THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

April 28, 2022

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 12th Street SW
Washington, DC 20554

Dear Chairwoman Rosenworcel:

We are writing to request the opinion of the Federal Communications Commission (Commission) regarding whether certain text messages and automated, pre-recorded telephone calls to individuals' cell phones, the content, timing, and recipients of which are discussed in detail below, are permissible under the under the Telephone Consumer Protection Act (TCPA). The text messages and automated, pre-recorded calls would be made to encourage those individuals to follow-up with their state Medicaid program, Children's Health Insurance Program (CHIP), Basic Health Program (BHP), or Health Insurance Marketplace (Marketplace) regarding their health coverage enrollment. Specifically, we are requesting the Commission's assistance in confirming our understanding that, under relevant cases and Commission rulings construing the TCPA:

1. State and federal government employees who deliver such text messages and automated, pre-recorded calls to individuals generally will be immune from suit under the TCPA;[1]
2. State and federal government contractors who deliver such text messages and automated, pre-recorded calls to individuals generally will be immune from suit under the TCPA when the government agency authorizes and directs the contractor's actions and the agency validly confers that authorization;[2]
3. In cases where a state government agency has delegated the authority to determine eligibility for Medicaid, CHIP, or the BHP to local government entities (e.g., agencies of cities and counties), the local government employees who deliver such text messages and automated, pre-recorded calls to individuals generally will be immune from suit under the TCPA, as will its contractors when the local government entity authorizes and directs the contractor's actions and the agency validly confers that authorization; and

[1] See *Cunningham v. Lester*, 990 F.3d 361, 363–65 (4th Cir. 2021) (holding that CMS employees who worked in connection with a federal government contract under which the contractor delivered auto-dialed messages were also immune from suit under the TCPA because the government was the real party in interest).
[2] See *Cunningham v. GDIT,* 888 F.3d 640, 643 (4th Cir. 2018) (holding that under *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 20–21 (1940), sovereign immunity barred the plaintiff's TCPA suit against a CMS contractor because "the government authorized the contractor's actions and the government validly conferred that authorization").

4. Managed care entities and, if applicable, their parent companies providing coverage to Medicaid, CHIP, or BHP enrollees under contract with a state agency that deliver such text messages and automated, pre-recorded calls to individuals generally will be immune from suit under the TCPA, as will their contractors when the managed care entity or its parent company authorizes and directs the contractor's actions and the entity validly confers that authorization.

The ongoing Coronavirus Disease 2019 (COVID-19) pandemic and implementation of federal policies to address the public health emergency for COVID-19 ("the public health emergency") have disrupted routine eligibility and enrollment operations for Medicaid, CHIP, and BHP programs, which provide health coverage to 86 million Americans, including children, pregnant individuals, seniors, and people with disabilities. Since the start of the public health emergency, enrollment in these programs has increased by more than 20 percent.[3,4] The sizeable growth in enrollment has resulted in large part from a provision in the Families First Coronavirus Response Act (P.L. 116-127), which makes increased federal matching funds available for state Medicaid programs that meet specified requirements, including that they maintain the enrollment of most Medicaid enrollees through the end of the month in which the public health emergency ends. We refer to this requirement as the "continuous enrollment" requirement.

A March 2022 report by the Urban Institute projected that as many as 15.8 million people may lose their Medicaid coverage when the public health emergency ends and the continuous enrollment requirement is no longer in effect.[5] Articles published by the *Washington Post* and local news agencies have highlighted stories of some of the individuals who may be affected by this loss in coverage.[6] For example, local news entities reported on the 200,000 Oklahomans who could lose their Medicaid coverage,[7] the more than 100,000 Connecticut residents who signed up for Medicaid during the public health emergency,[8] and the one million Arkansans at risk of losing Medicaid.[9]

While the continuous enrollment requirement is specific to Medicaid, the agencies operating CHIP and BHP have also been impacted by the public health emergency. Facing workforce shortages, challenges with reaching enrollees, and system limitations, many CHIPs and BHPs adopted flexibilities similar to those used by Medicaid programs, including the state option to delay timely completion of renewals during an emergency period. These flexibilities have impacted the timeliness of eligibility renewals and redeterminations based on changes in circumstances for Medicaid, CHIP, and BHP enrollees, such that individuals in all three programs could be at risk of losing coverage when state agencies resume normal operations after

