

Revised May 19, 2008

## **New CMS Letter on the August 17<sup>th</sup> Directive Does Not Materially Change the Policy But Does Raise New Questions**

On May 7, 2008, the Centers for Medicare and Medicaid Services (CMS) released a letter to state health officials to address issues that have arisen with respect to the CMS August 17, 2007 directive.<sup>1</sup>

The new letter does not change the basic August 17<sup>th</sup> directive policy, which places major new hurdles in states' way before they can provide uninsured children in more-moderate income families affordable coverage through SCHIP. With the worsening economy, and rising gas, food and health care prices, more families are struggling to afford health care coverage for their children. Rather than supporting state efforts to help these families, CMS' August 17<sup>th</sup> directive is forcing states to roll back and restrict children's coverage. Already, seven states and tens of thousands of uninsured children have been affected by the new rules. (For a recent status report of the impact of the directive, see, ["Out of Touch: A Status Report on CMS's August 17<sup>th</sup> Directive."](#) May 5, 2008.)

The May 7<sup>th</sup> letter seems to be an attempt by CMS to address concerns with the Directive raised in litigation and by the General Accountability Office and the Congressional Research Services' legal opinions.<sup>2</sup> Rather than providing new clarification, the letter emphasizes that the August 17<sup>th</sup> policy will be applied state by state. This leaves these important decisions about children's coverage to back room discussions without the benefit of clear rules, standards and objective data.

The new letter specifically addresses the following:

- It restates previous guidance that the Directive does not apply to current enrollees. This "grandfathering" policy, however, will not prevent the near elimination of coverage in states that have long covered children with incomes above 250 percent of the federal poverty level (FPL). New Jersey, for example, projects that under the policy within two years its coverage of children in this income range will drop by 84 percent.
- A 12-month waiting period will still apply if states meet the pre-conditions specified in the August 17<sup>th</sup> directive (no state has, so far). CMS now says it will consider other crowd out strategies and exceptions on a case-by-case basis if states can show justifications with data. No rules, criteria or acceptable data are identified.
- The May 7<sup>th</sup> letter states that the crowd-out prevention measures (e.g., the 12-month waiting period) do not apply to SCHIP coverage for unborn children, noting the "unique importance of timely pre-natal care." No explanation is offered as to why

timely care for newborns or other children is not similarly important.

- In regard to the requirement for 95 percent enrollment, CMS will measure the percentage of children in a state with family incomes below 200 percent of the FPL who have any coverage – Medicaid, SCHIP, or private. (Previously, CMS appeared to be looking at Medicaid and SCHIP participation rates, which would not take private coverage into account.) The rates for some states are higher (and for a few states lower) using this measure, but no state meets the 95 percent threshold under this measure, according to 2006-2007 CPS data (see Table 1). CMS states in the May 7<sup>th</sup> letter, as it has in the past, that it will consider other data and adjustments to the data, but it remains unclear what data or adjustments will meet CMS standards and whether there will be any objective basis for accepting or rejecting data or data adjustments.<sup>3</sup>

To date, only one state has been deemed in compliance with the standards of the August 17<sup>th</sup> directive, although it is possible that some additional states may be approved in the months ahead. The policy though, remains one that creates largely insurmountable hurdles and new hoops for states and families. The clear objective of SCHIP and the strong sentiment of the nation is that children ought to have health care coverage. The directive moves policy in the opposite direction, and the new letter only raises more questions about the policies that will be applied, the data that will be accepted, and the process by which the rules for this very important program are set.

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<sup>1</sup> The May 7, 2008 letter can be accessed at <http://ccf.georgetown.edu/index/cms-filesystem-action?file=policy/cms%20directive/cmsdirectiveltr5.7.pdf>, and the August 17, 2007 can be accessed at <http://ccf.georgetown.edu/index/cms-filesystem-action?file=policy/cms%20directive/cmsdirective.pdf>.

<sup>2</sup> The GAO opinion can be accessed at <http://ccf.georgetown.edu/index/cms-filesystem-action?file=policy/cms%20directive/gaoaug17legalopinion.pdf>, and the CRS opinion can be accessed at <http://ccf.georgetown.edu/index/cms-filesystem-action?file=policy/cms%20directive/crs%20memo%20to%20rockefeller01102008.pdf>.

<sup>3</sup> For discussion of various analyses of the 95 percent measure and related data issues, see “Out of Touch: A Status Report on CMS’s August 17<sup>th</sup> Directive.” Center for Children and Families, May 2008. pp. 7-8.

**Table 1**  
**Low-income Children's Coverage**

State	Participation Rate	Coverage Rate
Nation	72.4%	83.4%
Alabama	83.9%	82.4%
Alaska	80.8%	82.8%
Arizona	64.4%	75.9%
Arkansas	79.4%	77.0%
California	70.6%	79.9%
Colorado	55.6%	82.0%
Connecticut	76.7%	90.2%
Delaware	67.7%	86.9%
District of Columbia	88.5%	87.3%
Florida	56.0%	76.9%
Georgia	71.8%	80.9%
Hawaii	80.6%	93.9%
Idaho	73.5%	83.1%
Illinois	74.1%	87.1%
Indiana	80.7%	85.7%
Iowa	86.2%	89.8%
Kansas	82.3%	87.0%
Kentucky	81.1%	86.1%
Louisiana	75.2%	76.8%
Maine	84.3%	90.6%
Maryland	71.7%	86.9%
Massachusetts	82.3%	93.3%
Michigan	86.9%	89.6%
Minnesota	73.2%	92.4%
Mississippi	69.2%	81.4%
Missouri	78.3%	85.8%
Montana	64.6%	82.1%
Nebraska	76.2%	88.7%
Nevada	50.9%	82.2%
New Hampshire	76.6%	89.6%
New Jersey	63.3%	85.9%
New Mexico	66.5%	72.8%
New York	81.9%	87.5%
North Carolina	72.6%	81.1%
North Dakota	68.6%	88.6%
Ohio	83.6%	90.2%
Oklahoma	76.2%	77.7%
Oregon	71.3%	81.5%
Pennsylvania	77.7%	90.1%
Rhode Island	87.6%	91.8%
South Carolina	79.4%	83.9%
South Dakota	78.3%	87.2%
Tennessee	81.6%	85.9%
Texas	60.0%	70.6%
Utah	62.8%	82.9%
Vermont	89.1%	88.8%
Virginia	68.2%	86.0%
Washington	81.9%	86.3%
West Virginia	87.2%	80.7%
Wisconsin	81.4%	92.2%
Wyoming	77.2%	83.1%

Note: "Participation Rate" calculates the proportion of low-income children without private health insurance who are enrolled in Medicaid or SCHIP. "Coverage Rate" calculates the proportion of low-income children who are insured through public or private coverage. Data are averaged over two years to improve sample size and reliability. These data do not adjust for children ineligible due to immigration status.

Source: Calculations by the Center for Children and Families based on estimates by the Urban Institute for the Kaiser Commission on Medicaid and the Uninsured using the Census Bureau's 2006 and 2007 Annual Social and Economic Supplement to the Current Population Survey.