February 28, 2023

2:00 pm CT

Coordinator: Welcome and thank you for standing by. I'd like to remind all participants that your lines have been placed in a listen-only mode until the question and answer session of today's conference call. This call is also being recorded. If you have any objections, you may disconnect at this time. I would now like to turn the meeting over to Jackie Glaze. Thank you. You may begin.

Jackie Glaze: Thank you. And good afternoon, and welcome everyone, to today's all state call and webinar. I will now turn to Ann Marie Costello, our Deputy Center Director, for opening remarks. Ann Marie?

Anne Marie Costello: Thanks, Jackie. Hi, everyone, and welcome to today's all state call. Today, George Failla from our Medicaid and CHIP Operations Group, and Melissa Harris from our Disabled and Elderly Health Programs Group, will present Unwinding Home and Community-Based Services Flexibilities After the COVID-19 Public Health Emergency ends in May. After George's and Melissa's presentation, we'll open the line to your questions.

Before we jump in, I wanted to share one reminder. In a CMCS informational bulletin released on November 23, 2021, CMS announced that effective February 1, 2022 states will be required to submit all Medicaid and CHIP SPA and 1915(b) and 1914(c) waiver actions that are not already submitted through one of CMS's electronic systems, through our new (OneMAC). At this time, it

was shared that the 10 regional SPA mailboxes will close some time in the future. After monitoring those mailboxes for a year, CMS is now moving towards closing the mailboxes for submission.

Since December 2022 there has been a reminder reply explaining where to send package submissions. The 10 regional mailboxes will no longer accept incoming emails after March 31, 2023. Please refer to the November 23, 2021 CMCS informational bulletin for information regarding submission of these actions to CMS. With that, I'll turn things over to George. Thank you.

George Failla: Thank you, Anne Marie. And we'll be discussing with you today, Unwinding Home and Community-Based Services Public Health Emergency Flexibilities. As you will recall, Secretary Becerra sent a letter to US governors on February 9, 2023 specifying the renewal of the public health emergency for an additional 90-days. Based on the current trends regarding COVID-19, the United States Department of Health and Human Services declared that they would be having this as the final renewal of the public health emergency, and the PHE would end on May 3, 2023. This allowed for a full 90-days' notice before the COVID-19 PHE would end. Next slide, please.

Woman: May 11th.

George Failla: I apologize, May 11, 2023, if I've said that date wrong. Sorry about that. And again, COVID-19 HCBS public health flexibility affected several aspects of the program where it could be delivered, including Section 1135 waivers that impacted 1915(c) waivers, 1915(i), 1915(k), and 1905(a) state plan benefits not available using the Appendix K flexibility or disaster relief SPA authority. Also, there was a disaster relief SPA state plan amendment possibility for 1905(a) benefits, 1915(i) state plan HCBS benefits, the 1915(k) community first choice, or CFC state plan option.

And then of course, there was an Appendix(k) for the 1915(c) waiver. And in Attachment K Option 4 Section 1115 demonstrations with HCBS-like services. Next slide, please. Now I want to emphasize some key dates for the expiration of HCBS public health emergency flexibilities. The Section 1135 waiver expires at the conclusion of the public health emergency, May 11, 2023. The disaster relief SPA state plan amendment would expire at the end of the PHE, May 11, 2023, or at any earlier approved date elected by the state and approved by CMS.

The Home and Community-Based Services Appendix or Attachment K flexibility, expires no later than 6-months after the end of the public health emergency. And that would be November 11, 2023. Next slide, please. Now, when we discuss unwinding of HCBS-related flexibilities granted during the COVID-19 public health emergency, we mean one of two things. Unwinding allows a state to design and implement its program and return to its HCBS program services and supports in routine operation, and/or to adapt techniques and strategies from temporarily approved flexibilities to adjust to the changing needs of participants and providers, by making permanent amendments to the authority and/or program. Next slide, please.

Now, many states utilize Section 1135 waivers. Those waivers were utilized to modify HCBS program requirements such as written person-centered planning requirements. Some HCBS settings requirements - 1915(c) or 1915(k) community-first choice level of care timeline, conflict of interest requirements, 1915(i) state plan eligibility timeline, or 1905(a) or 1915(k) personal representatives providing services. It's important to remind you that Section 1135 waivers expire at the end of the public health emergency, May 11, 2023. Next slide, please.

