



STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

**Testimony before the U.S. Senate Special Committee on Aging
“Fighting Elder Fraud: Progress Made, Work to Be Done”**

**Presented by Kansas Attorney General Derek Schmidt
January 16, 2019**

Chairman Collins, Ranking Member Casey and Members of the Committee:

Thank you for the invitation to testify before the committee on the ongoing efforts being made by state attorneys general, in conjunction with our federal, state and local partners, to combat the growing problem of elder abuse, particularly from scams and rip-offs. I appreciate and commend the committee for holding this hearing to highlight this work and to further the discussion on what more we can do to strengthen these efforts.

I am the Attorney General for the State of Kansas, a statewide, elected constitutional officer of our state. I have served in this capacity since January 2011. As Kansas attorney general, I have made a priority of building capacity and focusing resources on fraud and abuse investigations and prosecutions, including those involving older Kansans.

Policy of the National Association of Attorneys General

I also am the immediate past president of the National Association of Attorneys General (NAAG), the nonpartisan association that represents all 56 state, territory and District of Columbia attorneys general in the United States. During my year as NAAG president in 2017-2018, I led our Presidential Initiative titled: “Protecting America’s Seniors: Attorneys General United Against Elder Abuse.” As part of that initiative, our organization worked in a bipartisan, or nonpartisan, manner to gather information, hear from experts and practitioners, and help build capacity to prevent and combat elder abuse throughout the country and in our respective jurisdictions. One culmination of the year was a national summit on the subject, which I hosted in Manhattan, Kansas, in April 2018. Information from that summit is available on the NAAG website at <https://www.naag.org/meetings-trainings/video-and-other-av-archive/2018-presidential-initiative-summit.php>.

Another ongoing outcome from our yearlong focus on elder abuse was the formation of a new committee within NAAG focused on elder justice issues. It is clear the need for this focus will

last for years into the future. I am proud to co-chair that committee along with Oregon Attorney General Ellen Rosenblum.

My testimony today will contain references to certain letters, signed by a super-majority of NAAG members, which under our procedures reflect an official policy position of NAAG. Thus, to the extent my testimony today reflects the content of those NAAG letters, it constitutes the views of the National Association of Attorneys General; to the extent I testify to matters outside those letters, my testimony constitutes only my views as Attorney General for the State of Kansas.

Growing Senior Population Requires Added Focus

Between 1900 and 2010, the number of Americans age 65 and older grew from fewer than 5 million to more than 40 million, according to the U.S. Census Bureau. Over the same time, the portion of the population in that age bracket rose from about 3 percent to more than 12 percent. As the baby boomers continue into retirement, roughly 10,000 Americans turn age 65 each day, and that trend is expected to continue for the next decade.

By one estimate, only one in every 24 cases of elder abuse is detected or reported. Despite that underreporting, statistically one in every 10 Americans age 65 or older who lives at home will become a victim of abuse. The types of abuse this includes span the full spectrum from consumer fraud to financial abuse to physical and sexual abuse, all of which can disproportionately target elder victims.

Another pertinent factor, less discussed, is that the median net worth of a U.S. household with at least one resident age 65 or older now exceeds \$240,000 – the most of any age group in the United States. Thus, at precisely the time the population of older Americans is growing rapidly, that same population – which includes many members made vulnerable by characteristics and changes often associated with aging – controls more wealth than ever before. So it should not be surprising that fraudsters and scam artists are targeting older Americans more than ever before. They target older Americans for the same reason Willie Sutton robbed banks: Because that's where the money is.

In our office, we have acknowledged this growing problem by strengthening our resources both to help prevent elder abuse and to investigate and prosecute cases when they occur. In 2016, I reorganized the Kansas attorney general's office to establish a new Fraud and Abuse Litigation Division that focuses criminal investigation and prosecution resources, in part, on elder abuse. That division houses the Abuse, Neglect and Exploitation Unit established by the Kansas Legislature and also the prosecution of financial crimes involving insurance or securities. By law, the Fraud and Abuse Litigation Division also coordinates closely with the consumer-protection and Medicaid fraud and abuse enforcement work in the attorney general's office.

On the prevention front, we have increased the educational resources of our office to help make sure Kansans are aware of the types of fraudulent activities that are prevalent. In particular, our Consumer Protection Division offers presentations to community organizations, senior centers and business groups to keep Kansans informed about current scams and fraud schemes. We have also increased our online educational resources through our consumer protection website at www.InYourCornerKansas.org, which offers a user-friendly way to get tips on prevention and how to get help in the unfortunate circumstance when one has become a victim.

Combatting Robocalls

I know the Committee has placed a particular focus for this hearing on frauds that are perpetrated through robocalls, and rightfully so. The plague of robocalls that has exploded in recent years has resulted in a huge surge in complaints being filed with our office, other states' attorneys general offices as well as the federal agencies with jurisdiction. I often have conversations with Kansans who are frustrated with the number of calls they are receiving, despite having their numbers on the Do Not Call Registry.

The unfortunate reality is that these spam callers don't care about the Do Not Call list or any other laws we may pass to try to combat them. The vast majority are located overseas, armed with VOIP technology that allows them to make thousands of calls each day for very little cost. These callers know that they only need to reach a very small percentage of the people they are placing calls to in order to make a profit. An estimated 47.8 *billion* robocalls were made to Americans in 2018.¹ Like other federal, state and local law enforcement agencies, we continue to investigate bad actors and take enforcement actions – when we can find them. But after-the-fact enforcement alone never will be able to solve this problem because the volume of calls is simply too large. This problem was enabled by technology, which allows robocalls to be placed from halfway around the world into American living rooms at virtually no cost, and it will also require a technological solution.

Already, there are several products on the market that help reduce robocalls. There are a multitude of smartphone apps that allow users to block calls from known robocall numbers. However, these apps are only effective insofar as the caller is not spoofing its caller ID to come from a number that is known to the user, or even in some cases the user's own number.

That is where we believe the new protocols under consideration and implementation by the Federal Communications Commission known by the acronym SHAKEN/STIR may prove to be effective. These protocols provide frameworks that service providers can utilize to authenticate legitimate calls and identify illegally spoofed calls.

¹ YouMail Robocall Index, <https://robocallindex.com/history/time>.

In two comment letters to the FCC on the adoption of the proposed regulations to implement these protocols, groups of 30 and 35 state attorneys general, respectively, including myself, have urged their swift adoption by domestic and international service providers. While I doubt this will be a magic bullet that ends the scourge of illegal robocalls, I am hopeful that implementation will move us in the right direction. I have attached to my testimony copies of these two comment letters (Attachments A and B).

Recommendations Going Forward

As we continue working to improve our overall response to the growing problem of the abuse, neglect and exploitation of older Americans, I offer several suggestions for the committee's consideration.

First, on the robocall front, it is imperative that we continue and step-up cooperative efforts to improve the availability and ease-of-use of consumer technology to block unwanted robocalls. SHAKEN/STIR is promising, but it alone will not be the solution. Our National Association of Attorneys General has developed a bipartisan working group that is engaging, on an ongoing basis, with major telecommunications companies to continually advance our efforts on this front. The goals of this working group are:

- Develop a detailed understanding of what is technologically feasible to minimize unwanted robocalls and illegal telemarketing,
- Engage the major telecom companies to encourage them to expedite the best possible solutions for consumers, and
- Determine whether states should make further recommendations to the FCC.

I recommend these ongoing cooperative efforts continue and, as appropriate, engage all of the key players: Federal regulators, state enforcers and the private sector companies that provide the services.

Second, we should strengthen and coordinate our outreach and education efforts. The purpose is to help empower those who work with older Americans, or older Americans themselves, to prevent abuse, neglect and exploitation by knowing what to look for and what to do when they see it. There are many such efforts now underway – so many, in fact, that messaging and advice can be inconsistent, or sometimes contradictory. So coordination is key. In Kansas, we help lead the ongoing education and outreach for preventing elder abuse, neglect and exploitation through our In Your Corner Kansas outreach program, and I am considering adding an employee whose job will be lead this outreach and education.

Moreover, recurring joint federal-state public events focusing on the problem of frauds and scams targeting older Americans can be beneficial by raising the profile of the issue. Last February, I joined then-U.S. Attorney General Jeff Sessions, other federal law enforcement

leaders, and representatives of victimized older Americans at a news conference at the Department of Justice to announce the largest federal-state enforcement sweep against fraudsters targeting older Americans in history. Future events of this sort could be helpful in sustaining attention on the problem.

