



---

**TO:** CO-OP Project Officers  
**FROM:** Kelly O'Brien, CO-OP Division Director  
**RE:** Amending CO-OP Loans Agreement to Apply Surplus Notes to Start-up Loans  
**Date:** July 9, 2015

Dear CO-OP Project Officers:

This notice is to inform you that the Centers for Medicare & Medicaid Services (CMS) will now allow CO-OPs to request that surplus notes be applied to Consumer Operated and Oriented Plan (CO-OP) Program start-up loans. Applying surplus notes to the start-up loans will enable CO-OP borrowers to record those loans as assets in financial filings with regulators. The start-up loans will be subject to commensurate terms of subordination, interest accrual, and repayment.

To pursue this change, a CO-OP loan recipient must provide CMS a written request that includes the following:

1. A justification or explanation of the specific benefit or benefits that the CO-OP expects to receive from the change;
2. Actuarially certified life of loan financial projections that reflect the implementation of the change, and an explanation of any key assumptions in those projections. Projections should include, but not be limited to:
  - a. debt service coverage ratios;
  - b. actual and/or projected payments made or received through the Risk Adjustment, Reinsurance, and Risk Corridors programs; and
  - c. risk based capital levels with respect to state requirements;
3. A description of the adverse impact to the CO-OP if the change is not implemented. For example, if a CO-OP anticipates they will fall below RBC level requirements absent this action; and
4. Actuarially certified life of loan financial projections that do not reflect the implementation of the change. Projections should include, but not be limited to:
  - a. debt service coverage ratios;
  - b. actual and/or projected payments made or received through the Risk Adjustment, Reinsurance, and Risk Corridors programs; and

- c. risk based capital levels with respect to state requirements.

Please note the following:

- It is necessary to amend the loan agreement to subject your start-up loan to a surplus note. **Attachment A** is the CMS-approved template to amend your loan agreement for these purposes. Proposed revisions to the template that are material will likely require further administrative review and approval, so we urge acceptance of the amendment as proposed here unless a material revision is absolutely necessary.
- Repayment due dates, interest rates, and disbursement processes are unaffected by this amendment.
- All active CO-OP loan recipients may request to enter into this amendment. In evaluating whether to approve these requests, CMS will consider the likelihood that the request will result in the overall benefits outlined by the applicant.
- Please communicate any questions or concerns related to the template of the amendment at your earliest convenience. Once the template is agreed to, CMS will provide a proposed amendment that includes amounts and parties.
- The proposed amendment that reflects amounts and parties must be approved by your state regulator before it can be executed. CMS will arrange calls with you and your regulator to discuss the proposed amendment, and make any necessary revisions.
- Once approved by your regulator, borrowers will execute the amendment and provide an image of the executed amendment to CMS.
- CMS will execute the amendment last, and provide an image of the executed amendment to each borrower.
- A CO-OP loan recipient who chooses not to apply at this time or whose application is denied may apply at their discretion in the future, and requests will be reviewed on a rolling basis.

**Please communicate questions, concerns, and your intent to amend your loan agreement consistent with this notice by emailing your account manager, Kevin Kendrick at [kevin.kendrick@cms.hhs.gov](mailto:kevin.kendrick@cms.hhs.gov), and Jamaca Mitchell at [Jamaca.mitchell@cms.hhs.gov](mailto:Jamaca.mitchell@cms.hhs.gov).**

Attachment (1)

cc: State Insurance Commissioners

**ATTACHMENT A**

**[PAGE INTENTIONALLY LEFT BLANK]**

[ ] **AMENDMENT TO LOAN AGREEMENT**

**I. Purpose**

The purpose of this [\_\_\_\_\_] Amendment (“Amendment”) is to amend the Loan Agreement dated [\_\_\_\_\_, 2012] (“Agreement”), between [CO-OP\Borrower Full Legal Name] (“Borrower”), and the Centers for Medicare & Medicaid Services (“Lender”) (Lender and Borrower together are “the Parties”), through a written amendment consistent with Section 19.4 thereof. This Amendment shall serve the purpose of, among other things, replacing Appendix 2 of the Agreement with that Appendix 2 attached as Attachment 1 hereto, for the purpose of enabling the outstanding balance of the Start-up Loan to be treated as the proceeds of a surplus note pursuant to National Association of Insurance Commissioners Statement of Statutory Accounting Principles No. 41 (SSAP 41). The Parties intend that this Amendment is necessary to advance the Parties’ mutual interest, and that the [STATE] [Insurance Commissioner or equivalent] acknowledges the promissory note contained in Appendix 2 of the Agreement as a surplus note within the meaning of SSAP 41, and thus accept the proceeds of the Start-Up Loan (designated as “Series A” on the facing page of the Agreement) provided pursuant to the Agreement as an asset for purposes of determining and acknowledging regulatory capital and surplus.