Continuing disaster relief SPA flexibilities or state plan HCBS benefits is possible, by extending those approved flexibilities temporarily. States do have the option to submit a SPA in Section 7.4(b) like in Boy, or 7.4(c) like in Cat, of the state plan, if choosing to temporarily extend disaster relief SPA flexibilities for HCBS benefits beyond the end of the public health emergency. These SPAs are subject to SPA submission requirements where applicable, including effective date, public notice, and tribal consultation. There's also a link to a recent all state call on February 14, 2023, that also provides some additional information. Next slide, please.

States will have the option to make certain provisions approved in disaster relief SPAs, permanent. States may submit a regular state plan amendment making a disaster relief state plan provision part of their state plan indefinitely. If they do that the state will need to submit that SPA with a requested effective date of May 12, 2023. CMS will review that state plan amendment following all standard processes and timelines. Next slide, please.

States may also continue certain 1915(i) state plan HCBS flexibilities. They can extend those flexibilities that CMS had previously approved in a disaster relief SPA. However, 1915(i) SPA submission must comply with all state plan amendment submission requirements including public notice and tribal consultation. And as required by 42 CFR Section 441.745(a) to (v) like in Victor, 1915(i) SPAs with substantive changes must be approved with a prospective effective date.

In order to prevent a gap in the authority, these submissions must be received and approved by CMS before the end of the public health emergency, with sufficient time for CMS to review and adjudicate that state plan amendment by May 12, 2023. States will need to submit a regular 1915(i) SPA on the 1915(i) template to make those disaster relief state plan amendments for

1915(i) flexibilities part of the state plan indefinitely. Next slide. And I will transition the presentation to Melissa Harris.

Melissa Harris: Thanks, George. And I'm going to pick up now talking about Appendix K and Attachment K HCBS flexibilities. Appendix K is the authority in the 1915(c) waiver to authorize a lot of HCBS flexibilities. And Attachment K is the corresponding authority for 1915(c) life services authorized in an 1115 demonstration. And so, many states have used either of those flexibilities to implement flexibilities that are available in the 1915(c) waiver authority.

And the enormous majority of states took advantage of the full lifespan of those authorities and currently have their Appendix K or Attachment K running through the 6-months after the end of the PHE, which is November 11th. If a state wanted an earlier date, they could be on record with an earlier date in the document that's approved by CMS.

So, all temporary changes that have been effectuated through Appendix K or Attachment Ks, have to be concluded as states revert back to their typical operations no later than the date that is reflected as the expiration date in their Appendix K or Attachment K. Again, in most cases, that's November 11th, but it will be based on the specific date articulated in the state's Attachment K or Appendix K.

So if a state - so states should take a look at what they have existing approved under Appendix K and Attachment K, and the termination date associated with those provisions. If a state would like to amend an end date, they can do that. For example, if you've determine that a flexibility is no longer needed and you don't see the need to continue that flexibility for 6-months after the end of the PHE, you can amend your existing Appendix K or Attachment K.

But we do want to flag that depending on the change to your Appendix K, there could be some implications for maintenance of effort requirements for the 98 - adhering to Section 9817 of the American Rescue Plan, which is the authorization of enhanced funding for a wide array of HCBS services. We'll talk a bit about maintenance of effort requirements in just a minute. But just a flag that if you are thinking about potentially ending an approved Appendix K or Attachment K flexibility, early, we'll want to have that conversation with you to make sure we are not tripping MOE requirements.

And you can reach out to the unwinding mailbox if you have any questions about taking down an approved flexibility. And that's at CMSUnwindingSupport@CMS.HHS.gov. Next slide, please. So a lot of the changes that were - that states stood up under the Appendix K, can be implemented as part of the underlying waiver operations at state discretion. And so states are encouraged to take a look again at the flexibilities that you currently have operating under your Appendix Ks, to see which of those you might choose to continue implementing through your underlying C waiver.