Third, while education, outreach and prevention are important, we must not lose sight of the fundamental importance of effective enforcement actions. Nothing gets the attention of those who abuse or exploit older Americans quite like seeing others who do so detected, caught, prosecuted and punished in a meaningful way for their actions.

To that end, I would like to bring to the committee's attention a potential model for stepping up prosecutions using existing resources. Several years, my office partnered with the Kansas City regional office of the Department of Health and Human Services—Office of Inspector General to increase enforcement against criminal home health care fraud in the Medicaid system. The concept was simple: Federal investigators at HHS-OIG encounter fraud involving losses small enough that obtaining prosecution by the United States Attorney was difficult or impossible. It is, of course, entirely understandable that U.S. Attorneys must prioritize use of their scarce prosecution resources and naturally focus first on larger cases. But smaller cases are no less important – just smaller.

We partnered with HHS-OIG for their agents to investigate and refer to our office cases with loss amounts less than what the U.S. Attorney chose to prosecute. Our only limitation was that we wanted the cases presented for prosecution in state court under state law, and that was agreeable to all parties. The result of this partnership – we called it “Operation No Show” – was about a dozen cases of home health care fraud successfully prosecuted. These were cases that otherwise would have been detected by federal authorities but never prosecuted in the federal system.

In short, it was a win-win for all involved.

That same model, it seems to me, has promise in addressing fraud and exploitation of older Americans. Federal agencies that encounter such fraud – the Postal Inspection Service, the Secret Service, Homeland Security Investigations, the Federal Bureau of Investigation, just to name a few – should develop standing partnerships with state attorneys general, where appropriate under state law, to obtain state prosecution of crimes against older Americans that otherwise would be unlikely to be prosecuted by federal authorities because of their relatively small size. The key is to institutionalize these relationships and the flow of cases, probably at the regional office level for the federal agencies, not to rely on *ad hoc* referrals.

Fourth, it is clear that our overall capacity to detect, investigate and criminally prosecute fraud and similar crimes against older Americans has not kept pace with the need that is being driven by the growing elder population. Most of this institutional capacity must come from states

because that is where most fraud is investigated and prosecuted. But we should continually seek opportunities for federal participation that could make a significant improvement in state capacity

One such area would be to change federal law in a manner that removes a limitation on the authority of Medicaid Fraud Control Units (MFCUs) to detect, investigate and prosecute patient abuse. Under current law, MFCUs may work to combat fraud against the Medicaid program itself wherever it may occur but may only combat abuse of Medicaid beneficiaries (including fraud committed against patients) when it occurs in a health care facility or board and care facility.

Last year, I testified before the U.S. House Committee on Energy and Commerce, Subcommittee on Health, in support of a bill that was backed by NAAG, to remove this limitation and allow our MFCUs to go after fraud or abuse of Medicaid beneficiaries *wherever it occurs*. That bipartisan bill, H.R. 3891, sponsored by Rep. Tim Walberg (R-MI) and Rep. Peter Welch (D-VT), was reported out of the House Energy and Commerce Committee by voice vote last September. It has been reintroduced by Reps. Walberg and Welch in this session of Congress as H.R. 233. To date, I am unaware of any Senate companion legislation. Attached for your consideration is my testimony in support of this legislation (Attachment C).

Conclusion

I again thank the committee for holding this hearing and for allowing me to share some information on the work that my colleagues and I are doing to combat elder abuse, including frauds, scams and ripoffs targeting older Americans. As the population of seniors in American continues to grow, we must continue to work together at all levels of government to ensure the resources, authority and coordination necessary to address this growing need are in place.

Thank you for your consideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:)
)
Advanced Methods to Target and Eliminate) CG Docket No. 17-59
Unlawful Robocalls)
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COMMENT OF 30 STATE ATTORNEYS GENERAL

Illegal robocalls often scam consumers by hiding behind fake or “spoofed” caller ID numbers.¹ The Federal Communications Commission (FCC) has identified robocalls as the “number one consumer complaint,”² and consumers frequently complain about these calls to our offices as well. By removing regulatory roadblocks and collaborating with the telecommunications industry, the FCC can address the illegal robocall issue.³ The undersigned attorneys general strongly support the FCC’s adoption of rules to help eliminate unlawful robocalls.

The number of telephone scam complaints has grown exponentially in recent years. For example, in 2014, the Arizona Attorney General’s Office (AZAG) received 117 complaints about telephone scams. In 2016, the AZAG received 1,151 calls about telephone scams—nearly a 1,000 percent rise in just two years.⁴ Consumers find these calls unwanted and annoying, but

¹ Federal Trade Commission, *Robocalls*, Consumer Information, <https://www.consumer.ftc.gov/features/feature-0025-robocalls> (last visited June 7, 2017).

² *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Notice of Proposed Rulemaking, 17 FCC 24, 26 (2017).

³ *Id.* at 5 *citing* Robocall Strike Force, Robocall Strike Force Report at 1 (2016), *available at* <https://transition.fcc.gov/cgb/RobocallStrike-Force-Final-Report.pdf> (“Strike Force Report”).

⁴ Other undersigned attorneys general have seen a similar rise in complaints. For example, in 2012, the Oregon Attorney General’s Office (ORAG) received approximately 1,800 complaints or contacts about telephone scams. In 2016, the ORAG received approximately 5,300 complaints or contacts about telephone scams, with roughly 3,500 of those alleging aggressive

more importantly, robocalls perpetrated by scammers put consumers at risk of identity theft and financial loss.⁵ One common form of unlawful robocall is the IRS scam. The AZAG reports that this scam was the impetus for over 600 complaints to the Arizona Attorney General’s Office in the past three years. Consumers received threatening calls and robocalls from scammers posing as IRS agents, demanding payments immediately.⁶ These scammers often spoofed legitimate IRS numbers, which helped trick many consumers into giving scammers thousands or even tens of thousands of dollars. By stopping this type of spoofing, the FCC can cut down on the efficacy of such scams, likely saving consumers across the country millions of dollars.

In addition to spoofing legitimate numbers, scammers also use non-existent or invalid numbers to prevent consumers from identifying the caller. Even if consumers complain, when law enforcement investigates the number, the evidentiary trail turns out to be a dead end.

The FCC’s plan would help address both of these growing menaces. The FCC is presenting a sensible plan to stop “certain types of calls that seem to be such clear violations of

calls related to the IRS scam, or related to other aggressive false “monies owed” type scams. The Pennsylvania Office of Attorney General (PA OAG) reports that its Bureau of Consumer Protection received approximately 1,368 telephone scam complaints in 2016, representing thirty percent of all its Do-Not-Call complaints for that calendar year. In addition, the PA OAG reports that in 2016, its Bureau of Consumer Protection received over 500 consumer complaints alleging calls affiliated with the IRS scam. In 2016, Montana’s Office of Consumer Protection fielded 2,867 complaints/inquiries regarding telephone scams, a 22 percent increase from 2015. Most of the consumer complaints involved spoofed telephone numbers. In 2014, the Florida Attorney General’s Office received 7,756 complaints and inquiries related to telephone scams, including 1,272 that dealt with IRS scams. That number grew to 8,072 in 2016, with 2,785 of those involving IRS scams. In Vermont, the Office of the Attorney General experienced a nearly 25% increase in complaints or reports about various scams—most of them telephone scams—between 2015 and 2016 (from 5,896 complaints to 7,364 complaints), according to its Consumer Assistance Program. In 2016, Indiana OAG received 15,883 complaints about unwanted calls. Approximately 60% of those complaints alleged robocalls.

⁵ *Advanced Methods to Target and Eliminate Unlawful Robocalls* at 1.

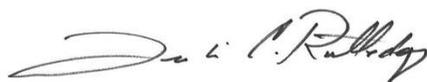
⁶ *Advanced Methods to Target and Eliminate Unlawful Robocalls* at 1–2.

the [federal] statute that they could be blocked.”⁷ There is little risk in allowing providers to block calls from the following: (1) an assigned number when the number’s subscriber requests calls from that number to be blocked, (2) invalid numbers, (3) numbers not allocated to a provider, and (4) numbers that are allocated to a provider but not assigned to a subscriber.⁸ Simply put, legitimate businesses do not need to use any of these methods to contact consumers. As such, allowing providers to block these calls would stymie scammers without burdening businesses.

