis-Letter.pdf>

2 State of Georgia Office of the Governor, Georgia Section 1332 State Empowerment and Relief Waiver Application, December 23, 2019, available at <https://medicaid.georgia.gov/document/document/georgia1332draftwaiver11042019pdf/download>.

3 86 FR 7793 (February 2, 2021), available at <https://www.federalregister.gov/documents/2021/02/02/2021-02252/strengthening-medicare-and-the-affordable-care-act>

4 PPACA § 1332(a)(4)(B)(v).

5 45 CFR 155.1328.

6 86 FR 35156, Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond Proposed Rule, July 1, 2021, available at <https://www.federalregister.gov/documents/2021/07/01/2021-13993/patient-protection-and-affordable-care-act-updating-payment-parameters-section-1332-waiver>.

7 45 CFR 155.1320(f).

8 45 CFR 155.1320(a).

9 Id.

10 Congressional Budget Office, Reconciliation Recommendations of the House Committee on Ways and Means, February 15, 2021, available at <https://www.cbo.gov/publication/57005>.

11 Centers for Medicare & Medicaid Services, Fact Sheet, “2021 Marketplace Special Enrollment Period Report,” at <https://www.cms.gov/newsroom/fact-sheets/2021-marketplace-special-enrollment-period-report-1>.

12 CMS recently released the early snapshot for 2021 effectuated enrollment, but this snapshot captures enrollment through February and so it captures only the first two weeks of the 2021 Marketplace Special Enrollment opportunity and none of the time the enhance premium tax credits are available.

13 Assistant Secretary for Planning and Evaluation, U.S. Department of Human Services, Trends in the U.S. Uninsured Population, 2010-2020 (February 11, 2021), at <https://aspe.hhs.gov/system/files/pdf/265041/trends-in-the-us-uninsured.pdf>.



8421 Wayzata Boulevard ★ Suite 110
Golden Valley, MN 55426

AmericanExperiment.org

To obtain copies of this report or to subscribe to the Center's free quarterly magazine, *Thinking Minnesota*, email Peter Zeller at Peter.Zeller@AmericanExperiment.org or call (612) 338-3605.