



Highlights of [GAO-08-785T](#), a testimony before Subcommittee on Health, Committee on Energy and Commerce, House of Representatives

Why GAO Did This Study

The State Children's Health Insurance Program (SCHIP) finances health care to low-income, uninsured children whose family incomes exceed the eligibility limits under their state's Medicaid program, but who cannot afford other health insurance coverage. To participate in SCHIP, a state must submit a plan that describes how its program meets applicable requirements and must receive approval of the plan from the Centers for Medicare & Medicaid Services (CMS).

On August 17, 2007, CMS issued a letter purporting to clarify statutory and regulatory requirements related to preventing SCHIP substitution for other insurance coverage in states wishing to cover children with effective family incomes in excess of 250 percent of the federal poverty level (FPL). The letter indicates that CMS will apply measures identified in the letter to state proposals to cover these children, as well as to states that already cover them, and may take corrective action against states that fail to adopt the measures within 12 months.

In response to a request from the Chairman of the Subcommittee on Health Care, Senate Committee on Finance, and a member of that Subcommittee, GAO considered whether the letter is a rule under the Congressional Review Act (the Review Act). This testimony is based on the resulting opinion, *Applicability of the Congressional Review Act to Letter on State Children's Health Insurance Program*, B-316048, April 17, 2008.

To view the full product, click on [GAO-08-785T](#).

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CONGRESSIONAL REVIEW ACT

Applicability to CMS Letter on State Children's Health Insurance Program

What GAO Found

The definition of "rule" in the Congressional Review Act incorporates by reference the definition of "rule" in the Administrative Procedure Act (APA), with some exceptions. The APA definition of rule includes three elements relevant to GAO's consideration of the SCHIP letter: an agency statement is a rule if it is of general applicability; of future effect; and designed to implement, interpret, or prescribe law or policy. GAO concluded that the letter meets these criteria and that none of the exceptions in the Review Act apply. GAO found the letter to be of general applicability since it extends to all states that seek to enroll children with effective family incomes exceeding 250 percent of the FPL in their SCHIP programs, as well as to states that have already enrolled such children. In addition, GAO found it to be of future effect, that is, concerned with policy considerations for the future rather than the evaluation of past or present conduct. Finally, GAO found that the letter is designed to implement, interpret, or prescribe law or policy since it purports to clarify and explain the manner in which CMS applies statutory and regulatory requirements to states that want to extend coverage under their SCHIP programs to children with effective family incomes above 250 percent of the FPL and seeks to promote the implementation of statutory requirements applicable to state plans.

The history of the regulatory provision regarding substitution of coverage supported the view that the August 17 letter is a rule. In issuing the proposed and final rules to implement SCHIP, CMS indicated that it could not require states to adopt any particular measures to prevent substitution of coverage, stating that it did not have a statutory or empirical basis for doing so. In its August 17 letter, however, CMS states that its experience and information derived from the operation of SCHIP programs have made it clear that the potential for substitution is greater at higher income levels, and states seeking to expand their SCHIP populations should implement specific strategies to prevent substitution of coverage. Thus, the letter amounts to a marked departure from the agency's settled interpretation of the regulation regarding substitution of coverage, and case law indicates that such a change may be made only by rule. Moreover, the agency expressly relied on the letter to disapprove a state request to amend its SCHIP plan to cover children with family incomes in excess of 250 percent of the FPL, confirming that the letter has binding effect and is, therefore, a rule.

In response to GAO's inquiries, CMS stated that the letter is a general statement of policy announcing the course that the agency intends to follow in adjudications concerning compliance with requirements already set forth in regulations. The GAO opinion explained that statements of policy would appear to fit within the definition of rule in the APA and that courts have referred to them as rules. However, GAO also concluded that the August 17 letter does not have the characteristics of a statement of policy identified in case law. It evidences little, if any, of the tentativeness that is the hallmark of a policy statement, and the agency has relied on the letter to disapprove a state plan amendment, treating the letter as if it were a binding rule.