Of course, the proposed rules will not block every illegal robocall. Perpetrators are sophisticated; robocalls can come from overseas, making it difficult to locate and prosecute the perpetrators, and callers within the U.S. may develop new methods to circumvent the rules.⁹ Nonetheless, the rules are a step in a positive direction for the FCC and for consumers, as they will reduce the ability of scammers to spoof real and fake numbers, and increase the ability of law enforcement to track down scammers. The FCC should thus implement the rules proposed in the Notice and help protect consumers from future scams.



MARK BRNOVICH
Attorney General of Arizona



LESLIE RUTLEDGE
Attorney General of Arkansas

⁷ *Id.* at 30.

⁸ *Id.* at 6–8.

⁹ *Id.* at 10.



XAVIER BECERRA
Attorney General of California



GEORGE JEPSEN
Attorney General of Connecticut



MATT DENN
Attorney General of Delaware



PAM BONDI
Attorney General of Florida



CHRISTOPHER M. CARR
Attorney General of Georgia



LISA MADIGAN
Attorney General of Illinois



CURTIS HILL
Attorney General of Indiana



TOM MILLER
Attorney General of Iowa



DEREK SCHMIDT
Attorney General of Kansas



ANDY BESHEAR
Attorney General of Kentucky



JEFF LANDRY
Attorney General of Louisiana



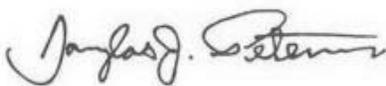
JANET T. MILLS
Attorney General of Maine



BRIAN E. FROSH
Attorney General of Maryland



TIMOTHY C. FOX
Attorney General of Montana



DOUGLAS J. PETERSON
Attorney General of Nebraska



ADAM LAXALT
Attorney General of Nevada



ERIC T. SCHNEIDERMAN
Attorney General of New York



JOSH STEIN
Attorney General of North Carolina



WAYNE STENEHJEM
Attorney General of North Dakota



MIKE HUNTER
Attorney General of Oklahoma



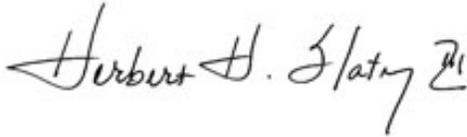
ELLEN F. ROSENBLUM
Attorney General of Oregon



JOSH SHAPIRO
Attorney General of Pennsylvania



PETER F. KILMARTIN
Attorney General of Rhode Island



HERBERT H. SLATTERY III
Attorney General of Tennessee



KEN PAXTON
Attorney General of Texas



SEAN D. REYES
Attorney General of Utah



THOMAS J. DONOVAN, JR.
Attorney General of Vermont



BRAD D. SCHIMEL
Attorney General of Wisconsin

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Advanced Methods to Target and Eliminate
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CG Docket No. 17-59

REPLY COMMENTS OF THIRTY-FIVE (35) STATE ATTORNEYS GENERAL

The undersigned State Attorneys General¹ (“State AGs”) submit these Reply Comments in response to the public notice issued by the Consumer and Governmental Affairs Bureau (“Bureau”), seeking to refresh the record on how the Federal Communications Commission (“FCC”) can further empower service providers to block illegal calls.² The State AGs have reviewed the comments submitted by voice service providers, consumer advocacy groups, consumers, private businesses, and other interested parties in the industry. In reply, the State AGs continue to support the FCC’s efforts to identify new ways to enable providers to block illegal calls before they ever reach consumers.

In the future, the State AGs encourage the FCC to adopt new rules authorizing voice service providers to block illegally spoofed³ calls beyond what is currently authorized in the 2017 Call Blocking Order.⁴ Likewise, we encourage all providers to use all available tools to accurately identify illegal calls, including continually monitoring call traffic patterns⁵ to develop and refine criteria for identifying such calls; and continually updating and developing technology in the event current systems and solutions become obsolete. In addition, providers who offer blocking or labeling tools should distribute to consumers – especially seniors – adequate information about the availability of these tools, how they function, and what effect they can have.

The State AGs intend to continue our fight against illegal robocalls and abusive calling practices on the front lines – by providing public education and outreach, receiving and responding to individual consumer complaints, and taking appropriate enforcement action when possible. We

will continue to do everything possible to track down and hold accountable those who engage in illegal calling practices. The State AGs recognize that no single tool or method will solve this serious consumer problem. Therefore, we are committed to continuing our multi-pronged attack of working closely with all interested parties, including our federal counterparts and members of the telecommunications industry.

A. Law Enforcement Alone Will Not Solve the Robocall Problem

Our respective Consumer Protection Offices receive and respond to tens of thousands of consumer complaints each year concerning the disruptive and abusive nature of these calls.⁶ We then attempt to identify and target potential wrongdoers. However, it is common for our efforts to be frustrated, as these types of calls travel through a maze of smaller providers. If the calling party is found at all, he or she is most often located overseas, making enforcement difficult. Due to the nature of this problem, investigations and enforcement actions cannot serve as the sole solution.

Virtually anyone can send millions of illegal robocalls and frustrate law enforcement with just a computer, inexpensive software (i.e., auto-dialer and spoofing programs), and an internet connection. Because “technology enables a cheap and scalable model,”⁷ illegal robocalls remain the “number one consumer complaint”⁸ for many of our Consumer Protection Offices, the FCC, and the Federal Trade Commission (“FTC”). Despite the 2017 Call Blocking Order, which increased providers’ ability to block illegally spoofed calls, the robocall problem appears to be getting worse.

B. The Impact to Consumers Is Increasingly Widespread and Deleterious

Based on available data, the number of illegal robocalls, and corresponding consumer complaints,⁹ increases every year. Last year, reports reflect that American landline and wireless subscribers received an estimated 30.5 billion illegal robocalls.¹⁰ This figure is up from the 2016 estimate of 29.3 billion illegal robocalls.¹¹ By the end of this year, the industry expects a 33%

increase, meaning spammers and scammers are going to disrupt our children's homework, our dinner, our relaxation time, and even our sleep, to the tune of over 40 billion illegal robocalls.¹²

Non-consensual robocalling in the telemarketing context is abusive and unlawful in and of itself.¹³ Many illegal robocallers, however, simply do not care about the law and have a more insidious agenda – casting a net of illegal robocalls to ensnare vulnerable victims in scams to steal money or sensitive, personal information. In fact, reports indicate, of the 4 billion illegal robocalls made just this past August, 1.8 billion were associated with a scam.¹⁴ Strikingly, criminals are estimated to have stolen 9.5 billion dollars from consumers through phone scams in 2017.¹⁵ If reports are accurate, scammers could potentially take even more in 2018.

Sadly, the fraud perpetrated by those employing illegal robocalls and other abusive calling practices falls heavily upon the shoulders of our respective senior populations. One year ago, on October 4, 2017, Pennsylvania Attorney General Josh Shapiro testified before the United States Special Committee on Aging with respect to protecting the elderly from financial exploitation.¹⁶ In his testimony before the Committee, and in a letter to the FCC sent shortly thereafter, Attorney General Shapiro highlighted the urgent need for the FCC to combat illegal robocalls, beginning with adopting rules allowing providers to block specific calls used in spoofing.¹⁷

C. Fraudsters Evolved to Evade the 2017 Call Blocking Order

On July 6, 2017, a bipartisan coalition of 30 state attorneys general submitted a comment, encouraging the FCC to adopt rules allowing providers to block calls from numbers on do-not-originate lists and from numbers that are invalid, unallocated, or unused.¹⁸ On November 17, 2017, the FCC released the 2017 Call Blocking Order, wherein it adopted rules allowing providers to block calls from these types of phone numbers, as they are used in spoofing. However, all concerned parties knew the new rules would not act as a 'cure-all' to the robocall epidemic. Soon after the 2017 Call Blocking Order was released, forty (40) state attorneys general formed the bipartisan, Robocall

Technologies Working Group in order to work together, and with providers, to understand the technological advancements, as well as the barriers, in combatting fraudsters' evolving methods.

One specific method which has evolved recently is a form of illegal spoofing called 'neighbor spoofing.'¹⁹ A neighbor-spoofed call will commonly appear on a consumer's caller ID with the same area code and local exchange as the consumer to increase the likelihood he/she will answer the call.²⁰ In addition, consumers have recently reported receiving calls where *their own phone numbers* appeared on their caller ID. A consumer who answered one such call reported the caller attempted to trick her by saying he was with the phone company and required personal information to verify the account, claiming it had been hacked.²¹ Scams like this cannot be tolerated. We can and must do more to block illegally spoofed calls before they ever reach consumers. The State AGs encourage the FCC to adopt rules authorizing providers to block these and other kinds of illegally spoofed calls.

