



Administrator
Washington, DC 20201

June 23, 2022

Michael Conway
Commissioner of Insurance
Colorado Division of Insurance
1560 Broadway, Suite 850
Denver, CO 80202

Dear Commissioner Conway:

Thank you for your November 30, 2021, submission of Colorado'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 full implementation of the Colorado Option, which is an innovative model for health insurance that promotes competition and health equity by combining several key components: standardized benefit plans; required premium reduction targets; regulatory and programmatic mechanisms as a backstop to ensure providers, hospitals, and issuers meet those targets; and affordability improvements for eligible Exchange enrollees and those not currently eligible for federal subsidies under the ACA. As part of its amendment application, Colorado also seeks to extend its section 1332 individual market reinsurance waiver program through 2027, but is not otherwise seeking to make changes to its approved reinsurance program.¹ 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 Colorado's amendment application for its State Innovation Waiver under section 1332 of the ACA (also referred to as a section 1332 waiver). Described below are the specific terms and conditions (STCs) that are enclosed with this letter, which are conditioned upon the state's acceptance within 30 days of this letter, or by July 22, 2022.² This approval is effective for a waiver period of January 1, 2023, through December 31, 2027.

The Departments are granting Colorado's request to waive ACA sections 1312(c)(1) and 1312(c)(2) as implemented at 45 C.F.R. § 156.80 to the extent they would otherwise prohibit plan-level rating variation(s) for the Colorado Option in the individual and small group markets, as well as to continue waiving the single risk pool requirement in the individual market under ACA section 1312(c)(1) to the extent it would otherwise require excluding total expected state reinsurance payments when establishing the market-wide index rate for the purpose of operating the Colorado Reinsurance Program, as described in the state's waiver amendment application.

¹ Colorado's currently approved extension of its original section 1332 waiver waives the individual market single risk pool requirement to the extent it would otherwise require excluding total expected state reinsurance payments. See <https://www.cms.gov/files/document/1332-co-extension-approval-letter-stcs.pdf>

² Upon the state's acceptance, the enclosed STCs will supersede and replace the August 2021 STCs governing Colorado's approved extension of its original section 1332 waiver.

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, including the Colorado Option and the Colorado Reinsurance Program, satisfies the statutory guardrails (as set forth in section 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 Colorado 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.³ 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 Colorado are available on the Centers for Medicare & Medicaid Services (CMS) section 1332 waiver website.⁴

The enclosed STCs further define the state's responsibilities with respect to implementation of the 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 Colorado's Section 1332 Waiver.

Overview of the Section 1332 Waiver Program

Section 1332 of the ACA permits a state to apply for a State Innovation Waiver (also referred to as a section 1332 waiver) to pursue innovative strategies that expand coverage, lower costs, and ensure that health care coverage is available for their residents. These waivers provide states with the opportunity to develop strategies that best suit their individual needs. Through innovative thinking tailored to specific state circumstances, states can lower premiums for consumers, improve market stability, and increase consumer choice. The Departments are committed to working in partnership with states on policies that improve health care coverage in their states.

The Secretaries may exercise their discretion to approve a request for a section 1332 waiver only if the Secretaries determine that the proposal for the section 1332 waiver meets the following four requirements (referred to as the statutory guardrails): (1) the proposal will provide coverage that is at least as comprehensive as coverage defined in section 1302(b) of the ACA and offered through Exchanges established by title I of the ACA, as certified by the Office of the Actuary of CMS based on reviewing sufficient data from the state and from comparable states about their experience with programs created by the ACA and the provisions of the ACA that would be waived; (2) the proposal will provide coverage and cost-sharing protections against excessive

³ 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.

⁴ https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html.

out-of-pocket spending that are at least as affordable for the state's residents as would be provided under title I of the ACA; (3) the proposal will provide coverage to at least a comparable number of the state's residents as title I of ACA would provide; and (4) the proposal will not increase the federal deficit.

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 Colorado's amended waiver plan meets the statutory guardrail requirements outlined in section 1332(b)(1)(A)-(D) of the ACA.

First, the state's amended section 1332 waiver is projected to provide coverage that is at least as comprehensive as coverage provided without the waiver. More specifically, the Colorado Option and Colorado Reinsurance Program will not alter the essential health benefits (EHBs) provided in individual or small group health insurance coverage offered through the State's Exchange, Connect for Health Colorado. Furthermore, Colorado Option plans will cover the same EHBs as other non-grandfathered single risk pool coverage available in the individual and small group markets.

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 implementing state-based reinsurance programs.⁵ Moreover, the Colorado Reinsurance Program has, by itself, lowered annual premiums by an average of 20% statewide, and the state projects that it will continue to do so. With these premium reductions and those attributable to the Colorado Option, Colorado's amended waiver is projected to increase affordability as compared to the without-waiver baseline scenario. Compared to the baseline, the state projects that individual market premiums under its amended waiver, which includes both the Colorado Option and Colorado Reinsurance Program, will decrease by a statewide average of 22.3% in 2023. The Departments have reviewed the actuarial assumptions behind Colorado's estimated premium reduction and conducted internal analysis, and also find that premium reductions are possible. For example, 2018–2019 Medical Loss Ratio data suggests that there is excess premium (on average approximately 4%) in individual market plans in Colorado, which could allow for issuers to reduce premiums. Even if the premium reductions achieved are less than the targets set by the state, the Departments project that coverage will be at least as affordable as would be without the amended waiver.

