

*Administrator*

Washington, DC 20201

July 15, 2022

Timothy N. Schott  
Acting Superintendent of Insurance  
Bureau of Insurance  
34 State House Station  
Augusta, ME 04333

Dear Acting Superintendent Schott:

Thank you for your February 10, 2022 submission, with an addendum submitted on March 23, 2022, on Maine's amendment application for its State Innovation Waiver under section 1332 of the Patient Protection and Affordable Care Act (ACA). The amendment will allow the extension of the state's reinsurance program, the Maine Guaranteed Access Reinsurance Association (MGARA), to a merged individual and small group market (also referred to as a pooled market) for plan years 2023 through 2027, as well as quarterly adjustments for small group plans that do not renew on a calendar year basis.<sup>1</sup> I am pleased to send this letter from the Department of Health & Human Services (HHS), as well as on behalf of the Department of the Treasury (collectively, the Departments).

This letter is to inform you that the Departments, having completed their review of the waiver amendment application, approve Maine's amendment application for its State Innovation Waiver under section 1332 of the ACA (also referred to as a section 1332 waiver). Enclosed with this letter are the specific terms and conditions (STCs) for Maine's section 1332 waiver amendment. The Departments' approval of Maine's waiver amendment application is conditioned upon the state's acceptance of these STCs within 30 days of this letter, or by August 14, 2022.<sup>2</sup> This approval is effective for a waiver period of January 1, 2023, through December 31, 2027.

The Departments are granting Maine's request to waive ACA sections 1312(c)(1)–(3) as implemented at 45 C.F.R. § 156.80 to the extent these provisions would otherwise require excluding total expected state reinsurance payments through MGARA when establishing the market-wide index rate for the purpose of operating MGARA, and to waive section 1312(c)(3) as implemented at 45 C.F.R. § 156.80(d)(4)<sup>3</sup> to the extent that these provisions would otherwise prohibit quarterly adjustments of small group rates for non-calendar year coverage in a merged

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<sup>1</sup> Maine's currently approved section 1332 waiver waives the individual market single risk pool requirement to the extent it would otherwise require excluding total expected state reinsurance payments when establishing the market-wide index rate. The approval of Maine's current waiver is effective for a waiver period of January 1, 2019 through December 31, 2023. See <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-STC-ME-Signed.pdf>

<sup>2</sup> Upon the state's acceptance, the enclosed STCs will supersede and replace the July 2018 STCs governing Maine's currently approved section 1332 waiver.

<sup>3</sup> 45 C.F.R. § 156.80(d)(4) provides that when the individual and small group risk pools have been merged the provisions allowing quarterly small group rate adjustments do not apply.

market single risk pool, as described in the state's waiver amendment application. As such, this will enable the consideration of total expected state reinsurance payments when determining the market-wide index rate in the newly merged market single risk pool for rate-setting and risk adjustment purposes. This waiver amendment also will allow for quarterly rating adjustments for non-calendar year small group coverage that is part of the merged market single risk pool. In addition, in accordance with the state's request in the waiver amendment application and letter dated June 21, 2022 describing the merged market,<sup>4</sup> HHS will treat Maine as having a merged market for purposes of the HHS-operated risk adjustment program starting with the 2023 benefit year.

The Departments remain committed to working with state partners to advance health care coverage policies. Through section 1332 waivers, the Departments aim to assist states with developing health insurance markets that expand coverage, lower costs, and ensure that affordable health coverage is available for their residents. The Departments have determined that the amended waiver plan satisfies the statutory guardrails (as set forth in sections 1332(b)(1)(A)-(D) of the ACA), and also have determined that the implementation of the amended waiver plan will lower individual market premiums in the state and the premium tax credits (PTC) to which Maine residents would have been entitled absent the waiver. These PTC savings will be passed through to the state to be used for implementation of the waiver plan. The Departments have considered public comments in making this determination.<sup>5</sup> The Departments summarize and respond to the major themes raised in comments received during the federal public comment period below in Appendix A, and questions and responses from Maine are available on the Centers for Medicare & Medicaid Services (CMS) section 1332 waiver website.<sup>6</sup>

The enclosed STCs further define the state's responsibilities with respect to implementation of the amended waiver, the use of pass-through funding during the waiver period, and the anticipated federal oversight of the project. The state is encouraged to engage with the Departments early in the process if it is interested in further amending or extending its waiver plan. The required information and process may vary based on the complexity of the proposed change or extension. A breach of any of the STCs may lead to termination of Maine's section 1332 waiver.

### **Departments' Determination**

Based on the analysis submitted by the state, consideration of public comments, experience with existing section 1332 waivers, and experience with other health programs, the Departments have determined that Maine's amended waiver plan meets the statutory guardrail requirements outlined in sections 1332(b)(1)(A)-(D) of the ACA.

First, the state's amended section 1332 waiver is projected to provide coverage at least as comprehensive as coverage provided without the waiver. The pooled market reinsurance

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<sup>4</sup> The letter is available at: [https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-)

<sup>5</sup> Public comments and the state's response to questions from the Departments are available online: [https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-.html](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html).

<sup>6</sup> *Ibid.*

program and allowance for small group quarterly rating adjustments will not alter the essential health benefits provided in individual or small group health insurance coverage offered in the state.

The state's amended waiver also is projected to provide coverage and cost-sharing protections against excessive out-of-pocket spending that are at least as affordable as would be provided without the waiver. The state's estimate of the premium reductions attributable to reinsurance is consistent with other approved waivers to implement state-based reinsurance programs.<sup>7</sup> Moreover, under Maine's amended waiver, average premium rates for individual and small group coverage are projected to be the same or lower than they would have been compared to the without-waiver baseline scenario. For example, the state projects that under its amended waiver, which includes both the pooled market and reinsurance program, premiums for individual health insurance coverage will decrease by a statewide average of 8.0% in 2023, and by 6.0% for small group health insurance coverage in 2023, when compared to the baseline. The Departments have reviewed the actuarial assumptions behind Maine's estimated premium reductions and conducted internal analysis, and determined that the amended waiver meets the affordability guardrail.

The Departments also have determined that the state's amended waiver satisfies the coverage guardrail, meeting the statutory requirement that the waiver is projected to provide coverage to at least a comparable number of people as would be provided without the waiver. The state projects that in all years of the amended waiver, enrollment across the pooled individual and small group market is projected to be higher when compared to the without-waiver baseline. For example, the state predicts that under the amended waiver in 2023, average enrollment in individual health insurance coverage will be higher by about 1,600 members (or 2.7%) and average small group enrollment will be higher by about 2,481 members (or 5.3%), compared to the baseline. In total, the state projected that enrollment in 2023 in the pooled individual and small group market under the amended waiver will be 109,663 compared to 105,585 without the waiver. Additionally, the amended waiver is not projected to decrease coverage in other health insurance markets and health coverage programs. The Departments note that the state's estimates of the impact of the pooled market reinsurance program on enrollment are consistent with the Departments' experience with section 1332 reinsurance waivers implemented by Maine and other states.<sup>8</sup> By reducing premiums, the amended waiver will enable more Maine residents to purchase affordable, comprehensive health insurance, thereby, expanding comprehensive coverage to Maine residents who struggled to afford health insurance. We note that the state still could meet the coverage 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.

Finally, the state's amended waiver is not projected to increase the federal deficit. Compared to the without-waiver baseline, the state projects \$22.8 million in net federal savings in 2023

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<sup>7</sup> See Table 3, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-Data-Brief-Aug2021.pdf>.

<sup>8</sup> *Ibid.*

resulting from the pooled market reinsurance program.<sup>9</sup> Since the amended waiver is projected to reduce premiums, the Departments expect the PTC savings attributable to the amended waiver to more than offset any potential new federal costs.<sup>10</sup>

The Departments note that the state's waiver amendment application and the approval of the amended waiver reflects state and federal law at the time of approval. Moving forward, the state is responsible, under STC 2, to inform the Departments of any change in state law or regulation that could affect the waiver.<sup>11</sup> Additionally, if there is a change in state or federal law,<sup>12</sup> consistent with the federal regulations and the STCs,<sup>13</sup> the Departments may request additional information from the state as part of their responsibility to conduct oversight and monitoring to ensure that approved section 1332 waivers continue to meet the statutory guardrails.<sup>14</sup>

### **Consideration of Public Comments**

To increase transparency, section 1332(a)(4)(B) of the ACA requires the establishment of a process for public notice and comment on a state's section 1332 waiver application that is sufficient to ensure a meaningful level of public input. This includes a state-level public comment period (generally occurring prior to submission), as well as a federal public comment period after the state's application is received and deemed complete by the Secretaries.<sup>15</sup>

Prior to submitting its amendment application to the Departments on February 10, 2022, the Maine Bureau of Insurance (BOI) conducted a state public comment period on its proposed waiver amendment application, beginning March 12, 2021. During the comment period, the state decided to delay its proposed merger of the individual and small group markets and proposed extension of the MGARA to that pooled market until plan year 2023.<sup>16</sup> The comment

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<sup>9</sup> This value does not reflect premium reductions in the small group market, as PTC—which is reduced when individual market premiums are reduced—is allowed only for coverage in the individual market.