D. STIR/SHAKEN Is Welcome Progress

Those concerned with battling illegal robocalls and illegal spoofing have been waiting for voice service providers to fully implement the STIR (Secure Telephone Intity Revisited) and SHAKEN (Secure Handling of Asserted information using toKENs)²² protocols – frameworks that service providers can utilize to authenticate legitimate calls and identify illegally spoofed calls. The State AGs see the industry is making progress concerning this initiative. On September 13, 2018, the Alliance for Telecommunications Industry Solutions ("ATIS")²³ filed a letter²⁴ at this docket announcing the launch of the Secure Telephone Identity Governance Authority ("STI-GA"), which is designed to ensure the integrity of the STIR/SHAKEN protocols. With the launch of the Governance Authority, the remaining protocols can be established. Reports indicate STIR/SHAKEN will be operational by some carriers throughout next year.²⁵

We strongly recommend the FCC explore ways to encourage all domestic and international service providers to aggressively implement STIR/SHAKEN. The capability to identify illegally

spoofed, scam calls will increase in proportion to the number of providers who adopt the STIR/SHAKEN protocols.²⁶ This is a positive step forward and we hope that as the implementation of STIR/SHAKEN continues to progress, the relevant participants, including the Governance Authority, will keep consumer organizations and the State AGs fully informed of their progress.

E. Conclusion – The Government and Industry Must Continue to Collaborate and Innovate

The pervasiveness of illegal robocalls and scam calls is a problem that cannot be solved by any one method, including the STIR/SHAKEN initiative. We, the undersigned State Attorneys General, need to continue to work together and in collaboration with our federal counterparts and the telecommunications industry to identify and implement new methods to combat the proliferation of these illegal acts. Also, we encourage the FCC to implement additional reforms, as necessary, to respond to technological advances that make illegal robocalls and illegal spoofing such a difficult problem to solve. Only by working together, and utilizing every tool at our disposal, can we hope to eradicate this noxious intrusion on consumers’ lives.

BY THIRTY-FIVE (35) STATE ATTORNEYS GENERAL:



MARK BRNOVICH
Attorney General of Arizona



LESLIE RUTLEDGE
Attorney General of Arkansas



GEORGE JEPSEN
Attorney General of Connecticut



MATTHEW P. DENN
Attorney General of Delaware



KARL A. RACINE
Attorney General of the District of Columbia



PAM BONDI
Attorney General of Florida



STEPHEN H. LEVINS
Executive Director of Hawaii
Office of Consumer Protection



LISA MADIGAN
Attorney General of Illinois



CURTIS HILL
Attorney General of Indiana



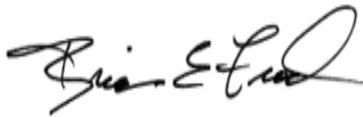
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Attorney General of Iowa



DEREK SCHMIDT
Attorney General of Kansas



JEFF LANDRY
Attorney General of Louisiana



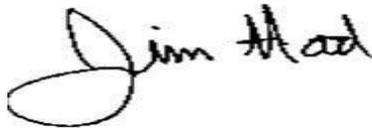
BRIAN E. FROSH
Attorney General of Maryland



MAURA HEALEY
Attorney General of Massachusetts



LORI SWANSON
Attorney General of Minnesota



JIM HOOD
Attorney General of Mississippi

TIM FOX
Attorney General of Montana

DOUGLAS J. PETERSON
Attorney General of Nebraska

ADAM PAUL LAXALT
Attorney General of Nevada

GORDON MACDONALD
Attorney General of New Hampshire

GURBIR S. GREWAL
Attorney General of New Jersey

HECTOR BALDERAS
Attorney General of New Mexico

BARBARA D. UNDERWOOD
Attorney General of New York

JOSH STEIN
Attorney General of North Carolina

WAYNE STENEHJEM
Attorney General of North Dakota

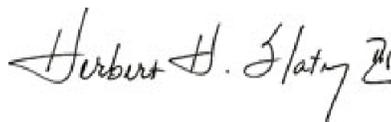
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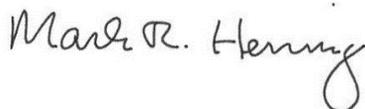
HERBERT H. SLATTERY III
Attorney General of Tennessee



SEAN D. REYES
Attorney General of Utah
Counsel for the State of Utah and
Utah Division of Consumer Protection



THOMAS J. DONOVAN, JR.
Attorney General of Vermont



MARK R. HERRING
Attorney General of Virginia



BOB FERGUSON
Attorney General of Washington



BRAD D. SCHIMEL
Attorney General of Wisconsin

DATE: OCTOBER 8, 2018

¹ Hawaii is represented in this matter by its Office of Consumer Protection, an agency which is not part of the state Attorney General’s Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii. For simplicity purposes, the entire group will be referred to as the “Attorneys General” or individually as “Attorney General” and the designations, as they pertain to Hawaii, refer to the Executive Director of the State of Hawaii’s Office of Consumer Protection.

² *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Public Notice, CG Docket No. 17-59, August 10, 2018, Bureau Seeks to Refresh the Record (“Public Notice”).

³ Caller ID spoofing is when a caller deliberately falsifies the information transmitted to your caller ID display to disguise their identity. See <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id>.

⁴ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, CG Docket No. 17-59, November 17, 2017 (“2017 Call Blocking Order”) (FCC adopted rules allowing providers to block calls from phone numbers on a do-not-originate (“DNO”) list and calls from invalid, unallocated, or unused numbers).

⁵ Here we are referring to the patterns that emerge from the analyzing of call data, including but not limited to, call completion rates, average call durations, call volumes, times at which calls are placed, and sequential dialing patterns.

⁶ *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, Comment of 30 State Attorneys General, CG Docket No. 17-59, filed July 6, 2017, pg. 1, 2, footnote 4 (number of consumer complaints from a sampling of States who signed on to the comment).

⁷ *See* <https://www.consumer.ftc.gov/articles/0381-how-does-robocall-work-infographic>.

⁸ *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, Notice of Proposed Rulemaking and Notice of Inquiry, CG Docket No. 17-59, March 23, 2017, Statement of Chairman Ajit Pai. *See also* FTC Do Not Call Registry Data Book for Fiscal Year 2017 (over 4.5 million robocall complaints as opposed to approximately 2.5 million “live caller” complaints).

⁹ *See* <https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/national-do-not-call-registry-data-book-fy-2>. In 2014, the FTC received approximately 1.7 million illegal robocall complaints. In 2015, the number of complaints rose to over 2.1 million. In 2016, the number climbed to approximately 3.4 million complaints. Last year, the FTC received 4.5 million illegal robocall complaints.

¹⁰ *See* <https://www.cbsnews.com/news/how-to-stop-robocalls-those-annoying-automated-phone-calls-are-about-to-get-worse/>. *See also* <https://www.prnewswire.com/news-releases/robocall-epidemic-breaks-annual-record-with-305-billion-calls-in-2017-300580916.html>.

¹¹ *See* <https://www.prnewswire.com/news-releases/robocall-epidemic-breaks-annual-record-with-305-billion-calls-in-2017-300580916.html>.

¹² *Id.*

¹³ 16 C.F.R. § 310.4(b)(1)(v) (abusive telemarketing act or practice, and violation of *Telemarketing Sales Rule*, to initiate an outbound telephone call that delivers a prerecorded message).

¹⁴ *See* <https://www.cbsnews.com/news/how-to-stop-robocalls-those-annoying-automated-phone-calls-are-about-to-get-worse/>.

¹⁵ *See* <https://blog.truecaller.com/2017/04/19/truecaller-us-spam-report-2017/>.

¹⁶ Attorney General Shapiro shared a story of a Pennsylvania senior who fell victim to the “IRS scam.” In the scammer’s initial call to the senior, the caller ID displayed a number for the Pennsylvania State Police. The spoofing of government agency phone numbers to facilitate scams is all too common. *See for example* <https://www.fbi.gov/contact-us/field-offices/philadelphia/news/press-releases/phone-scam-uses-threats-spoofed-fbi-phone-numbers>.

¹⁷ 2017 Call Blocking Order, pg. 1, footnote 3 (Noting Attorney General Shapiro’s letter encouraging the FCC to move forward quickly to implement the rules).

¹⁸ *See Advanced Methods to Target and Eliminate Unlawful Robocalls*, Comment of 30 State Attorneys General, CG Docket No. 17-59, filed July 6, 2017.

¹⁹ <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id>.

