

Message

**From:** Howe, Rory (CMS/CMCS) (b)(6)  
(b)(6)  
**Sent:** 5/8/2023 7:09:14 PM  
**To:** Briskin, Perrie (CMS/CMCS) (b)(6)  
(b)(6)  
**CC:** Costello, Anne Marie (CMS/CMCS) (b)(6)  
(b)(6) Tsai, Daniel  
(CMS/CMCS) (b)(6)  
(b)(6) Maccarroll, Amber  
(CMS/CMCS) (b)(6)  
(b)(6) Silanskis, Jeremy D.  
(CMS/CMCS) (Jeremy.Silanskis@cms.hhs.gov) (b)(6)  
(b)(6) Boston, Beverly (CMS/CMCS)  
(b)(6)  
(b)(6)  
**Subject:** RE: RE: OGC/DOJ Revisions to Draft Letter  
**Attachments:** Draft FRA Tax Letter (OGC-DOJ Edits 5-08-23 CMSD, FMG.docx)

Hi, Perrie. FYI – this will not be in the books tonight. After I sent the email below, OGC staff clarified that they are still awaiting OGC leadership sign-off on these edits. If anyone is interested in the interim, I have attached the OGC staff-level comments and our responses. Apologies for any confusion.

**From:** Howe, Rory (CMS/CMCS)  
**Sent:** Monday, May 8, 2023 10:55 AM  
**To:** Briskin, Perrie (CMS/CMCS) <Perrie.Briskin@cms.hhs.gov>  
**Cc:** Costello, Anne Marie (CMS/CMCS) <AnneMarie.Costello@cms.hhs.gov>; Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>; Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>; Silanskis, Jeremy D. (CMS/CMCS) (Jeremy.Silanskis@cms.hhs.gov) <Jeremy.Silanskis@cms.hhs.gov>; Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>  
**Subject:** FW: OGC/DOJ Revisions to Draft Letter

Hi Perris,

FYI, as you asked us to keep you in the loop on (b)(5) hold harmless letter status. FMG just received feedback from OGC and DOJ (see attached) and the comments were relatively minor. We plan to put an updated version in Dan and Anne Marie's book for tonight. Please let us know if you need anything in the interim.

Thanks,  
Rory

**From:** Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>  
**Sent:** Monday, May 8, 2023 10:37 AM  
**To:** Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>  
**Cc:** Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>  
**Subject:** OGC/DOJ Revisions to Draft Letter

Rory,

Attached is a draft of (b)(5) with some proposed revisions from OGC and DOJ. Please let us know if you have any comments or questions. Thanks.

Matt

Matthew A. Campbell  
Attorney  
Office of the General Counsel – CMS Division  
U.S. Department of Health & Human Services  
330 Independence Ave. S.W.  
Cohen Building, Room 5316  
Washington, D.C. 20201  
(202) 240-3275 (office)  
(b)(6) mobile)

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Message

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**From:** Howe, Rory (CMS/CMCS); (b)(6)  
(b)(6)  
**Sent:** 4/11/2023 4:51:07 PM  
**To:** Campbell, Matthew (HHS/OGC) [Matthew.Campbell@hhs.gov]  
**Subject:** RE: RE:

No problem at all. Thanks, Matt!

**From:** Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>  
**Sent:** Tuesday, April 11, 2023 12:40 PM  
**To:** Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>  
**Cc:** Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>  
**Subject:** RE:

Yes, that works for me. Sorry for the slow response. I'm only now getting up to speed with my computer. Thanks.

Matt

**From:** Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>  
**Sent:** Tuesday, April 11, 2023 12:19 PM  
**To:** Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>  
**Cc:** Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>  
**Subject:** RE:

Hi, Matt. Would you be available to meet at 1PM tomorrow?