[3] https://www.Medicaid.gov/medicaid/programinformation/medicaid-chip-enrollment-data/medicaid-and-chip-enrollment-trend-snapshot/index.html.
[4] https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//200776/ASPE%20Issue%20Brief-ACA-Related%20Coverage%20by%20State.pdf
[5] https://www.urban.org/sites/default/files/2022-03/what-will-happen-to-medicaid-enrollees-health-coverage-after-the-public-health-emergency_1_1.pdf.
[6] https://www.washingtonpost.com/health/2022/03/14/medicaid-loss-of-coverage/.
[7] https://www.newson6.com/story/62445117121aa20729fcd4f8/oklahoma-medicaid-members-at-risk-of-losing-coverage-when-federal-covid-aid-expires.
[8] https://www.ctinsider.com/news/article/Data-More-than-100-000-CT-residents-signed-up-17037373.php.
[9] https://www.actionnews5.com/2022/03/24/one-million-arkansans-risk-losing-medicaid/.

the public health emergency ends. Individuals at risk of losing coverage include those who are eligible but may be disenrolled for procedural reasons, such as failure to return a completed renewal form with information needed to confirm eligibility.

These types of coverage losses can be avoided if state agencies and their partners are able to communicate more easily with enrollees about the steps required to retain their enrollment. Additionally, many individuals disenrolled from Medicaid due to the expiration of the continuous enrollment requirement will be eligible for other health coverage through CHIP, the BHP or the Marketplaces. However, to receive assistance in transitioning their coverage, these individuals must respond to requests from the Medicaid agency.

Many state agencies and their partners, particularly local government entities and managed care entities, are considering the use of text messages or automated, pre-recorded calls to reach enrollees and remind them to respond to requests from the Medicaid agency. However, concerns about violating the TCPA are hindering state efforts to engage partners who are concerned about potential lawsuits resulting from such text messages or automated, pre-recorded calls. A confirmation or clarification issued by the Commission, confirming that specified entities would not be subject to liability under the TCPA when sending these types of messages, would be enormously helpful to state and federal efforts to reach enrollees and prevent gaps in health coverage that will result if individuals do not successfully transition to alternative coverage when their Medicaid enrollment ends. As discussed below, we do not believe this is a novel issue, so I respectfully request that the Commission issue a clarification as soon as possible, consistent with applicable law and the Commission's prior rulings.

What is the anticipated content and timing of these text messages and pre-recorded calls?

Nearly every state agency has already begun work to raise awareness about the coming end to the continuous enrollment requirement and the need for all Medicaid enrollees, as well as CHIP and BHP enrollees, to update their contact information with their program. For some enrollees, it has been two or more years since their eligibility was first determined or last renewed, and their contact information may be out of date. A data analysis conducted by the Kaiser Family Foundation found that about one in ten Medicaid enrollees moved in 2020.[10] The vast majority of these individuals remained in the same state, so their move did not affect their state residency for Medicaid eligibility purposes. However, considering the challenges faced by all Americans in 2020 and during the public health emergency generally, I believe it is extremely likely that some individuals have moved without sharing updated contact information with the Medicaid, CHIP, or BHP agency, as applicable, particularly if they moved multiple times during the public health emergency due to housing instability.

Without a current mailing address, the renewal packets and notices sent by the state agency may not reach individuals who have moved. When an enrollee's continued eligibility cannot be confirmed, the agency must disenroll that person, even if the individual would have remained eligible had they completed and returned the renewal packet. This loss of coverage and potential interruption in care is particularly troubling for individuals who continue to be at risk for severe

[10] https://www.kff.org/medicaid/issue-brief/how-many-medicaid-enrollees-moved-in-2020-and-what-are-the-implications-for-unwinding-the-public-health-emergency/

illness from COVID-19 infection or who are still suffering from symptoms of long COVID that require ongoing care. Because some enrollees are likely to be unreachable by mail, such as those who moved without providing the state agency with an updated mailing address, an effective strategy to ensure completed renewals and minimize gaps in coverage requires communicating with enrollees using all available contact information, including through phone calls and text messages.

