FEDERAL TRADE COMMISSION
Washington, DC 20580

In the Matter of

Deloitte Consulting LLP, a limited liability partnership, also d/b/a Deloitte

Complaint and Request for Investigation, Injunction, and Other Relief

Submitted by

National Health Law Program (NHeLP),

Electronic Privacy Information Center (EPIC), and

Upturn, Inc.

SUMMARY

1. This complaint is brought to address serious financial and health harms to hundreds of thousands of Medicaid enrollees in Texas caused by a faulty Medicaid eligibility system developed by Deloitte Consulting LLP ("Deloitte"). In Texas, individuals seeking to enroll in Medicaid must submit information to—and have their Medicaid eligibility determined by—the Texas Integrated Eligibility Redesign System ("TIERS"), an automated benefits eligibility system developed and maintained by Deloitte. Although Deloitte has represented that its Medicaid eligibility system produces consistent and accurate eligibility determinations, hundreds of thousands of people have been and are being injured by the system's failure to accurately automate the relevant eligibility rules. This results in loss of critical health care coverage and inability to access necessary medical care.

2. Deloitte has been aware of similar accuracy issues with its automated benefits eligibility systems in other states for several years, but it has yet to take meaningful steps to mitigate the same harms to consumers in Texas who must rely on TIERS to access essential Medicaid benefits. The harms caused by Deloitte's software are particularly acute at this time because all states are in the process of determining ongoing eligibility for millions of people who, by law, maintained Medicaid eligibility during the COVID-19 public health emergency. Deloitte has therefore failed to take reasonable measures to prevent foreseeable harm to consumers in Texas. Deloitte has also failed to show that its TIERS product is consistent with principles for responsible automated decision-making systems, such as those set out in Executive Order 14110 on

the Safe, Secure, and Trustworthy Development and Use of AI[1] and the White House's Blueprint for an AI Bill of Rights.[2]

3. Deloitte has engaged in unfair and deceptive trade practices, both directly and by providing the means and instrumentalities for unfair and deceptive trade practices, in violation of Section 5 of the Federal Trade Commission (FTC) Act.[3]

4. For the reasons set out below, the Commission should open an investigation, issue an injunction, and provide such other relief as proposed in Section VI, below, or as the Commission deems necessary and appropriate.

PARTIES

5. The National Health Law Program (NHeLP) is a public interest law firm with offices in Washington, D.C., Los Angeles, California, and Chapel Hill, North Carolina. NHeLP was established in 1969 to protect and advance health rights of low-income and underserved people. NHeLP has been a leader in ensuring that automated decision-making and artificial intelligence (AI) do not harm Medicaid and other public benefit recipients, including serving as a founding member of the Benefits Tech Advocacy Hub.[4]

6. The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC has played a leading role in developing FTC authority to address emerging privacy issues and to safeguard the privacy rights of consumers.[5]

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[1] Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75191 (Oct. 30, 2023) [hereinafter "Executive Order 14110"].
[2] White House Off. Sci. & Tech. Pol'y, Blueprint for an AI Bill of Rights (2022), https://www.whitehouse.gov/ostp/ai-bill-of-rights/ [hereinafter "Blueprint"].
[3] 15 U.S.C. § 45.
[4] National Health Law Program, Fairness in Automated Decision Making Systems, https://healthlaw.org/algorithms/; Elizabeth Edwards & David Machledt, National Health Law Program, *Principles for Fairer, More Responsive Automated Decision-Making Systems* (2023), https://healthlaw.org/resource/principles-for-fairer-more-responsive-automated-decision-making-systems/; Benefits Tech Advocacy Hub, https://www.btah.org/; Sarah Grusin, National Health Law Program *A Promise Unfulfilled: Automated Medicaid Eligibility Decisions* (June 30, 2021), https://healthlaw.org/a-promise-unfulfilled-automated-medicaid-eligibility-decisions/.
[5] See, e.g., EPIC, Comments on FTC Trade Regulation Rule on Commercial Surveillance and Data Security, 87 Fed. Reg. 51,273 (advanced notice issued Aug. 22, 2022), https://epic.org/wp-content/uploads/2022/12/EPIC-FTC-commercial-surveillance-ANPRM-comments-Nov2022.pdf [hereinafter "EPIC FTC Commercial Surveillance Comment"]; EPIC & Consumer Reps., *How the FTC Can Mandate Data Minimization Through a Section 5 Unfairness Rulemaking* (2022), https://epic.org/documents/how-the-ftc-can-mandate-data-minimization-through-a-section-5-unfairness-rulemaking/; EPIC, Comments on Proposed Consent Order, *In re Support King, LLC (SpyFone.com)*, FTC File No. 192-3003 (Oct. 8, 2021),

EPIC is a longstanding advocate for the transparent, ethical, and responsible development, procurement, and use of algorithms and artificial intelligence.[6]

7. Upturn is a non-profit organization in Washington, D.C., that advances equity and justice in the design, governance, and use of technology. Through research and advocacy, Upturn drives policy change by investigating specific ways that technology and automation shape people's opportunities, particularly in historically disadvantaged communities. Upturn is a founding member, along with NHeLP, of the Benefits Tech Advocacy Hub.[7]

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https://archive.epic.org/apa/comments/In-re-SpyFone-Order-EPIC-comment-100821.pdf; EPIC et al., Comments on Proposed Consent Order, *In re Zoom Video Communications, Inc.*, FTC File No. 192-3167 (Dec. 14, 2020), https://epic.org/apa/comments/EPIC-FTC-Zoom-Dec2020.pdf; EPIC, Comments on Proposed Consent Order, *In re Unrollme, Inc.,* FTC File No. 172-3139 (Sept. 19, 2019), https://epic.org/apa/comments/EPIC-FTC-Unrollme-Sept2019.pdf; EPIC, Comments on Proposed Consent Agreements, *In re Aleksandr Kogan and Alexander Nix*, FTC File Nos. 182-3106 & 182-3107 (Sept. 3, 2019), https://epic.org/apa/comments/EPIC-FTC-CambridgeAnalytica-Sept2019.pdf; EPIC, Comments on FTC Rule Setting Standards for Safeguarding Customer Information, 84 Fed. Reg. 13,158 (proposed Apr. 4, 2019), https://epic.org/apa/comments/EPIC-FTC-Safeguards-Aug2019.pdf; Complaint, Request for Investigation, Injunction, and Other Relief, *In re Zoom Video Commc'ns, Inc.* (July 11, 2019), https://epic.org/privacy/ftc/zoomEPIC-FTC-Complaint-In-re-Zoom-7-19.pdf; EPIC, Comments on Proposed Consent Order, *In re Uber Technologies, Inc.*, FTC File No. 152-3054 (May 14, 2018), https://epic.org/apa/comments/EPIC-FTC-Revised-Uber-Settlement.pdf; EPIC, Comments on Proposed Consent Order, *In re Paypal, Inc.*, FTC File No. 162-3102 (Mar. 29, 2018), https://epic.org/apa/comments/EPIC-FTC-PayPal-ConsentOrder.pdf; Complaint, Request for Investigation, Injunction, and Other Relief, *In re Google Inc*.(July 31, 2017), https://www.epic.org/privacy/ftc/google/EPIC-FTC-Google-Purchase-Tracking-Complaint.pdf; Complaint and Request for Investigation, Injunction, and Other Relief*, In re Genesis Toys and Nuance Communications* (Dec. 6, 2016), https://epic.org/privacy/kids/EPIC-IPR-FTC-Genesis-Complaint.pdf.

[6] *See, e.g.,* EPIC, Outsourced & Automated: How AI Companies Have Taken Over Government Decision-Making(Sept. 14, 2023), https://epic.org/wp-content/uploads/2023/09/FINAL-EPIC-Outsourced-Automated-Report-w-Appendix-Updated-9.26.23.pdf [hereinafter "Outsourced & Automated Report"]; EPIC, Comments on Notice of Proposed Rulemaking, *In re Access to Video Conferencing*, CG Docket No. 23-161 (Sept. 6, 2023), https://epic.org/documents/in-re-access-to-video-conferencing; EPIC, Comments on Proposed Parental Consent Method Submitted by Yoti, Inc., Under the Voluntary Approval Processes Provisions of the Children's Online Privacy Protection Rule, 88 Fed. Reg. 46705 (Aug. 21, 2023), https://epic.org/documents/epic-cdd-fairplay-comments-to-the-ftc-on-proposed-parental-consent-method-submitted-by-yoti-inc-under-coppa-rule/; EPIC, Generating Harms: Generative AI's Impact & Paths Forward (May 23, 2023), https://epic.org/gai.

[7] *See* Upturn, Our Work, https://www.upturn.org/work/?issue=public-benefits; Logan Koepke & Harlan Yu, Upturn, *Comments on OMB's AI Memorandum* (Dec. 5, 2023), https://www.upturn.org/work/comments-on-ombs-ai-memorandum/.

8. Deloitte Consulting LLP is a private company having its principal Texas office at 500 West 2nd Street, Suite 1600, Austin, Texas 78701. Deloitte Consulting LLP develops, *inter alia*, software and other "technical and business solutions" ("systems") to make Medicaid eligibility determinations.[8]

9. The FTC is an independent agency of the United States government given statutory authority and responsibility by, *inter alia*, the FTC Act, 15 U.S.C. §§ 41–58. The Commission is charged with enforcing section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices in or affecting commerce.

FACTUAL BACKGROUND

A. Federal Requirements for Medicaid Eligibility Determinations.

10. Title XIX of the Social Security Act establishes the Medicaid Act. The purpose of Medicaid is to enable each state, as far as practicable, "to furnish [] medical assistance" to individuals "whose income and resources are insufficient to meet the costs of necessary medical services" and to provide "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care."[9]

11. State participation in Medicaid is voluntary. Participating states receive generous federal funding. All states participate.

12. The Medicaid Act authorizes medical assistance coverage for designated low-income population groups and specifies health care services that states must or can furnish to covered groups.[10]

13. In addition to fitting within a covered population group, an individual must have limited income and, for some population groups, limited assets. The income limits vary between groups and income eligibility is established using one of two sets of rules: (1) Modified Adjusted Gross Income (MAGI) rules, which count income based on federal tax rules and does not include an asset test, or (2) non-MAGI rules, which follow the Medicaid eligibility rules in place before implementation of the Affordable Care Act in 2014 and may include an asset test.[11]

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[8] Deloitte, Services: State Integrated Eligibility Services, https://www2.deloitte.com/us/en/pages/public-sector/solutions/health-and-human-services-eligibility-and-service-integration-services.html.
[9] 42 U.S.C. § 1396-1.
[10] *Id.* § 1396a(a)(10)(A).
[11] *Id.* § 1396a(e)(14); 42 C.F.R. §§ 435.601, 435.603.

14. Medicaid coverage is a valuable benefit that enables low-income enrollees to purchase health care at little to no cost.[12]

15. Individuals are enrolled in either "fee-for-service" Medicaid or "managed care." Under the fee-for-service model, the state pays providers directly for each covered service received by a Medicaid enrollee, *e.g.*, each time an individual goes to the doctor or fills a prescription. Under managed care, the state pays a fee to a managed care plan for each person enrolled in the plan (similar to paying a premium each month). In turn, the plan pays providers for all of the Medicaid services an enrollee may require that are included in the plan's contract with the state.[13]

16. Individuals enrolled in Medicaid use their coverage to pay for many important products and services, including physician and hospital services, prescription drugs, medical equipment, and more.[14]

17. Federal law requires that individuals with Medicaid coverage undergo renewal of their eligibility, also referred to as "redetermination," at least every 12 months.[15]

18. During the COVID-19 public health emergency, states paused annual Medicaid redeterminations in exchange for enhanced federal funding.[16]

19. The Consolidated Appropriations Act of 2023 ended the continuous coverage requirement effective March 31, 2023.[17] Accordingly, states re-started redeterminations in a process referred to as "unwinding."