<sup>10</sup> For example, the Departments would consider changes in income and payroll taxes resulting from changes in tax exclusions for employer-sponsored insurance. To the extent that small group market premiums decrease, the percentage of total employee compensation receiving a tax exclusion for employer sponsored-coverage would decrease. This effect would be offset by any increase in small group market enrollment and the resulting increase in health benefits receiving the tax exclusion for employer-sponsored coverage, though these effects could still result in a decrease in the federal deficit on net. However, consistent with all section 1332 waivers the Departments will continue to assess these effects in connection with the annual determination of pass-through funding amounts.

<sup>11</sup> See STC 2 in the enclosed STCs.

<sup>12</sup> At the time of this approval, the Treasury Department has published a Notice of Proposed Rulemaking that would amend existing regulations regarding PTC eligibility for family members of employees offered health coverage through an employer. 87 Fed. Reg. 20354 (Apr. 7, 2022). This proposed change to federal regulations, if adopted, would likely decrease the number of uninsured individuals.

<sup>13</sup> In accordance with STCs 6, 13, 14, and 16 in the enclosed STCs, 31 C.F.R. § 33.120(a)(1) and (f), and 45 C.F.R. § 155.1320(a)(1) and (f).

<sup>14</sup> See section 1332(b)(1)(A)-(D) of the ACA.

<sup>15</sup> Requirements for the state comment period are codified at 31 C.F.R. § 33.112(a)(1) and 45 C.F.R. § 155.1312(a)(1), while federal public comment period requirements are codified at 31 C.F.R. § 33.116 and 45 C.F.R. § 155.1316.

<sup>16</sup> Maine also transitioned its existing reinsurance program to a retrospective, claims cost-based model beginning plan year 2022 as a technical change consistent with STC 2 under the July 2018 STCs governing its currently approved waiver.

period was slated to close on April 12, 2021, but the state extended the deadline to April 19, 2021, based on requests from the public.<sup>17</sup>

In addition to the section 1332 waiver state public comment period, the BOI hosted additional opportunities for public input, including a public hearing on October 12, 2021 on its then proposed regulation to establish procedures for implementation of the pooled market, which was subsequently finalized and adopted.<sup>18</sup> On January 28, 2022, the BOI also held a public forum to present the Actuarial and Economic Report for its waiver amendment application. Attendees were given the opportunity to submit written comments until February 4, 2022.<sup>19</sup> The state subsequently revised its section 1332 waiver amendment application, and then submitted its final application to the Departments on February 10, 2022. The state subsequently submitted an addendum to its waiver amendment application on March 23, 2022.

The Departments conducted a 30-day federal comment period from March 28, 2022, through April 26, 2022. During this period, the Departments received a total of four comments all from organizations, of which one letter from multiple organizations was in support of the amendment to the state's waiver plan,<sup>20</sup> and three letters were opposed.<sup>21</sup> The Departments shared all comments received during the federal comment period with the state for their review and consideration, and also posted them on the CMS section 1332 waiver website.<sup>22</sup> The Departments also sent Maine a series of questions throughout the review period of the waiver amendment application. These questions and responses from Maine are also posted on the CMS section 1332 waiver website.<sup>23</sup> A summary of major themes raised in the public comments and the Departments' responses are provided in Appendix A.

### **Next Steps**

Please send your written acceptance and any communications and questions regarding program matters or official correspondence concerning the waiver to [lina.rashid@cms.hhs.gov](mailto:lina.rashid@cms.hhs.gov) or [stateinnovationwaivers@cms.hhs.gov](mailto:stateinnovationwaivers@cms.hhs.gov).

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<sup>17</sup> During this comment period, the state held two public hearings and engaged with its federally recognized tribes. Maine received a total of 5 written comments, of which 3 were in support of the proposed amendment and 2 were opposed; no comments were received from the tribes.

<sup>18</sup> See Maine Regulation Rule Chapter 856: Combination of the Individual and Small Business Health Insurance Risk Pools. Available at: <https://www.maine.gov/sos/cec/rules/02/031/031c856.docx>

<sup>19</sup> During this additional comment period, the state received 2 written comments, both of which expressed concerns with the proposed waiver amendment.

<sup>20</sup> American Cancer Society Cancer Action Network with 8 other disease advocacy partner organizations.

<sup>21</sup> AHIP, Anthem, and the Maine Association of Health Plans (MeAHP).

<sup>22</sup> [https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-)

<sup>23</sup> *Ibid.*

Congratulations. We look forward to working with you and your staff. Please do not hesitate to contact us if you have any questions.

Sincerely,



Chiquita Brooks-LaSure

Enclosures

cc: Lily Batchelder, Assistant Secretary for Tax Policy, U.S. Department of the Treasury  
The Honorable Janet Mills, Governor, State of Maine  
Jeanne Lambrew, Commissioner, Maine Department of Health and Human Services  
Marti Hooper, Life and Health Actuary, Maine Bureau of Insurance  
Benjamin Yardley, Senior Attorney, Maine Bureau of Insurance

Appendix A: Summary and Response to Major Themes  
Raised in Public Comments Submitted During the Federal Comment Period

Guardrails

*Public Comments:*

Commenters in support of the proposed amendment expressed that the Departments should approve the waiver amendment request as it complies with the affordability and comprehensiveness guardrails, and promotes health equity. Commenters noted that the proposed amendment will improve affordability by reducing premiums for individual and small group coverage when compared to the without-waiver baseline, and ensure patients have access to comprehensive coverage that includes necessary treatments and services. Commenters also asserted that the waiver amendment will promote health equity as patients with high-cost, serious, or pre-existing conditions would otherwise struggle to afford adequate coverage in the absence of this waiver amendment.

Commenters in opposition to the proposed amendment called for the Departments to deny the waiver amendment request, asserting that it fails to meet the affordability, coverage, and comprehensiveness guardrails. With regard to affordability, these commenters argued that premiums for individual health insurance coverage would increase under the proposed amendment when compared to a baseline that includes the state's existing individual market reinsurance waiver, with the greatest premium increases impacting consumers with no or low PTC, particularly if the American Rescue Plan Act of 2021 (ARP) subsidies expire at the end of 2022. These commenters also emphasized that what they perceive as a modest one-time premium reduction for small group coverage would not outweigh the perceived harms of premium increases for individual health insurance coverage under the proposed waiver amendment compared to the state's existing waiver. For example, one commenter pointed to the state's addendum to its waiver amendment application, which indicated a projected 9.7% average increase in individual market premiums compared to the state's existing waiver for plan year 2023.<sup>1</sup> In terms of affordability in the small group market, these commenters argued the proposed amendment would encourage adverse selection with small employers electing to self-fund their coverage, leading to further erosion of the small group risk pool and increased premiums for small group health insurance coverage.

Commenters in opposition to the proposed amendment also argued that the proposed amendment would violate the coverage guardrail because the projected increased premiums for individual health insurance coverage under the proposed amended waiver compared to a baseline that includes the state's existing waiver would lead to enrollment declines, particularly for unsubsidized enrollees.<sup>2</sup> One commenter expressed concern that while implementation of the merged market may slow the decline in small group membership, the proposed amended waiver would lead to enrollment declines in individual health insurance coverage compared to a baseline that includes the existing waiver, even though the overall size of the combined markets will remain similar, whether merged or separate. Meanwhile, one commenter posited that higher

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<sup>1</sup> See PDF pg. 18 and 20 of Appendix H: Actuarial and Economic Report.

<sup>2</sup> For example, one commenter noted that according to the state's application addendum, the state estimated nearly 1,800 fewer people would be enrolled in individual health insurance coverage compared to the existing waiver. *Ibid.*

premiums for small group coverage would lead small group consumers to migrate to self-funded options and thus reduce enrollment in small group health insurance coverage.

