

TABLE OF CONTENTS

STATEMENT OF INTEREST OF THE AMICI.....	1
OVERVIEW OF THE SCHIP PROGRAM AND CMS' AUGUST 17 LETTER.....	3
ARGUMENT.....	7
I. THE EFFECT OF CMS' LETTER IS TO DENY FUNDING FOR HEALTH SERVICES FOR THOUSANDS OF NEEDY CONNECTICUT AND MASSACHUSETTS CHILDREN.....	7
A. Connecticut's Federally-Approved SCHIP State Plan.....	7
B. Massachusetts' Federally-Approved SCHIP State Plan.....	8
II. THE REQUIREMENTS OF THE CMS LETTER ARE INCONSISTENT WITH THE SCHIP STATUTE AND REGULATIONS AND THUS CONSTITUTE UNLAWFUL RULEMAKING.....	10
A. CMS' Letter Is Inconsistent with Congress' Intent to Grant States Discretion in Making Income Determinations for Their SCHIP Programs.....	10
B. CMS' Letter Is Inconsistent with Congress' Intent to Grant States Discretion in Devising Their Own "Crowd-Out" Provisions, and Its Own Regulations.....	13
III. CMS' NEW CROWD-OUT REQUIREMENTS ARE UNLAWFUL AND WILL UNDERMINE THE STATES' CONTINUED ABILITY TO PROVIDE HEALTH BENEFITS TO THEIR NEEDY CHILDREN.....	14
A. The Requirement That States Provide Assurance That They Have Enrolled At Least 95 Percent of the Medicaid or SCHIP-Eligible Children in the State Below 200 Percent of the Federal Poverty Is Unlawful.....	15
B. States Have Little Control Over Whether the Number of Children in the Target Population Insured Through Private Employers Has Decreased by More Than Two Percent Over the Previous Five-Year Period.....	18
C. States Face Difficult Hurdles in Preventing Employers from Changing Dependent Coverage Policies in a Manner That Would Favor a Shift to Public Coverage...	19
D. The Letter's Required One-Year Waiting Period of Uninsurance Is Unlawful to the Extent That It Recognizes No Exceptions and, Even with Exceptions, Would Require Rulemaking.....	19
CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

Alessi v. Raybesto-Manhattan, Inc., 451 U.S. 504 (1981).....19

Am. Frozen Foods Inst. v. United States, 855 F.Supp. 388 (Ct. of Int’l. Trade 1994).....6

Batterson v. Marshall, 648 F.2d 694 (D.C. Cir. 1980).....5

FMC Corp. v. Holliday, 498 U.S. 52 (1990).....19

General Motors Corp. v. Ruckelshaus, 742 F.2d 1561 (D.C. Cir. 1984).....5

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 733 (1985).....19

SBC v. Fed. Comm. Comm’n, 414 F.3d 486 (3d Cir. 2005).....5-6

Statutes

Federal

5 U.S.C. § 553.....5

29 U.S.C. § 1144(a).....19

42 U.S.C. § 1396a(r)(2)(A).....12

42 U.S.C. §§ 1397aa-1397jj.....3

42 U.S.C. § 1397bb(b).....3

42 U.S.C. § 1397bb(b)(1)(A).....11

42 U.S.C. § 1397bb(b)(3)(C).....13

42 U.S.C. § 1397bb(c).....16

42 U.S.C. § 1397dd.....10

42 U.S.C. § 1397ee.....3

42 U.S.C. § 1397ff.....7

42 U.S.C. § 1397hh.....13

42 U.S.C. § 1397jj(b)(1).....11

State

Conn. Gen. Stat. § 17b-292.....4, 8

Mass. Gen. Laws ch. 118E, § 16C.....4, 8, 9

Regulations

42 C.F.R. § 435.601(d).....	12
42 C.F.R. § 457.1.....	3
42 C.F.R. § 457.10.....	12
42 C.F.R. § 457.200 <u>et seq.</u>	7
42 C.F.R. § 457.310.....	12
42 C.F.R. § 457.805.....	4, 14
42 C.F.R. § 457.810.....	14

Other Authorities

Cindy Mann and Michael Odeh, Ctr. for Children and Families, <u>Moving Backward: Status Report on the Impact of the August 17 SCHIP Directive To Impose New Limits on States' Ability to Cover Uninsured Children</u> (Dec. 2007).....	13, 15, 16
Congressional Budget Office, <u>The State Children's Health Insurance Program</u> (May 2007).....	17
Donna Cohen Ross and Aleya Horn, Center on Budget and Policy Priorities and Caryn Marks, Kaiser Commission on Medicaid and the Uninsured, <u>Health Coverage for Children and Families in Medicaid and SCHIP: State Efforts Face New Hurdles</u> (Jan. 2008).....	20
Genevieve M. Kenney, The Urban Institute, <u>Medicaid and SCHIP Participation Rates: Implications for New CMS Directive</u> (Sept. 2007).....	17, 18
Judith Solomon and Donna Cohen Ross, Ctr. on Budget and Policy Priorities, <u>Administration Moves to Eviscerate Efforts to Enroll Uninsured Low-Income Children in Health Coverage Through the Schools</u> (Oct. 1, 2007).....	16
Letter from Dennis G. Smith, Director, CMS, to State Health Officials (Aug. 17, 2007)....	passim
Paul Frontsin, Employee Benefit Research Institute, <u>Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2007 Current Population Survey</u> (Oct. 2007).....	18
Teresa A. Coughlin and Mindy Cohen, The Urban Institute, for the Kaiser Commission on Medicaid and the Uninsured, <u>A Race to the Top: Illinois's All Kids Initiative</u> (Aug. 2007).....	15

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON VICINIGE

STATE OF NEW JERSEY, :
 :
 Plaintiff, : HON. JOEL A. PISANO
 :
 v. : Civ. Action No. 07-04698 (JAP) (JJH)
 :
 UNITED STATES DEPARTMENT :
 OF HEALTH AND HUMAN SERVICES, :
 :
 Defendant. :

**AMICI CURIAE BRIEF OF THE STATES OF
CONNECTICUT AND MASSACHUSETTS IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The State of Connecticut and the Commonwealth of Massachusetts file this brief amici curiae in opposition to the defendant U.S. Department of Health and Human Services' (HHS) motion to dismiss and in support of plaintiff State of New Jersey's cross-motion for partial summary judgment. The amici states, as administrators of their State Children's Health Insurance Programs (SCHIP), wish to advise the Court of the significant harm that will result from implementation of the August 17, 2007 letter issued by HHS concerning administration of state children's health insurance programs. HHS' letter violates the Administrative Procedure Act and creates onerous, ultra vires restrictions on state SCHIP programs that effectively undermine the states' ability to provide health coverage to thousands of low-income children.

STATEMENT OF INTEREST OF THE AMICI

For the past ten years, the State of Connecticut and the Commonwealth of Massachusetts have provided health insurance to thousands of needy children through their SCHIP programs. Throughout this period, HHS has consistently approved the manner in which Connecticut and