20. When determining and redetermining Medicaid eligibility, states must "to the maximum extent practicable establish, verify, and update eligibility using . . . data matching . . . and determine . . . eligibility based on reliable, third party data."[18]

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[12] *See generally* Wayne Turner, National Health Law Program, *What Makes Medicaid, Medicaid?* (April 17, 2023), https://healthlaw.org/resource/what-makes-medicaid-medicaid/; Dave Machledt, National Health Law Program, *What Makes Medicaid, Medicaid? – Affordability* (Apr. 17, 2023), https://healthlaw.org/resource/what-makes-medicaid-medicaid-affordability/.

[13] *See* Medicaid & CHIP Payment and Access Commission, *Provider Payment*, https://www.macpac.gov/topics/provider-payment/ (last visited Jan. 22, 2024).

[14] Wayne Turner et al., National Health Law Program, *What Makes Medicaid, Medicaid? – Services* (April 17, 2023), https://healthlaw.org/resource/what-makes-medicaid-medicaid-services/.

[15] 42 C.F.R. § 435.916.

[16] 42 U.S.C. § 1396d note (Temporary Increase of Medicaid reimbursements under Federal Medical Assistance Percentage ("FMAP") under Families First Coronavirus Response Act, Pub. L. No. 116-127, § 6008).

[17] 42 U.S.C. § 1396d note (amended by Consolidated Appropriations Act, Pub. L. No. 117-328, § 5131, 136 Stat. 4459, 5949).

[18] 42 U.S.C. § 18083(c)(3).

21. To meet this requirement, each state must "develop . . . a secure, electronic interface allowing an exchange of data . . . that allows a determination of eligibility."[19]

22. This eligibility determination system must "streamlin[e]" the process for submitting initial applications and paperwork required for re-determinations of eligibility.[20] And state Medicaid agencies must minimize the burden on individuals trying to obtain or retain eligibility.[21]

23. A state system to support Medicaid eligibility and enrollment qualifies for a federal matching rate of 90% for design, development, and implementation and at 75% for ongoing operations if it meets certain requirements, including that it is "likely to provide more efficient, economical, and effective administration" and "support[s] accurate and timely processing and adjudications/eligibility determinations."[22]

24. Each redetermination must start with an attempt to determine the enrollee's eligibility based on a review of reliable information already existing in state or federal records or available through a data exchange. This process is known as "ex parte" redetermination.[23]

25. States have access to multiple databases that can verify eligibility during ex parte redetermination. For example, to check financial eligibility requirements, states can access a state wage or tax database, information from other means-tested programs

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[19] *Id.* § 18083(c)(1); *see also* 1396w-3(b)(1)(D), (b)(3).
[20] *Id.* § 18083.
[21] 42 C.F.R. § 435.1200(b)(3)(i).
[22] 42 C.F.R. §§ 433.116(c); 433.112. The Centers for Medicare & Medicaid Services (CMS) has a process for approving federal funding for eligibility and enrollment systems, which are a type of "mechanized claims processing and information retrieval systems." 42 C.F.R. §§ 433.110-119. *See generally* CMS, Streamlined Modular Certification, https://www.medicaid.gov/medicaid/data-systems/certification/streamlined-modular-certification/index.html (last visited Jan. 26, 2023). Although CMS has a process to approve ongoing funding for costs of developing, operating, and maintaining the system, the process does not fully assess the functionality of the entire system and relies heavily on assurances from states and contractors. *See, e.g.,* CMCS, *Informational Bulletin: Medicaid Enterprise Systems Compliance and Reapproval Process for State Systems with Operational Costs Claimed at the 75 Percent Federal Match Rate* 3 (May 24, 2023), https://www.medicaid.gov/sites/default/files/2023-05/cib052423.pdf. Approved systems have been found to have errors with federal requirements. *See, e.g.,* CMS, *Dear State Medicaid Director Letter* (Aug. 30, 2023), https://www.medicaid.gov/sites/default/files/2023-08/state-ltr-ensuring-renewal-compliance.pdf (identifying dozens of states that had system errors that incorrectly performed ex parte reviews at the household rather than individual level).
[23] 42 C.F.R. §§ 435.916(a)(2) and (b), 435.948; CMS, *Eligibility & Enrollment Processing for Medicaid, CHIP, and BHP During COVID-19 Public Health Emergency Unwinding Key Requirements for Compliance* 6 (May 17, 2022) https://www.medicaid.gov/sites/default/files/2022-05/eligibility-enrollment-rules.pdf.

like the Supplemental Nutrition Assistance Program (SNAP), or federal data from the Internal Revenue Service (IRS).[24]

26. Information obtained through the ex parte process is then fed through the eligibility system's logic, which automatically applies the program rules to make an automated eligibility determinations.[25]

27. If the available information is sufficient to determine eligibility, Medicaid coverage will be renewed without requiring any information from the individual.[26]

28. If an individual cannot be renewed ex parte, the state sends them a renewal packet to collect the missing information. The state may also request that the individual provide additional documentation to verify particular eligibility factors.[27]

29. States may not ask for information that is irrelevant or that is available to it, and must not require individuals to provide information or documentation unless it "cannot be obtained electronically.[28]

30. If an individual does not return the renewal packet or requested documents, Medicaid coverage is terminated. This is known as a "procedural termination" (as opposed to termination based upon a merits-based determination of ineligibility).

31. If the individual returns the requested information and documents, the additional information is populated into the eligibility software and fed through the eligibility system's logic that automatically applies the program rules to make an automated eligibility determination.[29]

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[24] 42 C.F.R. § 435.948(a); Medicaid and CHIP Payment and Access Commission, *Increasing the Rate of Ex Parte Renewals*, (Sept. 2023) https://www.macpac.gov/wp-content/uploads/2023/09/Increasing-the-Rate-of-Ex-Parte-Renewals-Brief.pdf.
[25] *See* Medicaid and CHIP Payment and Access Commission, *Assessment and Synthesis of Selected Medicaid Eligibility, Enrollment, and Renewal Processes and Systems in Six States* 10 (Oct. 19, 2018), https://www.macpac.gov/wp-content/uploads/2018/11/Assessment-and-Synthesis-of-Selected-Medicaid-Eligibility-Enrollment-and-Renewal-Processes-and-Systems-in-Six-States.pdf.
[26] 42 C.F.R. § 435.916(a)(2), (b).
[27] *Id.* § 435.916(a)(3).
[28] 42 U.S.C. § 18083(b)(1); 42 C.F.R. §§ 435.907(e), § 435.952(c).
[29] Medicaid and CHIP Payment and Access Commission, *Assessment and Synthesis of Selected Medicaid Eligibility, Enrollment, and Renewal Processes and Systems in Six States* 10 (Oct. 19, 2018), https://www.macpac.gov/wp-content/uploads/2018/11/Assessment-and-Synthesis-of-Selected-Medicaid-Eligibility-Enrollment-and-Renewal-Processes-and-Systems-in-Six-States.pdf.

32. Before terminating Medicaid eligibility, a state must evaluate an enrollee's eligibility under all categories of eligibility.[30] To meet this requirement using an automated eligibility system, the system, must accurately evaluate for all categories of Medicaid eligibility.

33. If the individual is not eligible under any Medicaid category, the state must evaluate their eligibility for other insurance affordability programs, including the Children's Health Insurance Program (CHIP), and transfer the information to the other insurance affordability programs through its secure electronic interface.[31]

34. The state must timely notify an individual of its decision regarding the renewal of Medicaid eligibility. The notice must, among other things, include a statement of what action the state is taking and the specific reason for the action.[32] The notice must be in plain language and timely and be accessible to individuals with disabilities or limited English proficiency.[33]

35. States must "provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients."[34]

B. Texas and Several Other States Have Contracted with Deloitte to Automate Medicaid Eligibility Requirements.

36. Deloitte contracts with at least 20 states to provide software to determine Medicaid eligibility.[35]

37. These states include: Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Michigan, Nevada, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin.[36]

38. Deloitte is one of, if not the, largest Medicaid eligibility determination software provider in the country.[37]

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[30] 42 C.F.R. § 435.916(f)(1).
[31] 42 U.S.C. § 1396w-3(b)(1)(C); 42 C.F.R. § 435.916(f)(2); CMS, *Eligibility & Enrollment Processing*, *supra* note 23, at 6.
[32] 42 C.F.R. § 431.210.
[33] *Id.* §§ 435.905(b), 435.916(a)(3)(i)(C), 435.916(g).
[34] 42 U.S.C. § 1396a(a)(19).
[35] CMS, *Medicaid Enterprise System Solution/Module Contract Status Report*, https://www.medicaid.gov/medicaid/data-and-systems/mmis/contract-status-report/index.html.
[36] *Id.*
[37] *Id.* (identifying eligibility system contractor in all states and territories); *cf.* Outsourced & Automated Report, *supra* note 6, at 38 (highlighting scope of Deloitte benefits contracting).

39. In marketing materials, Deloitte describes itself as being able to give "consumers a single point of access across multiple health and human services programs" and having "the experience to meet federal requirements."[38] Deloitte touts its expertise in state and local systems, health care, and Medicaid systems specifically.[39]

40. The Texas Department of Health and Human Services maintains a contract with Deloitte Consulting LLP to operate the Texas Integrated Eligibility Redesign System (TIERS) and an online public-facing portal, YourTexasBenefits.[40]

41. Medicaid enrollees are individual users of Deloitte's eligibility determination software, through both the online public-facing portal and mobile app, YourTexasBenefits, and through Deloitte's automated decision-making logic in TIERS, which makes eligibility determinations based on enrollee data.[41]

42. In states, such as Texas, where Deloitte holds a contract to provide the eligibility determination software, Medicaid applicants and enrollees do not have a choice to use an alternate provider.

43. The online portal, YourTexasBenefits.com, is marketed as to enabling individuals to "submit redeterminations," "check status of documents submitted," and "check the status of their benefits."[42]

44. Deloitte represents to enrollees that "[t]he quick and easy way to send us proof is to use the website or mobile app. Uploading your files may help us review your case faster."[43]

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[38] Deloitte, *Services: State Integrated Eligibility Services*, https://www2.deloitte.com/us/en/pages/public-sector/solutions/health-and-human-services-eligibility-and-service-integration-services.html; Deloitte, *Services: Health and Human Services Practice*, https://www2.deloitte.com/us/en/pages/public-sector/solutions/health-and-human-services.html (last visited Jan. 29, 2024).

[39] *See, e.g.,* Deloitte, *Services: State Health Transformation*, https://www2.deloitte.com/us/en/pages/public-sector/solutions/state-health-care-transformation-services.html (discussing Deloitte's "deep Medicaid experience" and the strength of that knowledge combined with leadership in organizational assessment and transformation).

[40] HHSC Contract No. HHS000045800001, https://contracts.hhs.texas.gov/sites/default/files/documents/contracts/HHS000045800001-contract-redacted.pdf [hereinafter "TIERS Contract"].

[41] *Id.* at Ex. 3, Section 1.2 (identifying users including "Clients (comprised of individuals or families applying for or receiving government assistance, and those helping clients access benefits)").

[42] *Id.* at Ex. 3, Section 1.3 TIERS Suite of Applications.

[43] *See* YourTexasBenefits, *Help Center: How Do I send information to HHSC?*, https://yourtexasbenefits.com/Learn/Help/Section?s=5AD00E3E85242CA7530B76CB6591E631 (last visited Jan. 25, 2024).

45. Deloitte represents to Medicaid enrollees that "You can also go online to check the status of your case . . . The 'Details' page will show you which benefits each person gets."[44]

46. TIERS is used to manage delivery of 64 "types of assistance, including food, cash, medical, and community care services to Texans in need. Over 10,000 unique users rely on TIERS every day."[45]

47. Individuals seeking to apply for Medicaid coverage can submit information to establish their eligibility through paper applications, over the phone, or through Deloitte's online portal or mobile app, YourTexasBenefits. Regardless of how information is submitted, the data is entered into TIERS and individuals must have their eligibility determined using the TIERS system.