Finally, one commenter also contended that increased premiums for individual health insurance coverage could lead to plan switching, with enrollees opting for lower cost plans that offer less comprehensive coverage. As such, this commenter posited that the proposed amendment would violate the comprehensiveness guardrail.

*Departments' Response:*

The Departments appreciate commenters' support for the waiver amendment request and agree it will improve affordability for Maine residents. After review of the state's analysis and public comments, along with consideration of experience with existing section 1332 waivers, and reinsurance and other health programs, the Departments have determined that Maine's amended waiver plan satisfies the statutory guardrails set forth in section 1332(b)(1)(A)-(D) of the ACA. The Departments disagree with commenters contending that the proposed waiver amendment will not satisfy the statutory guardrails. In evaluating compliance of this waiver amendment with the statutory guardrails, the Departments considered the impact of the entire waiver on each guardrail compared to the without-waiver baseline. An explanation of the Departments' determination that the amended Maine waiver plan meets the statutory guardrails is included in the letter to the state.

The Departments also appreciate the comments regarding the amended waiver's potential impact on premiums for both individual and small group consumers, and the ability of the waiver amendment to satisfy the statutory guardrails. Section 1332(b)(1) of the ACA provides that the Secretaries may grant a waiver if the state's waiver plan—which in this case will consist of both the merged market and a reinsurance program for the new pooled market—meets the statutory guardrails. Specifically, recent notice and comment rulemaking explains that for purposes of analyzing a waiver amendment request, a state's approved section 1332 waiver plan and the proposed waiver amendment request will be analyzed together.<sup>3</sup> The rule further explains that if, for example, a state has an approved reinsurance program for plan years 2021 through 2025, and is seeking approval for a waiver amendment request to begin in 2023, the analysis in the waiver amendment request should demonstrate that the combination of the state's reinsurance program and any proposed amendments would meet the guardrails.<sup>4</sup> The rule also clarified more generally that the without-waiver baseline scenario the Departments would use when analyzing a state's waiver amendment request would include neither the state's existing waiver nor the waiver amendment request.<sup>5</sup> As demonstrated in Maine's waiver amendment application, in all years of the amended waiver period, average premium rates for both individual and small group health insurance coverage are projected to be the same or lower than they would have been absent the waiver, and the Departments agree with this assessment. As noted in the Departments' letter, under the amended waiver in 2023, the state projects that premiums for

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<sup>3</sup> See 86 FR at 53484. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf> Also see 86 FR at 35199. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-07-01/pdf/2021-13993.pdf>

<sup>4</sup> *Ibid.*

<sup>5</sup> See 86 FR at 53484 - 53485. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>. Also see 86 FR at 35198 – 35200. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-07-01/pdf/2021-13993.pdf>

individual health insurance coverage are projected to decline by 8.0% and by 6.0% for small group coverage, compared to the without-waiver baseline scenario. Since the state’s amended waiver is projected to provide coverage and cost-sharing protections against excessive out-of-pocket spending that are at least as affordable as would be provided without the waiver, the Departments have determined that Maine’s amended waiver meets the affordability guardrail.

Further, to facilitate the Departments’ analysis of the state’s waiver amendment request, the Departments’ response to Maine’s Letter of Intent (LOI)<sup>6</sup> included directions to the state to submit an updated actuarial and/or economic analysis using a baseline in which there is no state waiver plan in effect, and comparing premiums, comprehensiveness, and coverage under the baseline for each year to those projected under both the existing individual market reinsurance waiver and the proposed amended waiver plan. The state submitted the requested analysis<sup>7</sup>, which allowed the Departments to also separately evaluate the impact of the amendment on the existing “with-waiver” scenario that includes the current individual market reinsurance program. This additional level of detail assisted the Departments with their analysis of Maine’s waiver amendment request and assessment of the state’s projections regarding the impact of the merged market and new pooled market reinsurance program. The Departments considered the impact of the amendment on the existing with-waiver scenario, as well as the impact of the waiver amendment compared to the without-waiver scenario in making the determination to approve the amended waiver.

With regard to commenters’ concerns that under the amended waiver small group members could migrate to self-funded coverage options, the Departments sought more information from the state on this matter. As explained by the state in its response,<sup>8</sup> the state analysis assumed that small group membership is expected to continue declining in the baseline, some of which may be due to migration from fully-insured coverage to self-funded options, which could also worsen small group market morbidity. However, the Departments remind commenters that the flexibility to pursue self-funded coverage options exists outside of the waiver in all states and the District of the Columbia; therefore, this phenomenon could occur today in the baseline and is not limited to states with section 1332 waivers. Additionally, with the establishment of a merged market and a new reinsurance program for the pooled market under the amended waiver, small group members would benefit from reinsurance for the first time, which may serve as an incentive to retain or newly purchase small group health insurance coverage. The projected lower premiums for small group health insurance coverage should also serve to attract new small employers and retain existing ones in the risk pool. Separately, the state also currently reviews

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<sup>6</sup> <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-ME-LOI-Amendment-Response-Letter.pdf>

<sup>7</sup> For example, see PDF pg. 4-7 and pg. 18–20 of the addendum to Maine’s waiver amendment application, Appendix H: Actuarial and Economic Report. Available at: <https://www.maine.gov/pfr/insurance/sites/maine.gov.pfr.insurance/files/inline-files/appendix-h-actuarial-and-economic.pdf>

<sup>8</sup> The state took regulatory action in 2019 to increase the specific attachment point for stop loss coverage from \$20,000 to \$28,700, and prohibit the issuance of stop loss coverage to groups with 10 or fewer enrolled employees. The state’s responses to the Departments’ questions are posted on the CMS section 1332 waiver website under the Maine heading: [https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-)

and approves stop loss insurance products, and provided data that stop loss coverage has been steady between 2019 and 2021, contrary to commenters' claims. The state has also taken regulatory action that will further decrease stop-loss coverage.<sup>9</sup>

Some commenters raised concerns that individual market consumers with no or low PTC may exit the market and lose coverage due to increased premiums under the amended waiver or may be inclined to switch to lower cost plans. The Departments neither found sufficient evidence to support commenters' claims of projected increases in premiums for individual health insurance coverage, nor to project losses in coverage compared to the without-waiver baseline. In all years of the amended waiver, and as detailed above, the state projects enrollment will be higher and premiums will be lower when compared to the baseline without-waiver scenario. The Departments also project the amended waiver will not have an adverse impact on the number of individuals or small group members with minimum essential coverage (MEC). The amended waiver plan therefore satisfies the coverage guardrail.<sup>10</sup> Further, as part of the Departments' monitoring efforts, the state is required to report on key metrics on a quarterly and annual basis to ensure compliance with the statutory guardrails, as outlined in the enclosed STCs.

In addition, under state law, any issuer offering any merged market health plan must offer the same plan to all individuals and small employers within any service area where the issuer has made the plan available,<sup>11</sup> subject to certain network capacity limitations.<sup>12</sup> As such, under the amended waiver, consumers are projected to have comprehensive plan options to purchase in the pooled market, and there will be no changes to the Essential Health Benefits (EHB), actuarial value, or other cost-sharing requirements under applicable federal law. The amended waiver plan therefore satisfies the comprehensiveness guardrail.

### Actuarial Analysis

#### *Public Comments:*

Commenters in opposition to the proposed amendment cited several concerns with the state's actuarial analysis. First, commenters asserted the state's use of a no-waiver baseline (i.e., without reinsurance and without the pooled market) was inappropriate, inflates the positive impact of a merged market, and masks the decrease in affordability in the individual market, particularly for unsubsidized enrollees. These commenters asserted the actuarial analysis baseline should instead reflect the state's existing experience, which in this case, would be the

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<sup>9</sup> *Ibid.* The state also started collecting enrollment counts specifically for small group health insurance coverage in 2019 given concerns that healthier groups were leaving the small group market and moving to self-funded coverage options that relied on stop loss coverage. See

[https://www.maine.gov/pfr/insurance/sites/maine.gov/pfr/insurance/files/inline-files/employee\\_benefit\\_excess\\_insurance\\_report.pdf](https://www.maine.gov/pfr/insurance/sites/maine.gov/pfr/insurance/files/inline-files/employee_benefit_excess_insurance_report.pdf).