The Department of Health and Human Services, through the Centers for Medicare & Medicaid Services (CMS), is working closely with state agencies and their partners as they prepare to complete an unprecedented number of eligibility renewals. When the public health emergency ends, state Medicaid agencies will need to renew eligibility for every enrollee. Each state is developing a unique approach to spread out these Medicaid renewals over a 14-month period, so eligibility can be renewed for a portion of Medicaid enrollees each month.[11] During this period, all CHIP and BHP enrollees will also be due for an annual renewal, further increasing states' eligibility renewal workload. Many state Medicaid, CHIP, and BHP agencies are partnering with Marketplaces to encourage all enrollees to provide updated contact information; this will be particularly helpful for households with coverage in multiple programs, for example, children enrolled in Medicaid and parents enrolled in coverage through the Marketplace. This partnership will also be important for successfully transitioning current Medicaid enrollees to the Marketplace as their eligibility changes. Both State-based Marketplaces and the Federally-facilitated Marketplaces (33 states currently utilize a Federally-facilitated Marketplace rather than a State-based Marketplace) can play a role in reminding individuals and families to update their contact information, respond to renewal notices from the Medicaid, CHIP, or BHP agency, and to take the necessary steps to transition to coverage through the Marketplace if their eligibility changes.

While individual state approaches will vary, we anticipate that most state Medicaid agencies, in collaboration with CHIP, BHP, and the Marketplace that serves the state, will use three types of text messages or automated, pre-recorded calls during three different phases of the renewal process, including the lead up to the initiation of renewals. During the first phase, in preparation for the resumption of Medicaid eligibility renewals, all Medicaid enrollees, along with CHIP and BHP enrollees whose most recent renewal may have been delayed due to the public health emergency, may receive simple text messages or pre-recorded calls reminding them to contact their program online, by mail, or by phone to ensure that their contact information is up to date. These messages will be essential for ensuring that the agency can reach its enrollees. During the second phase, when renewals are being processed for Medicaid enrollees, along with regular annual renewals for CHIP and BHP enrollees, some individuals will need to provide additional information, such as updated income information, so the agency can complete the redetermination of eligibility. These individuals may receive text messages or pre-recorded calls reminding them to respond to their program with the information needed to confirm their continued eligibility. If they do not respond, these individuals may receive another reminder urging them to follow-up with their program or to contact the Marketplace that serves their state for assistance. In the event the agency has determined an individual no longer eligible for the program in which they were enrolled, during the final phase, the individual may receive text messages or pre-recorded calls explaining the time-limited actions they can take to enroll in

[11] https://www.medicaid.gov/federal-policy-guidance/downloads/sho22001.pdf

another health coverage program for which they may be eligible, such as coverage through the Marketplace.

We anticipate that no more than six to eight individual messages will be sent to any individual enrollee through some combination of text messages and automated, pre-recorded calls. Each message will identify the agency that is sending the message or on whose behalf the message is sent (the Medicaid, CHIP, or BHP agency or the Marketplace) and will provide the individual with information on how to opt out of or stop receiving messages. The use of text messages and pre-recorded calls to an individual will be discontinued once the agency or agencies receive all information needed to renew the individual's eligibility or transition their enrollment to another source of coverage. While all enrollees may receive messages about updating their contact information, only those for whom the agency needs additional information will receive messages about renewing their eligibility, and only those determined ineligible will receive messages about transitioning their coverage to another health coverage program for which they may be eligible. Finally, once an enrollee has responded with all requested information, or enrolled in another health coverage program when appropriate, we would not expect that individual to receive any additional reminders as part of this campaign.

We anticipate these text messages and/or automated, pre-recorded calls would begin as soon as clarification is issued by the Commission and would end approximately 18 months after the end of the public health emergency. If consistent with the TCPA, we believe the use of text messaging and automated, pre-recorded calls may become a best practice for reaching Medicaid, CHIP, BHP, and Marketplace enrollees, and both state and federal agencies may choose to incorporate them into future renewal work. The experiences of state Medicaid, CHIP, and BHP agencies and their partners, as they work through the renewal process for 86 million enrollees, as well as the experiences of the State-based and Federally-facilitated Marketplaces and their partners, will provide valuable information about whether text messages and automated, pre-recorded calls to enrollees help to keep eligible people enrolled in coverage and minimize coverage gaps for those transitioning to another program.