48. Texas is using TIERS to conduct Medicaid eligibility redeterminations for the more than six million individuals who will go through the Medicaid unwinding process by June 2024.[46]

49. In its contract, Deloitte represents that TIERS "automates complex rule-based processing ensuring consistency in eligibility determination."[47]

50. TIERS "determines eligibility for [Health and Human Services] public assistance programs" including Medicaid.[48]

51. TIERS "includes a central data repository to collect eligibility information," a "decision table logic to process information and determine eligibility," and software to generate client notices regarding eligibility determinations.[49]

52. In Texas, the ex parte renewal process is also referred to as the administrative renewal process.

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[44] *See* YourTexasBenefits, *Help Center: How do I know if my child is approved for Medicaid or CHIP?*, https://yourtexasbenefits.com/Learn/Help/Section?s=970BFEBC1EC7DFF66B40A5B6AA0C2C5D#qid=9B7E21F27261A9A1D7BFA180BCB4CBD1 (last visited Jan. 25, 2024).

[45] TIERS Contract, *supra* note 40, at Ex. 3, Section 1.2 TIERS Background.

[46] Texas Health and Human Services, *End of Continuous Medicaid Coverage Dashboard* 4 (Sept. 2023), https://www.hhs.texas.gov/sites/default/files/documents/sept-2023-end-continuous-medicaid-dashboard-rpt.pdf.

[47] TIERS Contract, *supra* note 40, at Ex. 3, Section 1.2 TIERS Background.

[48] *Id.*

[49] *Id.* at Ex. 3, Section 1.3 TIERS Suite of Applications.

53. The administrative renewal process begins with TIERS running an "automated renewal process."[50] "During the automated renewal process, TIERS checks for the required verification by program."[51]

54. "TIERS initiates the administrative renewal process without additional staff action. The administrative renewal process uses the automated renewal process to gather information from a person's existing case and from electronic data sources to determine if the person remains eligible for Medical Programs."[52]

55. "The automated renewal process attempts to verify income by determining if the person's income information is reasonably compatible with income information available through electronic data sources."[53]

56. "Once available verifications are assessed, the system runs eligibility."[54]

57. Beyond these generic descriptions, details of how TIERS is programmed to operate the automated renewal process are not publicly available.

58. For individuals whose eligibility is not renewed through the automated process, TIERS generates the renewal packet and a list of documents to provide by a stated deadline and the packet and list of documents is mailed to the individual.[55]

59. If the renewal form or requested documents are not provided by the deadline listed on the renewal packet "the system automatically makes an eligibility determination through a mass update based on the eligibility outcome from the automated renewal process," meaning the system automatically denies eligibility for failure to provide documentation.[56]

60. Deloitte, through the implementation of TIERS, is also responsible for generating a range of notices to Medicaid enrollees regarding their Medicaid coverage, including correspondence regarding how to maintain coverage and notices communicating final

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[50] Texas Works Handbook, Section B-122.4.1, https://www.hhs.texas.gov/handbooks/texas-works-handbook/b-120-redeterminations [hereinafter "Texas Works Handbook"]; *see also* Texas Medicaid for the Elderly and People with Disabilities Handbook, Section B-8400, Procedures for Redetermining Eligibility, https://www.hhs.texas.gov/handbooks/medicaid-elderly-people-disabilities-handbook/b-8400-procedures-redetermining-eligibility [hereinafter "Texas MEPD Handbook"]

[51] Texas Works Handbook, *supra* note 50, at B-122.4.1; *see also* Texas MEPD Handbook, *supra* note 50 at Section B-8400.

[52] Texas Works Handbook, *supra* note 50, at Section B-122.4; *see also* Texas MEPD Handbook, *supra* note 50 Section B-8400.

[53] Texas Works Handbook, *supra* note 50, at Section B-122.4.1.1.

[54] *Id.* at Section B-122.4.1.2.

[55] *Id.* at Section B-122.4.1.3; *see also* Texas MEPD Handbook, *supra* note 50 at Section B-8400.

[56] Texas Works Handbook, *supra* note 50, at Section B-122.4.2.1.

eligibility decisions. Deloitte was contracted to "develop and test English and Spanish versions of user interfaces, notifications, and correspondence for the TIERS Suite of Applications."[57]

61. For instance, if an individual is found ineligible, "TIERS provides 13 days advance notice to the household after informing them of a denial or termination of ongoing benefits using Form TF0001, Notice of Case Action."[58]

62. And if "additional information is needed and the client **does not** return a renewal form by the 30th day from the date Form H1211 is mailed, eligibility is auto-disposed and denied," with no action from a case worker.[59]

C. Deloitte's History of Inaccurate Eligibility Determination Systems.

63. Benefits eligibility systems built by Deloitte have generated numerous errors, resulting in inaccurate Medicaid eligibility determinations and loss of Medicaid coverage for eligible individuals in many states.[60]

64. These errors are ongoing and nationwide. A report on Deloitte's "dysfunctional computer system" that repeatedly cut tens of thousands of New Mexico families from Medicaid coverage noted: "From Oregon to Rhode Island, state governments have shelled out billions of dollars to Deloitte for these so-called integrated eligibility systems, only to see those systems melt down, leaving poor families without a safety net." [61]

65. This is because "[o]ften states have rushed to implement the software before it's ready—sometimes under pressure from Deloitte, according to workers in several state governments."[62]

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[57] TIERS Contract, *supra* note 40 at Ex. 3, Section 3.2 Design Development and Implementation (DDI) Software Services (DDI-TRS-019); *see also see also* Texas MEPD Handbook, *supra* note 50 at Section B-8400 ("The system generates the applicable correspondence from the list below per the eligibility outcome of the automated renewal process and the action needed by the person").

[58] Texas Works Handbook, Section A-2343.1, https://www.hhs.texas.gov/handbooks/texas-works-handbook/a-2340-adverse-action#A2342.

[59] *Id.* Section B-122.4.1.3, https://www.hhs.texas.gov/handbooks/texas-works-handbook/b-120-redeterminations (emphasis in original).

[60] Ed Williams, Las Cruces Sun News, *New Mexico benefits system is riddled with errors. How this affects thousands in need* (Jan. 10, 2019), https://www.lcsun-news.com/story/news/local/new-mexico/2019/01/10/benefits-system-aspen-searchlight-new-mexico/2530130002/.

[61] *Id.* For additional discussion of states' experience with Deloitte systems beyond the selected state summaries provided here, *see, e.g.*, Benefit Tech Advocacy Hub, *Colorado Medicaid, SNAP, CHIP, and TANF Wrongful Denials,* https://www.btah.org/case-study/colorado-medicaid-snap-chip-and-tanf-wrongful-denials.html.

[62] *Id.*

66. For example, in Rhode Island, the Deloitte-built system was launched in 2016, despite concerns that it was not ready to go live. The system was plagued with numerous errors, including errors that inaccurately revoked individuals' eligibility for the Medicare Premium Payment Program—and did so without providing the required advance notice of termination.[63]

67. In Rhode Island, the "[t]he State and Deloitte intended to direct clients to apply online, but due to system issues many non-Medicaid applications that were submitted through the online portal since golive did not reach DHS workers."[64]

68. Furthermore, "[b]ecause of underlying data issues and Deloitte's incorrect program rules (e.g., incorrect payment or benefit amounts), the system often fails to generate and issue accurate client notices on time. Notices provide basic information to providers and clients, and many are federally required."[65]

69. With respect to Medicaid, the Rhode Island system was also "unable to categorize Medicaid applicants into the correct sub-programs," meaning the system did not correctly evaluate individuals for the various Medicaid eligibility groups.[66]

70. Following the problems in Rhode Island, Deloitte acknowledged that it was aware of warnings that the system was not ready to go live and acknowledged that "[i]n retrospect it would have been a very good idea for us to go to pilot."[67] A report on Deloitte's Rhode Island eligibility system concluded, "[a]lthough Deloitte was selected

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[63] Katherine Gregg, The Providence Journal, *ACLU reaches settlement with R.I. in Medicaid dispute* (Jan. 10, 2019), https://www.providencejournal.com/story/news/courts/2019/01/10/aclu-reaches-settlement-with-ri-in-medicaid-dispute/6328087007/; Katherine Gregg, The Providence Journal, *UHIP debacle: R.I. to extend contract, as Deloitte agrees to more concessions*, (Mar. 15, 2019), https://www.providencejournal.com/story/news/politics/2019/03/15/uhip-debacle-ri-to-extend-contract-as-deloitte-agrees-to-more-concessions/5641154007/; *Scherwitz v. Beane*, ACLU Rhode Island, https://www.riaclu.org/en/cases/scherwitz-v-beane.

[64] Rep. to the Gov. from Acting Dir. of the Dep't of Human Servs., *An Assessment of the Unified Health Infrastructure Project* 8 (Feb. 15, 2017), http://www.transparency.ri.gov/uhip/documents/assessments/UHIP%2030-day%20assessment.pdf.

[65] *Id.*

[66] *Id.* at 10.

[67] Susan Campbell, WPRI, *"We are very sorry": Deloitte apologizes to RI about UHIP* (Apr. 13, 2018) https://www.wpri.com/target-12/we-are-very-sorry-deloitte-apologizes-to-ri-about-uhip/1119693506/; *see also* Ian Donnis & Kristin Gourlay, The Public's Radio, *Raimondo Faults Vendor Deloitte For Delivering 'Defective' UHIP' System* (Feb. 15, 2017), https://thepublicsradio.org/post/raimondo-faults-vendor-deloitte-delivering-defective-uhip-system ("'Deloitte presented much too rosy of a picture to us,' the governor said. 'I sat in meetings with Deloitte and questioned them and they gave us dashboards that showed us everything was green and ready to go, and the fact of the matter was it wasn't.'").

for its experience with these types of projects, it has not consistently adhered to industry best practices."[68]

71. Deloitte also launched the first phase of its integrated Medicaid and SNAP eligibility system in Illinois in 2013 despite known problems. And in 2017, following the launch of another phase after warnings the system was not ready, the resulting glitches caused long delays in access to essential benefits.[69]

72. In New Mexico, when Deloitte's integrated Medicaid and SNAP system was launched in 2013, individuals reported that the system was plagued with glitches, including that it would "swallow" documents people submitted to establish eligibility—*i.e.* the system would not recognize when documents had been submitted—resulting in a denial of benefits for failure to return the documents requested.[70]

73. The Deloitte system in New Mexico continued to experience glitches for many years. Reporting in 2019 described glitches that kicked foster children off of Medicaid and incorrectly denied health coverage to lawfully residing immigrants who are pregnant.[71]

74. In Tennessee, when the Deloitte-built system launched in 2019, there were numerous errors in how it conducted eligibility determinations, including failure to deem newborn children Medicaid-eligible for 12 months as required by the Medicaid Act. Specifically, "there was a gap in the programming logic for when [the Deloitte-built Medicaid eligibility system] would link the report of a newborn's birth to a mother," and Tennessee "discovered that in some cases . . . TEDS [Tennessee Eligibility Determination System] was not automatically linking the newborn to her mother," causing the newborns to experience gaps in Medicaid coverage.[72]

75. In 2019, the Deloitte-built system in Tennessee also had errors in how it loaded data from the Social Security Administration's State Data Exchange (SDX) database. As a result, individuals who should have been found eligible for Medicaid based on past receipt of Supplemental Security Income were found ineligible. Although the error was identified in 2019, it was not fully remedied until 2020, and individuals continued to lose coverage in the meantime.[73]

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[68] Rep. to the Gov. from Acting Dir. of the Dep't of Human Servs., *supra* note 64, at 3.
[69] Chris Coffey, NBC5 Chicago, *State Computer Glitches Impacting Illinois Families Waiting for Food, Medical Aid* (Dec. 5, 2017), https://www.nbcchicago.com/news/local/state-computer-glitches-impacting-illinois-families-waiting-for-food-medical-aid/29454/.
[70] Williams, *supra* note 60.
[71] *Id.*
[72] *See* Decl. of Kimberly Hagan, *A.M.C. v. Smith,* No. 3:20-cv-00240, ECF No. 63, ¶ 35(b) (Exhibit A hereto).
[73] *Id.*¶¶ 35(i), 129 (describing how in November 2019, "due to an error in how TEDS [the Deloitte-built Medicaid eligibility system] was loading social security data from the SDX into TEDS, social security income did not get loaded into Ms. Cleveland's case," and that the correction to this issue "was implemented in TEDS on May 15, 2020.").