Under state law, and as approved by the Departments in the waiver amendment, compared to 2021 plan rates, Colorado Option plans are required to reduce premiums by 5% in the first year (2023), 10% in the second year (2024), and 15% in the third year (2025). After 2025, premiums may only increase by national medical inflation. In addition, the Colorado Division of Insurance (the Division) has new and existing programmatic and regulatory authorities to support the premium reduction targets as a backstop if issuers and providers do not reach the established targets. Examples include requiring changes to filed plans and providers' contracts, levying

⁵ See Table 3, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-Data-Brief-Aug2021.pdf>

finances on hospitals that refuse to participate in the Colorado Option, and requiring additional public rate hearings. Additionally, as part of the waiver amendment, Colorado will further improve affordability for Qualified Individuals,⁶ as that term is defined under state law, through its state subsidy programs.

The Departments also have determined that the state's 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. Compared to the baseline, the state has projected that total individual market enrollment under its amended waiver plan, including both the Colorado Option and Colorado Reinsurance Program, will increase by 4.1% in 2023. The Departments note that the state's estimates of the impact of the Colorado Reinsurance Program on enrollment are consistent with the Departments' experience with section 1332 reinsurance waivers implemented by Colorado and other states.⁷ By reducing premiums and introducing new affordability policies, the amended waiver will enable more Coloradans to purchase affordable, comprehensive health insurance, thereby expanding comprehensive coverage to previously uninsured Coloradans. We note that the state can still meet the statutory guardrail even if the actual enrollment impact is 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 waiver is not projected to increase the federal deficit. Compared to the baseline, the state projects \$213.8 million in federal savings in 2023, primarily in the form of PTC savings resulting from the combined impact of reinsurance and the required premium reductions under the Colorado Option. Since the amended waiver is projected to reduce premiums, the Departments expect the PTC savings attributable to the waiver to more than offset any potential new federal costs. The federal costs considered by the Departments in making this determination include the cost of any additional PTC spending on new enrollees who are PTC-eligible. In addition, in making their determination, the Departments considered broader federal tax implications and do not expect that any foregone tax revenues (such as lost revenue due to reduced insurer or provider margins under the Colorado Option), net of any additional tax revenues (such as from insurer and hospital revenues attributable to coverage increases), would be significant. However, the Departments will continue to assess these changes.

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. For example, existing Colorado law reflects that the state subsidy program is for Qualified Individuals,⁸ which includes those who are not eligible for PTC. As such, if there is a change to the federal eligibility rules for PTC, such a change may impact who is eligible for the state subsidy program. Also, the state

⁶ See Colo. Rev. Stat. § 10-16-1203(12), which defines "Qualified Individual" as an individual regardless of immigration status who: (a) Is a Colorado resident; (b) has a household income of not more than three hundred percent of the federal poverty line; and (c) is not eligible for the premium tax credit, Medicaid, Medicare, or the Children's Basic Health Plan. Also see Colorado SB20-215, available at: https://leg.colorado.gov/sites/default/files/2020a_215_signed.pdf.

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

⁸ See supra note 6.

is required, under STC 2, to inform the Departments of any change in state law or regulation that could impact the waiver.⁹ Additionally, if there is a change in state or federal law,¹⁰ consistent with the federal regulations and the STCs,¹¹ 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.¹²

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.¹³

Prior to submitting its application to the Departments on November 30, 2021, the Division conducted a state public comment period on its proposed waiver amendment application beginning October 15, 2021. The comment period was slated to close on November 15, 2021 but the state extended the deadline to November 22, 2021, based on requests from the public.¹⁴

The Departments conducted a 30-day federal comment period from January 3, 2022 through February 2, 2022. During this period, the Departments received a total of 140 comments, of which 136 were in support of the amendment to the state's waiver plan, and 4 were opposed. Of the supporters, 6 letters were from organizations¹⁵ and 130¹⁶ were from individuals. All 4 letters in opposition were from organizations.¹⁷ 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.¹⁸ The Departments also sent Colorado a series of questions throughout the review period of the waiver amendment application. These

⁹ See STC 2 in the enclosed STCs.

¹⁰ 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 be reflected in Colorado's state law.

¹¹ 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).

¹² See section 1332(b)(1)(A)-(D) of the ACA.

¹³ 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.

¹⁴ During this comment period, two public hearings were held virtually and one tribal consultation was held virtually. Colorado received a total of 11 written comments, of which 3 were in support of the proposed amendment and 8 were opposed.

¹⁵ Colorado Center on Law & Policy, Centennial State Prosperity, Colorado Consumer Health Initiative, United States of Care, Good Business Colorado, and the American Lung Association with 13 other disease advocacy partner organizations.

¹⁶ Two individual comments were submitted after the close of the federal comment period and are not reflected in the total count.

¹⁷ AHIP, Kaiser Permanente, Colorado Hospital Association, and The Partnership for America's Health Care Future Action.

¹⁸ https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-

questions and responses from Colorado are also posted on the CMS section 1332 waiver website.¹⁹ 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 stateinnovationwaivers@cms.hhs.gov.