Under current law, the continuous enrollment requirement extends through the end of the month in which the public health emergency ends, and state agencies may begin to terminate coverage for ineligible individuals at that time, or at the point in time that they choose to forego the enhanced federal funding to which the continuous enrollment condition is tied. As COVID-19 has continued to impact our country, the public health emergency has been extended to ensure that emergency protections remain available. The most recent 90-day renewal became effective on April 16, 2022. While we cannot speculate on the eventual end of the public health emergency, we understand the urgency felt by states to move forward with outreach to their enrollees. That is an important reason why the Biden-Harris Administration is committed to providing at least 60 days advance notice before any expiration or termination of the public health emergency. If we were to determine, for example, that an emergency no longer exists effective July 15, 2022, an announcement would be made no later than May 16, 2022.

The time frame between this request and the end of the continuous enrollment requirement may be short. If the Commission agrees that state Medicaid, CHIP, and BHP agencies and the Marketplaces serving each state, as well as the contractors operating under their direction, may deliver the text messages and automated, pre-recorded calls described in this letter, current plans

for outreach efforts would need to be updated as quickly as possible. States are already engaged in outreach efforts to educate enrollees about the changes that are coming via other communication methods in connection with the end of the continuous enrollment requirement. Once text messaging and/or pre-recorded calls are incorporated into the renewal strategy, current outreach efforts would need to include information about the text messages and calls to assure enrollees that they are legitimate. These communications would need to happen as soon as possible after the Commission's clarification, so this request is very time sensitive.

Who will send text messages and/or initiate automated, pre-recorded calls?

As state agencies plan for the significant increase in workload that will occur as they return to normal eligibility operations, establishing a trained eligibility workforce with the capacity to meet the upcoming demand is one of their greatest concerns. Local government entities serve a critical role and often conduct determinations of Medicaid and CHIP eligibility on behalf of a state. Federal law requires a single state agency to administer or supervise the administration of each state Medicaid program, but states may delegate the function of determining Medicaid eligibility to local government entities, such as counties or cities. The state agency remains responsible for setting the program rules and ensuring that the determinations are made consistent with the statute, but in such cases, local government agency staff are on the front lines – communicating with enrollees, collecting updated information, and making determinations of continued eligibility on behalf of the state agency and under its supervision.

States are thinking broadly and creatively about what they can do with their existing staff and what partners they can bring in to help. Managed care entities function as important partners to states. The predominant form of service delivery in Medicaid, CHIP, and BHP, along with qualified health plans offered through the Marketplaces, is managed care, and enrollees are accustomed to receiving important information about their health coverage from their managed care plans. The managed care entities under contract with a state provide health care coverage directly to Medicaid, CHIP, and BHP enrollees and serve as important messengers on behalf of the state. The managed care entities' parent companies, which are typically health insurance companies, also may partner with the state on important messaging campaigns.

As states resume routine renewals and other eligibility actions, communicating with Medicaid, CHIP, and BHP enrollees will be critical to successful retention of coverage for eligible enrollees and successful transition to other health coverage programs for individuals who are no longer eligible for their current program. We anticipate that states will take different approaches to reaching enrollees, depending on factors such as the size of state programs, the structure of their agencies, their resources, and the contractors and partners available to assist them. Pending clarification by the Commission, states are likely to use one or more of the following approaches and would want to assure their enrollees that communications from these entities are legitimate. The state Medicaid, CHIP, or BHP agency, or the State-based Marketplace, may:

- Send text messages or initiate automated, pre-recorded calls directly, or work through their contracted call center, or other contractors that support eligibility and enrollment operations, to send text messages or initiate calls to their enrollees.