76. In 2019, the Deloitte-built system in Tennessee also inappropriately found children ineligible for coverage during 2019 for failure to return verifications, even when it found parents in the same household eligible. The problem was not corrected until February 23, 2020.[74]

77. In Pennsylvania, the Deloitte-built system could not conduct ex parte renewals for individuals who were also receiving SNAP benefits. Advocates trying to understand why the ex parte rates were so low ran into roadblocks because the processes and coding the eligibility system used to conduct ex parte renewals was not publicly available in the Medicaid handbook and was not produced in response to public records requests.[75]

78. Deloitte system issues identified previously continue to appear in other states as well, wrongfully terminating coverage for eligible individuals, suggesting that Deloitte has not taken effective steps to ensure similar systems do not generate harm, even during the unwinding.

79. For example, in Delaware, for several months during the 2023 unwinding, the Deloitte system generated notices that only provided individuals about two weeks to return the required renewal form when federal law and state policy require at least 30 days.[76] Similar problems with inaccurate and missing system-generated dates and deadlines have also been noted in Colorado.[77]

80. In Kentucky, during the 2023 unwinding, Deloitte's system was reported to keep applicants in limbo.[78] Advocates wrote to the State explaining that they had observed in the Deloitte system "a software error that is failing to flag to the system itself and workers that applicants have uploaded documents. As a result, the system appears to us

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[74] *Id.* ¶ 35(f).
[75] Louise Hayes, Center for Law & Social Policy, *Advocacy in the Dark: A Pennsylvania Case Study on Advocating to Improve Technology that Drives Eligibility Decisions* (Dec. 2020), https://www.clasp.org/sites/default/files/publications/2020/12/2020_PA%20ASAP.pdf.
[76] Redacted Delaware Notices (Exhibit B hereto) (Notices giving less than thirty days, specifically, one notice dated June 12, 2023 giving deadline of July 1, 2023 to complete renewal packet and another dated April 12, 2023 giving deadline of May 1, 2023).
[77] *See* Co. Office of the State Auditor, *Medicaid Correspondence* 42 (Sept. 2023) https://leg.colorado.gov/sites/default/files/documents/audits/2261p_medicaid_correspondence.pdf ("the system selects response deadlines, resulting in the inconsistent dates we saw . . . Based on the Department's response, it is not clear what program rule the CBMS [Colorado Benefits Management System] logic uses to calculate these deadlines.").
[78] Rachana Pradham, Kaiser Health News, *Lost in the mix of Medicaid 'unwinding': Kentucky cut off her healthcare over a clerical error*, Fierce Healthcare (Nov. 21, 2023), https://www.fiercehealthcare.com/regulatory/lost-mix-medicaid-unwinding-kentucky-cut-her-healthcare-over-clerical-error (reporting that errors in Deloitte's operation of Kentucky's eligibility system kept application in limbo).

to be automatically terminating Kentuckians' health care coverage for 'failure to submit documents' that applicants have, in fact, provided," and estimated that thousands of individuals had been impacted by this error each month.[79]

81. In Arkansas during the 2023 unwinding, the Deloitte system experienced numerous glitches resulting in incorrect terminations. According to one news report "Three Medicaid eligibility workers—who were granted anonymity to speak freely about their work—told POLITICO that they have seen those glitches with the state's new eligibility system, which was developed by the consulting firm Deloitte as part of a $340 million contract and launched in December 2020. The workers said they call them glitches because they seem to happen right after a system update is performed and because there's nothing in clients' files to explain the terminations. 'They'll do a mass update every so often and sometimes it accidentally closes the cases,' said one eligibility worker, granted anonymity to speak openly about their work."[80]

82. During the unwinding, 13 states with Deloitte systems were out of compliance with the requirement that eligibility be renewed on an individual rather than a household basis.[81] For the Deloitte states out of compliance, this issue affected at least 300,000 people (and with several states not providing an estimate at the time). This likely had a particular impact on children because they typically remain Medicaid-eligible even when their parents are not due to higher income eligibility thresholds.[82]

D. Deloitte's TIERS System is Faulty, Causing Hundreds of Thousands of People to Lose Medicaid Coverage and Deloitte Did Not Prevent these Foreseeable Harms.

1. TIERS Does Not Reliably Conduct Ex Parte Redeterminations.

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[79] Ltr. from Ben Carter & Chloe Atwater, Kentucky Equal Justice Ctr. to Sec'y Eric Friedlander & Comm'r Lisa Lee, Kentucky Cabinet for Health and Family Services, 2-3, n.5 (Sept. 6, 2023) (Exhibit C hereto).

[80] Megan Messerly, POLITICO, *Thousands lost Medicaid in Arkansas: Is this America's future?* (June 14, 2023), https://www.politico.com/news/2023/06/13/medicaid-insurance-coverage-arkansas-00101744.

[81] Those states are CO, CT, DE, GA, IL, KY, NV, NM, OR, PA, VA, WI, and WY. *Compare* CMS, *Preliminary Overview of State Assessments Regarding Compliance with Medicaid and CHIP Automatic Renewal Requirements at the Individual Level, as of September 21, 2023* 2-6 (2023), https://www.medicaid.gov/sites/default/files/2023-09/state-asesment-compliance-auto-ren-req_0.pdf *with* CMS, *Medicaid Enterprise System Solution/Module Contract Status Report*, *supra* note 35 (identifying eligibility & enrollment system contractors by state).

[82] CMS, *CMS Takes Action to Protect Health Care Coverage for Children and Families* (Aug. 30, 2023), https://www.cms.gov/newsroom/press-releases/cms-takes-action-protect-health-care-coverage-children-and-families.

83. TIERS does not reliably conduct ex parte redeterminations.

84. Only 2.9% of individuals going through the renewal process in Texas have had their eligibility successfully renewed ex parte.[83]

85. The national average for ex parte determinations is 32%.[84]

86. Individuals who are not renewed ex parte must complete a renewal packet and potentially provide additional documentation. This substantially increases the risk that eligible Medicaid enrollees will experience a procedural termination for failure to provide documents.[85]

87. For example, a recent news report documented a child with autism, Harper Wilson, whose Medicaid was terminated because TIERS determined that the family had not provided tax information.[86] But tax information is readily available through federal data exchanges and should not be required where it can be obtained electronically.[87]

88. After losing health care coverage, Harper's family had to pay about $1,000 out of pocket for her home health aide each month. The family also had to forego Harper's physical therapy appointments because they could not afford the weekly $150 cost. After missing several appointments, Harper's health deteriorated and she had to visit the ER, moreover "Harper's walking and balance are now three months behind where they might have been because she missed out on physical therapy, and she lost her spot at the facility while she was without coverage."[88]

2. TIERS Does Not Make Accurate Eligibility Determinations.

[83] Kaiser Family Foundation, *Medicaid Enrollment and Unwinding Tracker*, Fig. 4, https://www.kff.org/report-section/medicaid-enrollment-and-unwinding-tracker-overview/ (as of Jan. 22, 2024) (Figure 4 with option "% of All Renewals Due" selected).
[84] *Id.*
[85] *See* Bradley Corallo & Jennifer Tolbert, Kaiser Family Foundation, *Understanding Medicaid Ex Parte Renewals During the Unwinding* (Oct. 2, 2023), https://www.kff.org/policy-watch/understanding-medicaid-ex-parte-renewals-during-the-unwinding.
[86] Sophie Novack, Texas Monthly, *As Texas Throws 1.8 Million Off Medicaid, Children Pay the Price* (Jan. 25, 2024), https://www.texasmonthly.com/news-politics/medicaid-disenrollment-texas-children/.
[87] *See* 42 C.F.R. §§ 435.938(a), 435.952(c); *see also id.* § 435.949 (describing requirement for HHS to "establish an electronic service through which States may verify certain information with, or obtain such information from, Federal agencies and other data sources, including . . . the Department of Treasury."); *see also* Texas MEPD Handbook, *supra* note 50, at Section R-4300 ("IEVS data includes taxable income reported to the Internal Revenue Service (IRS)").
[88] Novack, *supra* note 86. The family continues to wait to see if Harper can resume treatments at the facility. *Id.*

89. Since unwinding began in Texas in April 2023, TIERS has repeatedly failed to make accurate eligibility determinations.

90. Many of the Texas errors are the same as errors Deloitte's software committed in other states and of which Deloitte was already aware.

91. As in Tennessee in 2019, in 2023 in Texas, TIERS incorrectly terminated newborns from Medicaid coverage despite long-standing, mandatory federal eligibility rules establishing that newborns receive continuous eligibility for 12 months regardless of income or other changes.[89] In Texas, workers noted in 2023 that "this newborn coverage issue is rooted in a distinct system glitch, poised to erroneously deny coverage for hundreds if not thousands of newborns."[90]

92. As in New Mexico in 2019, staff working with TIERS in 2023 have identified system errors affecting Medicaid coverage of eligible non-citizens and former foster youth.[91]

93. As in Rhode Island in 2016, individuals in Texas in 2023 lost Medicaid coverage that would pay for Medicare Part B premiums and received no notice of their loss of coverage.[92]

94. Texas staff have also recognized errors that have resulted in approximately 24,000 children losing coverage rather than being enrolled in CHIP.[93]

95. Further, in April 2023, several thousand pregnant women lost coverage erroneously, though they were in fact eligible for coverage based on their pregnancies.[94] In August, workers using TIERS wrote that "[t]he persistence of numerous and growing system

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[89] E-mail from Concerned Staff to Commissioner Young (Aug. 21, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/more-issues-and-challenges.pdf.

[90] *Id.*

[91] Email from Concerned Staff to Gov. Greg Abbott (Sept. 19, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/govenor-abbott-you-must-take-action-now.pdf.

[92] Email from Concerned Staff to Comm'r Young (July 25, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/hhsc-employee-email-medicaid-redeterminations-7.25.23.pdf.

[93] Ltr. from Texas Congressional Delegation to Chiquita Brooks-LaSure, Admin. Ctrs. For Medicare & Medicaid Servs. (Sept. 19, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/tx-delegation-medicaid-redeterminations-follow-up-9.19.23.pdf.

[94] Email from Concerned Staff to Comm'r Young (July 25, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/hhsc-employee-email-medicaid-redeterminations-7.25.23.pdf.

issues remains evident, causing erroneous denials of coverage, particularly impacting newborns and pregnant women."[95]

96. Staff estimated that over 5,800 pregnant women "had their coverage denied and did not get the full two months of postpartum coverage."[96]

97. "The problems [are] so obvious that employees expressed frustration about the accuracy of the system."[97] Altogether, staff in Texas's Health and Human Services Corporation working with TIERS have identified "over 20 active system issues, (and the list appears to grow weekly) each of which has either caused or is slated to cause disruptions in coverage."[98]

98. Attorneys working with families have also described repeated errors in eligibility determinations. As recently reported, "Terry Anstee, an attorney with Disability Rights Texas, said he's seen situations in which the state determined people no longer qualified for Medicaid under one eligibility criterion and removed them, even though they were eligible under another. Other applicants appeared to have done everything right but were erroneously kicked off anyway. In a couple of confusing cases, Anstee said, people who qualified due to a disability were kicked off Medicaid and moved to the Healthy Texas Women program, which offers a completely different set of services. 'It was just nonsensical,' he said. 'I don't know if it was some sort of computer glitch—I really don't know.'"[99]

99. Fixes to identified issues are often delayed and there is no indication that Texas has stopped redeterminations for the affected groups described above.[100] For example, workers noted that in May "approximately 68,000 individuals erroneously lost coverage, only to be reinstated on August 5th, a span of nearly three months without

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[95] E-mail from Concerned Staff to Comm'r Young (Aug. 21, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/more-issues-and-challenges.pdf.