Obviously, anything that is added to the underlying waiver, has to adhere to all the regulatory requirements of 1915(c). And we also point you to version 3.6 of the 1915(c) waiver application and the technical guide for the parameters that surround 1915(c) waiver approval. Now, obviously, we would like you to submit your waiver amendments, your amendments to your underlying waivers, as soon as possible. Even though you have until, in most cases, the middle of November for your Appendix K to be live, you need to allow enough time for CMS to process the amendments to your 1915(c) waiver, so we can have those ready to approve when your K expires. And we can go to the next slide, please.

Here we offer some reminders that substantive changes to the 1915(c) waiver can only be approved with a prospective effective date. One of the key flexibilities associated with the Appendix K, is the ability to have retroactive effective dates. And states have made really substantial use of that retroactive effective date. But once we start moving back into the more traditional 1915(c) world we now need to abide by the requirement to have a prospective effective date for substantive changes. And there are also requirements for public notice and tribal consultation.

So we ask states to be taking all of this into account as they determine what actions they want to embed into their underlying waiver, and to allow time for those pre-submission activities to happen, and allow sufficient time once submitted to CMS, so that we can have your approved waiver amendments ready to go right as your Appendix K is expiring. Next slide, please.

So we'll talk in the next few slides, about the Appendix K flexibilities that can be added into the underlying 1915(c) waivers. And I'll start with the use of tele-health, or other electronic methods of service delivery. You see in this first bullet that there are an awful lot of examples of the different types of services that can be delivered using tele-health or other kinds of remote delivery. States have really, not just in their C waivers, but really across the board in Medicaid authorities, increased the use of tele-health during the public health emergency.

And the ability for states to continue to use tele-health after the PHE ends, is just as wide open, as it was during the public health emergency. And so to the extent the state has been utilizing remote service delivery options and tele-health in its Appendix K, we are more than happy to have conversations with you about continuing those remote services in your underlying waiver. You'll

see here at the tail end of that first sub-bullet, that we do need to make sure that community integration is still facilitated.

And that is something that is unique to home and community-based services; not unique to C waivers, but unique to HCBS. And because of the nature of the service and the frequency at which a lot of these services are provided, if we find ourselves in complete reliance on remote-delivered services or tele-health, we could end up even after the PHE, with individuals continuing to be isolated in a way that is not ultimately in their best interest for their health and welfare.

And so we do want to have conversations with states who are looking to include tele-health on a long-term basis, in their C waivers and other HCBS authorities, to make sure that beneficiaries have a choice between service modalities in person, or remotely, and that individuals have the opportunity to engage in their community as they desire. And then the second sub-bullet is another type of remote or electronic flexibility that states have implemented during the PHE, and which can be continued at states' discretion in the underlying fee waiver. Next slide, please.

So here are a couple of additional examples of Appendix K flexibilities that can be embedded into the underlying 1915(c) waiver - home-delivered meals, assistive technologies. We do have a reminder here that home delivered meals cannot cross into the threshold of a full nutritional regimen, which means 3-meals a day. That constitutes board, and is part of the prohibited room and board expenditures that are in the 1915(c) statute. But we are happy to provide technical assistance to make sure that we are not running afoul of that standard.

And states have also implemented during the PHE, new non facility-based community integration services. And we are very supportive of states continuing with those types of services, particularly as implementation of the home and community-based services settings regulation continues to be of paramount importance. And so again, technical assistance is available to embed those into your underlying waivers. Next slide, please.

And then to wrap up this part of the conversation, you know, many states have implemented various types of payment increases through their Appendix K - either retention or sign-on bonuses, or increases to the rate of payments for service delivery. All of that is fine to continue under the underlying waiver. A note here about retainer payments - in the early days, think back to the early days of the PHE, when we issued guidance on retainer payments that allowed states up to three 30-day periods in 2 consecutive calendar years, 2020 and 2021, for COVID-specific retainer payments.

As we transition back into normal operations in the underlying 1915(c) waiver, retainer payments can continue at the level of the lesser of 30 consecutive days or the total number of nursing facility bed whole days approved in the state plan. So we're not talking about bed whole days of the duration or frequency that we did, that we allowed under COVID and under an Appendix K. But there is the ability for that smaller package of retainer payments.

