



May 9, 2017

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The Honorable Tom Price
Secretary, U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Mr. Secretary:

As the Attorneys General of our respective states, we write to request a change in federal policy to allow use of the federal funds provided to our Medicaid Fraud Control Units (MFCUs)¹ for the detection, investigation and prosecution of a wider range of abuse and neglect committed against Medicaid beneficiaries or in connection with Medicaid-funded services. Under the pertinent provisions of the Social Security Act, most state attorneys general have an important working relationship with their state’s MFCU; in many states, the MFCU is housed within the state attorney general’s office.²

As implied by its commonly used name, the MFCU has as its principal focus the detection and elimination of *fraud* within the Medicaid program. But Congress also created the MFCUs to help ensure “that beneficiaries under the [State] plan [for medical assistance] will be protected from *abuse and neglect* in connection with the provision of medical assistance under the plan.”³ Indeed, at one place in the Social Security Act, Congress expressly refers to MFCUs as “medicaid fraud *and abuse* control unit[s]”.⁴

Today, more than 74 million Americans are enrolled in Medicaid.⁵ Of those, more than 6.4 million are age 65 or older.⁶ Statistics cited by the Centers for Disease Control and Prevention (CDC) suggest that 1 in 10 persons age 65 and older *who live at home* will become a victim of abuse. Not surprisingly, CDC figures also suggest that most elder abuse is never detected, with one study concluding that for every case of elder abuse that is detected or reported, 23 more remain hidden.⁷

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¹ These federal funds are referenced in regulation as “federal financial participation,” or “FFP.” See 42 C.F.R. § 1007.19.

² See 42 U.S.C. § 1396b(q).

³ See 42 U.S.C. § 1396a(a)(61) (emphasis added).

⁴ *Id.* (emphasis added).

⁵ January-March 2016 Medicaid MBES Enrollment report (Updated December 2016), available at <https://www.medicaid.gov/medicaid/program-information/downloads/cms-64-enrollment-report-jan-mar-2016.pdf> (last accessed March 28, 2017).

⁶ See <http://kff.org/medicaid/state-indicator/medicaid-enrollment-by-age/?dataView=1¤tTimeframe=0&selectedDistributions=65-plus&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last accessed March 28, 2017).

⁷ See <https://www.cdc.gov/violenceprevention/elderabuse/consequences.html>.

In light of those realities, the current strict federal limitations on states' ability to use MFCU assets to investigate and prosecute abuse and neglect are outdated, arbitrarily restrict our ability to protect Medicaid beneficiaries from abuse and neglect as Congress intended, and should be replaced or eliminated. We request authority to use federally funded MFCU assets to detect, investigate and prosecute abuse and neglect of Medicaid beneficiaries or in connection with Medicaid-funded services to the full extent the federal statute allows. Toward that objective, we offer two specific recommendations, both of which can be accomplished by changing current federal regulations:

First, we recommend allowing the use of federally funded MFCU assets to investigate and prosecute abuse and neglect of Medicaid beneficiaries in non-institutional settings. The Social Security Act expressly allows use of MFCUs to investigate and prosecute patient abuse/neglect in "health care facilities"⁸ or "board and care facilities,"⁹ but the statute *does not prohibit* use of federal MFCU funds to investigate abuse/neglect in non-institutional settings—only the regulations impose that prohibition.¹⁰ This regulatory restriction arbitrarily limits the scope of potential abuse or neglect cases our MFCUs can investigate or prosecute—for example, by excluding abuse or neglect of a beneficiary alleged to have occurred in a home health care or other non-institutional setting. This regulatory restriction appears to us in conflict with Congress's broad command that the MFCUs are to help ensure that Medicaid beneficiaries "will be protected from abuse and neglect in connection with the provision of medical assistance" under Medicaid. We recommend these regulations be broadened to allow use of federal MFCU funds to freely investigate and prosecute suspected abuse or neglect of Medicaid beneficiaries in whatever setting it may occur, including non-institutional settings.

Second, we recommend improving detection of abuse and neglect of Medicaid beneficiaries by broadening the permissible use of federal MFCU funds to screen complaints or reports alleging potential abuse or neglect. Under current regulations, federal MFCU funds may be used only for the "review of complaints of alleged abuse or neglect of patients *in health care facilities*."¹¹ As with the first restriction discussed above, the regulatory limitation on the screening of only those complaints alleging patient abuse or neglect *in health care facilities* arbitrarily narrows the permissible use of MFCU assets and appears in conflict with the broad congressional command to help ensure that all Medicaid beneficiaries, not just those in institutions, "will be protected from abuse and neglect." This regulation effectively places blinders on the MFCUs in their ability to search for and identify cases of possible abuse and neglect of beneficiaries. The regulations should be broadened to allow use of federal MFCU funds to freely screen or review any and all complaints or reports of whatever type, in whatever setting, that may reasonably be expected to identify cases of abuse or neglect of any Medicaid beneficiary. The MFCUs should have the widest possible latitude to detect and identify potential abuse and neglect of Medicaid

⁸ 42 U.S.C. § 1396b(q)(4)(A)(i).