- Rely on local government entities to send text messages or initiate automated, pre-recorded calls to enrollees in their jurisdiction. This approach is most likely to occur in a state where eligibility determinations are delegated by the state agency to local government agencies, which may also rely on contractors to reach enrollees.
- Rely on contracted managed care entities (or a managed care entity's parent company) to send text messages or initiate pre-recorded calls to enrollees in their health plans, or to arrange with their contractors to send such text messages or initiate such calls. These managed care entities, and their parent companies, may also send text messages or initiate automated, pre-recorded calls to individuals who were served by their plan but who are no longer eligible for Medicaid, CHIP, or BHP. These text messages and calls would encourage the individuals to contact the Marketplace serving their state to seek a determination of eligibility for other coverage programs. Medicaid and CHIP managed care entities may not include marketing or marketing activities as defined by Medicaid managed care marketing regulations in 42 C.F.R. § 438.104 (cross-reference at § 457.1224 for CHIP) in their text messages or automated, pre-recorded calls.[12]

CMS, or federal contractors working with CMS, may also send text messages or initiate automated, pre-recorded calls to support state outreach to Medicaid, CHIP, and BHP enrollees. Staff from CMS or federal contractors working with CMS may initiate calls or text messages to individuals who are at risk for losing or have lost their Medicaid, CHIP, or BHP eligibility and who have not yet completed the process to obtain an eligibility determination for insurance affordability programs or to enroll in coverage through the Marketplace.

From what sources will contact information be collected to send text messages or initiate automated, pre-recorded calls?

Generally, text messages would be placed and pre-recorded calls initiated to a contact phone number provided by the enrollee. Every state is required to make available a single application to determine eligibility for most Medicaid coverage, CHIP, BHP, and financial subsidies for coverage through the Marketplace. When an individual applies for coverage, they must provide contact information so the applicable program can follow up with them. Most applications request both a primary and secondary phone number.[13] When an individual signs the application, they generally agree to permit the state to use the information provided to determine program eligibility and for other lawful program purposes. Every state must also have processes in place for enrollees to make timely reports of any changes in their circumstances.

In addition to direct updates from enrollees, state agencies may also receive updated contact information from other state agencies or state-administered programs, like the Supplemental Nutrition Assistance Program, in which individuals may also be enrolled, or from contracted entities like a managed care entity providing coverage to enrollees. Unless otherwise permitted, states may not utilize information obtained from other programs or other entities without first reaching out to the enrollee to confirm that the information is correct.

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[12] The information and outreach about the eligibility renewal process may not include information intended to influence a beneficiary to enroll in a specific Medicaid managed care plan or to not enroll in or disenroll from another Medicaid managed care plan, consistent with 42 C.F.R. §438.104.

[13] See, for example, https://marketplace.cms.gov/applications-and-forms/marketplace-application-for-family.pdf

In addition to the use of a single application for Medicaid, CHIP, BHP and coverage through the Marketplace, federal law requires that when individuals are determined ineligible for one program, their electronic accounts, including contact information, be transferred to another program for which they may be eligible, if potentially eligible for another insurance affordability program. For example, when an individual's income increases such that it exceeds the income eligibility standard for Medicaid, if the state determines that the individual may be eligible for enrollment in subsidized or unsubsidized coverage through the Marketplace, that individual's account is transferred to the Marketplace for a determination of eligibility and enrollment in a qualified health plan. If the Marketplace needs additional information to complete its eligibility determination, the Marketplace will contact the individual using the contact information that was originally provided by the individual to the Medicaid agency.

Why are these text messages and automated, pre-recorded calls permissible under the TCPA?

We understand that the TCPA prohibits "persons" from making phone calls and sending text messages using an automatic telephone dialing system or an artificial or prerecorded voice, except under very limited circumstances, such as where the called party has given "prior express consent." We believe that the text messages and phone calls contemplated here are permissible under the TCPA for the following reasons.

1. Prior Express Consent: When individuals apply for coverage, they provide consent to be contacted by phone by the program for which they are eligible or may be eligible. While the application form may not state explicitly that the individual may receive automated text messages or pre-recorded phone calls, the application instructions inform applicants that they may be contacted if more information is needed. In addition, when the application is signed, the applicant (or application filer on behalf of the applicant) acknowledges that the information provided on the form will be used to determine eligibility and may be used for other lawful purposes of insurance affordability programs, which include Medicaid, CHIP, BHP, and financial subsidies for coverage through the Marketplace. Applicants are also informed that they may be asked to provide additional information to verify their eligibility. We believe that the provision of a cell phone number at application and a signature acknowledging the terms stated on the application form could be considered "prior express consent" to be contacted using that cell phone number regarding their eligibility for and enrollment in coverage. Further, we believe this prior express consent could extend to eligibility and enrollment contractors of the state agency, local government agencies, managed care entities providing coverage under contract with a state agency (and their parent companies), the Marketplace serving the state, and contractors of all of these, when the involvement of any of these is necessary to complete the individual's determination of eligibility for or enrollment in health coverage through an insurance affordability program.