[96] *Id.*

[97] *See* Statement of Comm'r Alvaro M. Bedoya on *FTC v. Rite Aid Corporation & Rite Aid Headquarters Corporation,* 3 (Dec. 19, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023190_commissioner_bedoya_riteaid_statement.pdf.

[98] E-mail from Concerned Staff to Comm'r Young (Aug. 21, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/more-issues-and-challenges.pdf.

[99] Novack, *supra* note 86.

[100] Nicole Villalpando, Austin American-Statesman, *What's gone wrong with Texas' Medicaid unwinding? Inside the problems with state agency* (Sept. 8, 2023), https://news.yahoo.com/whats-gone-wrong-texas-medicaid-110327022.html?fr=sycsrp_catchall.

coverage they were rightfully entitled to coverage."[101] Deloitte, therefore, has failed to take reasonable measures to prevent foreseeable harm to consumers who use TIERS to enroll in Medicaid coverage in Texas.

100. Errors in TIERS also contribute to procedural terminations.[102] As in New Mexico in 2013, Medicaid enrollees in Texas report that Deloitte's online portal tells consumers they have no documentation to complete when they in fact do.[103] These errors are recurring in Texas, despite Deloitte's prior knowledge of the same errors in New Mexico.

101. Medicaid enrollees report that, as in Kentucky during the unwinding, TIERS does not reliably recognize when individuals have submitted requested documentation. Enrollees who have submitted the requested information are nonetheless automatically terminated by TIERS and automatically sent a TIERS-generated a notice that they have lost eligibility for failing to provide that information.

102. Medicaid enrollees report that Deloitte's online portal does not present individuals with accurate information about their Medicaid eligibility status. For example, the online portal will often display inaccurate deadlines and dates of coverage. Enrollees who reasonably rely on the information presented in TIERS therefore, may miss deadlines to take action necessary to keep their coverage.

103. Errors in TIERS' eligibility determinations are routinely only identified after individuals have lost Medicaid coverage.[104] Furthermore, repeating errors are routinely

[101] E-mail from Concerned Staff to Comm'r Young (Aug. 21, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/more-issues-and-challenges.pdf.

[102] *See* Nicole Villalpando, Austin American-Statesman, *Texas congressional Democrats call for federal intervention for states' Medicaid problems* (Oct. 17, 2023), https://www.statesman.com/story/news/healthcare/2023/10/17/texas-medicaid-problems-health-human-services-federal-intervention-kaiser-family-foundation-report/70991827007/ (Texans describe receiving no notice and one enrollee reporting "How do we renew benefits if the website constantly gives an error every time I try to submit the renewal?").

[103] *Id.*; *see also* Nicole Villalpando, Austin American-Statesman, *Austin Families talk about being stuck in Medicaid red tape and living without coverage* (Nov. 7, 2023), https://www.statesman.com/story/news/healthcare/2023/11/07/medicaid-enrollment-austin-texas-families-living-without-coverage/71256001007/ ("the website or app gives them errors or conflicting information, such as the date their Medicaid coverage ends.").

[104] Ltr. from Texas Congressional Delegation to Chiquita Brooks-LaSure, Admin. Ctrs. For Medicare & Medicaid Servs. (Sept. 19, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/tx-delegation-medicaid-redeterminations-follow-up-9.19.23.pdf.

identified by individuals working with many enrollees, such as managed care plans, rather than by Deloitte.[105]

104. Deloitte's apparent failure to identify and mitigate similar harms already identified in other states and to use programs that do not accurately reflect long-standing federal mandates demonstrates that it does not maintain sufficient quality-assurance systems to detect errors and mitigate foreseeable harm to Medicaid enrollees.

I. LEGAL FRAMEWORK

A. The FTC Act Prohibits Unfair and Deceptive Acts and Practices.

105. Section 5 of the FTC Act prohibits unfair and deceptive acts and practices and empowers the Commission to enforce the Act's prohibitions.[106]

106. The Commission has stated that a company violates Section 5 of the FTC Act not only when it directly engages in an unfair or deceptive trade practice, but also when it furnishes others with the means and instrumentalities for the commission of unfair and deceptive acts and practices.[107]

107. An unfair practice is defined as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[108]

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[105] *See* E-mail from Concerned Staff to Comm'r Young (Aug. 21, 2023), https://doggett.house.gov/sites/evo-subsites/doggett.house.gov/files/evo-media-document/more-issues-and-challenges.pdf (noting "it is common for an MCO to be the initial discoverer of issues with our system impacting their members.").

[106] 15 U.S.C. § 45.

[107] Complaint at 41, *FTC v. Neora, LLC, Signum Biosciences, Inc., Signum Nutralogix, Jeffrey Olson, Maxwell Stock, and Jeffry Stock*, FTC File No. 162-3099 (2019), https://www.ftc.gov/system/files/documents/cases/1623099_nerium_complaint_11-1-19.pdf (deceptive acts or practices); see also Complaint at 23-24, *FTC v. Office Depot, Inc., and Support.com, Inc.*, FTC File No. 172-3023 (2019), https://www.ftc.gov/system/files/documents/cases/office_depot_complaint_3-27-19.pdf (deceptive acts or practices); Complaint at 6-7, *In re DesignerWare, LLC*, FTC File No. 112-3151 (2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/04/130415designerwarecmpt.pdf (unfair acts or practices); Complaint at 10–11, *FTC v. CyberSpy Software, LLC, and Trace R. Spence*, No. 08-cv-01872, 2008 WL 5157718 (M.D. Fl. Nov. 5, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/11/081105cyberspycmplt.pdf.

[108] 15 U.S.C. § 45(n).

108. Deceptive acts and practices include material representations, omissions, or practices that are likely to mislead a consumer acting reasonably in the circumstances.[109]

B. The FTC Can Consider Established Public Policies Regarding AI and Automated Decision-Making to Determine Unfairness.

109. In determining whether a trade practice is unfair, the Commission may consider "established public policies."[110]

110. The OECD Artificial Intelligence Principles ("Principles"), the Blueprint for an AI Bill of Rights ("Blueprint"), the Universal Guidelines for Artificial Intelligence ("Guidelines"), Executive Order 14110 on the Safe, Secure, and Trustworthy Development and Use of AI, and the National Institute of Standards and Technology's AI Risk Management Framework ("AI RMF") each set forth established public policies for the use of artificial intelligence.

111. Medicaid eligibility determination software, including the software distributed by Deloitte, relies on data retrieved from third-party databases and a business rules engine to make automated eligibility decisions. This software is a form of automated decision-making that qualifies as AI under the Principles, Blueprint, Guidelines, Executive Order 14110, and AI RMF.

1. The Organization for Economic Cooperation and Development AI Principles.

112. The United States has expressly endorsed the Organization for Economic Cooperation and Development (OECD) Principles on Artificial Intelligence.[111]

113. OECD AI Principles define AI as machine-based systems that use input to "generate outputs such as predictions, content, recommendations or decisions."[112] Medicaid eligibility determination systems like those provided to states by Deloitte are AI as defined by the OECD AI Principles because they are machine-based systems that use input retrieved from third-party databases and Medicaid applicants and enrollees to make eligibility decisions.

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[109] FTC, Policy Statement on Deception (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.
[110] 15 U.S.C. § 45(n).
[111] Press Release, Fiona Alexander, NTIA, U.S. Joins with OECD in Adopting Global AI Principles (May 22, 2019), https://www.ntia.gov/blog/us-joins-oecd-adopting-global-ai-principles; *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449 [hereinafter "OECD AI Principles"].
[112] *Id.*

114. Under the OECD AI Principle on Human-Centered Values and Fairness, "AI actors should respect the rule of law, human rights and democratic values, throughout the AI system lifecycle. These include freedom, dignity, and autonomy, privacy and data protection, non-discrimination and equality, diversity, fairness, social justice, and internationally recognized labour rights."[113]

115. According to the OECD AI Principle on Transparency and Explainability, AI actors should "provide meaningful information, appropriate to the context, and consistent with the state of art (i) to foster a general understanding of AI systems, (ii) to make stakeholders aware of their interactions with AI systems . . . (iii) to enable those affected by an AI system to understand the outcome, and (iv) to enable those adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors, and the logic that served as the basis for the prediction, recommendation or decision."[114]

116. The OECD AI Principle on Robustness, Security, and Safety states, "AI systems should be robust secure and safe throughout their entire lifecycle so that, in conditions of normal use, foreseeable use or misuse, or other adverse conditions, they function appropriately and do not pose unreasonable safety risk."[115]

117. According to the OECD AI Principle on Accountability, "[o]rganizations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the above principles."[116]

118. The OECD Principles on Artificial Intelligence are "established public policies" within the meaning of the FTC Act.[117]

2. The Blueprint for an AI Bill of Rights.

119. The Blueprint for an AI Bill of Rights by the White House Office of Science and Technology Policy (OSTP) is a set of principles meant to guide the design, development, and deployment of automated systems in order to protect the rights of the American public.[118]

120. The Blueprint for an AI Bill of Rights is "fully consistent" with the OECD AI Principles.[119]

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[113] *Id.* at Principle 1.2(a).
[114] *Id.* at Principle 1.3.
[115] *Id.* at Principle 1.4(a).
[116] *Id.* at Principle 1.5.
[117] 15 U.S.C. § 45(n).
[118] The White House, Office of Science and Technology Policy, Blueprint for an AI Bill of Rights: Making automated systems work for the American People, https://www.whitehouse.gov/ostp/ai-bill-of-rights/ (last visited Jan. 4, 2023).
[119] *Id.* at 9 (noting the Blueprint is fully consistent with the OECD's 2019 Recommendation on

121. The Blueprint applies to "(1) automated systems that (2) have the potential to meaningfully impact the American public's rights, opportunities, or access to critical resources or services," including "healthcare" and "social services."[120] The Blueprint expressly covers "systems that support decision-makers who adjudicate benefits such as collating or analyzing information or matching records," and "systems which make benefits or services related decisions on a fully or partially autonomous basis (such as a determination to revoke benefits)."[121]

122. Medicaid eligibility determination software, like that provided by Deloitte, is therefore a type of automated system to which the Blueprint applies.

123. According to the Blueprint's Principle of Safe and Effective Systems, individuals should be protected from unsafe and ineffective systems. To that end, AI and automated systems should "undergo pre-deployment testing, risk identification and mitigation, and ongoing monitoring that demonstrate they are safe and effective based on their intended use, [and] mitigation of unsafe outcomes."[122] Further, the Blueprint states that "[i]ndependent evaluation and reporting that confirms that the system is safe and effective, including reporting of steps taken to mitigate potential harms, should be performed and the results made public whenever possible."[123]

124. The Blueprint's Principle of Human Alternatives, Consideration, and Fallback recommends, "automated systems with an intended use within sensitive domains, including, . . . health, should . . . provide meaningful access for oversight . . . and incorporate human consideration for adverse or high-risk decisions."[124]

125. The Blueprint's Principle on Notice and Explanation recommends that systems should provide explanations that are technically valid, meaningful and useful to affected individuals and to any operators or others who need to understand the system, and calibrated to the level of risk based on the context.[125]

126. The Blueprint's Principle on Notice and Explanation, in identifying why the principle is important, acknowledges that "[p]roviding notice has long been a standard practice, and in many cases is a legal requirement."[126]

Artificial Intelligence).

[120] *Id.* at 8.

[121] *Id.* at 54.

[122] *Id.* at 5.

[123] *Id.*

[124] *Id.* at 7.

[125] *Id.* at 40-44.