**From:** Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>  
**Sent:** Monday, April 10, 2023 5:01 PM  
**To:** Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>; Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>  
**Cc:** Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>; Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>  
**Subject:** RE:

I can do 11 tomorrow, and I can make 1p work on Wednesday if that's where we land. Thank you,

Jeremy Vogel (he/him)  
Attorney, DHHS/OGC/CMUSD  
(202) 205-8778 | [Jeremy.Vogel@hhs.gov](mailto:Jeremy.Vogel@hhs.gov)

**From:** Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>  
**Sent:** Monday, April 10, 2023 4:58 PM  
**To:** Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>  
**Cc:** Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>; Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>  
**Subject:** Re:

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Garrett

**From:** Howe, Rory (CMS/CMCS) <[Rory.Howe@cms.hhs.gov](mailto:Rory.Howe@cms.hhs.gov)>  
**Sent:** Monday, April 10, 2023 4:56:30 PM  
**To:** Vogel, Jeremy (HHS/OGC) <[Jeremy.Vogel@hhs.gov](mailto:Jeremy.Vogel@hhs.gov)>; Mannchen, Garrett (HHS/OGC) <[Garrett.Mannchen@hhs.gov](mailto:Garrett.Mannchen@hhs.gov)>  
**Cc:** Campbell, Matthew (HHS/OGC) <[Matthew.Campbell@hhs.gov](mailto:Matthew.Campbell@hhs.gov)>; Kaiser, Bridgette (HHS/OGC) <[Bridgette.Kaiser@hhs.gov](mailto:Bridgette.Kaiser@hhs.gov)>  
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**To:** Mannchen, Garrett (HHS/OGC) <[Garrett.Mannchen@hhs.gov](mailto:Garrett.Mannchen@hhs.gov)>; Howe, Rory (CMS/CMCS) <[Rory.Howe@cms.hhs.gov](mailto:Rory.Howe@cms.hhs.gov)>  
**Cc:** Campbell, Matthew (HHS/OGC) <[Matthew.Campbell@hhs.gov](mailto:Matthew.Campbell@hhs.gov)>; Kaiser, Bridgette (HHS/OGC) <[Bridgette.Kaiser@hhs.gov](mailto:Bridgette.Kaiser@hhs.gov)>  
**Subject:** Re:

Unfortunately I am not available tomorrow afternoon I could be available in the morning, or later in the week.

Jeremy Vogel (he/him)  
Attorney, DHHS/OGC/CMSD  
(202) 205-8778 | [Jeremy.Vogel@hhs.gov](mailto:Jeremy.Vogel@hhs.gov)

**From:** Mannchen, Garrett (HHS/OGC) <[Garrett.Mannchen@hhs.gov](mailto:Garrett.Mannchen@hhs.gov)>  
**Sent:** Monday, April 10, 2023 4:46:12 PM  
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**Cc:** Campbell, Matthew (HHS/OGC) <[Matthew.Campbell@hhs.gov](mailto:Matthew.Campbell@hhs.gov)>; Vogel, Jeremy (HHS/OGC) <[Jeremy.Vogel@hhs.gov](mailto:Jeremy.Vogel@hhs.gov)>; Kaiser, Bridgette (HHS/OGC) <[Bridgette.Kaiser@hhs.gov](mailto:Bridgette.Kaiser@hhs.gov)>  
**Subject:** RE:

Adding Matthew Campbell to this email. Matthew has just joined our office and has been assigned as the lead CMSD attorney in this litigation. I'll still be available to consult and help out while Matt is getting up to speed.

Matt—Rory is the Director of the Financial Management Group in CMS and has been working closely with Jeremy and me (among others in our office) on this hold harmless issue.

Jeremy & Matt—are you both available tomorrow at 2 or 2:30 to meet with Rory to discuss the case?

**From:** Howe, Rory (CMS/CMCS) <[Rory.Howe@cms.hhs.gov](mailto:Rory.Howe@cms.hhs.gov)>  
**Sent:** Monday, April 10, 2023 3:49 PM  
**To:** Mannchen, Garrett (HHS/OGC) <[Garrett.Mannchen@hhs.gov](mailto:Garrett.Mannchen@hhs.gov)>  
**Subject:** RE:

Hi, Garrett. Tomorrow afternoon works great. Would 2 or 2:30 work?