<sup>10</sup> As explained in rulemaking, for the coverage guardrail to be met the Departments must determine the waiver would provide MEC to a comparable number of state residents under the waiver as would have coverage absent the waiver. See 86 FR 53412 at 53469 – 54370, available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf> This guardrail analysis does not consider and is not impacted by consumers electing lower cost MEC options, as suggested by some commenters.

<sup>11</sup> See Maine Regulation Rule Chapter 856: Combination of the Individual and Small Business Health Insurance Risk Pools, Section 5 (1)(A). Available at: <https://www.maine.gov/sos/cec/rules/02/031/031c856.docx>

<sup>12</sup> See Maine Revised Statutes Title 24-A §§ 2736-C(3)(A)(2) and 2808-B(4)(A)(2). Available at: <http://www.mainelegislature.org/legis/statutes/24-A/title24-Asec2736-c.html> and <http://www.mainelegislature.org/legis/statutes/24-A/title24-Asec2808-b.html>

individual market reinsurance waiver projected to 2023. In support of the suggested alternative baseline, these commenters contended that if the proposed amendment were not approved, the state would not revert to the without-waiver baseline (i.e., no reinsurance program and no merged market), as the existing reinsurance program would remain in the individual market.

One commenter asserted that Maine overstated the recent contraction of its small group market. This commenter argued that small group enrollment declines and premium increases in recent years have actually been quite modest and do not support the state's claim that a merged market is necessary to stabilize the small group market. The commenter asserted that average 2022 rate increase across all small group issuers was only 3.4%, which does not indicate a deteriorating market and compares favorably with the expected premium increases in the individual market under the waiver amendment.

Finally, one commenter commissioned a report by BerryDunn, which included a literature review of existing research on merged markets and an overview of the actuarial studies prepared for the state concerning its merged market proposal.<sup>13</sup> Specifically, the report compared studies conducted by Gorman Actuarial,<sup>14</sup> Milliman,<sup>15</sup> and Wakely,<sup>16</sup> and notes that Gorman and Milliman differed substantially in estimating PTC savings and the effect of reinsurance on premiums. The BerryDunn report also noted that these firms used a without-waiver scenario for the baseline.

#### *Departments' Response:*

The Departments appreciate commenters examining and providing feedback on the state's actuarial analysis. In response to comments regarding the state's actuarial analysis' use of a baseline without the state's existing reinsurance waiver, the Departments disagree that this was inappropriate. As explained above, consistent with policies established through recent notice with comment rulemaking and instructions in the Maine LOI, the state submitted a without-waiver baseline analysis that did not include the existing individual market reinsurance waiver, while also including data and analysis in the amendment waiver request regarding the existing

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<sup>13</sup> BerryDunn report, on behalf of Maine Association of Health Plans. See <https://www.cms.gov/files/document/1332-ME-Amendment-Federal-Public-Comments.pdf>

<sup>14</sup> On behalf of the BOI, Gorman Actuarial completed a study in August 2020 to explore the potential for a merged market in Maine. See [https://www.maine.gov/pfr/insurance/legal/notices/pdf/ga\\_indiv\\_and\\_sm\\_grp\\_policy\\_option\\_report.pdf](https://www.maine.gov/pfr/insurance/legal/notices/pdf/ga_indiv_and_sm_grp_policy_option_report.pdf). Gorman also completed a study in December 2021 which was later updated in February 2022. See [https://www.maine.gov/pfr/insurance/sites/maine.gov.pfr.insurance/files/inline-files/ga\\_maine\\_modeling\\_ld-2007\\_feb\\_26\\_2020.pdf](https://www.maine.gov/pfr/insurance/sites/maine.gov.pfr.insurance/files/inline-files/ga_maine_modeling_ld-2007_feb_26_2020.pdf). Note these are distinct from and precede the analyses that Gorman later prepared in 2022 for Maine's final waiver amendment application (March and April 2022).

<sup>15</sup> On behalf of MGARA, Milliman completed a study in 2020 similarly exploring the potential for a merged market in Maine. See [https://www.maine.gov/pfr/insurance/sites/maine.gov.pfr.insurance/files/inline-files/milliman\\_individual-smallgrp\\_merge\\_analysis.pdf](https://www.maine.gov/pfr/insurance/sites/maine.gov.pfr.insurance/files/inline-files/milliman_individual-smallgrp_merge_analysis.pdf).

<sup>16</sup> Wakely completed a study in December 2020 comparing the Gorman Actuarial and Milliman studies. See [https://www.maine.gov/pfr/insurance/legal/notices/pdf/pooled\\_market\\_option\\_maine-wakely\\_review\\_actuarial\\_pass%20through\\_estimates.pdf](https://www.maine.gov/pfr/insurance/legal/notices/pdf/pooled_market_option_maine-wakely_review_actuarial_pass%20through_estimates.pdf)

waiver.<sup>17,18</sup> Additionally, the Departments determined that the waiver amendment application's actuarial analysis specifies the data and assumptions used, includes information consistent with 31 C.F.R. § 33.108(f)(4)(i)-(iii) and 45 C.F.R. § 155.1308(f)(4)(i)-(iii), and is actuarially certified. The submission of this information assisted with the Departments' evaluation of the amendment waiver request and the assessment of the amended waiver plan's compliance with the statutory guardrails.

Additionally, as part of the review of the waiver amendment request, the Departments also engaged with the state to seek additional information regarding premium trends in the individual and small group markets. In response to the Departments' request, the state provided premium trends from 2018 to 2022 in the individual and small group markets.<sup>19</sup> In contrast to the one commenter's assertion that recent premium rate increases in the small group market have been quite modest and are comparable to the premium increases in the individual market, the premium trend information provided by the state demonstrated that average small group market rates from 2018 to 2022 continued to rise each year, meaning small group members have continued to face higher costs for coverage each year. Meanwhile, average individual market rates continue to decline from year to year, reflecting in part the impact of the state's reinsurance program.

In response to the comment about the different estimates of PTC savings from the waiver amendment, even if premiums are less than the state has estimated but lower than the premiums would be without the waiver in place, the affordability guardrail would still be met. In these scenarios it is likely that the pass-through funding would be less than Maine anticipated because, if premium decreases are lower than expected, the PTC savings would be smaller as well. However, this would not be a violation of the deficit neutrality guardrail, as the state's amended waiver plan is still achieving savings for the federal government.

### Market Participation and Competition Considerations

#### *Public Comments:*

Commenters opposed to the proposed amended waiver expressed concerns that the merged market would result in decreases in issuer participation and reduced competition in the small group market. These commenters disagreed with the state's position that because there are existing issuers in the small group market that do not currently offer coverage in the individual market, a merged market may then increase the number of participating issuers. Instead, these commenters asserted that merging the markets would require issuers to participate in both markets or withdraw. According to these commenters, small group issuers—especially those with lower membership in Maine—may choose not to actively market plans to individuals and as such limit themselves to the small group market, or they may choose to exit the small group market entirely.

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<sup>17</sup> See notes 13, 14, 15 and 16 in the approval letter.

<sup>18</sup> It was therefore also appropriate for other entities, such as Gorman Actuarial and Milliman, to use a similar without-waiver baseline for their respective analysis.

<sup>19</sup> This supplemental information on premium trends is included as part of the state's responses to the Departments' questions that are posted on the CMS section 1332 waiver website under the Maine heading:

[https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-)

### *Departments' Response:*

The Departments appreciate the concerns regarding decreased issuer participation, reduced plan offerings, and reduced competition in the small group market, and followed up with the state to request more information on these topics and the potential impact of the amended waiver plan on the small group market. As noted in the state's response,<sup>20</sup> given Maine's experience with its issuers and state requirements for participation in the individual and small group markets, the state assumes in its waiver amendment application that issuer participation will be the same under the amended waiver plan as compared to the baseline. The state reports that all 6 issuers, including a new entrant, have participated actively in Maine's Clear Choice<sup>21</sup> stakeholder meetings to develop standardized plans and filed rates for small group and individual plans, which serves as an indication of participation in the pooled market for plan year 2023. In terms of requirements for participating issuers, state regulation requires every issuer offering any pooled market health plan to offer the same plan to all individuals and small employers within any service area where the issuer has made the plan available,<sup>22</sup> subject to certain network capacity limitations.<sup>23</sup> It is correct that the state's regulations permit issuers in the pooled market to use different marketing strategies for its individual and small group customers.<sup>24</sup> However, the state explained in its response to these comments that it expects all six issuers will offer and market pooled market health plans to both individuals and small groups in the newly merged market. Furthermore, the state explained that issuers in Maine will have an incentive to stay in the merged market given state statute which requires that if issuers cease to write new business in the individual or small group market, they are prohibited from writing new business in that market for a period of five years.<sup>25</sup> As such, Maine does not project that the transition to a pooled market will reduce the number of issuers participating in the state's health insurance market or the number of plans offered. The state's responses further add that even if the state's separate initiative requiring standardized plans to be offered to both individuals and small

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<sup>20</sup> The state's responses to the Departments' questions are posted on the CMS section 1332 waiver website under the Maine heading: [https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section\\_1332\\_State\\_Innovation\\_Waivers-](https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-)

<sup>21</sup> Maine's Clear Choice refers to health plans designed to reduce consumer confusion and provide meaningful choices for consumers by promoting a level playing field on which carriers compete on the basis of price and quality.