[126] *Id.* at 41. This Explanation cites problems of individuals terminated from Medicaid-funded home care who could not determine the reason. During a court hearing, it was revealed that a new algorithm had been adopted. *Id.*

127. The Blueprint for an AI Bill of Rights are "established public policies" within the meaning of the FTC Act.[127]

3. The Universal Guidelines for Artificial Intelligence

128. The Universal Guidelines for Artificial Intelligence (UGAI) are a framework for AI governance based on the protection of human rights that was set out at the 2018 meeting of the International Conference on Data Protection and Privacy Commissioners in Brussels, Belgium.[128]

129. The Guidelines cover systems that include "some degree of automated decision-making" and "systems that impact the rights of people."[129]

130. Medicaid eligibility determination systems like those provided to states by Deloitte rely on automated decision-making and impact the rights of people to access health care. Therefore, they are artificial intelligence as defined by the Guidelines.

131. According to the UGAI Right to Transparency, "[a]ll individuals have the right to know the basis of an AI decision that concerns them. This includes access to the factors, the logic, and techniques that produced the outcome."[130]

132. According to the UGAI Assessment and Accountability Obligation, "[a]n AI system should be deployed only after an adequate evaluation of its purpose and objectives, its benefits, as well as its risks."[131]

133. According to the UGAI Accuracy, Reliability, and Validity Obligations, "[i]nstitutions must ensure the accuracy, reliability, and validity of decisions."[132]

134. The Universal Guidelines for Artificial Intelligence are "established public policies" within the meaning of the FTC Act.[133]

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[127] 15 U.S.C. § 45(n).
[128] *Universal Guidelines for Artificial Intelligence*, The Public Voice (Oct. 23, 2018), https://thepublicvoice.org/ai-universal-guidelines/.
[129] *Universal Guidelines for Artificial Intelligence*, Explanatory Memorandum and References, The Public Voice (Oct. 23, 2018), https://thepublicvoice.org/ai-universal-guidelines/memo/.
[130] UGAI Guideline 1, *supra* note 128.
[131] UGAI Guideline 5, *supra* note 128.
[132] UGAI Guideline 6, *supra* note 128.
[133] 15 U.S.C. § 45(n).

4. Executive Order 14110 on the Safe, Secure, and Trustworthy Development and Use of AI

135. On October 30, 2023, the White House published Executive Order 14110 setting out comprehensive guidelines to manage the development, procurement, and use of AI.[134]

136. Under Section 5.3 of Executive Order 14110, the White House encourages the FTC to "consider, as it deems appropriate, whether to exercise the Commission's existing authorities, including its rulemaking authority under the Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*, to ensure fair competition in the AI marketplace and to ensure that consumers and workers are protected from harms that may be enabled by the use of AI."[135]

137. The Executive Order states that the "Federal Government will enforce existing consumer protection laws and principles and enact appropriate safeguards" and "[s]uch protections are especially important in critical fields like healthcare…where mistakes by or misuse of AI could harm patients, cost consumers or small businesses, or jeopardize safety or rights."[136]

138. Section 7.2 of the Executive Order also addressed the use of AI in Federal Government programs and benefits administration, including how states and localities use such systems in administering public benefits and how qualified recipients should be protected from unjust denials.[137]

139. Section 2 of Executive Order 14110 sets out eight guiding principles and priorities concerning responsible AI development and use, including:

    a. Ensuring that AI is safe and secure through "robust, reliable, repeatable, and standardized evaluations of AI systems, as well as policies, institutions, and, as appropriate, other mechanisms to test, understand, and mitigate risks from these systems before they are put to use";[138]

    b. Ensuring that AI policies are consistent with the White House's dedication to advancing equity and civil rights, including efforts to combat the "use of AI to disadvantage those who are already too often denied equal opportunity and justice" and to "hold those developing and deploying AI accountable to standards that protect against unlawful discrimination and abuse";[139]

[134] Executive Order 14110, *supra* note 1.
[135] *Id.* at 75209.
[136] *Id.* at 75,192-93
[137] *Id.* at 75,213
[138] *Id.* at 75191.
[139] *Id.* at 75192.

c. Protecting the "interests of Americans who increasingly use, interact with, or purchase AI and AI-enabled products in their daily lives," including efforts to "enforce existing consumer protection laws and principles and enact appropriate safeguards against fraud, unintended bias, discrimination, infringements on privacy, and other harms of AI";[140] and

d. Protecting "American's privacy and civil liberties," including efforts to "ensure that the collection, use, and retention of data is lawful, is secure, and mitigates privacy and confidentiality risks."[141]

140. Executive Order 14110 is an "established public policy" within the meaning of the FTC Act.[142]

5. National Institute of Standards and Technology AI Risk Management Framework.

141. On January 26, 2023, the National Institute of Standards and Technology ("NIST") published its AI Risk Management Framework ("AI RMF"), alongside various companion resources.[143]

142. The AI RMF refers to "an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments."[144] Automated Medicaid eligibility systems are AI as defined by AI RMF.

143. The AI RMF is "designed to equip organizations and individuals… with approaches that increase the trustworthiness of AI systems, and to help foster the responsible design, development, deployment, and use of AI systems over time."[145] It is "intended to be practical, to adapt to the AI landscape as AI technologies continue to develop, and to be operationalized by organizations in varying degrees and capacities so society can benefit from AI while also being protected from its potential harms."[146]

144. Under Section 5.1 of the AI RMF, NIST states that AI risk management processes and outcomes should be "established through transparent policies, procedures, and other controls based on organizational risk priorities" and that "organizational policies and practices [should be] in place to foster a critical thinking and safety-first

[140] *Id.*
[141] *Id.* at 75193.
[142] 15 U.S.C. § 45(n).
[143] *See* Nat'l Inst. Standards & Tech., Artificial Intelligence Risk Management Framework (AI RMF 1.0) (2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.
[144] *Id.* at 1.
[145] *Id.* at 2.
[146] *Id.* at 2.

mindset in the design, development, deployment, and uses of AI systems to minimize potential negative impacts."[147]

145. Section 5.1 of the AI RMF also recommends that "organizational teams document the risks and potential impacts of the AI technology they design, develop, deploy, evaluate, and use, and they communicate about the impacts more broadly."[148]

146. Under Section 5.2 of the AI RMF, NIST states that organizations developing, selling, or using AI should examine and document the "potential costs, including non-monetary costs, which result from expected or realized AI errors or system functionality and trustworthiness."[149]

147. Under Section 5.3 of the AI RMF, NIST states that (1) "AI system performance or assurance criteria [should be] measured qualitatively or quantitatively and demonstrated for conditions similar to deployment setting(s)," (2) "the functionality and behavior of the AI system and its components… [should be] monitored when in production," (3) "the AI system to be deployed [should be] demonstrated to be valid and reliable," (4) "the AI system [should be] evaluated regularly for safety risks," and (5) "[AI system] fairness and bias… [should be] evaluated and results [should be] documents."[150]

148. Under Section 5.4 of the AI RMF, NIST recommends that (1) AI organizations should follow "procedures… to respond to and recover from a previously unknown risk when it is identified," (2) "mechanisms are in place and applied, and responsibilities are assigned and understood, to supersede, disengage, or deactivate AI systems that demonstrate performance or outcomes inconsistent with intended use," (3) "post-deployment deployment AI system monitoring plans are implemented, including mechanisms for capturing and evaluating input from users and other relevant AI actors, appeal and override, decommissioning, incident response, recovery, and change management," and (4) "incidents and errors are communicated to relevant AI actors, including affected communities."[151]

149. NIST's AI RMF is an "established public policy" within the meaning of the FTC Act.[152]

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[147] *Id.* at 22–23.
[148] *Id.* at 24.
[149] *Id.* at 27.
[150] *Id.* at 29–30.
[151] *Id.* at 32–33.
[152] 15 U.S.C. § 45(n).

C. Deloitte's Development, Maintenance, and Continued Deployment of the TIERS System Constitute Unfair and Deceptive Practices under the FTC Act.

150. Deloitte's inaccurate statements through its online portal, YourTexasBenefits.com, and its inaccurate eligibility determinations through the TIERS system are deceptive because they are material representations and omissions that mislead reasonably acting consumers.

151. For example, as described above, Deloitte through the online portal, YourTexasBenefits.com, presents inaccurate deadlines, causing enrollees to miss deadlines to take action necessary to keep their Medicaid coverage.

152. Deloitte also presents its inaccurate eligibility determinations to Medicaid enrollees through notices that are generated by TIERS. For example, TIERS also automatically generates notices stating required documents have not been provided.[153] Where these notices are generated despite the Medicaid recipient having provided the information, the statements are deceptive. [154]

153. And where TIERS inaccurately determines someone is not eligible for a category of Medicaid coverage due to a programming error, statements in the TIERS-generated notices communicating that ineligibility determination are likewise deceptive.

154. Deloitte's inaccurate eligibility information and determinations are reasonably relied upon by consumers to determine what actions they need to take, or not, to maintain their Medicaid coverage. The details of how TIERS makes eligibility decisions are not available to Medicaid enrollees whose eligibility is being determined. For example, a notice might state only that "You are not eligible for benefits" and "The money you get is more than allowed by program rules," without describing what data sources TIERS relied on for income information, how TIERS calculated the household size and applicable income limit for that household size, or even that an automated decision-making system was used to make an eligibility determination.[155] Thus individuals lack the information necessary to even identify an error in the TIERS eligibility decision.

155. Accordingly, individuals reasonably assume that the TIERS eligibility decision is correct and may not challenge their loss of Medicaid coverage. As courts have recognized in the Medicaid context "there is a human tendency, even among those who are more experienced and knowledgeable in the ways of bureaucracies than the aged, blind, and disabled persons before us in this case, to assume that an action taken by a

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[153] Texas Works Handbook, Section B-122.4.1.3, https://www.hhs.texas.gov/handbooks/texas-works-handbook/b-120-redeterminations.

[154] *See supra* ¶¶ 59, 100-01.

[155] Texas Health & Human Services Redacted Notice at 5 (June 13. 2023) (Exhibit D hereto) (for example, explaining only that "You are not eligible for benefits" and "The money you get is more than allowed by program rules," without describing what data sources TIERS relied on for income information or how TIERS calculated income.)

government agency in a pecuniary transaction is correct."[156]

156. Deloitte's inaccurate eligibility determinations and failure to correct known errors are also unfair under Section 5 of the FTC Act because they "cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[157]

157. Deloitte's operation of its eligibility determination software systems is unfair because, as described above, the systems are deployed without sufficient measures to evaluate and mitigate risks of Medicaid coverage loss, directly injuring consumers.