**From:** Mannchen, Garrett (HHS/OGC) <[Garrett.Mannchen@hhs.gov](mailto:Garrett.Mannchen@hhs.gov)>  
**Sent:** Monday, April 10, 2023 1:24 PM

**To:** Howe, Rory (CMS/CMCS) <[Rory.Howe@cms.hhs.gov](mailto:Rory.Howe@cms.hhs.gov)>

**Subject:** Re:

Is tomorrow afternoon ok with you, or do you need to meet with us before then?

Garrett

**From:** Howe, Rory (CMS/CMCS) <[Rory.Howe@cms.hhs.gov](mailto:Rory.Howe@cms.hhs.gov)>

**Sent:** Sunday, April 9, 2023 1:39:37 PM

**To:** Mannchen, Garrett (HHS/OGC) <[Garrett.Mannchen@hhs.gov](mailto:Garrett.Mannchen@hhs.gov)>

**Cc:** Vogel, Jeremy (HHS/OGC) <[Jeremy.Vogel@hhs.gov](mailto:Jeremy.Vogel@hhs.gov)>; Lyons, Susan (HHS/OGC) <[Susan.Lyons@HHS.GOV](mailto:Susan.Lyons@HHS.GOV)>

**Subject:** Re:

Thanks for sharing, Garrett. I think it would be helpful to set up a call to discuss. Please let me know when it would make sense to aim for, particularly if you need some time to digest.

Rory

**From:** Mannchen, Garrett (HHS/OGC) <[Garrett.Mannchen@hhs.gov](mailto:Garrett.Mannchen@hhs.gov)>

**Sent:** Sunday, April 9, 2023 11:07:41 AM

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**Cc:** Vogel, Jeremy (HHS/OGC) <[Jeremy.Vogel@hhs.gov](mailto:Jeremy.Vogel@hhs.gov)>; Lyons, Susan (HHS/OGC) <[Susan.Lyons@HHS.GOV](mailto:Susan.Lyons@HHS.GOV)>

**Subject:**

Good morning Rory,

This email is to apprise you of a suit filed Tuesday challenging a February 17, 2023 CMCS Informational Bulletin. *Texas v. Brooks-LaSure*, No. 6:23-cv-161 (E.D. Tex. filed April 5, 2023) (the complaint and the challenged CIB are attached to this email). This lawsuit is related to an issue with Texas's State Directed Payments that came up previously in a different *Texas v. Brooks-LaSure* case—that earlier case dealt primarily with Texas's Medicaid 1115 Demonstration Project and has since been dismissed as moot. This current lawsuit challenges a guidance document issued by CMS that explains the agency's interpretation of the Medicaid statute related to permissible sources of the non-federal share of states' Medicaid payments, and a final rule issued by CMS in 2008. Specifically, the bulletin addresses the statutory limitation on provider taxes used to finance the non-federal share if "hold harmless" arrangements exist. 42 U.S.C. § 1396b(w)(1)(A)(iii) and (w)(4). The statute defines a hold harmless arrangement as including an arrangement in which the "State or other unit of government imposing the tax provides (directly or indirectly) for any payment, offset, or waiver that guarantees to hold taxpayers harmless for any portion of the costs of the tax." *Id.* The CMCS Informational Bulletin explained CMS's interpretation of the statutory hold harmless prohibition and its own regulations. Under that interpretation, private agreements among taxpaying providers to redistribute Medicaid payments for which the state's share is financed using provider taxes would constitute an impermissible hold harmless arrangement where the existence of the redistribution arrangement results in a reasonable expectation that taxpaying providers will be repaid all or a portion of their tax payments.

Texas's lawsuit claims that the CMCS Informational Bulletin violates the Administrative Procedure Act because it (1) contradicts the plain language of the Medicaid statute and CMS's regulations; (2) constitutes a legislative rule and CMS issued it without first going through notice and comment rulemaking; and (3) is arbitrary and capricious because CMS failed to acknowledge its change in position. The lawsuit also claims that CMS's 2008 final rule addressing impermissible hold harmless arrangements is inconsistent with the plain language of the Medicaid statute.