<sup>22</sup> See Maine Regulation Rule Chapter 856: Combination of the Individual and Small Business Health Insurance Risk Pools, Section 5 (1)(A). Available at: <https://www.maine.gov/sos/cec/rules/02/031/031c856.docx>

<sup>23</sup> See Maine Revised Statutes Title 24-A §§ 2736-C(3)(A)(2) and 2808-B(4)(A)(2). Available at: <http://www.mainelegislature.org/legis/statutes/24-A/title24-Asec2736-c.html> and <http://www.mainelegislature.org/legis/statutes/24-A/title24-Asec2808-b.html>

<sup>24</sup> This approach is also consistent with CMS' interpretation of the ACA's guaranteed availability requirement and guidance related to marketing of Qualified Health Plans (QHPs) outside Exchanges. See [https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq\\_on\\_qhps\\_and\\_guaranteed\\_availability\\_6314.pdf](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq_on_qhps_and_guaranteed_availability_6314.pdf). Consistent with that guidance, a pooled market issuer can actively market a plan offered in the pooled market only toward the small group market or only toward the individual market and still satisfy the guaranteed availability standard if it adopts a reasonable process to otherwise accept applications and enroll all eligible individuals and small employers who wish to enroll in the pooled market plan and complies with other applicable requirements. See, e.g., 45 C.F.R. § 147.104(e) and <https://www.cms.gov/files/document/agent-broker-compensation-and-guaranteed-availability-coverage.pdf>.

<sup>25</sup> See Maine Revised Statutes Title 24-A § 2736-C(4)(C). Available at: <http://www.mainelegislature.org/legis/statutes/24-A/title24-Asec2736-c.html>

employers could reduce the overall number of plans offered in 2023, there would still be meaningful plan choice after implementation of standardized plans.

Lastly, as part of the Departments' monitoring efforts, the state is required to report on key metrics on a quarterly and annual basis to ensure compliance with the statutory guardrails, as outlined in the enclosed STCs. For example, STC 11 provides that the state must report on operational challenges in quarterly or other reports that the Departments will consider as part of their monitoring and oversight activities.<sup>26</sup> To the extent operational challenges such as market participation and plan offerings arise during implementation of the amended waiver plan, we encourage stakeholders to share those concerns with the state and for the state to report on those issues to the Departments.

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<sup>26</sup> Under 31 C.F.R. § 33.120(b), 31 C.F.R. § 33.124(a), 45 C.F.R. § 155.1320(b), and 45 C.F.R. § 155.1324(a), the state must conduct periodic reviews related to the implementation of the waiver.



STATE OF MAINE  
DEPARTMENT OF PROFESSIONAL & FINANCIAL REGULATION  
BUREAU OF INSURANCE



Janet T. Mills  
Governor

Anne L. Head  
DPFR Commissioner

Timothy N. Schott  
Acting Superintendent

July 27, 2022

Chiquita Brooks-LaSure  
Administrator  
Center for Medicare & Medicaid Services  
200 Independence Avenue SW  
Washington, DC 20201

Dear Administrator Brooks-LaSure:

Thank you for your July 15, 2022 letter on behalf of the Department of Health and Human Services and the Department of the Treasury approving Maine's State Innovation Waiver amendment application. On behalf of the State of Maine, I accept the Specific Terms and Conditions of the waiver. I have enclosed a signed copy of the STCs.

We greatly appreciate the assistance your staff gave us throughout the application and look forward to working with the Departments as we implement the waiver.

Sincerely,

Timothy N. Schott  
Acting Superintendent  
Maine Bureau of Insurance

cc: Lina Rashid  
Sonya Zhu

Office Location: 76 Northern Avenue, Gardiner, Maine 04345  
Mailing Address: 34 State House Station, Augusta, Maine 04333  
[www.maine.gov/insurance](http://www.maine.gov/insurance)

Phone: (207) 624-8475

TTY: Please Call Maine Relay 711

Consumer Assistance: 1-800-300-5000

Fax: (207) 624-8599

DEPARTMENT OF HEALTH & HUMAN SERVICES (HHS)  
U.S. DEPARTMENT OF THE TREASURY  
PATIENT PROTECTION AND AFFORDABLE CARE ACT SECTION 1332 STATE  
INNOVATION WAIVER  
SPECIFIC TERMS AND CONDITIONS  
TITLE: State of Maine— Patient Protection and Affordable Care Act Section 1332 Waiver  
Approval  
AWARDEE: The State of Maine

I. PREFACE

The following are the specific terms and conditions (STCs) for the State of Maine Bureau of Insurance’s (hereafter referred to as “the state”) Patient Protection and Affordable Care Act (ACA)<sup>1</sup> section 1332 State Innovation Waiver to implement the Maine Guaranteed Access Reinsurance Association (MGARA) and pooled market (hereafter referred to as “the waiver” or “the waiver plan”), which has been approved by the U.S. Department of Health & Human Services (HHS) and the U.S. Department of the Treasury (collectively, the Departments). These STCs govern the operation of the waiver by the state. The STCs set forth, in detail, the state’s responsibilities to the Departments related to the waiver. These STCs are effective beginning January 1, 2023, through December 31, 2027, unless the waiver is extended, otherwise amended, suspended, or terminated by the parties in accordance with the applicable processes set forth in and provided by these STCs; however, the Departments reserve the right to amend these STCs when the Departments make the annual determination of the pass-through amount for plan years 2023 through 2027. The state’s waiver plan to waive certain provisions of the ACA, dated February 10, 2022, is specifically incorporated by reference into these STCs, except with regard to any proposal or text in the waiver plan that is inconsistent with the Departments’ approval of the waiver or these STCs. Further, these STCs supersede the STCs issued in the Departments’ July 30, 2018 approval of the state’s original waiver plan.

**1. ACA Provisions Waived under Section 1332 State Innovation Waiver (Section 1332 waiver).** Sections 1312(c)(1)-(3) of the ACA as implemented at 45 C.F.R. § 156.80, to the extent these provisions would otherwise require excluding expected state reinsurance payments through MGARA when establishing the market-wide index rate, as well as to the extent the provisions would otherwise prohibit quarterly rating adjustments for small group coverage not issued on a calendar year basis in a merged market.

**2. Changes in State Law and Technical Changes to the Waiver.** The state must inform the Departments of any change in Maine state law or regulations that could impact the waiver, including any changes to the requirements of the state waiver plan, or any technical changes to the MGARA, occurring after the date of this approval letter, within seven (7) days of any such

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<sup>1</sup> The Patient Protection and Affordable Care Act (Pub. L. 111-148) was enacted on March 23, 2010. The Healthcare and Education Reconciliation Act of 2010 (Pub. L. 111-152), which amended and revised several provisions of the Patient Protection and Affordable Care Act, was enacted on March 30, 2010. In these STCs, the two statutes are referred to collectively as the “Patient Protection and Affordable Care Act” or “ACA.”

changes. Technical changes are changes that do not impact the statutory guardrails (as set forth in section 1332(b)(1)(A)–(D) of the ACA) or any obligations of the state or the Departments. Examples of technical changes to the MGARA include changes to the state-approved program funding level or program parameters like altering the attachment point, cap, coinsurance rate, or eligible conditions. If the Departments determine that the change in state law or regulation or the change to the state waiver plan is not a technical change but instead would be an amendment, the state must immediately suspend implementation of the change and submit an amendment as set forth in STC 9.