I wanted to draw your attention to the bullet that talks about payment for family caregivers to render services. We had a presentation on this topic last week on the all state call. You'll see a footnote link to the slides from last week's call where we took a deep dive into that issue. And within the context of 1915(c) waivers, states can continue to have family caregivers, including legally responsible individuals, act as providers even outside of their

Appendix K when "extraordinary services," are being rendered. And we can walk states through what really that means and how states can write their narrative for the types of services that family members will be reimbursed for, to stay on the right side of that extraordinary circumstances standard.

And as always, options for self-directed services - CMS continues to be a great supporter of self-directed options. And to the extent a state made new use of self-direction in their Appendix K during the PHE, we can walk states through how to extend that longer term, (in their) waiver. Next slide, please. So a couple - this slide and the next slide - a couple of flags on flexibilities that cannot be transitioned from an Appendix K into an underlying 1915(c) waiver. One of those first prohibitions is the provision of waiver services in institutional settings.

Here, though, we do have a flag that respite services and waiver services provided in hospital settings, in accordance with the CARES Act, those are still okay to be provided in institutional settings in the underlying waiver. But the larger flexibility to provide waiver services in institutional settings that some states took advantage of under the K, will disappear with the expiration of that K.

Likewise, extension of timeframes for completing level of care evaluations and reevaluations, that flexibility will expire upon the expiration of your Appendix K, as well flexibility with the settings requirement, for those settings that did not have the protection of the transition period and we're talking here about settings that were not in operation when the final rule became effective in March 2014, and had to meet the settings requirements immediately.

Some states used Appendix K authority to not have to comply with the requirements to have visitors at any time, you know, given the isolation and sheltering in place orders that were in existence for so long during the PHE. That is no longer allowable after your Appendix K ends. Next slide, please.

We also had a few states take advantage of Appendix K authority to suspend implementation of the conflict of interest protections in the 1915(c) waiver authority. And so it's a reminder those conflict of interest requirements will once again apply under the traditional waiver, as will the expectation that states timely adhere to submission requirements for CMS 372s and quality reports. Next slide, please.

I'll say just a word about 1115 demonstrations, because you heard me say earlier that some states who have 1915(c)-like services authorized through their 1115 demo, used an Attachment K authority to modify that demo to build in flexibilities just like the Appendix Ks were in the 1915(c) waiver. So, states that are interested in continuing existing Attachment K flexibilities beyond the current expiration date in their 1115 demonstrations, can submit a new demo request or an amendment to an existing demo. And you should contact your project officer in our state demonstrations group for additional technical assistance.

We remind you that any kind of amendments to your underlying demonstration would require adherence to public notice and application requirements as described in 1115 regulations, or as described in your existing demo special terms and conditions. And states should take those requirements into account in allowing for the time that will be necessary to submit an amendment to your existing 1115, and allow sufficient time to do all of those pre-submission requirements and allow sufficient time for CMS to complete our review. And you can see here in the last bullet, that we are asking states to

submit their applications at least 120 calendar days in advance of the amendment requested effective date. Next slide, please.

And I'll largely end by talking about the maintenance of efforts considerations that I alluded to earlier on. You know, as part of the backdrop of unwinding, our expectations associated with states continuing to spend increased funding made available to them under Section 9817 of the American Rescue Plan Act, and also there is the separate maintenance of effort requirements that are contained in the Families First Coronavirus Relief Act. And so states need to be aware of those MOE provisions as they are making decisions about unwinding and moving forward. Both of these two statutes and MOE provisions, have different requirements. And states need to be aware of both of those as they are making adjustments to their HCBS program.

So, as we have said in prior public guidance, the expiration of a COVID-19 flexibility or COVID-19 authority like an 1135 waiver, an Appendix K, an Attachment K, a DR SPA, the organic expiration date of those authorities and the expiration of the flexibilities contained in those authorities, is not a MOE violation in terms of Section 9817. So for example, if a state has an Appendix K with an overall expiration date of July 1, 2023, and July 1 comes and goes, the state's Appendix K is expired, all of the flexibilities in that K have expired, the state is not going to be violating their MOE expectation.