²⁰ In 2017, reports of caller ID spoofing, as well as neighbor spoofing have increased from previous years. *See Biennial Report to Congress*, Under the Do Not Call Registry Fee Extension Act of 2007, FTC, December 2017.

²¹ See <https://philadelphia.cbslocal.com/2018/04/11/scam-own-phone-number-calls/>.

²² See <https://transnexus.com/whitepapers/understanding-stir-shaken/>. See also Robocall Strike Force Report, October 26, 2016, pg. 5, (“The premise of STIR/SHAKEN is that telephone calls and the telephone numbers associated with the calls, when they are originated in a service provider network can be authoritatively and cryptographically signed by the authorized service provider, so that as the telephone call is received by the terminating service provider, the information can be verified and trusted. This set of industry standards is intended, as it is more fully deployed into the VoIP based telephone network, to provide a basis for verifying calls, classifying calls, and facilitating the ability to trust caller identity end to end. Illegitimate actors can then be more easily and quickly identified with the hope that telephone fraud is reduced significantly. While industry members believe that the SHAKEN framework holds considerable promise for repressing the presence of robocalling in the communications ecosystem, the Strike Force recognizes that the nature of bad actors and their tactics to harass consumers with unwanted robocalls and fraudulent, spoofed Caller IDs are ever changing and adapting. Further, carriers are at various stages of transitioning to IP-enabled networks and SHAKEN fundamentally depends upon IP network technologies.”)

²³ See <https://www.atis.org/> (“ATIS is a forum where the information and technology companies convene to find solutions to...shared challenges.”).

²⁴ See *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Letter, ATIS, September 13, 2018.

²⁵ See *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, *ex parte* filings, Verizon (5/7/18), Comcast (5/18/18), AT&T (5/16/18), and T-Mobile (5/24/18).

²⁶ See *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Comments of T-Mobile USA, Inc., September 24, 2018, pg. 4.



**STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL**

DEREK SCHMIDT
ATTORNEY GENERAL

MEMORIAL HALL
120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.AG.KS.GOV

Testimony in Support of H.R. 3891

Presented to House Committee on Energy and Commerce

Subcommittee on Health

By Kansas Attorney General Derek Schmidt

September 5, 2018

Chairman Burgess, Ranking Member Green, and Members of the Subcommittee:

Thank you for this opportunity to testify in support of H.R. 3891, legislation that would eliminate an outdated limitation in federal law, thereby expanding the authority of Medicaid Fraud Control Units (MFCUs) to detect, investigate and prosecute Medicaid patient abuse in non-institutional settings. I appreciate and commend the work by Representatives Walberg and Welch to bring this important legislation forward.

I am the Attorney General for the State of Kansas, a statewide, elected constitutional officer of our state. I have served in this capacity since January 2011. As Kansas attorney general, I have made a priority of building capacity and focusing resources on fraud and abuse investigations and prosecutions, including but not limited to fraud and abuse in the Medicaid program.

Policy of the National Association of Attorneys General

I also am the immediate past president of the National Association of Attorneys General (NAAG), the nonpartisan association that represents all 56 state, territory and District of Columbia attorneys general in the United States. During my year as NAAG president in 2017-2018, I led our Presidential Initiative

titled: “Protecting America’s Seniors: Attorneys General United Against Elder Abuse.” As part of that initiative, our organization worked in a bipartisan, or nonpartisan, manner to gather information, hear from experts and practitioners, and help build capacity to prevent and combat elder abuse throughout the country and in our respective jurisdictions.

One specific action that came from our NAAG initiative was the endorsement from our organization for H.R. 3891 and its proposed expansion of authority to allow MFCUs to detect, investigate and prosecute Medicaid patient abuse in non-institutional settings. To that end, our organization authored two letters: A May 9, 2017, letter to then-Health and Human Services Secretary Tom Price expressing support for the policy of expanded MFCU authority and a March 28, 2018, letter to Representatives Walberg and Welch specifically supporting H.R. 3891. The first letter was signed by 38 attorneys general and the second by 49. Both were bipartisan. Under our NAAG procedures, both letters reflect the official policy statements of NAAG. Both are attached as exhibits to this testimony, and I incorporate them by reference as part of my testimony so that NAAG policy on this subject may be fully presented to the Committee. Also attached are the July 17, 2017, response from Secretary Price and the August 7, 2017, response from Health and Human Services Inspector General Daniel R. Levinson.

Thus, to the extent my testimony today reflects the content of those NAAG letters, it constitutes the views of the National Association of Attorneys General; to the extent I testify to matters outside those two letters, my testimony constitutes only my views as Attorney General for the State of Kansas.

The Value of MFCUs

The Social Security Act requires that every state, as a condition of participation in the Medicaid program, either maintain a MFCU or obtain a waiver. All but one state maintains a MFCU. States choose to situate their MFCU in various positions within state government. Forty-four MFCUs are housed in the state attorney general’s office; Kansas is one of those states. Five states – Connecticut, Illinois, Iowa, Tennessee, and West Virginia – and the District of Columbia house the MFCU in another state agency.

North Dakota has received a waiver from the federal government and does not have a MFCU. None of the five territories has established a MFCU.

Our MFCU has both civil and criminal jurisdiction. When appropriate, we seek both injunctive and monetary relief in instances of civil false claims to the Medicaid program or other unlawfully made payments. We also investigate and prosecute criminal Medicaid fraud and patient abuse. While our MFCU attorneys occasionally work in federal court enforcing federal law as cross-designated Special Assistant United States Attorneys, most of our work is in state court enforcing state laws against Medicaid fraud and patient abuse. Because of the joint federal-state nature of the Medicaid program, we work closely with the United States Attorney and with appropriate federal law enforcement agencies. Our federal-state working relationship is excellent.

The size of MFCUs varies substantially by state, with the overall size continually overseen and subject to approval by the Department of Health and Human Services-Office of Inspector General (HHS-OIG). In Kansas, our MFCU employs four attorneys, four fiscal analysts, one nurse investigator, one legal assistant, a special agent-in-charge, and six special agents. The special agent-in-charge and the special agents all are sworn law enforcement officers. The total annual budget for the Kansas MFCU is approximately \$1.8 million. Of that amount, 75 percent is paid with federal funds and the other 25 percent with state matching funds. In a small state like Kansas, this federal financial support is critically important to enable us to maintain the important capacity to detect, investigate and prosecute instances of Medicaid fraud and of the criminal abuse – physical, sexual or financial – of Medicaid beneficiaries.

The federal funding that supports MFCUs is known as Federal Financial Participation, or FFP. It comes with conditions. Those conditions limit the uses of our MFCU assets. One of those conditions governs the type of cases our MFCU may handle. In general, cases within a MFCU's jurisdiction fall into one of two categories: Fraud committed against the Medicaid program itself, and abuse of patients who are Medicaid beneficiaries. Under federal rules, our MFCU may investigate and prosecute cases of financial *fraud*

against the Medicaid program *wherever it may be discovered*. Consequently, we have handled cases of Medicaid fraud in billing services, in nursing homes, in medical offices, in home health care settings, and in other situations. However, our MFCU may only investigate and prosecute cases of patient *abuse* when it occurs *in a health care facility or board and care facility*.

In a small state like Kansas, our MFCU provides important services in detecting, investigating and prosecuting the abuse of Medicaid patient-beneficiaries. Sadly, we have had occasion to investigate and prosecute almost every type of patient abuse imaginable – financial abuse, physical abuse and sexual abuse. Consider several recent examples of criminal abuse cases we have handled:

- Prosecuted a nursing home employee for physical or sexual abuse of five residents. The defendant was convicted of one count of attempted criminal sodomy and four counts of mistreatment of a dependent adult and sentenced to 91 months in state prison.
- Prosecuted a nursing home employee for sexual abuse of a resident. The defendant was convicted of one count of aggravated sexual battery and sentenced to 130 months in state prison.
- Prosecuted a couple who illegally used the assets of one of the defendants' mother, while acting as her power of attorney and trustee, to make purchases for themselves, including a house, farm and truck, while the mother was living in a nursing home and her expenses were going unpaid. Both defendants were convicted of mistreatment of a dependent adult and conspiring to mistreat a dependent adult and each defendant was sentenced to more than 90 months in state prison.

We are currently prosecuting a nurse for allegedly stealing narcotics intended for beneficiaries in nursing homes and diverting them for illicit use, thereby denying patients the pain treatment to which they were entitled. The defendant is charged with multiple counts in three different counties. This case remains pending, and of course the charges are merely accusations and the accused is presumed innocent unless and until proven guilty. Our office has more than a dozen similar cases of suspected or alleged patient abuse currently being investigated or prosecuted.