2. Maker of the Call: In many cases, the maker of the call will be the state agency administering the Medicaid program, CHIP, or BHP through which the individual is enrolled in coverage, a private contractor engaged by the agency to conduct outreach on the agency's behalf, or a managed care entity under contract with the state. The maker of

the call may also be the Federally-facilitated or State-based Marketplace that serves the individual's state. The Federally-facilitated Marketplace will conduct this outreach through private contractors engaged by CMS under the Federal Acquisition Regulations.

In an adjudicatory ruling effective February 12, 2021, the Commission clarified that neither federal, nor state, government callers are considered "persons" under the TCPA when they are making calls in the conduct of official government business.[14] However, a federal or state government contractor, and a local government entity is considered a "person" for purposes of the TCPA except in cases where the federal or state government is actually the "maker of the call." Although local government entities and private contractors generally may be subject to the TCPA, the Commission also clarified that federal and state government contractors may qualify for forms of derivative immunity in certain circumstances when they are making calls on behalf of the federal government or a state government.[15] When a state agency administering the Medicaid program, CHIP, or BHP, or the state or federal agency administering the Marketplace is working with a partner directly participating in the eligibility and enrollment process (e.g., a contracted call center, managed care entity, health insurer, or local government entity) to facilitate the sending of text messages or automated pre-recorded calls to their enrollees, and the state or federal agency directs the content, timing, and recipients of the calls or text messages, we believe the state or federal program is so involved in placing the or text message call that it could be deemed to be the "maker of the call" for purposes of the TCPA. If the federal or state government agency is deemed to be the "maker of the call" in such cases, we understand that prior consent from the individual would not be required.

Closing

Protecting access to health coverage and minimizing coverage gaps are among my top priorities when the continuous enrollment requirement ends. The strategies outlined in this letter would help state Medicaid, CHIP, and BHP agencies to facilitate renewals, limit additional requests for information from enrollees, and reduce coverage terminations due to enrollee non-response. This would not only reduce gaps in coverage, but would also reduce the administrative burden on state agencies as they navigate an extraordinary volume of renewals. These strategies would also be critical to ensuring that state agencies have up to date information when transferring ineligible individuals to the Marketplaces for further eligibility determinations; this would facilitate financial assistance applications to the Marketplaces and reduce the number of individuals who become uninsured.

Over the last decade, we have made great strides in reducing the number of Americans who are uninsured. Research shows that having health coverage improves access to primary and preventive care, improves medication adherence, and improves mental health because insured

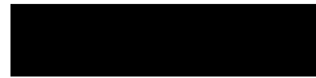
[14] *See* Government and Government Contractor Calls Under the Telephone Consumer Protection Act of 1991, 86 FR 9299, 9300 (Feb. 12, 2021).
[15] *Id.*

people know they can get health care if and when they need it.[16] The COVID-19 pandemic has had many negative effects on individuals, families, cities, states, and our nation as a whole. As our country recovers from the greatest public health crisis of our time, we would like to see the millions of Americans who are eligible for and have gained access to health coverage, some for the very first time, remain covered and continue to have the peace of mind that comes with having health coverage, as they navigate the many new challenges before us.

Thank you for taking the time to consider our request. We would be happy to answer any follow-up questions that you may have. Please contact Rachel Pryor, Counselor for Health Policy, at Rachel.Pryor@hhs.gov, if you need additional information.

Sincerely,

Xavier Becerra
Secretary



Chiquita Brooks-LaSure
CMS Administrator

[16] Sommers, Benjamin D; Gawande, Atul A; Baicker, Katherine. *Health Insurance Coverage and Health – What the Recent Evidence Tells Us.* **The New England Journal of Medicine; Boston** Vol. 377, Iss. 6, (Aug 10, 2017): 586-593.