As I said at the beginning, if the state wants to end an existing flexibility early - let's say a state had an Appendix K with a 6-month post-PHE ending date on it, which means November 2023, and the state came to us and said, instead I want to end the flexibility on July 1, we would need to look at that flexibility and make sure it doesn't violate the MOE. Next slide, please.

And here's a reminder of what those MOE provisions are, as we laid out in the State Medicaid Director Letter implementing Section 9817. And again, we go back to how your program looked on April 1, 2021. And as we said in the Medicaid Director Letter, the MOE is implemented through a state not imposing stricter eligibility standards that were in place April 1, 2021, not offering fewer services or services at a lower amount duration of scope than was in place April 1, 2021. And a state not reducing provider payment rates below what was in effect April 1, 2021.

And so if the state is wanting to take down an approved flexibility before its approved expiration date, we would just need to make sure that none of these three provisions are violated by that early expiration. Next slide, please. Okay. So again, this is really just saying that states need to take into account the MOE as they are making decisions about next steps for existing approved COVID flexibilities. So otherwise, you know, we would expect states to retain approved Appendix K or Attachment K changes through the expiration of whatever is approved by CMS right now, which is obviously no later than 6-months post-PHE.

So I think I'm going to end there. There are a couple of additional slides. There's a summary slide, you know, that kind of recaps the salient points from today, and then a couple of slides' worth of resources that I would invite you to check out. But I think we'll go ahead and stop here and turn it back to Jackie. Thank you.

Jackie Glaze: Thank you, Melissa. And thank you, George, for your presentation. So we are ready to take questions from the states at this point. So we'll begin as we have in the past, by asking that you submit your questions through the chat function, and then we'll follow by taking questions over the

phone line. So I do see a couple of questions, so keep sending your questions. And I'll turn to you, (Ashley), so that you can begin taking a look at those.

(Ashley): Thanks, Jackie. The first question says, during unwinding if we close someone and we are required to reopen them, but they have not received a long-term care service for over 30-days, can we reopen long-term care for the entire period?

Melissa Harris: So this is Melissa. I'm not sure what it means to reopen long-term care. I think, you know, as states are re-initiating their eligibility determinations, there will be beneficiary-specific actions that are taken. And if that question is, you know, in relation to various MOE expectations, or yes, MOE expectations, you know, we can answer it through that lens. But I feel like I need a little bit of additional information. And so I would invite the author of that question to reach out to us through the mailbox, and we'll get a more intelligent answer.

(Ashley): Okay. Thanks, Melissa. The next question says, can you confirm (OneMAC) must be used for submission of managed care and (PACE) contract and rate actions, and managed care 438.6(c) state-directed payment pre-print after March 2023?

Jackie Glaze: (Ashley), we may need to take that one back. I'm not sure if we have anyone on that can address this, around the managed care.

(Ashley): Okay. Thanks, Jackie. Then we have a couple of questions asking if the slides will be made available. And the slides are actually already available on Medicaid.gov. So if you visit Medicaid.gov, scroll down a little bit to the COVID-19 section, and click on the link for the COVID page; on the left-

hand side you'll see a CMCS Medicaid and CHIP all state call section. You can click on there, and the slides are already available.

We have a question that says, we have some participants in our 1915(c) waiver program who do not currently meet the nursing facility level of care. Is it okay to resume nursing facility level of care redetermination after May 11, 2023? Or can that activity be resumed now? We have been keeping them enrolled because if they are disenrolled, they may lose their Medicaid eligibility.

Melissa Harris: (Ashley), I'm not sure whether that question is best answered by our unwinding team from the eligibility perspective, or the HCBS perspective. I mean, obviously again, there will be beneficiary-level implications once the eligibility redeterminations start. And it could be that individuals that are meeting their Medicaid or achieving their Medicaid eligibility by virtue of being at a nursing home level of care, could have that impacted if they are no longer assessed to meet an institutional level of care. But I'm a little hesitant to weigh in on the specifics without the benefit of our eligibility unwinding piece.

