



STATE OF GEORGIA  
OFFICE OF THE GOVERNOR

July 27, 2022

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

Dear Administrator Brooks-LaSure:

This letter is in response to your letter dated April 29, 2022, in which the U.S. Department of Health and Human Services (HHS) and U.S. Department of Treasury (collectively, “the Departments”), stated that they would suspend implementation of Part II of Georgia Access unless Georgia submitted either a corrective action plan or a written challenge to the Departments’ determinations prior to July 28, 2022. This letter is Georgia’s written challenge.

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On March 27, 2019, Governor Brian P. Kemp signed Senate Bill 106, the Patients First Act into law. The Act grants the State of Georgia broad authority to submit and implement a section 1332 waiver in a manner consistent with state and federal law. Georgia then spent over a year exhaustively working with the Departments on Georgia’s proposed section 1332 waiver, Georgia Access. The Departments’ robust evaluation period included, among other things, six public hearings, two state public comment periods, and two federal public comment periods. In a November 1, 2020 letter, the Departments approved the waiver and explained in detail why the waiver satisfied the statutory guardrails.

The Georgia Access waiver consists of two parts. In Part I, Georgia received a waiver to implement a Reinsurance Program for up to five years beginning with plan year (“PY”) 2022. In Part II, Georgia received a waiver that allows the state to transition the individual market from the federal exchange to a new model. The waiver allows private sector entities to provide the front-end consumer shopping experience and enrollment operations with the state providing back-end operations to handle eligibility determinations and enrollment reconciliation.

In particular, Georgia and the Departments shared the view that Part II of the waiver was an innovative, market-driven model designed to address the unique challenges facing Georgians in accessing healthcare coverage. For many Georgians, HealthCare.gov is difficult to navigate. That

is why, despite offering billions in federal premium tax credits over the years for people seeking insurance through that portal, almost one million Georgians eligible for subsidies remained uninsured. Part II of Georgia Access was developed to ensure that those Georgians receive an improved consumer experience and can shop for an affordable plan that meets their needs—all while incentivizing the private market to target the uninsured who have been left behind by HealthCare.gov. Indeed, Part II of Georgia Access will put more affordable, quality insurance coverage within reach of consumers in our state than the existing one-size-fits-all federal solution. It will also create an enhanced consumer experience with private-sector incentives and marketing for consumers to shop, compare, and enroll in insurance through a more user-friendly experience.

After the Departments issued that approval on November 1, 2020, Georgia began working in good faith with the Centers for Medicare & Medicaid Services (“CMS”) to implement both parts of the waiver. Georgia relied on that approval and made substantial investments toward that shared goal. Georgia conducted extensive outreach to carriers to bring them into the market and also engaged Enhanced Direct Enrollment (“EDE”) vendors who expressed their commitment to participating under the waiver. Over the last twenty-one months, more than twenty private-sector organizations collaborated with the State and made their own investments in the new program. On Part II alone, Georgia has spent \$31 million and thousands of hours of staff time to prepare for implementation in PY 2023.

The Departments’ support for Part I of Georgia Access remains unchanged. But the Departments’ support for Part II and the state’s efforts toward implementation abruptly changed on June 3, 2021. Without warning, the Departments sent Georgia a letter claiming that “changes in both health care priorities and policies, as well as federal law” required Georgia to submit updated analysis of the already-approved waiver. It was obvious from the start, however, that the Departments were merely reopening the waiver’s application and approval process with the goal of eliminating the Part II of Georgia Access altogether before its 2023 implementation—an effort that started just seven months after the Departments unequivocally approved the program.

The Departments have asserted two bases for their threatened suspension of Part II Georgia Access: (1) Georgia’s alleged failure to comply with the waiver’s specific term and condition (STC) 15 when it did not provide the Departments an extensive post-approval actuarial analysis; and (2) the waiver allegedly no longer meets the statutory guardrail that it will provide coverage to at least a comparable number of residents without the waiver (the “statutory coverage guardrail.”). Neither contention has merit nor provides any basis to suspend implementation of the Part II of Georgia Access.