158. Inaccurate Medicaid eligibility determinations injure consumers in multiple ways including harms to health, financial harms, and the time, resources, and energy that must be spent to correct erroneous decisions. These types of "monetary . . . and unwarranted health and safety risks," constitute substantial injuries.[158]

159. Robust evidence shows that loss of Medicaid, even for short periods of time, leads to worse health outcomes, including premature mortality.[159] These negative outcomes occur for a number of reasons. Churning on and off of coverage can result in skipping care and subsequent higher use of the emergency room, including for conditions like

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[156] *Vargas v. Trainor*, 508 F.2d 485, 490 (7th Cir. 1974).
[157] 15 U.S.C. § 45(n).
[158] FTC, Policy Statement on Unfairness (1980), https://www.ftc.gov/legal-library/browse/ftc-policystatement-unfairness.
[159] Benjamin D. Sommers et al., *Health Insurance Coverage and Health—What the Recent Evidence Tells Us*, 377 New England J. Medic. 586 (2017), http://www.nejm.org/doi/full/10.1056/NEJMsb1706645; Benjamin D. Sommers, *State Medicaid Expansions and Mortality, Revisited: A Cost-Benefit Analysis*, 3 Am. J. of Health Economics 392 (2017), https://dash.harvard.edu/bitstream/handle/1/27305958/Mcaid%20Mortality%20Revisited%20DASH%20Version.pdf?sequence=1&isAllowed=y; Allyson G. Hall et al., *Lapses in Medicaid Coverage: Impact on Cost and Utilization Among Individuals with Diabetes Enrolled in Medicaid*, 48 Medic. Care 1219 (2008); Andrew Bindman et al., *Interruptions in Medicaid Coverage and Risk for Hospitalization for Ambulatory Care-Sensitive Conditions*, 149 Annals Internal Medicine 854 (2008), https://www.commonwealthfund.org/publications/journal-article/2008/dec/interruptions-medicaid-coverage-and-risk-hospitalization; Steffie Woolhandler & David U. Himmelstein, *The Relationship of Health Insurance and Mortality: Is Lack of Insurance Deadly?*, 167 Ann. Intern. Med. 424 (2017), http://annals.org/aim/fullarticle/2635326/relationship-health-insurance-mortality-lack-insurance-deadly; Aviva Aron-Dine, Ctr. on Budget and Pol'y. Priorities, *Eligibility Restrictions in Recent Medicaid Waivers Would Cause Many Thousands of People to Become Uninsured* (Aug. 9 2018), https://www.cbpp.org/sites/default/files/atoms/files/8-9-18health.pdf.

asthma and diabetes that can be managed in an outpatient setting.[160] Even brief lapses in coverage increase the incidence of skipped medications and foregone treatment and result in worse health outcomes and increased use of the emergency department.[161] Continuous insurance coverage is also associated with earlier cancer identification and outcomes.[162]

160. These harms are occurring in Texas. One recent news report described how "patients are showing up for appointments only to learn that they no longer have Medicaid and can't afford to pay out of pocket to be seen. Even if their coverage is eventually restored, gaps can mean children missing vaccines or patients forgoing treatments for chronic diseases. Shanna Combs, president-elect of the Texas Association of Obstetricians and Gynecologists, said she's heard about pregnant patients losing Medicaid just weeks before their due dates. At her practice in Fort Worth, she saw a child who was admitted to the hospital with a blockage in her lower genital tract, only learning then that she was no longer enrolled. 'She basically has a uterus full of blood that's probably up to her belly button' and needed MRI imaging and ultimately surgery that the family couldn't afford, said Combs. Doctors had to wait several weeks for her Medicaid to be reinstated, giving the child medication to try to prevent the condition from worsening in the meantime."[163]

161. Studies also show that Medicaid coverage reduces medical debts and out-of-pocket expenses for enrollees and that loss of coverage imposes financial harms.[164] That is

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[160] Leighton Ku & Erika Steinmetz, Ass'n for Community Affiliated Plans, *Bridging the Gap: Continuity and Quality of Coverage in Medicaid* (2013), http://www.communityplans.net/Portals/0/Policy/Medicaid/GW%20Continuity%20Report%209-10-13.pdf.

[161] *Id.* at 1, 5-6; Julia Paradise & Rachel Garfield, Kaiser Family Found., *What is Medicaid's Impact on Access to Care, Health Outcomes, and Quality of Care? Setting the Record Straight on the Evidence* 4-5 (2013), https://www.kff.org/report-section/what-is-medicaids-impact-on-access-to-care-health-outcomes-and-quality-of-care-setting-the-record-straight-on-the-evidence-issue-brief/.

[162] Ku & Steinmetz, *supra* note 160.

[163] Novack, *supra* note 86.

[164] *See, e.g.*, Georgetown Univ. Health Pol. Inst., Ctr. for Children and Families, *Medicaid: How Does it Provide Economic Security for Families* (2017), http://ccf.georgetown.edu/wp-content/uploads/2017/03/Medicaid-and-Economic-Security.pdf; Jesse Cross-Call, Ctr. on Budget & Pol. Priorities, *More Evidence Medicaid Expansion Boosts Health, Well-Being* (2018), https://www.cbpp.org/blog/more-evidence-medicaid-expansion-boosts-health-well-being; Louija Hu et al., *National Bureau of Economic Research Working Paper No. 22170: The Effect of the Patient Protection and Affordable Care Act Medicaid Expansions on Financial Well-Being*, (2016), http://nber.org/papers/w22170 ; Dahlia K. Remler et al., *Estimating the Effects of Health Insurance and Other Social Programs on Poverty Under the Affordable Care Act*, 36 Health Affairs 1828 (2017), https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0331?url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Acrossref.org&rfr_dat=cr_pub++0pubmed; Paradise & Garfield, *supra* note 161 at 5-6. Nicole Dussault, Maxim Pinkovskiy & Basit Zafar, *Is Health Insurance Good for Your Financial Health?* Federal Reserve Bank of New York - Liberty Street

because absent Medicaid coverage individuals must pay for necessary medical care, often at the expense of other basic needs or by incurring medical debt.[165]

162. Medical debt is a major contributor to bankruptcies across the country.[166] The financial benefits of Medicaid coverage have been repeatedly documented and have contributed to lower rates of bankruptcy.[167] For instance, one study found that Medicaid coverage reduced the likelihood of borrowing money or skipping bills to pay for medical care by 40% and reduced the probability of having a medical debt collection by 25%.[168] Without Medicaid coverage medical debt can be hard to control "unlike other sources of debt, people often fall into medical debt with total lack of consumer control. Seeking medical care differs from other consumer transactions since patients have little price transparency or provider options when receiving medically necessary services, especially in the case of an emergency."[169]

163. Evidence since the passage of the ACA also demonstrates how access to Medicaid in particular—rather than private insurance through the Marketplace or an employer—reduces medical debt and promotes financial security. For instance, one national study of low-income parents found that Medicaid expansion reduced difficulty paying

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Economics (2016), http://libertystreeteconomics.newyorkfed.org/2016/06/is-health-insurance-good-for-your-financial-health.html; Katherine Baicker et al., *The Oregon Experiment -- Effects of Medicaid on Clinical Outcomes*, 36 New Eng. J. Med. 1713 (2013); Ohio Dep't of Medicaid, *Ohio Medicaid Group VII Assessment: A Report to the Ohio General Assembly* 39-40 (2017), https://medicaid.ohio.gov/stakeholders-and-partners/reports-and-research/ohio-medicaid-group-viii-assessment/; Naomi Zwede & & Christopher Wimer, *Antipoverty Impact of Medicaid Growing with State Expansions Over Time,* 38 Health Affairs 132-138 (2019) (finding that Medicaid significantly reduces poverty and that Medicaid's impact has increased over the past decade).

[165] *See, e.g.,* Sarah Miller et al., *The ACA Medicaid Expansion in Michigan and Financial Health* (2018), http://www.nber.org/papers/w25053; Aaron E. Carroll, *Medicaid as a Safeguard for Financial Health*, 321 JAMA 135 (2019), https://jamanetwork.com/journals/jama/fullarticle/2720716?guestAccessKey=8a4329f5-c92a-4aee-a143-2d44b8138da2&utm_source=silverchair&utm_medium=email&utm_campaign=article_alert-jama&utm_content=etoc&utm_term=011519.

[166] David U. Himmelstein, et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 Am. J. Med. 741 (2009), http://www.pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf.

[167] Tal Gross & Matthew J. Notowidigdo, *Health Insurance And The Consumer Bankruptcy Decision: Evidence From Expansions of Medicaid*, 95 J. Pub. Ec. 767, 776 (2011), https://www.sciencedirect.com/science/article/abs/pii/S0047272711000168.

[168] Amy Finkelstein *et al. The Oregon Health Insurance Experiment: Evidence from The First Year*, 127 Q. J. Econ. 1057, 1057 (2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3535298/.

[169] Every Texan, *Medical Debt*, https://everytexan.org/our-work/policy-areas/health-care/affordability-medical-debt/medical-debt/ (last visited Jan. 23, 2024).

medical bills and reduced stress and severe psychological distress.[170] Ohio's evaluation of its Medicaid expansion likewise reported substantial reductions in medical debt and improved ability to pay non-medical bills.[171] And in Kentucky, evidence showed that among individuals who gained coverage under Medicaid expansion, average annual out-of-pocket spending decreased by $337, and the number of individuals who reported trouble paying medical bills decreased by 58%.

164. Additional studies of the Medicaid expansion following the enactment of the Affordable Care ACt show significant improvements in financial well-being from Medicaid coverage. One study of credit report data found that when compared to low-income areas in non-expansion states, low-income areas in expansion states had significant reductions in unpaid non-medical bills and in the amount of non-medical debt sent to third-party collection agencies.[172] Another national study found that medical debt fell by almost twice as much in expansion states (13%) compared to non-expansion states (7%).[173] And a third study showed that Medicaid expansion reduced the incidence of newly-accrued medical debt by 30% to 40%, and also reduced the number of bankruptcies compared to non-expansion states.[174] That study also examined the indirect consequences of unpaid medical debt, including reduced or higher-priced access to credit markets, and found that following expansion, credit scores improved significantly.[175]

165. Medicaid enrollees also suffer a "time tax" because of TIERS unreliable and inaccurate determinations. As described by the Office of Information and Regulatory Affairs, the time tax includes "the time, money, and psychological costs involved in interacting with government," which puts a "tax on the time and well-being of individuals seeking assistance."[176] These burdens are exacerbated by "confusing notices, complicated questions, and underlying it all, the deep anxiety of potentially losing life-saving assistance."[177]

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[170] Stacey McMorrow et al., *Medicaid Expansion Increased Coverage, Improved Affordability, and Reduced Psychological Distress For Low-Income Parents,* 36 Health Affairs 808 (2017), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2016.1650.

[171] *Ohio Medicaid Group VII Assessment: A Report to the Ohio General Assembly, supra* note 164, at 39-40.

[172] Louija Hu et al., *supra* note 164.

[173] Aaron Sojourner & Ezra Golberstein, Health Affairs, *Medicaid Expansion Reduced Unpaid Medical Debt and Increased Financial Satisfaction* (2017), https://www.healthaffairs.org/do/10.1377/hblog20170724.061160/full/.

[174] Kenneth Brevoort, Daniel Grodzixki, & Martin B. Hackmann, Nat'l Bureau of Economic Research, *Medicaid and Financial Health* 3 (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063326.

[175] *Id.* at 3-4.

[176] OIRA, *Tackling the Time Tax: How the Federal Government is Reducing Burdens to Accessing Critical Benefits and Services* (July 2023), https://www.whitehouse.gov/wp-content/uploads/2023/07/OIRA-2023-Burden-Reduction-Report.pdf.

[177] *Id.*

166. The TIERS system's low rates of ex parte renewals cause a substantial injury to Medicaid enrollees by doing "a small harm to a large number of people" and by raising "a significant risk of concrete harm."[178] The dramatically low rates of ex parte renewals means that vastly more Medicaid recipients have to complete complicated forms and collect and submit documents to maintain Medicaid coverage, imposing significant administrative burdens on those enrollees.

167. Furthermore, the low rates of ex parte renewals increase the risk that eligible individuals will lose Medicaid coverage for not providing necessary forms, including as for example, children like Harper Wilson, discussed above.

168. Inaccurate eligibility determinations also impose a time tax because they require individuals to spend substantial time and resources to correct errors—either through informal efforts or through an appeal of the Medicaid eligibility decision through a "fair hearing."

169. To correct a decision informally, individuals may, for example, have to re-collect and submit documentation previously submitted. They often have to spend time on the phone to reach the call center, which in Texas can take a substantial amount of time. Particularly for families "where caregivers work in hourly jobs. Being on the phone is really difficult . . . because it could result in less pay."[179]

170. This "time tax" constitutes both economic and quantifiable non-economic harm, which establish "substantial injury."

171. And while individuals have the option to appeal the decision through a fair hearing process, that process can itself be onerous and time consuming, particularly for individuals with disabilities.[180]

172. The burdens of correcting an erroneous decision are exacerbated because the information regarding how Deloitte developed and programmed the TIERS system to generate eligibility determinations in any particular case is not made available to Medicaid enrollees.

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[178] *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985).

[179] Laura Santhanam, PBS Newshour, *Texas schools and families struggle as hundreds of thousands of kids lose Medicaid coverage,* (Sept. 15, 2023) https://www.pbs.org/newshour/health/texas-schools-and-families-struggle-as-hundreds-of-thousands-of-kids-lose-medicaid-amid-unwinding.