Clearly, the MFCU is an important instrument for justice and for protecting Medicaid beneficiaries from abuse. This is consistent with the intention of Congress in creating the MFCUs as evidenced by the statutory instruction that MFCUs were created, in part, 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.” *See* 42 U.S.C. SEC 1396a(a)(61)(emphasis added). But under current federal law, we are constrained from using these same important law enforcement tools in the MFCUs to protect Medicaid beneficiaries from abuse and neglect when the crime occurs someplace other than in a health care facility or, at the discretion of individual states, in a board and care facility – someplace such as in a home-health setting.

For emphasis, I would note that the expanded MFCU authority proposed in H.R. 3891 is a particularly important tool for combating elder abuse. As we noted in our NAAG letter:

Today, more than 74 million Americans are enrolled in Medicaid. Of those, more than 6.4 million are age 65 or older. 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.

See NAAG Letter to HHS Secretary Tom Price, May 9, 2017 (internal citations omitted). While the expanded authority would not be limited to addressing abuse against elder Medicaid beneficiary-patients, the importance of this tool in addressing elder abuse is what led NAAG to lend our support to this legislation as an outgrowth of our presidential initiative on combating elder abuse.

Importance of H.R. 3891

The difference in scope between a MFCU's anti-fraud authority and its narrower anti-abuse authority is the subject of H.R. 3891. This bill proposes to allow states the option of expanding their MFCU's scope to combat Medicaid beneficiary-patient abuse wherever it may occur, including in non-institutional settings. That state-by-state option, which mirrors the flexibility in current law that allows states to opt-in to using MFCUs to combat patient abuse in board-and-care facilities, is an important component of the bill. That is optional authority that, if H.R. 3891 is enacted, Kansas intends to exercise. From my vantage point, it makes little sense to allow broad MFCU authority to combat fraud when the public treasury is the victim but to insist on narrower MFCU authority to combat abuse when the Medicaid beneficiaries themselves are the victim. Whatever its original rationale, this distinction seems, at best, outdated. Nevertheless, states must abide by that distinction and limit the scope of the efforts to combat patient abuse or risk losing their FFP.

In practice, the limitation on using MFCU assets to detect, investigate and prosecute patient abuse outside of an institutional setting has real consequences. In Kansas, we have seen at least two real-world, detrimental effects of this limitation:

- We have seen cases in which our MFCU agents, in the course of conducting a lawful investigation in connection with suspected fraud in home health care services being funded by Medicaid and provided in the beneficiary's home, have uncovered evidence of abuse of the Medicaid beneficiary-patient. Under current law, our MFCU could proceed to investigate and prosecute the fraud committed against the government program but could not proceed to investigate and prosecute the abuse committed against the beneficiary-patient. That is because of the current statutory restriction that limits a MFCU's authority over patient abuse only to institutional settings such as in a health care facility.

- We also have seen cases involving so-called “pill mills” involving the illegal diversion of narcotics from the lawful supply chain to the illicit market. In some cases, that diversion results in the misuse of these drugs causing death or great bodily harm. But if the diversion occurs entirely in a setting outside a health care facility or a board and care facility – for example, at a doctor’s office – our MFCU is permitted to pursue the relatively small fraud (the stealing of pills from the Medicaid program) but not the much greater harm done to patients as a result of the diversion (the death or great bodily harm from misuse of the drugs).

That difference in scope between our MFCU’s anti-fraud authority and its anti-abuse authority is poor public policy and, at least in my view, logically unjustifiable. It has roots in an era long ago when the delivery of most health services was in an institutional setting and, therefore, the opportunity for Medicaid beneficiary-patient abuse in a non-institutional setting, such as a home health care setting, was remote.

But today, far more care is delivered to patients, including Medicaid beneficiaries, through home and community-based services outside of health care facilities. And when we discover that a patient-beneficiary is being abused in that non-institutional setting, I can see no logical policy reason to be prohibited from using MFCU assets to appropriately pursue that abuse.

H.R. 3891 is designed to eliminate that barrier in federal law to using existing MFCU assets to protect Medicaid beneficiaries from patient abuse, regardless of where the abuse may occur. It proposes a small change in statute that has a large likelihood of providing better protection, and better justice, for Medicaid beneficiary-patients who are the victims of abuse.

For that reason, I strongly support passage of H.R. 3891 both as Kansas Attorney General and on behalf of the National Association of Attorneys General. This legislation, if enacted, would take the blinders off the MFCUs and let them detect, investigate and prosecute Medicaid beneficiary-patient abuse wherever it may occur. I commend Representatives Walberg and Welch for their leadership in bringing this

legislation forward, and I offer to work with the Committee in whatever manner may be helpful to advance this legislation and, I hope, find a way for it to reach the President's desk before this calendar year is through.

Thank you for your consideration of this important matter.



PRESIDENT
George Jepsen
Connecticut Attorney General

PRESIDENT-ELECT
Derek Schmidt
Kansas Attorney General

VICE PRESIDENT
Jeff Landry
Louisiana Attorney General

IMMEDIATE PAST PRESIDENT
Marty Jackley
South Dakota Attorney General

EXECUTIVE DIRECTOR
James McPherson

May 10, 2017

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

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%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last accessed March 28, 2017).

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

2030 M Street, NW
Eighth Floor
Washington, DC 20036
Phone: (202) 326-6000
<http://www.naag.org/>

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.

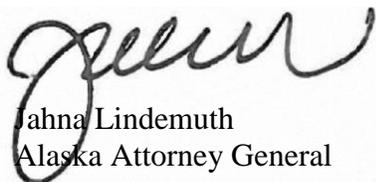
Sincerely,



George Jepsen
Connecticut Attorney General



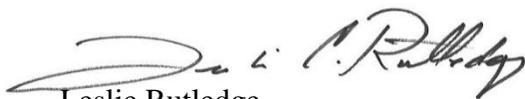
Derek Schmidt
Kansas Attorney General



Janna Lindemuth
Alaska Attorney General



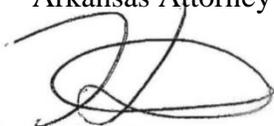
Mark Brnovich
Arizona Attorney General



Leslie Rutledge
Arkansas Attorney General



Cynthia H. Coffman
Colorado Attorney General



Karl A. Racine
District of Columbia Attorney General



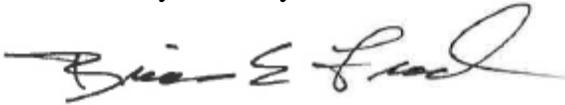
Doug Chin
Hawaii Attorney General



Curtis T. Hill, Jr.
Indiana Attorney General



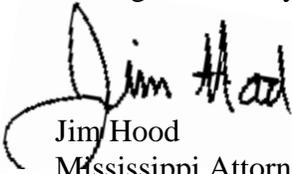
Andy Beshear
Kentucky Attorney General



Brian Frosh
Maryland Attorney General



Bill Schuette
Michigan Attorney General



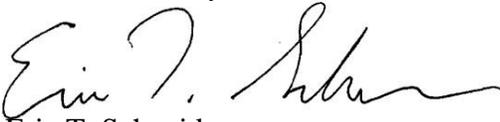
Jim Hood
Mississippi Attorney General



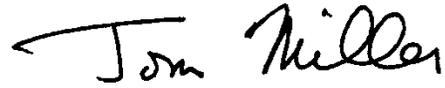
Tim Fox
Montana Attorney General



Adam Paul Laxalt
Nevada Attorney General



Eric T. Schneiderman
New York Attorney General



Tom Miller
Iowa Attorney General



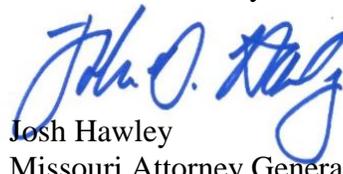
Jeff Landry
Louisiana Attorney General



Maura Healey
Massachusetts Attorney General



Lori Swanson
Minnesota Attorney General



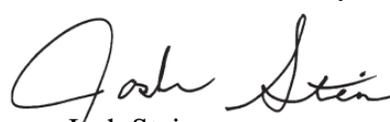
Josh Hawley
Missouri Attorney General



Douglas Peterson
Nebraska Attorney General



Hector Balderas
New Mexico Attorney General



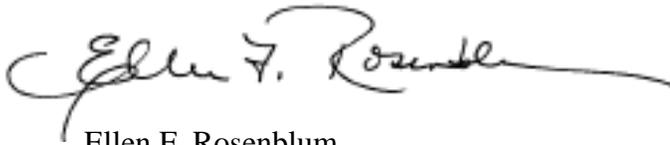
Josh Stein
North Carolina Attorney General