**I. There is no basis for suspending Part II of Georgia Access.**

**A. Georgia has complied with the STCs because the Departments had no authority to ask for additional actuarial information.**

The Departments’ first contention is that “the State has materially failed to comply with its section 1332 waiver’s specific terms and conditions (STCs) by repeatedly not providing the Departments with the information requested as part of our oversight and monitoring authority.” *See*

Administrator Brooks-LaSure Letter to Georgia pg. 2 (April 29, 2022) (“Suspension Letter”). In particular, the Departments had sought to impose on Georgia the considerable undertaking of redoing and updating the entire actuarial and economic analysis that supported its waiver application. This would be an enormous task. The Departments demanded extensive analysis supported by actuarial certifications—certifications that the Departments themselves did not conduct for their own approval reconsideration. *See infra* §I.B. The demand included dozens of elements with which the Departments wanted Georgia to comply, which the Departments knew would take at least several months to complete and yet they gave Georgia just 30 days to complete—an unrealistic deadline by any account.

Specifically, the Departments contend that Georgia’s failure to produce this information violated STC 15. *See* Suspension Letter pg. 7. But as Georgia previously explained, the Departments’ reliance on STC 15 is misplaced. STC 15 refers to “oversight of an approved waiver,” which plainly contemplates ongoing 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 the waiver is working and to ensure it continues to meet the statutory guardrails. STC 15 makes little sense in the context of a waiver that has already been approved but is yet to be implemented (as here); there is nothing new for the state to report beyond the materials already submitted in connection with the original approval. Any request for additional information before implementation cannot be to “monitor” or “evaluate” the waiver because there is nothing yet to “monitor” or “evaluate.” This means the Departments’ requests can only be categorized as an attempt to reopen and reconsider the initial approval. But the STCs do not give the Department authority to reopen or reconsider the waiver at this stage.<sup>1</sup>

Even if the STCs authorized the Departments’ request as a procedural matter, there was no substantive reason for the request in the first place. The request claimed that “changes in federal law and policies since the initial approval of the Georgia waiver on November 1, 2020” spurred the Departments to “review[] all section 1332 waivers for compliance with the guardrails.” Administrator Brooks-LaSure Letter to Georgia pg. 2 (July 30, 2021). The Departments invoked STC 7, which provides a mechanism for keeping the waiver in “compliance with changes to existing applicable federal statutes enacted by Congress or applicable new statutes enacted by Congress.” None of the Departments’ cited authorities can justify a request for additional information under this provision.

The letters pointed to 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,” and the new administration’s funding increase for the federal Navigator program. These executive actions obviously did not qualify

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<sup>1</sup> The Suspension Letter makes clear that the Departments are asserting a violation of STC 15 itself. Though the Departments refer to 31 C.F.R. §33.120(f) and 45 C.F.R. §155.1320(f), STC 15 incorporates those regulations as part of its ongoing oversight responsibilities once the waiver is in effect. And the Departments’ apparent claim that they can effectively reopen the waiver approval process would render large portions of the carefully drafted STCs, 31 C.F.R. §33.120, and 45 C.F.R. §155.1320 little more than surplusage, as Georgia has previously explained. *See* Georgia Letter to Administrator Brooks-LaSure (Aug. 26, 2021).

because they are not laws “enacted by Congress.” 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, 108-111 (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 Part II of Georgia Access’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”). If that were not enough, 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(d) (“This order is not intended to, and does not, create 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 one statute that the Departments did reference—the American Rescue Plan Act of 2021 (“ARP”)—fares no better. The ARP provisions expire before Part II of Georgia Access is even implemented in PY 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 as we previously explained, the Congressional Budget Office estimates that the ARP’s provisions will have no impact on enrollment levels by 2023.<sup>2</sup> The Departments try to get around that problem by offering 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.

In sum, STC 15 does not authorize the Departments to request additional information before Part II of Georgia Access goes into effect and, even if it did, there was no valid basis for demanding the requested information. Georgia not responding to these burdensome, unnecessary, unjustified, and unrealistic requests cannot be a basis for suspending the Georgia Access Model.