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

Enclosure

¹⁹ https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-

cc: Lily Batchelder, Assistant Secretary for Tax Policy, U.S. Department of the Treasury
Jared Polis, Governor, State of Colorado

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 satisfies all the statutory guardrails. Commenters noted that the waiver submitted by Colorado will improve affordability and expand coverage in the state, including for Coloradans who currently cannot qualify for federal tax credits. In terms of the deficit neutrality guardrail, these commenters noted the waiver will lead to additional savings for the federal government based on the premium reductions required through the Colorado Option, on top of the state's reinsurance program. Finally, these commenters also noted the waiver amendment would contribute to the state's overall efforts to improve health equity in Colorado.

Commenters in opposition to the proposed amendment called for the Departments to deny the waiver amendment request, asserting that it fails to comply with the coverage, affordability, and deficit neutrality guardrails. With regard to affordability, commenters in opposition to the waiver contended that the state incorrectly assumes that all issuers will meet the premium reduction targets, and that the state's analysis fails to account for numerous factors that contribute to the cost of care and premium levels, such as: greater plan benefits, more restrictive network adequacy standards, and cost-sharing restrictions. These commenters argued that through the annual premium reduction requirements, the state is statutorily limiting the ability of issuers to address high hospital costs and thereby does not allow issuers to appropriately reflect those costs in premiums. Moreover, these commenters argued that since the premium targets will not be met by all issuers in all counties, the waiver amendment will violate the affordability guardrail.

These commenters also argued that the waiver amendment will violate the coverage guardrail by decreasing plan choice and reducing coverage options in certain counties due to issuers leaving the market if they are unable to meet the premium reduction targets. Similar to the above concern with affordability, this concern stems from disagreement with the state's assumption that all issuers will meet the premium reduction targets.

These commenters also contended that the state failed to consider the impact of issuer participation on the federal deficit neutrality guardrail if issuers are unable to meet the premium reduction targets in all counties. They further noted that the state likely overestimated the size of federal savings, such that the waiver amendment will violate the deficit neutrality guardrail.

Departments' Response:

The Departments appreciate commenters' support for the waiver amendment request and agree it would improve affordability and coverage for Coloradans. After review of the state's analysis and public comments, along with consideration of the Departments' experience with existing section 1332 reinsurance waivers and other health programs, the Departments have determined that Colorado'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

amendment waiver request will not satisfy the statutory guardrails. In evaluating 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 Colorado waiver plan meets the guardrails is included in the letter to the state.

As described in the letter, the Departments have considered the possibility that issuers will not achieve the state's required premium reductions and have determined that, even with Colorado Option premium reductions that are less than the targets set by the state, the combined impact of the reinsurance program and the Colorado Option would still result in with-waiver premiums that are lower than without-waiver premiums, and the amended waiver would still be projected to meet the guardrails.¹ Even if the premiums under the Colorado Option are the same as premiums would have been absent a waiver (or if the Colorado Option results in an additional 3% premium reduction instead of a 5% premium reduction in 2023, for example), the amended waiver would still provide coverage that is as affordable as without the waiver. Even if premiums are higher than the mandated premium reductions, 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 Colorado anticipated, but this would not be a violation of the deficit neutrality guardrail, as the state amended waiver plan is still achieving savings for the federal government. Furthermore, if premiums under the waiver are the same as premiums would have been absent a waiver, the premium impact of the waiver would not, on its own, increase the federal deficit. In terms of the coverage guardrail, as explained in rulemaking,² the Departments must determine that the section 1332 waiver would provide minimum essential coverage to a comparable number of state residents under the waiver as would have coverage absent the waiver. This guardrail does not consider the number of plan or issuer choices available to consumers, as suggested by some commenters.

However, the Departments appreciate commenters' concerns regarding the required premium reductions and their potential impact on issuers, the individual market in Colorado, and the ability of the waiver amendment to satisfy the statutory guardrails. Based on public feedback and the Departments' own review of the waiver amendment request, the Departments asked the state to provide more information on this aspect of its proposed waiver amendment. As noted in the state's response to the Departments' questions,³ under the waiver amendment, issuers could end up having rates for the standardized Colorado Option plans that do not include the full required premium rate reduction. Colorado explained that the Division will continue to exercise its rate review authority to scrutinize rates, and would not approve any rate that is actuarially unsound. The state explained that, in line with Colo. Rev. Stat. § 10-16-1304(1)(e), issuers would not be required to submit actuarially unsound rates for Colorado Option plans and would be required to meet the other financial requirements established under state law consistent with all other plans. In addition, Colorado explained they expect that both issuers and providers

¹ There would also not be a violation of the comprehensiveness guardrail if issuers do not meet the required premium reduction targets because the coverage provided under the amended waiver would continue to be as comprehensive as the coverage defined in section 1302(b) of the ACA and offered through Exchanges.

² See 86 FR 53412, at 53469 – 54370. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

³ The state's responses to the Departments' questions are posted online on the CMS section 1332 waiver website under Colorado here: https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-

would continue to participate at about current levels under the waiver amendment, which is captured in the analysis the state submitted with its waiver amendment application. One of the reasons the state assumed this, in addition to market conditions and recent trends in issuer participation, is that the Colorado Option was signed into law on June 16, 2021. Issuers who did not want to participate in the Colorado Option or premium reduction targets under the waiver could have exited the Colorado individual or small group market. Instead, some issuers expanded their business in the state. Although the Division does not anticipate that an issuer would leave the Colorado individual or small group markets in response to the full implementation of the Colorado Option under the amended waiver, the Division has authority under state law to require an issuer, after a public hearing, to offer the Standardized Colorado Option Plan in specific counties in either the individual market or the small group market where no issuer is offering the Standardized Plan in that plan year in that market.⁴

