



STATE OF GEORGIA
OFFICE OF THE GOVERNOR

August 26, 2021

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services

Dear Administrator Brooks-LaSure:

This letter is in response to your letter dated July 30, 2021, in which the U.S. Department of Health and Human Services (HHS) and U.S. Department of Treasury (collectively, “the Departments”), requested that the State of Georgia provide updated actuarial and economic analyses of its approved Section 1332 State Relief and Empowerment Waiver (“1332 Waiver”) by August 29, 2021. After review of our correspondence to date, the Specific Terms and Conditions (“STCs”), and recent federal statutory changes, Georgia plans to proceed with implementation of its approved 1332 Waiver and urges the Departments to adhere to the agreed-upon STCs.

On November 1, 2020, after a robust evaluation period including public comment, the Departments approved Georgia’s State Innovation Waiver under Section 1332 of the Affordable Care Act. In reliance on that approval, Georgia took numerous steps to diligently implement its waiver, which consists of a state reinsurance program (Part I) and the Georgia Access Model (Part II), an innovative, market-driven model designed to address the unique problems Georgia faces from the insufficiency of Healthcare.gov. Over several months after the Departments granted the waiver, Georgia expended significant resources to begin implementing Georgia Access and fully cooperated with the Centers for Medicare & Medicaid Services (“CMS”) on implementation.

Despite Georgia’s reliance on the duly approved STCs, significant investments, and a good faith partnership with CMS, the Departments now appear to be backtracking on their approval. In letters dated June 3, 2021 and July 30, 2021, the Departments asserted that recent changes in both federal health care policies and priorities, as well as federal law, necessitate a reevaluation and updated actuarial and economic analyses of Part II of the State’s approved 1332 Waiver to ensure its continued compliance with the statutory guardrails. Specifically, the letters referenced Executive Order 13985, entitled “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” Executive Order 14009, entitled “Strengthening Medicaid and

the Affordable Care Act,” increased funding for the federal Navigator program, and the American Rescue Plan Act of 2021 (“ARP”) as reasons for the reevaluation.¹

The Departments cite the STCs referenced in CMS’ letter to Governor Kemp on November 1, 2020, approving Georgia’s 1332 Waiver, as the authority to request additional analyses, continuing to rely on STC 7, 14, 15, 31 C.F.R. §33.120(a)(1), (f), and 45 C.F.R. §155.1320(a)(1), (f). However, those provisions do not allow for a reopening of the waiver approval process. Further, the Departments’ attempted use of them to do so would render the thoughtfully drafted STCs, 31 C.F.R. §33.120, and 45 C.F.R. §155.1320 surplusage. The Departments appear to acknowledge that—under the STCs—the Departments may not unilaterally reopen the waiver approval process. For this reason, they point to the enactment of the ARP, issuance of two executive orders, and increased funding for the federal Navigator program as potential justifications to reopen or reconsider the waiver. However, those actions are not the types of changes in federal law required under the very STC that the Departments rely upon—STC 7—to justify inquiry into Georgia Access’s continued compliance with the statutory guardrails. STC 7 states “the Departments reserve the right to amend, suspend, or terminate the waiver, these STCs, or the pass-through funding amount as necessary to bring the waiver, these STCs, or the pass-through funding amount into compliance with changes to existing applicable federal statutes *enacted by Congress* or applicable new statutes *enacted by Congress*.” STC ¶7.

The cited executive orders are wholly irrelevant to Georgia’s compliance with the ACA statutory guardrails and STCs. Executive orders do not qualify as a basis to make a change under STC 7 because they are not enacted by Congress. Moreover, an executive pronouncement cannot override the STCs’ unambiguous provision that only changes in federal *law* are relevant to the Department’s evaluation of the Model’s compliance with the statutory guardrails. *See, e.g., Am. Hist. Ass’n v. Nat’l Archives & Recs. Admin.*, 516 F. Supp. 2d 90, 108 (D.D.C. 2007) (executive orders cannot override existing regulatory frameworks). And, in any event, executive orders are merely broad, aspirational pronouncements that cannot provide a reasoned basis to question CMS’s careful findings and conclusions regarding the Georgia Access Model’s compliance with the ACA guardrails. *See, e.g., California v. Bernhardt*, 472 F. Supp. 3d 573, 600-01 (N.D. Cal. 2020) (“While the Executive branch holds the power to issue executive orders, an agency cannot flip-flop regulations on the whims of each new administration. The APA requires reasoning, deliberation, and process.”); *New York v. U.S. Immigr. & Customs Enf’t*, 466 F. Supp. 3d 439, 449 (S.D.N.Y. 2020) (“misguided reliance on [an] Executive Order” is “no rationale” for a “consequential decision”). Indeed, the cited executive orders expressly disclaim any intent to have the force or effect of law. *See* Executive Order 13985 §11(a)(i) (Jan. 20, 2021) (“Nothing in this order shall be construed to impair or otherwise affect the authority granted to an executive department or agency, or the head thereof.”); *id.* §11(b) (“This order shall be implemented consistent with applicable law.”); *id.* §11(c) (“This order is not intended to, and does not, create

¹ The June 3, 2021, letter, however, separately reaffirmed that “there is no indication that reinsurance waivers are unable to continue to meet the guardrails.” Accordingly, the Departments “determined that Part I of the Georgia waiver plan, which establishes a state-based reinsurance program, does not require further evaluation at this time.”

any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”); Executive Order 14009 §§5(a)(1), (b), (c) (Jan. 28, 2021) (same).