**II. Amendment**

Accordingly, the Parties hereby agree to amend the Agreement as follows:

1. By replacing the version of Appendix 2 to the Agreement that existed prior to the execution of this Amendment with that new Appendix 2 attached as Attachment 1 to this Amendment.

2. In the Definition section, under the defined terms “Interest” or “Interest Amount,” inserting a period after the phrase “Accrual Period” and deleting the remainder of the text.
3. Deleting the text of the section entitled “4.3 Interest” in its entirety and replacing it with the following text:

The Interest rate for the Start-Up Loan and any individual Disbursement thereof shall be fixed for the life of the Loan at the amount in Appendix 6, which represents the Treasury rate on five year securities in effect on the initial Date of Award minus one percentage point (“Interest Rate”); provided, however, that in the event this Agreement is earlier terminated for cause under Section 16.3 below, the Interest Rate for the Start-Up Loan shall be fixed at the rate in Appendix 6, which is equal to the Treasury rate on five year securities based on the Date of Award. Interest on the Start-Up Loan and each individual Disbursement thereof shall, subject to all terms and limitations in the Start-up Loan Promissory attached hereto and incorporated herein by reference as Appendix 2, accrue on a monthly basis using a 360-day year and 30-day month for actual days elapsed. Interest shall be payable according to the Repayment Schedule attached to this Agreement and incorporated herein by reference as Schedule A of Appendix 2.

4. Deleting the text of the second paragraph of the section entitled “4.4 Repayment of Start-Up Loan” in its entirety and replacing it with the following text:

Unless Lender terminates this Agreement for cause under Section 16.3 below, Borrower shall, subject to all terms and limitations in the Start-up Loan Promissory attached hereto and incorporated herein by reference as Appendix 2.1 be obligated to repay 100 percent of the Start-Up Loan amount disbursed, plus any Interest due to Lender in accordance with the Repayment Schedule for the Start-Up Loan, subject to its ability to meet State Reserve Requirements and other solvency regulations, or requisite surplus note arrangements.

5. Deleting in its entirety the last sentence of the section entitled “5.5 Interest”.
6. Deleting the text of paragraph (a) of the section entitled “15.1 Events of Default” in its entirety and replacing it with the following text:

Borrower, for reasons other than a State’s Solvency Payment Restriction, fails to pay any installment of Principal or Interest on a Loan or other Obligation for more than 60 days after the date the same is due, subject to any applicable surplus note limitations in the Start-up Loan Promissory Note or the Solvency Loan Promissory Note attached hereto

and incorporated herein by reference as Appendices 2 and 4, respectively, and such delinquent payment is not subsequently recapitalized in accordance with the terms hereof.

7. Replacing all occurrences of the phrase “capitalized interest,” in section 5.6 or otherwise throughout the Agreement, with the phrase “interest due.”
8. Deleting in its entirety the second sentence of the text below the table in Schedule A to Appendix 2.

### **III. Execution and Effective Date**

This Amendment may be executed by the Parties in any order and is effective upon execution by the last of the two Parties to so execute. This Amendment may be executed in counterparts.

### **IV. No Other Change**

Except as expressly modified herein, all other terms and conditions of the Agreement shall remain in full force and effect, and are hereby ratified, endorsed and reaffirmed by the Parties hereto, as witnessed by their respective signatures below. In conjunction therewith, each Party hereby expressly agrees to abide by and be legally bound by all covenants, terms and conditions of the Agreement, as the same be modified hereby. In the event of a conflict between any provision of the Agreement as originally drafted and the provisions of this Amendment, the provisions of this Amendment shall control.

IN WITNESS WHEREOF, Lender and Borrower have executed this Amendment as of the date indicated by each signature.