Under the amended waiver, Colorado residents are expected to continue seeing lower premiums, which will attract new consumers while also keeping current consumers in the individual market. The Departments acknowledge that the commenters noted concern with the number of plan choices and their contention that, with fewer plan choices, fewer people may be covered.⁵ Under state law, in any region where a carrier offers a plan in either the individual or small group market, the carrier must also offer in that market a Standardized Colorado Option Plan, and—as noted above—the state may compel an issuer to offer a standardized plan in a county in which no plans would otherwise be offered.⁶ As such, consumers are projected to have comprehensive plan options to purchase in each market in each county, and under the amended waiver the plans offered are projected to be as affordable as without the waiver. The Departments do not project that changes in plan offerings under the amended waiver will have an adverse impact on the number of individuals with minimum essential coverage. 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.

Actuarial Analysis

Public Comments:

Commenters in opposition to the proposed amendment cited several concerns with the state's actuarial analysis. First, commenters expressed concerns that the state's analysis assumes that all issuers will meet premium reduction targets, and that there will be no impact to existing carrier participation and coverage options under the waiver amendment. They also argued that certain issuers may not be able to meet the premium reduction targets in some counties because they already reimburse at levels below the Colorado Option reimbursement rate floors, such that achieving premium reduction targets in those counties by lowering reimbursement rates is not possible. Relatedly, some of these commenters cited concerns that the premium reduction targets proposed in the waiver amendment are arbitrary and unrealistic, in that the targets do not account for a variety of factors.⁷

⁴ See Colo. Rev. Stat. § 10-16-1306(4)(e). Also see Colorado HB21-1232, available at: https://leg.colorado.gov/sites/default/files/documents/2021A/bills/sl/2021a_sl_241.pdf

⁵ See 86 FR at 53469 – 54370. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

⁶ See supra note 24.

⁷ These commenters pointed to a separate analysis conducted by another actuarial firm that concluded the projections in the amendment waiver request would have been different if consideration had been given to which

Furthermore, these commenters contended that the state’s analysis does not account for changes in law and policy occurring outside of the section 1332 waiver but that would impact the baseline and therefore, the waiver’s compliance with the guardrails, such as: the addition of new EHBs (i.e., acupuncture, gender affirming care, mental health wellness exams, and changes to drug coverage, as well as recent state legislation requiring coverage of infertility and reproductive services); finalization of plan benefit designs; potential extension of Colorado’s cost-sharing subsidy program beyond 2022; potential approval of a new state subsidy program beginning in 2023; potential extension of the ARP’s enhanced subsidies beyond 2022; and Medicaid redeterminations at the end of the COVID-19 public health emergency. Other commenters suggested the state did not isolate the effects of the waiver amendment from the existing Colorado Reinsurance Program.

Finally, some commenters also noted that the state did not provide sufficient analysis on the small group market to determine whether the waiver amendment request satisfies the guardrails, and someone recommended that the Departments should have determined the waiver incomplete and request that the state submit a more thorough analysis.

Departments’ Response:

The Departments appreciate commenters examining and providing feedback on the state’s actuarial analysis. The Departments review of the state’s analysis confirmed it accounts for a variety of factors impacting premiums such as the actual costs of providing care, limits on annual reimbursement rate reductions, new network adequacy requirements, the full impact of state benefit mandates since 2021, and exemptions for certain health plans like state co-ops. Further, the state’s analysis reflects state law, which includes certain exemptions for providers and different reimbursement floors depending on the type of provider. In terms of potential differential impacts on counties and issuers across the state, while the state’s initial analysis assumed statewide average premium reductions and includes the impact on premiums by rating area using statewide average premium reduction targets, the state subsequently provided information on current average hospital reimbursements compared to projected average hospital reimbursements under the Colorado Option (where the average hospital reimbursement exceeded the floor in all rating areas), and the premium reduction targets by rating area to plans and providers.⁸ The Departments found the state’s assumptions regarding issuer participation under the amended waiver reasonable, and the Departments plan to continue monitoring issuer participation. The state’s analysis projected no change in issuer participation, and the state further noted that the Colorado Option law was signed prior to 2022 rate submissions, during which some issuers expanded their offerings. Further, the state’s experience with the Peak Health Alliance (Peak),⁹ which implemented a plan with lower reimbursement rates without

assumptions were realistic to achieve. See NovaRest Actuarial Review of the Section 1332 Innovation Waiver Amendment Request – Colorado Option. February 1, 2022. <https://coloradoshealthcarefuture.org/wp-content/uploads/2022/02/NovaRest-Report-2.1.22.pdf>

⁸ See supra note 3.

⁹ See PDF pg. 14 of Colorado’s waiver amendment application which states, “Peak was formed in 2018 as an insurance purchasing cooperative which designed plans and solicited bids to offer significant savings for mountain community residents. By 2021, Peak plans represented the lowest priced plans in all regions where Peak operates - while increasing carrier participation and maintaining strong networks in their regions.” Ibid. Available online: <https://drive.google.com/file/d/1SUy-iNz3i7IIRTPTqy2OJgNYH1oyN5mX/view>

leading to coverage losses or lower issuer participation, supports the notion that issuer participation will not decrease. Additionally, as detailed above, the Departments determined that in the event the premium reduction targets are not achieved by some (or all) issuers in some (or all) counties, the statutory guardrails would still be met.