Mike DeWine
Ohio Attorney General



Mike Hunter
Oklahoma Attorney General



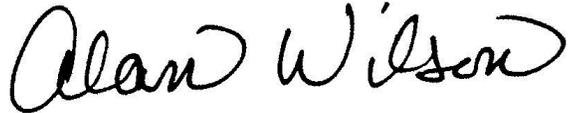
Ellen F. Rosenblum
Oregon Attorney General



Josh Shapiro
Pennsylvania Attorney General



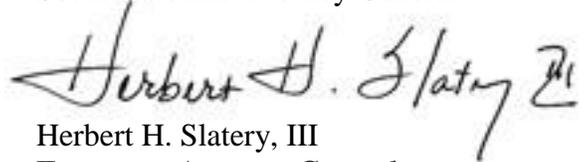
Peter F. Kilmartin
Rhode Island Attorney General



Alan Wilson
South Carolina Attorney General



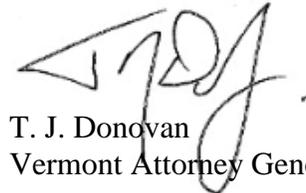
Marty J. Jackley
South Dakota Attorney General



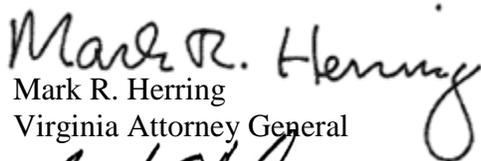
Herbert H. Slatery, III
Tennessee Attorney General



Sean Reyes
Utah Attorney General



T. J. Donovan
Vermont Attorney General



Mark R. Herring
Virginia Attorney General



Patrick Morrissey
West Virginia Attorney General



Brad Schimel
Wisconsin Attorney General



Peter K. Michael
Wyoming Attorney General



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

JUL 17 2017

The Honorable George Jepsen
President
National Association of Attorneys General
Washington, DC 20036

Dear Attorney General Jepsen:

Thank you for your letter requesting that the U.S. Department of Health and Human Services change its current regulations to allow Medicaid Fraud Control Units (MFCUs) to receive federal financial participation to detect, investigate, and prosecute abuse and neglect of Medicaid beneficiaries in non-institutional settings. We share your concerns regarding the safety and well-being of Medicaid beneficiaries in all settings, and we are diligently working on responding to your inquiry.

This matter has been referred to Inspector General Daniel R. Levinson, from whom you can expect a direct response. As the agency responsible for overseeing MFCUs and administering the MFCU grant award, the Office of Inspector General would be in a position to respond to the issue you have raised.

Thank you again for your letter and your focus on protecting the safety and well-being of Medicaid beneficiaries.

Yours truly,

A handwritten signature in black ink, appearing to read "Thomas E. Price, M.D.", with a large, sweeping flourish at the end.

Thomas E. Price, M.D.



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



AUG 07 2017

The Honorable George Jepsen
President
National Association of Attorneys General
Washington, DC 20036

Dear Attorney General Jepsen:

Thank you for your letter to Secretary Thomas E. Price, M.D., requesting that the U.S. Department of Health and Human Services (HHS) change its current regulations to allow Medicaid Fraud Control Units (MFCUs) to receive Federal financial participation (FFP) to detect, investigate, and prosecute abuse and neglect of Medicaid beneficiaries in non-institutional settings. As indicated by Secretary Price's letter of July 17, 2017, your letter has been referred to the Office of Inspector General (OIG) for response.

We share your concerns regarding abuse and neglect of Medicaid beneficiaries. We recognize that the laws governing Federal matching were established almost 40 years ago and do not reflect the shift in delivery and payment for health care services to home- and community-based settings. OIG believes that the law should be changed to expand MFCUs' use of FFP to include the detection, investigation, and prosecution of abuse and neglect of Medicaid beneficiaries in non-institutional settings. However, we do not believe that the change can be made by regulation.

The Social Security Act (the Act) currently allows for payment of FFP for MFCU activities in abuse and neglect cases involving Medicaid beneficiaries.¹ Section 1903(q)(4)(A) of the Act specifically sets forth only two settings in which MFCUs may review complaints of abuse or neglect of patients: (1) health care facilities that receive Medicaid payments and (2) board and care facilities. Other non-institutional settings, such as home-based care and transportation, are not listed. Because the statute specifically enumerates some settings in which MFCUs can investigate abuse and neglect cases and receive FFP, the failure to include the others, according to statutory construction principles, is read as excluding them.

In cases in which a beneficiary is receiving services in his or her own home, the requirements of the statute are not met. Homes and most other non-institutional settings are neither health care facilities that receive Medicaid payments nor board and care facilities. Thus, the statute does not

¹ Section 1903(a)(6) of the Act requires HHS to pay a portion of the sums expended by a State "which are attributable to the establishment and operation of (including the training of personnel employed by) a State Medicaid fraud control unit (described in subsection (q))." Section 1903(q) of the Act defines MFCU requirements, including MFCU duties regarding patient abuse and neglect.

permit FFP for the detection, investigation, and prosecution of abuse or neglect of patients in non-institutional settings.

HHS is bound by the statute and cannot expand the regulatory definition of “health care facilities receiving payments under the State Medicaid plan” to include non-institutional settings that do not receive Medicaid payments. While we cannot make the requested regulatory change, we have been and continue to be supportive of efforts to effect a statutory change that would allow MFCUs to receive FFP for the detection, investigation, and prosecution of abuse and neglect in non-institutional settings. OIG representatives have also identified the need for a statutory change in testimony before congressional committees, including, most recently, in May 2017 testimony.²

Thank you for raising this important issue. We continue to support the concept that MFCUs should receive FFP to conduct these investigations of abuse and neglect. If you have questions or seek additional information, please contact me, or someone from your staff may contact Ann Maxwell, Assistant Inspector General for Evaluation and Inspections, at (202) 619-2482.

Sincerely,



Daniel R. Levinson
Inspector General

² Testimony of Christi A. Grimm, Chief of Staff, before House Committee on Energy and Commerce: Subcommittee on Oversight and Investigations: "Combatting Waste, Fraud, and Abuse in Medicaid's Personal Care Services Program," May 2, 2017, available at <https://oig.hhs.gov/testimony/docs/2017/grimm-testimony-05022017.pdf>



PRESIDENT
Derek Schmidt
Kansas Attorney General

PRESIDENT-ELECT
Jeff Landry
Louisiana Attorney General

VICE PRESIDENT
Tim Fox
Montana Attorney General

IMMEDIATE PAST PRESIDENT
George Jepsen
Connecticut Attorney General

EXECUTIVE DIRECTOR
Chris Toth

March 28, 2018

Honorable Tim Walberg
2436 Rayburn House Office Building
Washington, D.C. 20515

Honorable Peter Welch
2303 Rayburn House Office Building
Washington, D.C. 20515

Dear Representatives Walberg and Welch:

As the Attorneys General of our respective states, we write in support of your legislation, H.R. 3891, that would expand the authority of Medicaid Fraud Control Units (MFCUs) to detect, investigate and prosecute Medicaid patient abuse in non-institutional settings.

On May 10, 2017, thirty-eight attorneys general wrote to then-Secretary Tom Price at the U.S. Department of Health and Human Services urging expanded authority for MFCUs to address patient abuse and neglect (“the NAAG letter”). Specifically, the NAAG letter requested HHS alter its regulations implementing the pertinent statutory provisions to broaden the permissible authority for MFCUs, and the associated use of federal financial participation (FFP), in two regards. First, it recommended “allowing the use of federally funded MFCU assets to investigate and prosecute abuse and neglect of Medicaid beneficiaries in non-institutional settings.” Second, it recommended “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.”

On August 7, 2017, HHS Inspector General Daniel R. Levinson responded to the NAAG letter stating “OIG believes that the law should be changed to expand MFCUs’ use of FFP to include the detection, investigation, and prosecution of abuse and neglect of Medicaid beneficiaries in non-institutional settings.” However, HHS concluded that such a change requires statutory amendment and could not be accomplished solely by regulation.