The provisions of the ARP cited by the Departments are also irrelevant to the Georgia Access Model’s compliance with the statutory guardrails and STCs because the cited ARP provisions expire before the Georgia Access Model even goes into operation in 2023. *See* American Rescue Plan Act of 2021 §9661 (March 11, 2021) (temporarily expanding premium tax credits in 2021 and 2022) (codified at 26 U.S.C. §§36B(b)(3)(a)(iii), (c)(1)(E)). And the Congressional Budget Office estimates that the ARP’s provisions which changed how household income is counted for households receiving unemployment compensation for 2021 will have no impact on enrollment levels by 2023.² The Departments ignore this critical issue altogether and instead offer only unsubstantiated speculation about the ARP’s potential, later effects on the insurance market due to “inertia in coverage selections” and “potentially chang[ing] market dynamics.” But STC 7 applies to the Model’s “compliance” with amendments to existing federal laws or new federal laws—it does not authorize reopening of an approved waiver to consider the speculative effects of hypothetical future changes in the insurance market.

The Departments also invoke STC 15 to justify their actions, but that reliance is misplaced. STC 15, by its terms, refers to “oversight of an approved waiver.” This STC is plainly contemplating monitoring by the Departments *once a waiver has gone into force*. That is, once the waiver has taken effect the Departments may request information to evaluate how it is working and to ensure it continues to meet the statutory guardrails. But STC 15 makes little sense in the context of a waiver that has already been approved but is yet to go into force. Until the waiver has been implemented and gone into force, there is nothing new for the state to report beyond the materials already submitted in connection with the original approval. In that circumstance, the Departments would not be requesting additional information to “monitor” or “evaluate” the waiver but would instead merely be reconsidering the initial approval. The State thus continues to believe that what the Departments call an evaluation under STC 15 is, in effect, an attempt to reopen or reconsider the waiver without complying with the required procedures for such an action.

Moreover, nothing in the ARP changes the fact that Georgia’s 1332 Waiver remains in compliance with the guardrails. Additional analyses and review of Georgia’s compliant 1332 Waiver are unreasonable and unwarranted because Georgia continues to meet the guardrails for the following reasons:

- Georgia will be implementing the same standards for Qualified Health Plans (QHPs) as required by CMS today in Georgia’s market, therefore there is no impact on the **Comprehensiveness** guardrail.
- Georgia will be implementing the same advance premium tax credits (APTC) and Cost-Sharing Reduction (CSR) eligibility rules for consumers as is available federally under HealthCare.gov, therefore there is no impact on the **Affordability** guardrail.

² Reconciliation Recommendations of the House Committee on Ways and Means | Congressional Budget Office (cbo.gov)

- Georgia’s 1332 Waiver will drive innovation to improve affordable and accessible healthcare coverage for Georgians to bring more people into the market and reduce the number of uninsured across the State. As outlined in the Waiver, the State’s implementation approach is designed to minimize the potential loss of current market consumers through the transition. Therefore, the State continues to maintain compliance with the **Scope of Coverage** guardrail.
- Lastly, the 1332 Waiver maintains compliance with the **Deficit Neutrality** guardrail because increases in federal APTC spending under Georgia Access due to increased enrollment will be offset by net savings and state passthrough funding from the Reinsurance Program.

There is thus a significant mismatch between the Departments’ stated reasons for conducting this reevaluation and the underlying record. No changes of law cognizable under the STCs authorize a fundamental reevaluation of the Departments’ approval of Georgia’s waiver. This disparity is further underscored by the actual inquiries the Departments put to the State, all of which merely repeat the information required in the initial approval process with the addendum that this repetitive analysis must account for changes in federal law. But, as noted, none of the cited changes to federal law have any meaningful effect on the only question relevant here—the demonstration’s compliance with the guardrails. Moreover, CMS is nowhere authorized to open a public comment period in a routine evaluation, yet the Departments’ June letter states that it plans to do so here. The planned public comment period further underscores that the Departments are planning to conduct a full reevaluation of CMS’s approval of Georgia’s waiver without a cause provided for under the STCs. CMS already conducted a comprehensive and robust analysis and approved Georgia Access, and there have been no relevant changes since then to either the governing legal framework or the nature of the program.

Given that 1) the Executive Orders and increase in federal Navigator funding do not represent applicable federal statutes for the purposes of Georgia’s 1332 Waiver STCs, and 2) the applicable provisions within ARP expire before the implementation of Georgia Access and do not have long-term impacts on Georgia, the State disagrees with the Departments’ assertion that updated actuarial and economic analyses are needed to ensure the compliance of Georgia Access with the statutory guardrails.

The State is concerned that the Departments fail to recognize and appreciate the significant investments that the State and our stakeholders have made to facilitate a seamless implementation of the 1332 Waiver. Over the previous eight months of implementation, Georgia has seen increased carrier participation and strong private sector engagement.

Georgia’s 1332 Waiver is exactly the type of state innovation that Section 1332 waivers are intended to promote, and we are one of many states that have chosen to transition from the Federally Facilitated Exchange (FFE). The two components of the 1332 Waiver – the Reinsurance Program and Georgia Access – will address the high uninsured rate in Georgia by lowering costs through statewide premium reductions and improving access through a more individualized consumer-centered plan shopping and enrollment experience that will help residents access and

better understand available plan and subsidy options. When fully implemented, the approved 1332 Waiver will better meet the needs of Georgia's currently underserved populations.

It is our hope that the Departments will adhere to their obligations under the STCs and work with Georgia on implementing this critical program which will expand access to comprehensive, affordable care across our State. Thank you for your attention to this important issue. Should you have any questions, please contact me at grant.thomas@opb.georgia.gov or (404) 971-7575.

Sincerely,

A handwritten signature in cursive script, appearing to read "Grant Thomas", followed by a horizontal line extending to the right.

Grant Thomas
Director, Governor's Office of Health Strategy and Coordination