In response to the comment asserting a deficiency in the state's analysis due to the failure to isolate the effects of the waiver amendment request from the state's existing reinsurance waiver, the Departments disagree there was any such deficiency. 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 reinsurance program and the Colorado Option—meets the statutory guardrails. This interpretation is confirmed by recent rulemaking, which explains that a state's approved section 1332 waiver plan and the proposed waiver amendment request will be analyzed together.¹⁰ For example, if 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.¹¹ Nonetheless, to facilitate the Departments' analysis of the state's waiver amendment request, the Departments' response to Colorado's Letter of Intent (LOI)¹² 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 currently approved waiver and the proposed amended waiver. The state submitted the requested analysis, which allowed the Departments to separately evaluate the impact of the amendment on the existing "with-waiver" scenario. Indeed, the state's waiver amendment application includes both an analysis of the proposed amendment separate from the reinsurance program, and of the combined impact of the two programs.¹³ Although each program is not independently required to satisfy the guardrails, this additional level of detail assisted the Departments' analysis of the waiver amendment, by allowing a better assessment of the reasonableness of the state's projections with respect to each program.

In terms of the small group market analysis, the Departments' response to Colorado's LOI¹⁴ noted that the state's actuarial and/or economic analysis must include the applicable information for the small group market. The state's analysis details the assumptions used and references studies that demonstrate that the amended waiver would meet the guardrails, including in the small group market. In addition, the state also noted that prior Congressional Budget Office (CBO) analysis estimated that small employers are less likely to drop coverage if premiums decrease.¹⁵ The Departments determined that the state's actuarial analysis discussion on the small group market as a result of the amended waiver, including the data and assumptions used in the Colorado waiver amendment application, included information consistent with 45 C.F.R. § 155.1308(f)(4)(i)-(iii) and the actuarial analysis was certified. As such, the Departments preliminarily determined that the application was complete and provided sufficient information

¹⁰ See 86 FR at 53484. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

¹¹ See 86 FR at 53484. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

¹² <https://www.cms.gov/files/document/1332-co-lol-amendment-response-letter.pdf>

¹³ For example, see PDF pg. 36-43, Table 9 (pg. 56-57), and Table 10 (pg. 60-61) of Colorado's waiver amendment application. Available online: <https://drive.google.com/file/d/1SUy-iNz3i7IIRTPTqy2OJgNYH1oyN5mX/view>

¹⁴ <https://www.cms.gov/files/document/1332-co-lol-amendment-response-letter.pdf>

¹⁵ https://www.cbo.gov/system/files/2019-01/54915-New_Rules_for_AHPs_STPs.pdf

to demonstrate that the waiver amendment meets the regulatory requirements for a complete application.¹⁶ Additionally, as part of their 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, and whether there would be expected migration between the individual and small group markets.¹⁷ In response to the Departments' request, the state provided premiums in the individual and small group market, and that information demonstrated that, while premiums in the Colorado small group market are currently more expensive than the Colorado individual market, small employers have still maintained coverage in the small group markets. The Departments also considered the state's feedback that the premium reduction targets in the Colorado Option law affect both the individual and small group markets equally, as well as that past experience with the reinsurance program (which resulted in greater premium reductions in the individual market than Colorado expected to achieve) did not result in a material shift in enrollment from the small group market to the individual market.

Finally, the Departments generally do not require states to provide analyses that accounts for the potential impact of pending state or federal legislation. States are required to reflect current law in their waiver applications,¹⁸ although some states in their waiver applications may proactively include scenarios addressing pending legislation. States may also be required to update their assumptions and analyses to reflect the enactment of new federal legislation or relevant changes in federal policy. Similarly, states with approved section 1332 waivers must inform the Departments of any change in state law or regulation that could impact the waiver and may be required to provide additional information, depending on the type of change and impact on the waiver.¹⁹

Procedural Considerations

Public Comments:

Commenters opposing the proposed amendment cited procedural concerns that they suggest should have resulted in the Departments' determining the state's waiver amendment request to be incomplete. For example, these commenters asserted that, since the state had not finalized certain regulations²⁰ prior to submitting its amendment waiver request, the request should be deemed incomplete. These commenters argued that these outstanding rules would have a material impact on projected benefits and savings of the state's amended waiver, and suggested the Departments require the state to update its actuarial and economic analysis after the state has finalized the outstanding rules to allow for a more complete review of how the Colorado Option will impact the guardrails.²¹ Commenters further asserted that the Departments have stated that a

¹⁶ See 31 C.F.R. §§ 33.104 and 33.108(f) and 45 C.F.R. §§ 155.1304 and 155.1308(f).

¹⁷ See *supra* note 3.

¹⁸ See section 1332(a)(4)(i) and (iii) of the ACA. Also see 31 C.F.R. §§ 33.112 and 116 and 45 C.F.R. §§ 155.1312 and 1316.

¹⁹ See, e.g., STCs 2 and 9 in the enclosed STCs.

²⁰ Commenters contended that the state's failure to finalize state implementing regulations should amount to a procedural deficiency leading to a determination that the waiver amendment request was incomplete. Rules cited by commenters that were not finalized at the time the state submitted its amendment request include: regulations establishing the premium reduction methodology, standard benefit designs for the Colorado Option plans, network adequacy requirements, additional cost-sharing restrictions, and required actuarial values. At the time of the state's application submission, these commenters also cited the pending rulemaking on the rate hearing process and potential hospital and provider rate setting that would take effect in 2024.

