

January 11, 2021

The Honorable Alex Azar, Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, DC 20201

Dear Secretary Azar:

The undersigned organizations are writing to express serious concerns and opposition to the consideration of Texas' request to extend the Texas Healthcare Transformation and Quality Improvement Program (THTQIP) section 1115 demonstration for an additional five years, from September 30, 2022 to September 30, 2027, under "fast-track" authority with an exemption from following the normal public notice and comment process.

We urge the Centers for Medicare & Medicaid Services (CMS) to reverse its December 15, 2020 determination that Texas' request meets the requirements for a "fast-track" extension and the regulatory requirements for an exemption to the public notice and comment process. The state's fast-track request is unnecessary and doesn't meet the requirements CMS established for fast-track approval. Moreover, the state's request for an exemption from the normal public notice and comment process doesn't meet the requirements specified in 42 CFR 431.416(g)(3).

### **Fast-Track Approval of the Texas Extension Request is Unnecessary and Doesn't Meet Fast-Track Requirements**

Texas' current demonstration expires more than a year from now on so there's no pressing reason to extend the demonstration at this point in time. There's more than enough time for both the state and CMS to solicit public feedback on the extension proposal following normal public comment and notice processes before the demonstration expires in 2022.

Even if there *was* a pressing need to extend its demonstration now, the state's request doesn't meet the requirements for a fast-track approval, as laid out in CMS' 2015 guidance.<sup>1</sup> According to this guidance, demonstration projects that involve "complex policy areas," such as "uncompensated care pools," are not eligible for the fast-track approval process. Texas' fast-track extension request seeks to continue all existing waiver and expenditure authorities, including the expenditure authority authorizing its uncompensated care pool. As such, the state's extension request is ineligible for the fast-track process.

Finally, CMS' December 15, 2020 letter doesn't include an explanation or rationale for its determination that the state's request meets the fast-track requirements and is exempt from the requirements for public notice and comment. The letter just states that the request meets the requirements for a complete extension application and that it is exempt from public notice and

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<sup>1</sup> Centers for Medicare & Medicaid Services, "CMCS Information Bulletin: Implementation of a "Fast Track" Federal Review Process for Section 1115 Medicaid and CHIP Demonstration Extensions," July 24, 2015, <https://www.medicaid.gov/federal-policy-guidance/downloads/CIB07242015-Fast-Track.pdf>.

comment. The failure to provide an explanation for its determination is at odds with providing transparency during the decision-making processes.

We urge CMS to reverse its determination to consider Texas' request under the fast-track approval process given the ample time left in the demonstration's current approval period and its failure to meet CMS' fast track approval requirements.

### **Texas' Public Notice and Exemption Request Doesn't Meet Regulatory Requirements**

Texas also included a request for an exemption from following the normal public notice and comment process, citing the COVID-19 public health emergency (PHE) in its fast-track extension request. Given that the state isn't proposing to make any changes to its current demonstration, including any changes to help it or Texas providers respond to COVID-19, it's unclear how the PHE is affecting the state's ability to comply with the public notice and comment process for an extension of a demonstration that doesn't expire until September 2022.

Meanwhile, the state's exemption request doesn't meet the requirements for an exemption from notice and comment process specified in 42 CFR 431.416(g)(3), which requires that a state establish (or meet) *all* of the following criteria:

- (i) The state [acted](#) in good faith, and in a diligent, timely, and prudent manner.
- (ii) The circumstances constitute an emergency and could not have been reasonably foreseen.
- (iii) Delay would undermine or compromise the purpose of the [demonstration](#) and be contrary to the interests of beneficiaries.

Texas' extension request merely mentions the COVID-19 PHE, but doesn't provide any supporting documentation to demonstrate that it meets the exemption requirements. That's not surprising. Given that the demonstration isn't set to expire until September 30, 2022, it's unclear how the state could meet any of the criteria, especially the third one since a delay in approving the request wouldn't compromise the demonstration or harm beneficiaries. CMS' December 15, 2020 determination letter doesn't provide any clarity either. Like its fast-track determination, CMS simply stated, in one sentence, that the state met the requirements without providing any information as to how it arrived at its decision.

As such, we urge CMS to rescind its exemption approval and require the state to comply with the normal public notice and comment period. Specifically, we request that CMS direct Texas to withdraw its extension request and update it consistent with the requirements in 42 CFR 431.412(c) to reflect the comments the state received during the state comment period, which ended on December 27, 2020. Following Texas' resubmission of its extension request, we request that CMS follow the normal public notice and comment process specified in 42 CFR 431.416, including soliciting public input during the 30-day federal comment period.

Thank you for the opportunity to share our views. Please contact Judith Solomon ([solomon@cbpp.org](mailto:solomon@cbpp.org)) or Joan Alker ([jca25@georgetown.edu](mailto:jca25@georgetown.edu)) if you would like additional information.

CC: Administrator Seema Verma, Judith Cash

American Cancer Society Cancer Action Network  
American Heart Association  
American Lung Association  
Arthritis Foundation  
Asthma and Allergy Foundation of America  
Autistic Self Advocacy Network  
Bazon Center for Mental Health Law  
Center for Law and Social Policy  
Center on Budget and Policy Priorities  
Children's Defense Fund  
Chronic Disease Coalition  
Georgetown University Center for Children and Families  
Hemophilia Federation of America  
HIV Medicine Association  
Justice in Aging  
Mental Health America  
National Association of Community Health Centers  
National Health Law Program  
National Hemophilia Foundation  
National Multiple Sclerosis Society  
National Organization for Rare Disorders