⁹ 42 U.S.C. § 1396b(q)(4)(A)(ii).

¹⁰ *See, e.g.*, 42 C.F.R. § 1007.19(d)(1) ("Reimbursement will be limited to costs attributable to the specific responsibilities and functions set forth in this part in connection with the investigation and prosecution of suspected fraudulent activities and the review of complaints of alleged abuse or neglect of patients *in health care facilities*." (emphasis added)).

¹¹ *See* 42 C.F.R. § 1007.19(d)(1) (emphasis added); *see also* 42 C.F.R. § 1007.11(b)(1) ("The unit will also review complaints alleging abuse or neglect of patients in health care facilities....").

beneficiaries. We favor permitting the MFCUs to cast a wide net at the screening stage: Better to err on the side of reviewing complaints or reports that ultimately are determined to involve conduct outside the scope the MFCU may investigate or prosecute than to err through narrow screening criteria that can leave abuse or neglect of Medicaid beneficiaries undetected by the MFCU.

Mr. Secretary, we know you share our strongly held view that all persons should live free from abuse and neglect. The MFCUs are valuable assets to help make that freedom a reality for Medicaid beneficiaries. We respectfully request you take swift action to eliminate federal regulations that needlessly narrow our use of these valuable assets. Instead, we request to be freed to use federal MFCU funds to detect, investigate and prosecute abuse and neglect committed against Medicaid beneficiaries or in connection with Medicaid-funded services to the fullest extent permitted by federal statute.

Thank you for considering our recommendations. We stand ready to work with you to achieve this important objective.

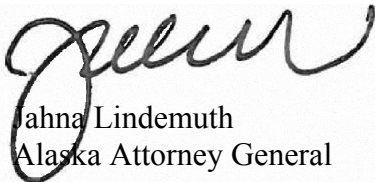
Sincerely,



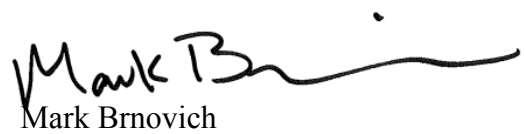
George Jepsen
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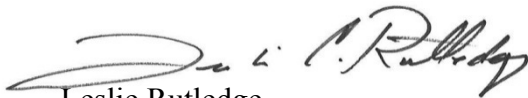
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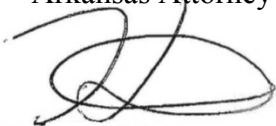
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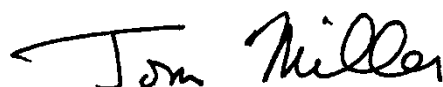


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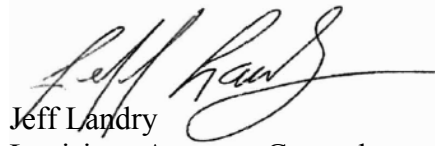
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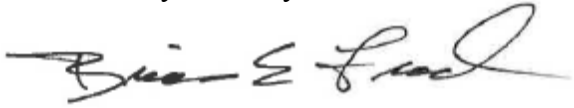
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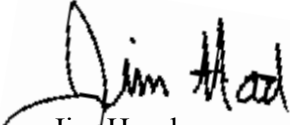
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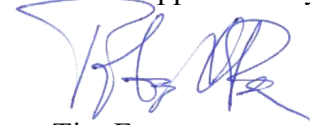
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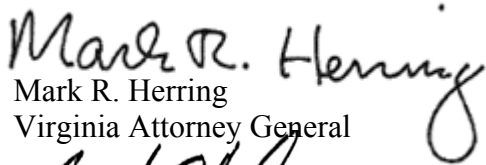
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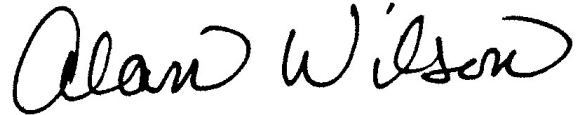
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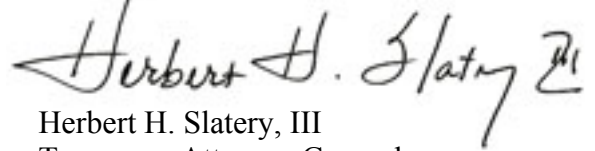
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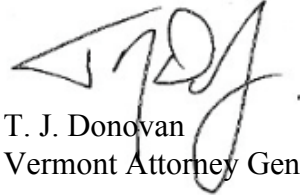
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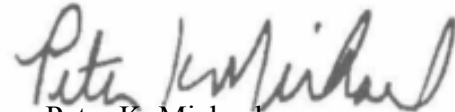
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