²¹ See 31 C.F.R. § 33.102 and 45 C.F.R. § 155.1302.

section 1332 waiver request would not be approved if it is contingent on further state action.²² These commenters also took issue with the projection of benefits contingent on future state action, suggesting that Colorado had thereby submitted incomplete analyses and data.

Commenters opposed to the amendment also suggested that the state provided an insufficient state public comment period, arguing that the state did not satisfy applicable federal requirements because the state provided insufficient time for stakeholders to review and respond to initial and updated drafts of the waiver amendment application, given the complexity of the amendment.²³ These commenters suggested the Departments should require the state to conduct a new state notice and public comment period in order to address the complexity of the amendment and consider stakeholder feedback. These commenters further contended that lack of a new notice and public comment period at the state level should result in a denial of the waiver amendment request.

Departments' Response:

The Departments have considered these comments on procedural requirements. After review of the state's amendment waiver application, the Departments determined Colorado's application was complete. It provided sufficient information for the Departments to initiate the review of the application, and the state provided additional requested information throughout the review process.

Further, we disagree that the state failed to comply with the applicable public comment and participation procedures. The state has met the requirements established under 31 C.F.R. § 33.112 and 45 C.F.R. § 155.1312 to solicit meaningful public input at the state level prior to submitting its waiver amendment request to the Departments. More specifically, the state outlined on the Division's website a timeline of the waiver application development and state public review and comment process, as well as shared stakeholder materials and written comments received.²⁴ The state also held two public hearings (November 9 and 10, 2022) and one tribal consultation (November 2, 2022), consistent with 31 C.F.R. §§ 33.112(c) and 33.112(a)(2) and 45 C.F.R §§ 155.1312(c) and 155.1312(a)(2). The state's responses to state public comments are also found in the final application that was submitted to the Departments on November 30, 2021.²⁵ We further note that, in response to comments submitted during the state comment period requesting more time to review and provide feedback on the updated application, the state extended the state comment period by seven days, for a total of 37 days, which the Departments determined to be sufficient at the state level, even considering the complexity of the amendment. Moreover, the section 1332 framework provides for both state and federal comment periods in part to ensure that stakeholders have an opportunity to address changes to the state plan that are made in consideration of comments received during the state comment period.²⁶ The Departments held a federal public comment period from January 3, 2022 through February 2, 2022, and shared all public comments received with the state and posted the

²² See 86 FR at 53459. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

²³ The state updated its application during the state comment period to include an additional waived provision (section 1312(c)(2) of the ACA). This addition did not impact or change the guardrail analysis.

²⁴ <https://doi.colorado.gov/insurance-products/health-insurance/health-insurance-initiatives/colorado-option>

²⁵ <https://drive.google.com/file/d/1SUy-iNz3i7IIRTPtqy2OJgNYH1oyN5mX/view>

²⁶ See section 1332(a)(4)(i) and (iii) of the ACA. Also see 31 C.F.R. §§ 33.112 and 116 and 45 C.F.R. §§ 155.1312 and 1316.

comments on the CMS section 1332 waiver website.²⁷ The Departments therefore have determined that the state satisfied the applicable public comment and participation requirements.

States are required to reflect current law in their waiver applications.²⁸ The Departments do not consider the potential impact of policy changes that are contingent on further state action, such as state legislation that is proposed, but not yet enacted, that would be in effect during the timeframe for the section 1332 waiver.²⁹ The illustrative example in the aforementioned preamble of the rule was specific to legislative changes, as the Departments understand that, as part of a waiver plan, some programmatic and operational details may be determined in forthcoming guidance or regulations. In general, the Departments have allowed states to proceed with their waiver applications based on the framework codified in statute prior to those details being finalized, if the state's waiver plan otherwise meets the statutory guardrails and other applicable requirements.

In addition, recognizing the status of the state's implementing regulations, throughout the waiver amendment application review process, the Departments asked the state for updated information regarding the timing and content of the proposed state implementing regulations, and the state has provided the requested information.³⁰ The Departments further note that the state has issued several implementing regulations to support the amended waiver plan and the Colorado Option. This includes the adoption of emergency regulations on February 28, 2022 regarding the premium rate reduction target methodology, which were later finalized. The state also shared final templates and instructions on the premium rate reduction targets in mid-April.³¹ To help address stakeholder concerns on the timeline, the state also extended the deadline from May 1, 2022 to May 13, 2022 for carriers to notify the Division on whether they will meet the 5%

²⁷ See <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-CO-Amendment-Organization-Federal-Public-Comments.pdf> and <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/1332-CO-Amendment-Individual-Federal-Public-Comments.pdf>

²⁸ See 31 C.F.R. § 33.102 and 45 C.F.R. § 155.1302. "Specifically, the Departments will not consider the potential impact of policy changes that are contingent on further state action, such as state legislation that is proposed but not yet enacted that would be in effect during the timeframe for the section 1332 waiver. For example, the Departments will not consider the potential impact of state legislation to expand Medicaid that is not yet enacted. The Departments also will not consider the impact of changes contingent on other Federal determinations, including approval of Federal waivers (such as waivers under section 1115 or titles XVIII, XIX, or XXI of the Act) pursuant to statutory provisions other than section 1332 of the ACA." Available online:

<https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

²⁹ See 86 FR at 53459. For example, the rule preamble notes that "The Departments' determination also will not take into account any proposed changes to the Medicaid or CHIP state plan that are subject to Federal approval."

Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

³⁰ Ibid footnote 3.

³¹ [Regulation 4-2-80](#). **Culturally responsive provider network** requirements (effective March 2, 2022); [Regulation 4-2-81](#). **Standardized plan** requirements (an emergency regulation has been in place since December 2021. The permanent rule effective date is June 30, 2022 and reposted on May 12, 2022); [Bulletin B-4.120](#) Concerning the Standardized Plan and Network Adequacy (effective March 7, 2022); [Regulation 4-2-85](#). **Premium rate reduction** requirements for the standardized plan (As of February 28, 2022 an emergency regulation is currently effective and will be in place until the permanent rule effective date of June 14, 2022); [Bulletin B-4.121](#) Concerning the **Medical inflation trend** calculation for the premium rate reduction requirements (effective March 31, 2022); [Bulletin B-4.123](#) Concerning the **Pricing AV adjustment** for the premium rate reduction requirements (effective April 14, 2022); [Regulation 4-2-86](#). Exemption requirements for **purchasing alliances** (As of February 28, 2022 an emergency regulation is currently effective and will be in place until the permanent rule effective date of June 14, 2022)

premium reduction target for PY 2023. The Departments encourage the state to continue engaging with stakeholders on implementation and operational considerations. The Departments understand significant features of the methodology for the premium reduction methodology were incorporated into the state's waiver amendment submission, and note that these final regulations do not materially change the program targets or the Departments' guardrail analysis. If there are relevant changes in federal law, policy, and circumstances the Departments have the authority to request an updated analysis or other information to ensure the amended waiver continues to meet the statutory guardrails and other applicable requirements. Additionally, under the STCs, the state is obligated to inform the Departments if there are changes in state law or regulation, including any changes to the requirements of the state waiver plan. STC 11 also provides that the state will report³² on operational challenges in quarterly or other reports that the Departments will consider as part of their monitoring and oversight activities. To the extent there are stakeholder concerns related to operational challenges, we encourage the state to report on those issues.

Pass-through Funding

Public Comments:

Commenters in support of the proposed amendment noted that the waiver amendment is anticipated to yield savings for the federal government in the form of reduced PTC outlays based on the premium reductions required through the Colorado Option, as well as the reductions in PTC from the Colorado Reinsurance Program, which will support more affordable and accessible coverage in the state.

Commenters opposing the proposed amendment contended that the state did not include in its application a sufficient explanation as to how pass-through funding associated with the Colorado Option will be used, and how those funds will be kept separate from the pass-through funding associated with the Colorado Reinsurance Program. One commenter contended that the Department should develop a process such that pass-through funding resulting from the reinsurance program and the Colorado Option would be separated. Opposing commenters also were concerned that Colorado overstated the size of federal pass-through savings expected; asserting that if carriers are unable to meet premium reduction targets, then pass-through funding will be less than estimated, which could result in the waiver amendment not meeting the guardrails.

Some stakeholders also expressed concern about the use of federal funds to cover health care costs for people of different immigration statuses.

Departments' Response:

The Departments appreciate the comments on pass-through funding. The Departments also agree that the state's intended use of pass-through funding, to offer state subsidies, will improve the affordability of coverage. Consistent with section 1332(a)(3) of the ACA, pass-through funding is provided to states with approved waivers for the reductions in federal spending on the

³² 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.

types of federal financial assistance specified in the statute and regulations³³ and reduced, as necessary, to ensure deficit neutrality. However, as detailed above, the Departments remind commenters that as long as the waiver generates savings to the federal government, the state's waiver plan would meet the deficit neutrality guardrail and the state would be entitled to receive pass-through funding to implement the waiver plan, reduced as necessary to ensure compliance with the deficit neutrality guardrail. Each year, the Departments calculate pass-through funding amounts based on a methodology developed by the Departments.³⁴ Due to various factors, such as premium and enrollment trends or changes in law, a state may receive more or less pass-through funding than anticipated for a given year; this is to be expected and does not present an issue in terms of guardrail compliance because pass-through funding is reduced, as necessary, to ensure federal deficit neutrality.³⁵

Furthermore, consistent with statute, regulations, and the waiver's STCs, pass-through funding can only be used for purposes of implementing a state's approved section 1332 waiver plan.³⁶ In other words, as Colorado's amended waiver plan includes the Colorado Reinsurance Program, the Colorado Option, and the accompanying state subsidy programs, the state may use pass-through funding for purposes of implementing the amended waiver plan which includes these programs. Per STC 3, the state must ensure sufficient state funds are available, on an annual or other appropriate basis, for the amended waiver to operate as described in the state's amended waiver plan. Lastly, as noted above, in recent rulemaking, the Departments also explain that a state's approved section 1332 waiver plan and the proposed waiver amendment request should be analyzed together, including with respect to anticipated pass-through funding.³⁷

In response to the feedback expressing concern about the use of federal funds to cover health care costs for people of different immigration statuses, the Departments note that PTC is available only to individuals and families enrolled in plans offered through the Exchange if they are citizens or have other lawful status. Further, Colorado is not seeking to change eligibility for PTC in its waiver amendment application, and approval of the state's amended section 1332 waiver request does not change eligibility for PTC. However, under section 1332(a)(3) of the ACA, if a state's approved section 1332 waiver plan results in federal savings in PTC spending, the federal government must provide those savings to the state to implement the state's approved waiver plan, in the form of pass-through funding. The state's waiver plan may use those pass-through funds to enhance access to health care coverage in ways that fall outside the PTC rules, including by offering a state subsidy to those not eligible for PTC and to fund other state affordability programs.