Consistent with the state’s waiver, the state is responsible for any reconciliation of reinsurance payments that it wishes to make to account for any duplicative reimbursement through the state’s reinsurance program for the same high-cost claims reimbursed through the HHS-operated risk adjustment program. This is also considered a technical change to the state reinsurance program.

**3. Funds to Operate the Waiver.** The state waiver plan will be funded through a combination of federal pass-through funding and state funding from the per member per month assessment across the state’s fully-insured and self-funded commercial health insurance markets. The state must ensure sufficient funds are available on an annual basis for the waiver to operate as described in the state’s waiver.

**4. Compliance with Federal Non-Discrimination Statutes.** The state must comply with all applicable federal statutes relating to non-discrimination. These include, but are not limited to, the Americans with Disabilities Act of 1990, title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, title I and II of the Genetic Information Nondiscrimination Act of 2008 and section 1557 of the ACA.

**5. Compliance with Applicable Federal Laws.** Per 31 C.F.R. § 33.120(a) and 45 C.F.R. § 155.1320(a), the state must comply with all applicable federal laws and regulations, unless a law or regulation has been specifically waived. The Departments’ State Innovation Waiver authority is limited to requirements described in section 1332(a)(2) of the ACA. Further, section 1332(c) of the ACA states that while the Secretaries of the Departments have broad discretion to determine the scope of a waiver, no federal laws or requirements may be waived that are not within the Secretaries’ authority. *See* 77 Fed. Reg. 11700, 11711 (February 27, 2012). Therefore, for example, section 1332 of the ACA does not grant the Departments authority to waive any provision of the Employee Retirement Income Security Act of 1974. The state must also comply with requirements of the Cash Management Improvement Act (CMIA).

**6. Changes to Applicable Federal Laws.** The Departments reserve the right to amend, suspend, or terminate the waiver, these STCs, or the pass-through funding amount as needed to reflect changes to applicable federal laws or changes of an operational nature without requiring the state to submit a new waiver proposal. The Departments will notify the state at least 30 days in advance of the expected implementation date of the amended STCs, if applicable, to allow the state to discuss the changes necessary to ensure compliance with law, regulation, and policy, to allow the state adequate time to come into compliance with state and federal requirements

(including rate review and consumer noticing requirements), and to provide comment, if applicable. Changes will be considered in force upon the Departments' issuance of amended STCs. The state must accept the changes in writing within 30 days of the Departments' notification for the waiver to continue to be in effect. The state must, within the applicable timeframes, come into compliance with any changes in federal law or regulations affecting section 1332 waivers, unless the provision being changed has been expressly waived for the waiver period. If any of the waived provision(s) identified in STC 1 are eliminated under federal law, the Departments would re-evaluate the waiver to see if it still meets all of the section 1332 waiver requirements. If the Departments determine that the waiver needs to be suspended or terminated as a result of a change to federal law, the Departments will provide further guidance to the state as to that process.

**7. Finding of Non-Compliance.** The Departments will review and, when appropriate, investigate documented complaints that the state is failing to materially comply with requirements specified in the state's waiver and these STCs. In addition, the Departments will promptly share with the state any complaint that they may receive and will notify the state of any applicable monitoring and compliance issues.

**8. State Request for Suspension, Withdrawal, or Termination of a Waiver.** The state may only request to suspend, withdraw, or terminate all or portions of its waiver plan consistent with the following requirements:

- (a) Request for suspension, withdrawal, or termination: If the state wishes to suspend, withdraw, or terminate all or any portion(s) of the waiver, the state must submit a request to the Departments in writing specifying: the reasons for the requested suspension, withdrawal, or termination; the effective date of the requested suspension, withdrawal or termination; and the proposed phase-out plan (with the summary of comments received, as described below). The state must submit its request and draft phase-out plan to the Departments no less than six (6) months before the proposed effective date of the waiver's suspension, withdrawal, or termination. Prior to submitting the request and draft phase-out plan to the Departments, the state must publish on its website the draft phase-out plan for a 30-day public comment period and conduct Federal tribal consultation as applicable. The state must include with its request and proposed phase-out plan a summary of each public comment received, the state's response to the comment and whether or how the state incorporated measures into a revised phase-out plan to address the comment.
- (b) Departments' approval: The state must obtain the Departments' approval of the phase-out plan prior to the implementation of the phase-out activities. Implementation of phase-out activities must begin no sooner than 14 calendar days after the Departments' approval of the phase-out plan, unless otherwise directed by the Departments.

- (c) Recovery of unused funding: Any unused pass-through funding will be recovered. The state will comply with all necessary steps to facilitate the recovery within a prompt timeframe.

#### **9. State Request for Amendment.**

- (a) Definition: For purposes of these STCs and per 31 C.F.R. § 33.130(a) and 45 C.F.R. § 155.1330(a), an amendment is a change to a waiver plan that is not otherwise allowable under these STCs, a change that could impact any of the statutory guardrails, or a change to the program design for an approved waiver. Such potential changes include, but are not limited to, changes to eligibility, coverage, benefits, premiums, out-of-pocket spending, and cost sharing.
- (b) Amendment Request Submission Process: Consistent with 31 C.F.R. § 33.130 and 45 C.F.R. § 155.1330, to amend a waiver the state must comply with the following requirements:
- (1) The state must submit a letter to the Departments notifying them in writing of its intent to request an amendment to its waiver plan(s). The state must include a detailed description of all of the intended change(s), including the proposed implementation date(s), in its letter of intent. The Departments encourage the state to submit its letter of intent at least 15 months prior to the waiver amendment's proposed implementation date and to engage with the Departments early in its development of a potential waiver amendment. The state may wish to submit this letter of intent more than 15 months prior to the waiver amendment's proposed implementation date, depending on the complexity of the amendment request and the timeline for implementation, among other factors.
  - (2) The Departments will review the state's letter of intent requesting changes to its waiver plan. Within approximately 30 days of the Departments' receipt of the state's letter of intent, the Departments will respond to the state and confirm whether the change requested is a waiver amendment, as well as identify the information the state needs to submit in its waiver amendment request. This written response will also include whether the proposed waiver amendment(s) would be subject to any additional or different requirements consistent with STC 9(c)(7).
    - a. For example, depending on the complexity of the amendment request, scope of changes from the waiver plan, operational/technical changes, or implementation considerations, the Departments may impose requirements similar to those specified in 31 C.F.R. § 33.108(f) and 45 C.F.R. § 155.1308(f) for new section 1332 waiver applications.
  - (3) The state should generally plan to submit its waiver amendment request in writing in electronic format, as outlined in STC 9(c), no later than 9 months prior to the waiver amendment's proposed implementation date in order to allow for sufficient time for review of the waiver amendment request. Similar to the regulations at 31 C.F.R. § 33.108(b) and 45 C.F.R. § 155.1308(b) for new waiver

applications, the state must submit the waiver amendment request sufficiently in advance of the requested waiver amendment implementation date, particularly when the waiver plan or requested amendment could impact premium rates, to allow for an appropriate review and implementation timeframe. Depending on the complexity of the amendment request, the state may want to submit the amendment request earlier than 9 months prior to implementation. In developing the implementation timeframe for its waiver amendment request, the state must maintain uninterrupted operations of the Exchange in the state and provide adequate notice to affected stakeholders and issuers of health insurance plans that would be (or may be) affected by the amendment to take necessary action based on approval of the waiver amendment request.

- (4) The Departments reserve the right to deny or withhold approval of a state waiver amendment request based on non-compliance with these STCs or any additional direction and information requests from the Departments, including a failure by the state to submit required reports and other deliverables in a timely fashion.
- (5) The state is not authorized to implement any aspect of the proposed amendment without prior approval from the Secretaries.