Sarah Lichtman Spector: Hi Melissa. This is Sarah Lichtman Spector. Thanks for the beginning part there. I think maybe we should take that one back on the eligibility side, so that we're able to consider it with all the right staff here internally. and then consult with you all on the 9817 part as well.

Melissa Harris: Yes.

Sarah Lichtman Spector: Thank you.

Melissa Harris: Yes, okay. Thanks, Sarah.

(Ashley): Thanks, Sarah. So we'll move to the phone lines now. Operator, can you please provide instructions to the participants on how to register their questions? And then if you could open the phone lines, please.

Coordinator: Thank you. If you would like to ask a question, please press star 1 on your telephone keypad. Please ensure that your phone is unmuted and record your name at the prompt, so I may introduce your question. Again, that is star 1 if you would like to ask a question. Please stand by for the first question. And I'm showing no questions at this time. Again, that is star 1.

Jackie Glaze: Thank you. (Ashley), back to you.

(Ashley): Let's look at one more question. It says, is 100% FMAP available for COVID-19 vaccine administration and COVID-19 vaccine counseling for the under-21 population, through September 30, 2024, the end of the ARP period?

Melissa Harris: So this is Melissa. And September 30, 2024 is in fact, the end of the ARP COVID coverage period. And I'll - I never get it right from memory, but it's, you know, the end of the quarter following the 1-year mark after the end of the PHE. So that does shake out to be September 30, 2024. And that marks the timeframe through which states are still expected to adhere to the ARP coverage requirements, including the provision of COVID vaccine and vaccine administration. So, yes, the 100% FMAP is available through that date.

For COVID vaccine counseling for individuals eligible for (EPSCT), we also indicated that 100% FMAP was available for standalone counseling for the (EPSCT) population, even if the vaccine was not administered as part of that individual visit. And the 100% FMAP for those visits would also be available

through September 30, 2024. I know we've got some benefits and coverage SMEs on the line, and I want to give them an opportunity to either confirm what I just said, or weigh in with any corrections.

Kirsten Jensen: Yes. This is Kirsten Jensen. I think that's fine, Melissa. Thanks.

(Ashley): Great. Thank you, both. Looks like the last question we have right now says, will CMS consider postponing the annual Medicaid plan change opportunity during unwinding?

Melissa Harris: This is Melissa. I'm not exactly sure what that question is referring to, but I don't think we have anybody on the phone who can speak to it.

(Ashley): Okay. Thanks, Melissa. We have a question that says, when do the MOE requirements through 9817 expire?

Melissa Harris: This is Melissa. And I do know the answer to that one. So the outer date in which a state can expend the funds generated through 9817, is March 31, 2025. States don't have to use that entire period to expend 9817 funds. We've had a couple of states come to us saying that they are about at the end of expending their enhanced funding. And when a state says to us that they are about done, we have a closeout process that we would walk the state through.

And when the state has kind of certified to us that they are done expending their 9817 funds, the MOE requirement also expires. And so if the state is thinking that they are, you know, forecasting that in the next several months they think they will have extended all of their funding, they're encouraged to reach out to us and we can walk them through that closeout process. But in all cases, we would expect states to be done with their 9817 expenditure - we

would expect things to be done spending the money they have collected through 9817, by March 31, 2025.

(Ashley): Thank you, Melissa. We'll transition back to the phone lines. So, Operator, if you could once again provide instructions for registering the questions, and then if you could open the phone lines, please?

Coordinator: Thank you. Once again, if you would like to ask a question, please press star 1 on your telephone keypad. That is star 1 to ask a question. One moment, please. And I am showing no questions at this time.

Jackie Glaze: Thank you. And (Ashley), just confirming we don't have any additional questions through the chat?

(Ashley): We do not.

Jackie Glaze: Okay. So I think with that, we will close early today. And so I would like to thank our team for their presentations. Looking forward we will provide topics and the invitation for the next call. If you do have questions that come up between the next call or before the next call, please feel free to reach out to us, your state leads, or bring your questions to the next call. So we do thank you for joining, and we hope everyone has a great afternoon. Thank you.

[End]