[180] *See, e.g.*, *Vargas*, 508 F.2d at 489 (noting that individuals "who are aged, blind, or disabled . . . would be unable or disinclined, because of physical handicaps and, in the case of the aged, mental handicaps as well, to take the necessary affirmative action," to appeal Medicaid denial).

173. Individuals do receive a TIERS-generated notice regarding the ultimate eligibility decision. However, this notice does not describe what data sources the TIERS system relied on or explain the logic for how TIERS reached its conclusion.

174. As described above, a notice might state only that "You are not eligible for benefits" and "The money you get is more than allowed by program rules," without describing what data sources TIERS relied on for income information, how TIERS calculated the household size and applicable income limit for that household size, or even that an automated decision-making system was used to make an eligibility determination.[181]

175. Without that information, an individual cannot determine if TIERS, for example, calculated their income incorrectly or applied the wrong income standard, making it difficult to determine whether to try to challenge a decision.[182] Many individuals may simply assume the system was correct about their ineligibility, because, without the specific information, they cannot tell that the system made incorrect decisions.

176. For individuals who do seek to challenge the decision, the lack of information requires individuals to expend more time and effort to first attempt to understand the basis of an erroneous decision before they can seek to correct it. Individuals are "force[d] into an unreasonable choice between either attempting to learn the reasons for the proposed action and then decide whether to appeal, or to appeal without knowing whether an appeal might have merit."[183]

177. The risks of appealing are even greater in Texas, where as the notices warn, individuals may have to repay benefits if they lose at the hearing.[184] Thus, individuals must risk financial penalties to correct errors made by TIERS.

178. Ultimately, the lack of information, confusion, and administrative hurdles can dissuade individuals from seeking to challenge the erroneous determination or trying to re-

[181] Texas Health & Human Services Redacted Notice at 5 (June 13. 2023) (Exhibit D hereto) (for example, explaining only that "You are not eligible for benefits" and "The money you get is more than allowed by program rules," without describing what data sources TIERS relied on for income information or how TIERS calculated.).
[182] *See, e.g.*, *Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005) ("Claimants cannot know *whether* a challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with sufficient information to understand the basis for the agency's action."); *Vargas*, 508 F.2d at 490 ("Unless the welfare recipients are told why their benefits are being reduced or terminated, many of the mistakes that will inevitably be made will stand uncorrected, and many recipients will be unjustly deprived of the means to obtain the necessities of life.")
[183] *M.A. by & through Avila v. Norwood*, No. 15-cv-3116, 2016 WL 11818203, at *9 (N.D. Ill. May 4, 2016) (internal quote omitted).
[184] Texas Health & Human Services Redacted Notice at 5 (Ex. D) ("If you lose the appeal, you might have to pay back benefits you got while waiting for the hearing.").

enroll.[185] For example, one survey of parents revealed that the perceived hassle of applying, the complexity of rules and regulations, and confusion about how to apply were all significant factors that prevented parents from trying to enroll their children in Medicaid.[186]

179. As one parent in Texas recently explained "I hate to say this, but I wholeheartedly believe it: I feel that Medicaid just says no so parents will quit, and they almost capitalize on parents being tired and worn down by this whole process."[187]

180. Deloitte's inaccurate eligibility systems are likely to substantially impact a large class of people, including the six million Medicaid enrollees undergoing annual redetermination in Texas.

181. The injuries caused by Deloitte's inaccurate eligibility determinations cannot be reasonably avoided. Individuals are legally required to complete the annual redetermination process to maintain Medicaid coverage and must have their eligibility determination processed through TIERS. If TIERS determines an individual is ineligible, an individual cannot use their Medicaid coverage to purchase medical care until the decision in TIERS is updated.

182. The harms caused by Deloitte's inaccurate eligibility determinations are not outweighed by countervailing benefits to consumers or to competition. As described above, the harms to Medicaid enrollees who receive inaccurate determinations are substantial.

183. There are no countervailing benefits to consumers or the State Medicaid agency from continuing to deploy an unreliable and inaccurate eligibility determination system. The Texas Medicaid agency is required to operate an eligibility system that performs enrollment functions and simplifies enrollment. Thus, any benefits to the Medicaid agency or state generally from the efficiency and automation of eligibility decisions are benefits from *any* system that would be implemented to comply with the Medicaid Act.

184. On the other hand, there are no countervailing benefits flowing from Deloitte's apparent failure to assess its eligibility determination systems for known errors that have been identified in other states. Deloitte could implement certain safeguards at a reasonable cost and expenditure of resources, such as inspecting and testing all of its

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[185] Michael Perry et al., Kaiser Family Found., *Medicaid and Children, Overcoming Barriers to Enrollment, Findings from a National Survey* 10-12 (2000) https://www.kff.org/medicaid/report/medicaid-and-children-overcoming-barriers-to-enrollment/; Judith Solomon, Ctr. on Budget & Pol. Priorities, *Locking People Out of Medicaid Coverage Will Increase Uninsured, Harm Beneficiaries' Health* (2018), https://www.cbpp.org/research/health/locking-people-out-of-medicaid-coverage-will-increase-uninsured-harm-beneficiaries#_ftn3.

[186] Perry et al., *supra* note 185, at 10-12.

[187] Novack, *supra* note 86.

Medicaid eligibility software for errors identified in one state. Thus, there are no benefits of Deloitte's practice that outweigh the harm to Texas Medicaid enrollees.

185. Deloitte is therefore directly engaged in an unfair trade practice in violation of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1).

186. Alternatively, Deloitte furnishes state Medicaid agencies with the means and instrumentalities for unfair and deceptive acts and practices when it provides these agencies with eligibility determination software that it claims accurately and consistently automates Medicaid eligibility rules. Based on faulty eligibility determinations made by Deloitte's TIERS software, Texas's Medicaid agency has reduced or revoked public benefits from eligible consumers, causing the substantial harms outlined above, which cannot be reasonable avoided.

D. Deloitte's Practices Are Grossly Inconsistent with Established Public Policies Regarding the Development and Maintenance of Automated Decision-Making Systems.

187. On information and belief, Deloitte does not follow key responsible AI risk management practices outlined in established public policies like the Principles, Blueprint, Guidelines, Executive Order 14110, and the AI RMF when developing and deploying automated benefits systems like the TIERS system, injecting unnecessary and serious risks of financial, health, and other consumer harms on benefits recipients.

188. Deloitte does not provide meaningful information to foster an understanding of the determinations made by its eligibility systems that allow individuals affected to understand the outcome and challenge its outcome based on plain and easy-to-understand information on the factors and logic that was the basis of the decision in violation of the OECD Principle on Transparency and Explainability.

189. Without meaningful information about the existence, role, and accuracy of the TIERS system within the Medicaid eligibility process, enrollees lack the knowledge they need to take steps to avoid harm caused by errors within the TIERS system.

190. Deloitte has not ensured that its eligibility determination systems function properly and do not pose unreasonable safety risk throughout its entire lifecycle and in conditions of normal use in violation of the OECD Principle on Robustness, Security, and Safety, thus increasing the risk of substantial consumer injury while undermining any claims that the Deloitte system benefits consumers.

191. The repetition of the same errors in Deloitte eligibility systems across Texas and other states and over time demonstrates that Deloitte has failed to perform the necessary testing, risk identification and mitigation, and ongoing monitoring to ensure safe and effective systems in violation of the Blueprint's Principle of Safe and Effective Systems.

192. Its failure to mitigate risks identified in other states also violates Section 5.4 of the AI RMF principles which directs organizations to follow "procedures… to respond to and recover from a previously unknown risk when it is identified." Deloitte has not "deactivate[d]" Medicaid eligibility systems when they "demonstrate performance or outcomes inconsistent with intended use." Nor does Deloitte report publicly on errors that have been identified, contrary to the recommendation to communicate "incidents and errors . . . to relevant AI actors, including affected communities."[188]

193. Deloitte has not tailored its eligibility determination systems to the purpose, nor incorporated human consideration for the adverse and high-risk decisions associated with Medicaid coverage determinations, particularly for the entirely automated procedural terminations, in violation of the Blueprint's Principle of Human Alternatives, Consideration, and Fallback.

194. Deloitte does not provide Medicaid enrollees with the logic used to make the eligibility determinations in violation of the UGAI's Right to Transparency, which includes "access to the factors, the logic, and techniques that produced the outcome.".

195. As shown by the repeated experiences across Texas and other states, Deloitte has not ensured the accuracy, reliability, or validity of its eligibility determination software's eligibility determinations in violation of the UGAI's Accuracy, Reliability and Validity Obligation.

196. Deloitte deploys its software without adequate evaluation of its risks and without adequate ongoing monitoring and oversight in violation of the UAGI's Assessment and Accountability Obligation.

E. REQUEST FOR INVESTIGATION AND PRAYER FOR RELIEF

197. The complaining parties urge the Commission to investigate Deloitte and to find that its use of an inaccurate and unreliable automated system to make Medicaid eligibility determinations constitutes a deceptive and unfair trade practice under Section 5 of the FTC Act.

198. The complaining parties further urge the Commission to:

    a. Initiate an investigation into the business practices of Deloitte, including specifically investigating whether Deloitte develops, markets, deploys, or maintains TIERS without adequately testing, auditing, or otherwise evaluating TIERS for accuracy and reliability;

    b. Pause Deloitte's use of TIERS in making Medicaid eligibility determinations until it implements an effective testing, evaluation, and monitoring program that:

[188] NIST AI RMF, *supra* note 143, at 32–33.

i. Confirms that TIERS reliably and accurately determines eligibility;

ii. Will continue to test for and detect errors during deployment, including testing for errors identified in other Deloitte-built Medicaid eligibility determination systems deployed in other states;

iii. Includes processes to monitor automatic terminations and prevent related wrongful terminations; and

iv. Provides documentation and periodic, public reporting regarding the monitoring regime and its findings;[189]

c. Require Deloitte to develop a comprehensive harm mitigation strategy that prevents ongoing Medicaid coverage loss once any errors in have been identified, whether through the monitoring regime or otherwise. The harm mitigation strategy should include prohibiting Deloitte from deploying the TIERS system or any related Medicaid eligibility systems, or components thereof, where they impose a significant risk of errors or injury, where the risks cannot be timely eliminated or mitigated, or where there is not enough information to assess the risks of harm.[190]

d. Require that Deloitte identify individuals previously harmed by errors in TIERS and take corrective action, including addressing harms from loss of Medicaid coverage;

e. Require that Deloitte make public the design specifications, logic and data sources used to make Medicaid eligibility assessments within TIERS, including making public the specific causes of known errors identified within TIERS;

f. Require that Deloitte make public the processes, templates, and data sources used by TIERS to produce notices and other communications to Medicaid enrollees, including through the online portal;

g. Require that Deloitte provide a written notice explaining the precise basis, including the data, data sources, and logic used to reach any Medicaid eligibility determinations or recommendations to any enrollees subject to an adverse action because of the TIERS system;

[189] This monitoring program could mirror similar AI monitoring programs mandated by the Commission. *See, e.g.*, Administrative Decision and Order at 7–13, *In re Rite Aid Corp.*, FTC File No. 072-3121 (2023) [hereinafter "Ride Aid Order"]; Jevan Hutson & Ben Winters, *America's Next "Stop Model!": Model Disgorgement*, 8 Geo. L. Tech. Rev. 125, 134–137 (2024).

[190] *See* Rite Aid Order at 6–7.

h. Require that Deloitte comply with existing public policy frameworks for responsible AI development and use, including the OECD Artificial Intelligence Principles, the Blueprint for an AI Bill of Rights, the Universal Guidelines for AI, Executive Order 14110, and NIST AI RMF;

i. Require that Deloitte provide such other information or documentation which may be necessary to ensure compliance with the aforementioned monitoring and notice requirements, including but not limited to compliance reports, model cards, and incident reports;[191] and

j. Provide such other relief as the Commission finds necessary and appropriate.

Respectfully Submitted,

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[191] *See id.* at 24–26.