**(c) Content of Amendment Application:** All amendment applications are subject to approval at the discretion of the Secretaries in accordance with section 1332 of the ACA. The state must furnish such information and analysis regarding the proposed waiver amendment that is necessary to permit the Departments to evaluate the request. A waiver amendment request must include the following:

- (1) A detailed description of the requested amendment, including the time period for the proposed amended waiver, impact on the guardrails set forth in the statutory guardrails, the scope of the proposed amendment to the waiver plan—including whether the state seeks to waive any new provisions and the rationale for the waiver—and related changes to the waiver plan elements as applicable, including sufficient supporting documentation;
- (2) An explanation and evidence of the process used by the state to ensure meaningful public input on the proposed waiver amendment request. The state must conduct the state public notice process that is specified for new applications at 31 C.F.R. § 33.112 and 45 C.F.R. § 155.1312. It may be permissible for a state to use its annual public forum required under 31 C.F.R. § 33.120(c) and 45 C.F.R. § 155.1320(c) for the dual purpose of soliciting public input on a proposed waiver amendment request and on the progress of its waiver plan;<sup>2</sup>
- (3) Evidence of sufficient authority under state law(s) in order to meet the requirement in section 1332(b)(2)(A) of the ACA for purposes of pursuing the waiver amendment request;

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<sup>2</sup> In the event of an emergent situation, the state may seek to use the flexibilities provided at 31 C.F.R. § 33.118(a) and 45 C.F.R. § 155.1318(a), in part, to modify the public participation requirements. For example, in an emergent situation that impacts or otherwise limits in-person gatherings, a state could request to host its annual public forum or other events intended to solicit public feedback virtually while meeting the other applicable requirements.

- (4) An implementation plan with operational details (if appropriate) to demonstrate that the waiver would maintain uninterrupted operations of the Exchange in the state, and provision of adequate notice for stakeholders and issuers of health insurance plans that would be (or may be) affected by the proposed amendment to take necessary action based on approval of the waiver amendment request;
- (5) An updated actuarial and/or economic analysis demonstrating how the waiver, as amended, will meet the statutory guardrails. Such analysis must identify the “with waiver” impact of the requested amendment on the statutory guardrails. Such analysis must include a “with waiver” and “without waiver” status on both a summary and detailed level through the current approval period using data from recent experience, as well as a summary of and detailed projections of the change in the “with waiver” scenario;
- (6) An explanation of the estimated impact, if any, of the waiver amendment on pass-through funding, as well as any new proposed uses for pass-through funding if applicable; and
- (7) Any further requested information and/or analysis that is determined necessary by the Departments to evaluate the waiver amendment request.

#### **10. State Request for Waiver Extension.**

- (a) **Definition:** For purposes of these STCs and per 31 C.F.R. § 33.132 and 45 C.F.R. § 155.1332, a waiver extension is an extension of an approved waiver under the existing waiver terms.

The waiver extension request and approval process is separate from the waiver amendment request and approval process described in STC 9, with separate timelines and requirements. An extension request can only include an extension of the existing waiver terms, not other changes to the existing waiver plan. If a state also seeks to make substantive changes to its waiver plan along with seeking an extension, the Departments will treat those changes as amendments and the requirements of STC 9 will also apply.

- (b) **Extension Request Submission Process:** Consistent with 31 C.F.R. § 33.132 and 45 C.F.R. § 155.1332, to extend the waiver the state must comply with the following requirements:
  - a. The state must inform the Departments if the state will apply for an extension of its waiver at least one year (1) prior to the waiver’s end date. The state must submit a letter of intent in electronic format to the Departments to notify them in writing of its intent to request an extension of its waiver plan. The state must include a detailed description of the requested extension period in the letter of intent. The Departments will then review the state’s letter of intent request. Within approximately 30 days of the Departments’ receipt of the letter of intent, the Departments will respond to the state and confirm whether the extension request will be considered an extension request and, if applicable, whether the request includes changes that would be considered an amendment request subject

to the separate process and requirements set forth in STC 9. The Departments' response will also identify the information the state needs to submit in its waiver extension request.

- b. The state must submit its waiver extension request in writing in electronic format, consistent with the format and manner requirements applicable to initial waiver applications under 31 C.F.R. § 33.108(a) and 45 C.F.R. § 155.1308(a).
- c. An extension request shall be deemed granted unless the Secretaries, within 90 days after the date of the state's submission of a complete waiver extension request, either deny such request in writing or inform the state in writing with respect to any additional information needed to make a final determination with respect to the request.
- d. The Departments reserve the right to deny a state's waiver extension request based on non-compliance with these STCs or any additional direction and information requests from the Departments, including a failure by the state to submit required reports and other deliverables in a timely fashion.

(c) Content of Extension Application: All extension applications are subject to approval at the discretion of the Secretaries in accordance with section 1332 of the ACA. The state must furnish information and analysis regarding the proposed waiver extension that is necessary to permit the Departments to evaluate the request. In addition to the periodic reports required by 31 C.F.R. § 33.124 and 45 C.F.R. § 155.1324, the Departments may require additional data and information to be submitted to review the extension request in accordance with 31 C.F.R. § 33.120(f)(2) and 45 C.F.R. § 155.1320(f)(2). A waiver extension request may be required to include the following information:

- (1) Updated economic or actuarial analyses for the requested extension period in a format and manner specified by the Departments;
- (2) Preliminary evaluation data and analysis from the existing waiver;
- (3) Evidence of sufficient authority under state law(s) to meet the requirement in section 1332(b)(2)(A) of the ACA for purposes of pursuing the waiver extension request;
- (4) An explanation of the process followed by the state to ensure meaningful public input on the proposed waiver extension request at the state level. It may be permissible for the state to use its annual public forum under 31 C.F.R. § 33.120(c) and 45 C.F.R. § 155.1320(c) for the dual purpose of soliciting public input on a proposed waiver extension request and on the progress of its waiver plan;<sup>3</sup> and
- (5) Other information as requested by the Departments that is necessary to reach a decision on the waiver extension request.

The Departments will identify the information the state needs to submit as part of its waiver extension request in its response to the state's letter of intent.

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<sup>3</sup> *Ibid.*

- (d) Temporary Extension of Waivers: The Departments may extend an existing waiver program on a temporary basis for an additional year while a waiver extension request is under review, without regard to the date when the extension application was submitted.
- (e) End of Waiver Period: If the state does not submit an extension request before the end of the waiver period consistent with STC 10(b)(1), the Departments will provide guidance on wind-down of the state's waiver.

**11. Reporting.** The state must submit quarterly and annual reports as specified in 31 C.F.R. § 33.124 and 45 C.F.R. § 155.1324.

*Annual Reports:* The state must submit a draft annual report to the Departments within ninety (90) days after the end of the first waiver year and each subsequent year that the waiver is in effect. The state will publish the draft annual report on the state's public website within thirty (30) days of submission to the Departments. Within sixty (60) days of receipt of comments from the Departments on the report, the state must submit to the Departments the final annual report for the waiver year, summary of the comments, and all public comments received as part of the post-award forum process. The state must publish the final annual report on the state's public website within thirty (30) days of approval by the Departments.

*Report Contents:* Each such annual report must include:

- (a) The progress of the waiver;
- (b) Data and metrics sufficient to show compliance and assist evaluation of the waiver's compliance with section 1332(b)(1)(A) through (D) of the ACA:
  - (1) Projected and actual individual market enrollment in the state, both through the Marketplace and off-Marketplace.
  - (2) Projected and actual small group enrollment in the state.
  - (3) Projected and actual average individual market premium rate (i.e., total individual market premiums divided by total member months of all enrollees).
  - (4) Projected and actual small group premium rate.
  - (5) The actual Second Lowest Cost Silver Plan (SLCSP) premium under the waiver and an estimate of the SLCSP premium as it would have been without the waiver, for a representative consumer (e.g., a 21-year old non-smoker) in each rating area.
  - (6) Large group market premiums or premium changes over prior years.
- (c) A summary of the annual post-award public forum, held in accordance with 31 C.F.R. § 33.120(c) and 45 C.F.R. § 155.1320(c), including all public comments received at such forum regarding the progress of the waiver and action taken in response to such concerns or comments;

- (d) Technical changes to the state's waiver plan, including the funding level the program will be operating at for the next plan year, or other waiver plan changes as specified in STC 2;
- (e) Notification of changes to state law or regulations that may impact the waiver as specified in STC 2;
- (f) Reporting of:
  - (1) Federal pass-through funding spent on reinsurance claim payments to issuers from the MGARA and/or operation of the reinsurance program;
  - (2) The unspent balance of federal pass-through funding for the reporting year, if applicable;
- (g) The amount of state funding from the per member per month assessment across the state's fully-insured and self-funded commercial health insurance markets, or other funding to support the waiver, specifically: any funds designated by the state to provide reinsurance to issuers that offer individual health benefit plans in the state or any other money from any other source accepted for the benefit of the fund to fully fund the state's reinsurance program for the reporting year;
- (h) A description of any incentives for providers, enrollees, and issuers to continue managing health care cost and claims for individuals eligible for reinsurance;
- (i) *If applicable*: A report on the reconciliation (if any) of reinsurance payments that are duplicative of reimbursement through the HHS-operated risk adjustment program high-cost risk pooling mechanism. The report should include the state's reinsurance program reinsurance payment (before reconciliation) for high-cost claims to issuers who also receive payment through the HHS-operated risk adjustment program under the high-cost risk pooling mechanism, the high-cost risk pool payment amount made by HHS for those claims, and the reinsurance true-up amount applied; and
- (j) Other information the Departments determine is necessary to calculate pass-through amounts or to evaluate the waiver.