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

## **B. The Georgia Access Model complies with the statutory coverage guardrail.**

The Departments' second contention is that Part II of Georgia Access no longer "meet[s] the statutory requirement that it will provide coverage to at least a comparable number of residents as without the waiver," Suspension Letter pg. 2, *i.e.*, the statutory coverage guardrail. As with information requests, the Departments have no authority to reopen, reconsider, or suspend an approved waiver before it goes into effect. The STCs and regulations contemplate the Departments monitoring the waiver's compliance with the statutory guardrails once the waiver is implemented. *See, e.g.*, Administrator Verma's Letter to Georgia pg. 1 (Nov. 1, 2020) ("Approval Letter") ("Georgia will *implement* the Georgia Access Model beginning with PY 2023." (emphasis added)); 31 C.F.R. §33.120(b)(1) ("The terms and conditions of an approved section 1332 waiver will provide that the State will perform periodic reviews of the *implementation* of the section 1332 waiver." (emphasis added)). The Departments' claim that they can reopen an application at any time renders those provisions superfluous. It also converts the static application stage into an indefinite, ongoing process where an approval may be reopened, reconsidered, and rescinded at any time. Both outcomes contradict the governing statutory and regulatory scheme for 1332 waivers.

But even if the Departments had the authority to reopen, reconsider, and suspend an approved waiver before it is implemented, the Departments' reasons for doing so here wither under the slightest scrutiny. The Departments claim that Part II of Georgia Access no longer complies with the statutory coverage guardrail because of "[1] changes in relative levels of advertising and [2] attrition due to the change in enrollment pathways (absence of HealthCare.gov)." *See* Suspension Letter pg. 8. The entire basis for that conclusion, however, comes from a brief analysis done by the Departments' handpicked consultant, Acumen LLC. That analysis did not include an actuarial certification. And the Departments never explain why they apparently agree with Acumen's analysis even though that analysis contradicts the Departments' own findings and conclusions when they approved the waiver. That is likely because the Departments know Acumen's analysis is deeply flawed on multiple levels.

To start with, the entire Acumen report is based on assumptions layered on assumptions and estimates layered on estimates. For example, the new baseline analysis that Acumen conducts to ground its analysis is little more than guesswork. *See* Acumen LLC, Estimating the Coverage Impact of Georgia's Section 1332 Waiver with the Georgia Access Model pgs. 3-5 (April 2022) ("Acumen Analysis"). It employs three separate "estimate" steps to get a new baseline enrollment, with the steps themselves relying on dozens of assumptions. Those assumptions and estimates unsurprisingly resulted in the Departments' preferred outcome: a "significantly higher" baseline enrollment from which to judge Part II of Georgia Access.

Acumen's analysis of transition attrition is particularly puzzling. Acumen claims that "[t]he removal of the HealthCare.gov platform as the enrollment channel in Georgia is ... likely to impact total non-group enrollment." *See* Acumen Analysis pg. 8. But it was *always* going to be the case that Georgia would transition away from HealthCare.gov under Part II of Georgia Access; that was a primary point for approving the waiver in the first place. And the transition from the federal exchange to the Georgia Access Model is no different than the six states (Kentucky, Maine,

Nevada, New Jersey, New Mexico, and Pennsylvania) that have recently transitioned from the federal exchange to a state-based exchange.

The Departments also expressly rejected this *precise* attrition concern after commenters raised it at the approval stage in 2020. *See* Approval Letter pg. 19 (addressing comments that “both the transition itself and the new shopping experience would result in less overall enrollment.”). The Departments explained that the transition would not cause coverage losses because Georgia would automatically re-enroll “current Georgia FFE enrollees during the transition year to the Georgia Access Model, and that this process would mirror the one currently provided through the FFE;” and the Departments noted that those consumers “will similarly be able to auto-re-enroll each year in the Georgia Access Model.” *Id.* That means the same number of eligible consumers will be enrolled in plans on Day One of Georgia Access Model as were previously enrolled on the federal exchange prior to data migration. In addition, CMS would be “providing notice to Georgia FFE enrollees about the transition to the Georgia Access Model and [would] also provide the state with any necessary technical assistance to effectuate a smooth transition from HealthCare.gov.” *Id.*

The Departments also previously rejected commenters’ claims of transition attrition because, among other reasons, Georgia was required to (and did) “develop a comprehensive outreach and communications plan detailing ... all of the steps the state will take to ensure a smooth transition.” *Id.* That communications plan includes directing consumers to the Georgia Access Model website that will serve as a comprehensive source to provide information to consumers and stakeholders about plan shopping and enrollment options, as well as provide a Georgia Access Contact Center number on notices to consumers for them to get support and learn how to enroll in Georgia Access. This is one of many prior, contrary findings that the Departments now completely ignore.

