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Department of Health

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Commissioner

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NY State of Health and Office of Health Insurance Programs NYS Department of Health

Comment on:

Federal Communications Commission, Consumer and Governmental Affairs Bureau Health Coverage Program Enrollment Calls

May 17, 2022

We write to express our full support for the thorough and well-detailed petition that the Secretary of the Department of Health and Human Services (HHS), jointly with the Administrator for the Centers for Medicare & Medicaid Services, submitted to your agency regarding the need for state agencies to send limited communications to enrollees via text messages and automated, pre-recorded calls. Specifically, NY State of Health (“NYSOH”) and the Office of Health Insurance Programs within the New York State Department of Health support the position of HHS that:

- 1) Providing a telephone number to a health exchange upon application for eligibility in health coverage constitutes prior express consent to be contacted at that number regarding eligibility and enrollment; and
- 2) That federal and state agencies are so involved in the placement of the calls and text messages by determining the content, timing, and recipients of these calls or text messages that the federal or state agency should be considered the maker of these calls or text messages for purposes of the Telephone Consumer Protection Act (TCPA) even when a third-party vendor of the state is involved in facilitating the call or text message.

Due to a provision in the Families First Coronavirus Response Act (P.L. 116-127), New York has maintained enrollment of nearly all public health insurance program enrollees throughout the COVID-19 public health emergency under what is known as the “continuous enrollment” requirement. As the Secretary has indicated, the public health emergency may soon come to an end. When it does, New York will have to redetermine health insurance coverage for nearly 9 million individuals, nearly half the state’s population. To ensure the maximum number of individuals respond to renewal notices that may require consumers to return and take action in order to their maintain health insurance coverage, text messaging is more likely to elicit a timely response, compared to other modes of communication such as paper notices and emails.

More than two years into the pandemic, many Medicaid enrollees in our state face the devastating possibility of losing their health insurance solely because we have an expired mailing address on file and/or because they missed their window to respond to the renewal requests for information. There is a simple solution to prevent this impending crisis from becoming worse:



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sending text messages and pre-recorded phone calls to enrollees to obtain the information we need to determine whether an individual continues to qualify for Medicaid.

CMS guidance on the post COVID-19 public health emergency redetermination process requires states to communicate with consumers through multiple modalities. Clarifying that state and local government agencies and their vendors may use automated calls and text messages to communicate with consumers will facilitate compliance with this requirement. Failure to reach enrollees with important renewal information and the subsequent unnecessary loss of their health insurance coverage would be yet another terrible consequence of the pandemic. NY State of Health, local Medicaid agencies, vendors who perform essential functions, and our partners should be able to use the information we have, including the cell phone numbers of our enrollees, to communicate with our enrollees to ensure they can properly renew their coverage.

We understand that the Federal Communications Commission (FCC) has already provided guidance that indicates that state agencies are not “persons” under the TCPA and therefore employees of such agencies are immune from suit under the TCPA to the extent they are acting in their official capacity. However, this guidance does not go far enough because we rely on outside organizations to communicate with enrollees. NY State of Health and the Office of Health Insurance Programs need contractors to assist in performing automated calls and text messages for myriad reasons including technology contractors’ expertise in developing and implementing systems for large-volume automated communications to reach millions of enrollees and to supply the staff necessary for such implementation. These contractors include our IT System Integrator, GDIT; Customer Service Center, Maximus; contracted enrollment assistors at health plans and community-based organizations; and Local Departments of Social Services offices, who would send text messages and/or calls to enrollees with important reminders about renewal.

We appreciate the FCC’s consideration of flexibility on deeming consent upon a consumer providing their cell phone number to the NY State of Health for communications regarding their eligibility and enrollment in health coverage. We believe the FCC has the authority to allow NY State of Health, local Medicaid agencies, vendors of state and local government agencies, and our partners to engage in such communications, and we implore your agency to exercise that authority.