**For Lender:**

Per: \_\_\_\_\_  
Name: Kevin Counihan  
Title: Director, Center for Consumer Information and Insurance Oversight  
Marketplace CEO

Date: \_\_\_\_\_

**For Borrower:**

Per: \_\_\_\_\_  
Name:  
Title:

Date: \_\_\_\_\_



**ATTACHMENT 1**

**[PAGE INTENTIONALLY LEFT BLANK]**

**Appendix 2**

**START-UP LOAN PROMISSORY NOTE**

**[PAGE INTENTIONALLY LEFT BLANK]**

**U.S. Department of Health and Human Services,  
Centers for Medicare & Medicaid Services**

**CO-OP Loan Borrower's Start-Up Loan, Series A, Dated \_\_\_\_\_**

**PROMISSORY NOTE**

**Loan #: Start Up Loan Series A**

**This**        day of \_\_\_\_\_, 201\_

**By:**

**Title:**

[Address]

[CO-OP] ( "**Borrower**")

The Start-up Loan provided pursuant to the Loan Agreement of which this Promissory Note is a part, and is incorporated into as Appendix 2, is a Surplus Note. Accordingly, Borrower promises, agrees, and covenants to pay to the order of Lender, the United States Department of Health and Human Services, Centers for Medicare & Medicaid Services (and its successors) the amounts specified in Schedule A below (this amount is called "Principal"), plus interest. Notwithstanding any conflicting provisions contained in the Loan Agreement, other than Section 3.4 of the Loan Agreement which is incorporated herein by reference. Payment shall be on the terms and subject to the conditions set forth in this Surplus Note. Interest shall not compound and shall be computed annually for the twelve (12) months ending on the anniversary of each disbursement on the basis of a year of twelve thirty-day months.

Borrower agrees to pay Principal and interest in the installments listed in Schedule A below, as may be amended from time to time.

**PROVIDED, HOWEVER,** that payment of Principal and interest shall be subject to the following conditions:

1. This surplus note shall not be a liability or claim against Borrower or any of its assets, except as provided in this Surplus Note. This Surplus Note does not confer any rights upon the Lender, as Note Holder, other than the right to receive payment of principal and interest on the terms and subject to the conditions set forth in this Surplus Note.
2. This Surplus Note shall be repaid only out of the surplus earnings of Borrower and, as to each payment, only with the prior approval of the [State] Insurance Commissioner [of State] or his designee. Subject to the approval requirements set forth herein, Borrower at its option may repay all or any part of this Surplus Note at any time after issuance at the outstanding principal amount plus the interest accrued thereon to the date of repayment.

3. By acceptance of this Surplus Note, the Note Holder agrees that the payment of principal and interest hereunder is expressly subordinated to claims of creditors and members of Borrower, including a) policyholders of Borrower; b) claimant and beneficiary claims of policies issued by Borrower; c) all other classes of creditors other than surplus note holders; d) Operating expenses of Borrower, and e) reserve and solvency requirements as determined by applicable State law. If Borrower is dissolved and there are insufficient assets to pay in full the principal amount of and interest on all outstanding Surplus Notes, then Borrower shall pay on the Surplus Notes pro rata on the basis of the outstanding principal amount of each Surplus Note and the interest accrued thereon, unless and only to the extent that such payment is otherwise prevented, restricted or delayed by a State Solvency Payment Restriction. Regardless of the issuance date of this Surplus Note or any other surplus note of Borrower this Surplus Note shall be of equal rank with any other surplus note, unless such other surplus note is expressly subordinated to this Surplus Note.

Subject to the conditions for payment, repayment, discharge, and retirement of this Promissory Note set forth above, Borrower may, at its option, prepay this Promissory Note in whole or in part at any time without penalty.

The obligation of Borrower under this Promissory Note may not be offset or be subject to recoupment with respect to any liability or obligation owed to Borrower. No security agreement or interest, whether existing on the date of this Note or subsequently entered into, applies to the obligation under this Note.

No modification of this obligation is effective and no other agreement may modify or supersede the terms of this obligation, whether existing on the date of this Note or subsequently entered into, unless the modification or agreement is approved by the **[Insurance Commissioner]**.

Borrower hereby waives the rights of presentment (meaning the right to require CMS to demand payment) and notice of dishonor (meaning the right to require CMS to give notice to other persons that amounts due hereunder have not been paid).

This Note is attached to and expressly incorporated by reference in the Loan Agreement dated [ , 2012], as amended, supplemented or otherwise modified and in effect from time to time, the "Loan Agreement"), by and among Borrower and CMS, and evidences the "Solvency Loan" made by CMS thereunder.

The terms and conditions of the Loan Agreement are hereby incorporated in their entirety by reference as though fully set forth herein.

<p>Address:</p>  <p>Attention: Telephone No.: E-Mail:</p>	<p>[CO-OP]</p> <p>Per: _____ Name:  Title:  Date: _____</p>
---	---