The April 29, 2022 letter and the Acumen Analysis likewise ignore other aspects of Georgia’s implementation plan that will minimize any transition attrition. For example, current consumers will receive a *Welcome to Georgia Access* notice in October informing them of the migration to Georgia Access Model, which will be tailored to provide information for consumers based on how they enrolled in coverage on the federal exchange. Consumers who enrolled through an EDE on the federal exchange will be informed that they can continue to use their same enrollment platform for Georgia Access. Consumers who enrolled using HealthCare.gov will receive information on how to shop for and compare all plans in the market using certified web-brokers. They will enjoy the same type of “one-stop-shopping” experience as the federal exchange. Consumers will also be notified on how to find a local agent to get support or how to enroll directly with a carrier to streamline the shopping and enrollment process if they already know they want to stay with their current carrier. These and other strategies outlined in the state’s implementation plan will minimize the risk of loss during transition.

Acumen’s advertising analysis is flawed as well. As with transition attrition, the advertising analysis ignores the Departments’ prior, contrary conclusions on the exact same subject. For example, the Departments previously concluded that private brokers “will have access to a significantly larger addressable (or obtainable) market than under the current hybrid FFE/private sector model,” which will give them a “greater incentive to invest in marketing and outreach in order to retain existing enrollees and attract new consumers to the individual market.” Approval

Letter pgs. 5-6; *see also id.* at 22-23 (concluding that Part II of Georgia Access “creates significant market incentives to invest in marketing and outreach in the state.”). Yet Acumen’s analysis somehow concludes that there is “insufficient evidence from the state’s waiver application to predict how private entities will respond to the Georgia Access Model.” Acumen Analysis pg. 7. As a result of that divergent conclusion, Acumen “assumes that private entities do not change their marketing and outreach in response to the Georgia Access Model.” *Id.* That assumption is critical to Acumen’s conclusions—but is largely unexplained and directly contradicts the Departments’ prior conclusions.

So too with the analysis’s treatment of state advertising. For example, the Departments previously concluded that Georgia’s “plan to conduct a statewide public awareness campaign” was a sufficient “safeguard [] aimed to ensure it will not result in a decrease in enrollment.” Approval Letter 10. But Acumen now criticizes Georgia’s marketing plans as insufficient to maintain enrollment. *See* Acumen Analysis pg. 8.

Acumen relies on several other misguided assumptions that are critical to its conclusions on advertising. For example, Acumen claims that it assumed state and federal marketing are equally as effective. Acumen Analysis pg. 8. But Acumen *actually* loaded the dice against Georgia on this point by relying on coefficient estimates from a study that claimed federal marketing is more effective than state marketing.<sup>3</sup> Acumen either tried to deceive readers into believing it was making pro-Georgia assumptions (when it wasn’t) or it blatantly misread the underlying study. Either scenario undermines the credibility of Acumen’s analysis. At any rate, that study is not in line with other studies that have found federal advertising has no impact (while also concluding, for example, that “state-sponsored advertising has the most robust evidence for being a positive driver of Marketplace enrollment.”).<sup>4</sup>

In their Georgia Access approval letter to the state, the Departments themselves believed that state and private advertising was superior. Much of federal outreach funding goes to the Navigator program, which the Departments previously explained “has simply had limited impact on reducing the overall uninsured rate in Georgia.” Approval Letter pg. 22; *see also id.* (“In fact, one of the key criticisms of HealthCare.gov and the implementation of the Navigator program is that it has squeezed local agents and brokers out of the market with government-funded competition.”). The Departments recognized that state and private marketing was superior because “Georgia agents and brokers are part of their respective local communities and have a much greater reach and understanding of local dynamics to better reach local consumers.” *Id.* at 24. Acumen’s analysis thus contradicts the Departments’ own prior conclusions. It also contradicts CMS’s own findings that EDE partners (which Part II of Georgia Access is using) “attract[s] a higher proportion of new

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<sup>3</sup> Naoki Aizawa and You Suk Kim, “Public and Private Provision of Information in Market-Based Public Programs: Evidence from Advertising in Health Insurance Marketplaces,” NBER Working Paper 27695, Table 4, Column 3 (April 2021), available at <https://www.nber.org/papers/w27695>.