On September 28, 2017, you introduced H.R. 3891. We are informed that, in the drafting of your legislation, you were mindful of the NAAG letter and that you intended to implement the letter’s recommendations. We have reviewed H.R. 3891 and understand that, if adopted, it would enable HHS-OIG to implement all changes requested in the NAAG letter. Your legislation permits, but does not require, each MFCU to exercise the expanded authority the bill proposes, just as current law does with board and care facilities. It is our understanding that States electing to operate under the expanded authority of H.R. 3891 would be able to use their MFCUs to detect, investigate and

1850 M Street, NW
Twelfth Floor
Washington, DC 20036
Phone: (202) 326-6000
<http://www.naag.org/>

prosecute cases of abuse or neglect of Medicaid patients in whatever setting abuse or neglect may occur and to do so without losing federal financial participation.¹

This change is vitally important because it eliminates the blinders current law places on MFCUs' ability to detect, investigate and prosecute cases of abuse or neglect of Medicaid patients. Since the current statute was enacted decades ago, substantial growth has occurred in home and community-based services, office-based services, transportation services, and other settings that are neither "health care facilities" nor "board and care facilities" but where services are provided and thus patient abuse or neglect may occur. H.R. 3891 proposes a common-sense change that will better protect an often-vulnerable population and will maximize the benefits and efficient use of MFCU assets.

We also note that your bill is particularly timely and important in light of the national opioid epidemic. Consider, for example, a situation in which a Medicaid beneficiary in a home or community-based setting is provided prescription opioid painkillers in an unlawful manner, resulting in death or great bodily harm to the patient. Under current law, although the patient harm caused by distribution of those opioids may have been criminal, our MFCUs would be hampered or prevented from investigating or prosecuting the case of patient abuse because it occurred in a setting other than a health care facility or a board and care facility. Under H.R. 3891, however, MFCUs could exercise clear authority to pursue that sort of investigation and, if appropriate, prosecute that patient abuse, thus bringing more criminal and civil investigation and prosecution assets to bear in the fight against the opioid epidemic.

Thank you for your leadership in proposing H.R. 3891. We hope it can become law soon so our states may have the option to use the important new tools it would make available in the fight

¹ The NAAG letter requested expanded authority for MFCUs to "detect, investigate and prosecute" a wider range of abuse and neglect cases, and Mr. Levinson's response confirms that OIG favors "use of FFP to include the detection, investigation, and prosecution" of such cases. By "detect," the NAAG letter specifically sought broader authority for MFCUs to use FFP to "screen" complaints or reports alleging potential abuse or neglect." Current HHS regulations constrain states' ability to use MFCU assets to *review* complaints in order to detect which may allege patient abuse or neglect that would warrant investigation or prosecution using MFCU assets. *See, e.g.*, 42 C.F.R. Sec. 1007.19(d)(1)(limiting FFP to "review of complaints of alleged abuse or neglect of patients *in health care facilities*")(emphasis added); *see also* 42 C.F.R. Sec. 1007.11(b)(1)(restricting authority of MFCU to "review[ing] complaints alleging abuse or neglect of patients *in health care facilities*" and to "review[ing] complaints of the misappropriation of patient's private funds *in such facilities.*")(emphasis added). For states that would choose to exercise the expanded authority in H.R. 3891, we read the bill to require elimination of these and similar regulatory barriers that restrict MFCUs authority to review complaints. Obviously, a review will necessarily precede a determination whether a complaint or report alleges Medicaid patient abuse or neglect that would fall within H.R. 3891's expanded authority to investigate or prosecute, and it would make no sense to arbitrarily limit review to complaints from patients in health care facilities if the authority to investigate and prosecute abuse and neglect is expanded to other settings.

against the abuse and neglect of *all* Medicaid patients -- wherever that may occur. If we may be of assistance in advancing this legislation, please let us know.

Sincerely,



George Jepsen
Connecticut Attorney General



Mike Hunter
Oklahoma Attorney General



Steve Marshall
Alabama Attorney General



Mark Brnovich
Arizona Attorney General



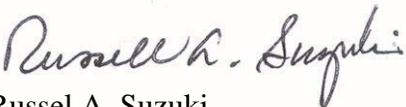
Xavier Becerra
California Attorney General



Matthew P. Denn
Delaware Attorney General



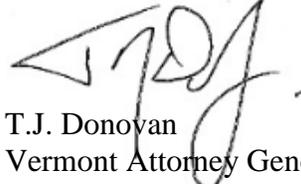
Pamela Jo Bondi
Florida Attorney General



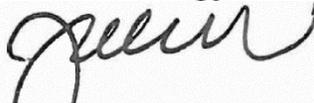
Russel A. Suzuki
Hawaii Acting Attorney General



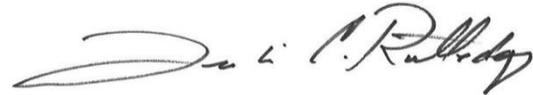
Derek Schmidt
Kansas Attorney General



T.J. Donovan
Vermont Attorney General



Jahna Lindemuth
Alaska Attorney General



Leslie Rutledge
Arkansas Attorney General



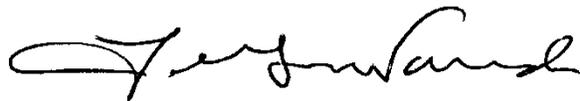
Cynthia H. Coffman
Colorado Attorney General



Karl A. Racine
District of Columbia Attorney General



Christopher M. Carr
Georgia Attorney General



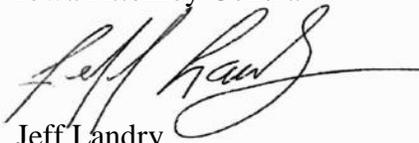
Lawrence Wasden
Idaho Attorney General



Lisa Madigan
Illinois Attorney General



Tom Miller
Iowa Attorney General



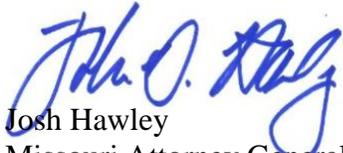
Jeff Landry
Louisiana Attorney General



Maura Healey
Massachusetts Attorney General



Lori Swanson
Minnesota Attorney General



Josh Hawley
Missouri Attorney General



Doug Peterson
Nebraska Attorney General



Gordon MacDonald
New Hampshire Attorney General



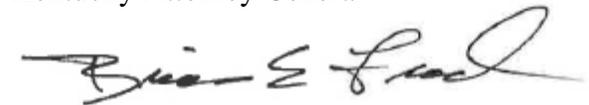
Hector Balderas
New Mexico Attorney General



Curtis T. Hill Jr.
Indiana Attorney General



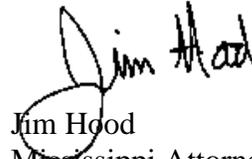
Andy Beshear
Kentucky Attorney General



Brian Frosh
Maryland Attorney General



Bill Schuette
Michigan Attorney General



Jim Hood
Mississippi Attorney General



Tim Fox
Montana Attorney General



Adam Paul Laxalt
Nevada Attorney General



Gurbir S. Grewal
New Jersey Attorney General



Eric T. Schneiderman
New York Attorney General



Josh Stein
North Carolina Attorney General



Ellen F. Rosenblum
Oregon Attorney General



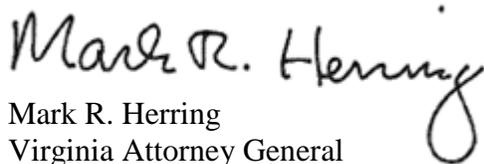
Peter F. Kilmartin
Rhode Island Attorney General



Marty J. Jackley
South Dakota Attorney General



Sean Reyes
Utah Attorney General



Mark R. Herring
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Wyoming Attorney General



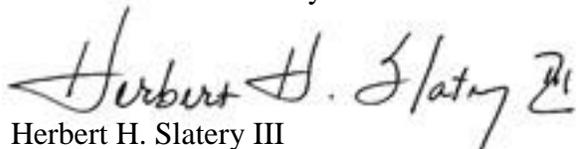
Mike DeWine
Ohio Attorney General



Josh Shapiro
Pennsylvania Attorney General



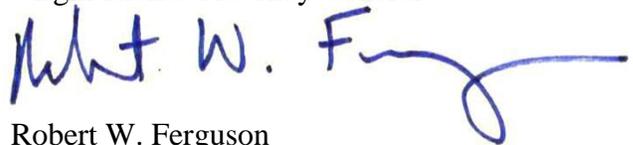
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Claude Earl Walker
Virgin Islands Attorney General



Robert W. Ferguson
Washington Attorney General



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