*Quarterly and Other Reports:* Under 31 C.F.R. § 33.120(b), 31 C.F.R. § 33.124(a), 45 C.F.R. § 155.1320(b), and 45 C.F.R. § 155.1324(a), the state must conduct periodic reviews related to the implementation of the waiver. The state must report on the operation of the waiver quarterly, including, but not limited to reports of any ongoing operational challenges and plans for and results of associated corrective actions, no later than 60 days following the end of each calendar quarter. The state can submit its annual report in lieu of their fourth quarter report.

*Rate Filing Schedule:* The state will inform the Departments of the number and names of issuers participating in each rating area for the upcoming plan year at initial and final rate filings within 7 days of posting the initial and final rate filings, and in the first year of the waiver the number of

issuers participating in each rating area in the previous plan year, to allow the Departments to monitor market stability, issuer participation, and the breadth of plan offerings.

**12. Post Award Forum.** Per 31 C.F.R. § 33.120(c) and 45 C.F.R. § 155.1320(c), within six months of the waiver's effective date and annually thereafter, the state will afford the public an opportunity to provide meaningful comment on the progress of the waiver.<sup>4</sup> The state is required to publish the date, time, and location of the public forum in a prominent location on the state's public web site at least 30 days prior to the date of the planned public forum. Per 31 C.F.R. § 33.120(c) and 45 C.F.R. § 155.1320(c), the state must also include a summary of this forum as part of the quarterly report for the quarter in which the forum was held and the annual report as required under 31 C.F.R. § 33.124 and 45 C.F.R. § 155.1324 and specified in STC 11.

**13. Monitoring Calls.** The state must participate in monitoring calls with the Departments that are deemed necessary by the Departments. The purpose of these monitoring calls is to discuss any significant actual or anticipated developments affecting the waiver. Areas to be addressed include the impact on the statutory guardrails set forth in section 1332(b)(1)(A)–(D) of the ACA and state legislative or policy changes. The Departments will update the state on any federal policies and issues that may affect any aspect of the waiver. The state and the Departments will jointly develop the agenda for the calls. It is anticipated that these calls will occur at least semi-annually.

**14. Federal Evaluation.** The Departments will evaluate the waiver using federal data, state reporting, and the application itself to ensure that the Secretaries can exercise appropriate oversight of the approved waiver. Per 31 C.F.R. § 33.120(f) and 45 C.F.R. § 155.1320(f), if requested by the Departments, the state must fully cooperate with the Departments or an independent evaluator selected by the Departments to undertake an independent evaluation of any component of the waiver. As part of this required cooperation, the state must submit all requested data and information to the Departments or the independent evaluator. The Departments may charge the state for evaluation costs to the federal government.

**15. Pass-through Funding.** Under section 1332(a)(3) of the ACA, pass-through funding is based on the amount of premium tax credits (PTC) that would have been provided to individuals under section 36B of the Internal Revenue Code in the state absent the waiver, but that will not be provided under the state's waiver, reduced, if necessary, to ensure deficit neutrality as required by section 1332(b)(1)(D) of the ACA. The state will receive pass-through funding for the purpose of implementing the waiver, including administration of the waiver, when the requirements described below are met.

Starting with the 2023 plan year and for each plan year thereafter, by September 15 of the preceding year or once a state has finalized rates for the applicable plan year, whichever is later, the state will provide the following information to the Departments:

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<sup>4</sup> *Ibid.*

- (a) The final SLCSP rates and plan IDs for individual health insurance coverage for a representative individual (e.g., a 21-year-old non-smoker) in each rating area or service area (if premiums vary by geographies smaller than rating areas) for the applicable plan year, that are actuarially certified. Also include the actuarial memorandums;
- (b) Estimates of what the final SLCSP rates and plan IDs for individual health insurance coverage for a representative individual in each rating area or service area (if premiums vary by geographies smaller than rating areas) would have been absent approval of this waiver for the applicable plan year, that are actuarially certified. The state must include with this information the detailed methods and assumptions the state used to estimate the final SLCSP rates and state's estimate of what the final SLCSP rates would have been absent approval of the waiver for each rating area or service area absent approval of this waiver. The state's methods and assumptions should specify, in particular, any assumptions relating to issuer participation or plan offerings absent the waiver;
- (c) The total amount of all premiums expected to be paid for individual health insurance coverage for the applicable plan year;
- (d) What total premiums for individual health insurance coverage would have been for the applicable plan year without the waiver;
- (e) The amount of advance payments of the premium tax credit (APTC) paid by month and rating area for the current plan year to date;
- (f) The number of APTC recipients by month and rating area for the current plan year to date;
- (g) The state specific age curve premium variation for the current and upcoming plan year for the individual and small group markets;
- (h) Reports of the estimated total reinsurance reimbursements for the upcoming plan year;
- (i) Reports of the total enrollment estimates for individual health insurance coverage, both with and without the waiver for the upcoming plan year;
- (j) An explanation of why the experience for the upcoming plan year may vary from previous estimates and how assumptions used to estimate the impact have changed. This includes an explanation of changes in the estimated impact of the waiver on aggregate premiums, the estimated impact to the SLCSP rates, and the estimated impact on enrollment. The state should also explain changes to the estimated reinsurance estimates relative to prior estimates; and

- (k) Any other information or data requested by the Departments.

The estimated amount of pass-through funding for plan years 2023 through 2027 will be communicated to the state as soon as practicable, conditional on receipt of items (a) through (l) in the paragraph above by the date specified above, and reported to the state on the earliest date practicable. Pass-through amounts are subject to a final administrative determination by the Department of the Treasury prior to payment, and will be made available no later than April of the applicable calendar year. The pass-through amount for plan years 2023 through 2027 will be calculated by the Departments annually (per section 1332(a)(3) of the ACA) and reported to the state on the earliest date practicable, conditional on receipt of items (a) through (l) in the paragraph above by the applicable deadline.

The pass-through funds cannot be obligated prior to the effective date for the waiver. The state agrees to use the full amount of pass-through funding for purposes of implementing the state's waiver. Moreover, to the extent pass-through funding exceeds the amount necessary for the state to implement the waiver in a given plan year, the remaining funds must be carried forward and used for purposes of implementing the state's waiver in a subsequent year.

If the waiver is not extended, the Departments will promptly recover unused pass-through funds following the end of the waiver period, December 31, 2027. The state must comply with all necessary steps to facilitate the recovery of such amounts by the Departments within a prompt timeframe.

**16. The Departments' Right to Amend, Suspend, or Terminate.** Consistent with 31 C.F.R. § 33.120(d) and 45 C.F.R. § 155.1320(d), the Departments reserve the right to amend, suspend, or terminate the waiver (in whole or in part) at any time before the date of expiration if the Departments determine that the state has materially failed to comply with these STCs, or if the state fails to meet the statutory guardrails.

- (a) The Departments will promptly notify the state in writing of the determination and the reasons for the amendment, suspension, or termination, together with the effective date.
- (b) In the event that all of or a portion of the waiver is suspended or terminated by the Departments, federal funding available after the effective date of the suspension, or termination will be limited to normal closeout costs associated with an orderly suspension or termination including service costs during any approved transition period and administrative costs of transitioning participants, as described in 31 C.F.R. § 33.120(e) and 45 C.F.R. § 155.1320(e).

(c) The Departments will recover unused pass-through funding. The state must comply with all necessary steps to facilitate the recovery of such amounts by the Departments within a prompt timeframe.



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Timothy N. Schott  
Acting Superintendent of Insurance  
Maine Bureau of Insurance  
State of Maine

Date: 7/27/2022



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Chiquita Brooks-LaSure  
Administrator  
Center for Medicare & Medicaid Services

Date: 7/15/2022



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Lily Batchelder  
Assistant Secretary for Tax Policy  
U.S. Department of the Treasury

Date: 9/9/2022