<sup>4</sup> *See, e.g.,* Paul Shafer, et al., “Competing Public and Private Television Advertising Campaigns and Marketplace Enrollment for 2015 to 2018,” *Journal of Social Sciences*, Vol. 6, No. 2 (July 2020), available at <https://muse.jhu.edu/article/761091>.

consumers and increased the percentage of returning consumers who made active plan selections during then 2021 OEP as compared to the 2020 OEP” in relation to “non-DE enrollment channels (the HealthCare.gov website and call center).”<sup>5</sup>

Acumen also makes incorrect assumptions about future spending to manufacture its conclusions on advertising. Acumen first assumes that federal advertising spending remains constant to 2022 levels. But federal funding for marketing varies year-over-year. And instead of affording Georgia the same assumption, Acumen assumed that the state would stop advertising entirely after 2023—even though Georgia has always intended to spend the same amount (or more) as it will in 2023 to maintain and drive enrollment. Acumen likewise assumes that private advertising funding will remain constant, again contradicting the Departments’ explicit prior conclusion that private companies will be incentivized to *increase* marketing efforts without the federal exchange in the market.<sup>6</sup>

For all these reasons, the Departments’ reliance on the Acumen analysis is badly misplaced. That analysis cannot serve as a plausible basis for concluding that Part II of Georgia Access does not comply with the statutory coverage guardrail.

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Georgia’s 1332 Waiver is exactly the type of state innovation that Section 1332 waivers are intended to promote. As the Departments recognized by approving the waiver, both parts are designed to work together to increase affordability of, and access to, coverage for thousands of uninsured Georgians. The waiver accomplishes this goal in several ways, including by targeting reinsurance funds to high-cost areas of the state to provide greater premium relief to those areas; incentivizing private-sector partners to enroll uninsured Georgians; and enabling the development of a more tailored, consumer-centric shopping experience than can be offered through a single, national exchange website like HealthCare.gov.

Part I of the waiver has already been highly successful. Premiums in the state are down 12% state-wide; and the number of carriers in Georgia’s market has increased from four in 2019 to 11 in 2022. Part II will work in tandem with Part 1 to add to that success. When both parts of Georgia Access are fully implemented, Georgia Access will accomplish the goal of better meeting the needs of Georgia’s currently underserved populations.

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<sup>5</sup> CMS, Impact of Enhanced Direct Enrollment During the Open Enrollment Period for 2021 Coverage pg. 1 (Jan. 2021), available at <https://go.cms.gov/3ozt9nu>.

<sup>6</sup> The Departments also explained that the “state could still meet the statutory guardrail even if the actual enrollment impact was somewhat lower than the state estimates, since state waiver plans are not required to increase enrollment, but rather must provide coverage to a comparable number of people as would receive it absent the waiver in order to meet this statutory guardrail.” Approval Letter pg. 10. Even accepting Acumen’s analysis as reasonable, the Departments do not explain why that analysis’s projected decrease in enrollment falls outside the permissible amount.



Georgia has taken numerous steps and made substantial investments toward that goal after the Departments approved the waiver, as Georgia has outlined for the Departments several times already. In reliance on that approval, Georgia conducted extensive outreach to carriers to bring them into the market as a part of the waiver. Georgia also engaged with numerous direct enrollment vendors that expressed a commitment to participating in Part II of Georgia Access. In all, Georgia has collaborated with more than twenty private-sector organizations that have made their own investments to ramp up for Part II of Georgia Access.

Georgia has also spent approximately \$31 million on Part II of Georgia Access after approval as the state moves toward implementation in PY2023—and that figure that does not include thousands of hours of staff time. If the Departments try to suspend the program, that will unlawfully undermine Georgia’s reliance interests and render those investments wasted. Georgia expects the Departments will adhere to their obligations under the STCs and work with the state on implementing this critical program.

Thank you for your attention to this important issue. Should you have any questions, please contact me at [grant.thomas@opb.georgia.gov](mailto:grant.thomas@opb.georgia.gov) or (404) 971-7575.

Sincerely,

A handwritten signature in black ink, appearing to read "Grant Thomas", is written over a solid horizontal line.

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