Please feel free to share this information with anyone else in CMS who should be aware of the lawsuit. And please reach out if you have any questions or if you'd like to set up a call to discuss.

Best,

Garrett

Message

---

**From:** Mannchen, Garrett (HHS/OGC) [Garrett.Mannchen@hhs.gov]  
**Sent:** 4/11/2023 5:17:36 PM  
**To:** Campbell, Matthew (HHS/OGC) [Matthew.Campbell@hhs.gov]; Howe, Rory (CMS/CMCS)  
(b)(6)  
**CC:** Kaiser, Bridgette (HHS/OGC) (b)(6) Vogel, Jeremy  
(HHS/OGC) (b)(6)  
(b)(6)  
**Subject:** Re: Re:

Thanks all! Rory, can you send around a meeting invite with a zoom link? Thanks!

Garrett

**From:** Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>  
**Sent:** Tuesday, April 11, 2023 12:40:18 PM  
**To:** Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>  
**Cc:** Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>  
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Jeremy Vogel (he/him)  
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(202) 205-8778 | [Jeremy.Vogel@hhs.gov](mailto:Jeremy.Vogel@hhs.gov)

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Jeremy Vogel (he/him)  
Attorney, DHHS/OGC/CMSCD  
(202) 205-8778 | [Jeremy.Vogel@hhs.gov](mailto:Jeremy.Vogel@hhs.gov)

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Matt—Rory is the Director of the Financial Management Group in CMS and has been working closely with Jeremy and me (among others in our office) on this hold harmless issue.

Jeremy & Matt—are you both available tomorrow at 2 or 2:30 to meet with Rory to discuss the case?

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**Subject:**

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failed to acknowledge its change in position. The lawsuit also claims that CMS's 2008 final rule addressing impermissible hold harmless arrangements is inconsistent with the plain language of the Medicaid statute.

Please feel free to share this information with anyone else in CMS who should be aware of the lawsuit. And please reach out if you have any questions or if you'd like to set up a call to discuss.

Best,

Garrett

## Appointment

---

**From:** Vogel, Jeremy (HHS/OGC) [Jeremy.Vogel@hhs.gov]

**Sent:** 5/4/2023 7:26:06 PM

**To:** Howe, Rory (CMS/CMCS); (b)(6)

(b)(6)

**Subject:** Accepted: Accepted: Texas Hold Harmless Litigation

**Location:** <https://cms.zoomgov.com/>; (b)(6)

**Start:** 5/5/2023 2:00:00 PM

**End:** 5/5/2023 2:30:00 PM

**Show Time As:** Busy

**Recurrence:** (none)

## Appointment

---

**From:** Kaiser, Bridgette (HHS/OGC) [Bridgette.Kaiser@hhs.gov]

**Sent:** 5/4/2023 7:30:30 PM

**To:** Howe, Rory (CMS/CMCS); (b)(6)

(b)(6)

**Subject:** Accepted: Accepted: Texas Hold Harmless Litigation

**Location:** <https://cms.zoomgov.com>; (b)(6)

**Start:** 5/5/2023 2:00:00 PM

**End:** 5/5/2023 2:30:00 PM

**Show Time As:** Busy

**Recurrence:** (none)

## Appointment

---

**From:** Campbell, Matthew (HHS/OGC) [Matthew.Campbell@hhs.gov]

**Sent:** 5/4/2023 7:33:44 PM

**To:** Howe, Rory (CMS/CMCS) (b)(6)

(b)(6)

**Subject:** Accepted: Accepted: Texas Hold Harmless Litigation

**Location:** <https://cms.zoomgov.com/> (b)(6)

**Start:** 5/5/2023 2:00:00 PM

**End:** 5/5/2023 2:30:00 PM

**Show Time As:** Busy

**Recurrence:** (none)