³³ See section 1332(a)(3) of the ACA, which refers to premium tax credits, cost-sharing reductions, and small business credits under section 36B of the Code or under Part I of subtitle E of the ACA. Also see 31 C.F.R. § 33.122 and 45 C.F.R. § 155.1322. See also 86 FR at 53470 – 53472 and 53482 - 53483.

³⁴ For more information on the methodology and other pass-through funding resources, see pass-through funding tools and resources section of the 1332 website here: https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.

³⁵ See 86 FR at 53471. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

³⁶ See section 1332(a)(3) of the ACA. Also see 31 C.F.R. § 33.122 and 45 C.F.R. § 155.1322.

³⁷ See 86 FR at 53459. Available online: <https://www.govinfo.gov/content/pkg/FR-2021-09-27/pdf/2021-20509.pdf>

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 Colorado— Patient Protection and Affordable Care Act Section 1332 Waiver
Approval
AWARDEE: The State of Colorado

I. PREFACE

The following are the specific terms and conditions (STCs) for the State of Colorado Division of Insurance’s (hereafter referred to as “the state”) Patient Protection and Affordable Care Act (ACA)¹ section 1332 State Innovation Waiver to implement the Colorado Option and Colorado Reinsurance Program (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 November 30, 2021, 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’ August 13, 2021 approval of the state’s waiver plan.

1. ACA Provisions Waived under Section 1332 State Innovation Waiver (Section 1332 waiver). Sections 1312(c)(1) and 1312(c)(2) of the ACA as implemented at 45 C.F.R. § 156.80 to the extent they would otherwise prohibit plan-level rating variation(s) for the Colorado Option in the individual and small group markets. Additionally, section 1312(c)(1) of the ACA is waived for the purposes of operating the Colorado Reinsurance Program to the extent it would otherwise require excluding total expected state reinsurance payments when establishing the market-wide index rate.

2. Changes in State Law and Technical Changes to the Waiver. The state must inform the Departments of any change in Colorado 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 Colorado reinsurance program or Colorado Option program, occurring after the date of this approval letter, within seven days of any such changes. Technical changes are changes that do

¹ 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.”

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 waiver include changes to the state-approved program funding level; program parameters like altering the attachment point, cap, coinsurance rate, or conditions eligible for reinsurance; or the state subsidy structure for “Qualified Individuals” which includes those not eligible for PTC. 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 Colorado Health Insurance Affordability Enterprise. 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;²
- (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;
- (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

² 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.

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, an 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:
 - (1) The state must inform the Departments if the state will apply for an extension of its waiver at least one year 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.
 - (2) 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).
 - (3) 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.

- (4) 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;³ 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.

- (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.

³ *Ibid.*

Annual Reports: The state must submit a draft annual report to the Departments within 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 30 days of submission to the Departments. Within 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 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 and with the Colorado Option alone, 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.
 - (7) The state's network adequacy requirements, including but not limited to: the number of Colorado Option plans that meet the network adequacy requirements for ACA plans; the number of Colorado Option plans that meet the state's enhanced requirements related to essential community providers; the number of plans that were required to submit corrective action plans based on inability to meet certain enhanced network adequacy requirements in the Colorado Option; and qualitative data from stakeholders shared during the annual post-award forum;
- (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 Colorado Reinsurance Program and/or operation of the reinsurance program;
 - (2) Federal pass-through funding spent on the state subsidy or cost-sharing program and/or operation of the state subsidy or cost-sharing program; and
 - (3) The unspent balance of federal pass-through funding for the reporting year, if applicable;
- (g) The amount of state funding from the Colorado Health Insurance Affordability Enterprise, or other funding to support the waiver, specifically: 1) 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, and 2) any state funds that are going to the state subsidy or cost-sharing program;
- (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.⁴ 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 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:

- (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) The estimates of what the final silver plan rates and plan IDs for individual health insurance coverage for a representative individual in each rating area or service area

⁴ *Ibid.*

- (if premiums vary by geographies smaller than rating areas) would have been absent approval of this waiver and with the Colorado Option alone 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 silver plan rates and state's estimate of what the final silver plan 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. Also include the actuarial memorandums;
- (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 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;
 - (a) 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 total estimated reinsurance funding and estimated Colorado Option premium reductions relative to prior estimates;
 - (j) The benefit structures, with and without the waiver, for any Health Insurance Affordability Enterprise programs or initiatives. For example, this would include the subsidy schedules and eligibility criteria for any state-provided subsidies; 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.

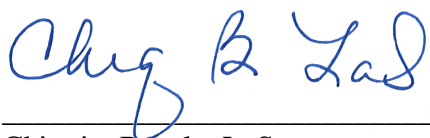
If the waiver is not extended, the Departments will promptly recover unused pass-through funds following the end of the waiver period, December 31, 2027. The state must comply with all necessary steps to facilitate the recovery of such amounts by the Departments within a prompt timeframe.

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.

Michael Conway
Commissioner of Insurance, Colorado Division of Insurance
State of Colorado

Date: _____



Chiquita Brooks-LaSure
Administrator
Center for Medicare & Medicaid Services

Date: June 23, 2022

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

Date: _____