

September 17, 2007

The Honorable Michael O. Leavitt  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, D.C. 20201

Dear Secretary Leavitt:

Governors are deeply troubled by new Centers for Medicare and Medicaid Services (CMS) mandates that limit state flexibility under the State Children's Health Insurance Program (SCHIP) for those states that provide SCHIP eligibility for children of families with income levels at or above 250 percent of the Federal poverty level (FPL). In fact one state has already been a victim of these new rules, which sets an unfortunate precedent that will negatively affect all states with existing programs or plans to expand coverage for children. Released as a measure to address the substitution of SCHIP for private insurance, the requirements amount to a unilateral restriction on state authority to provide health insurance coverage for children and undermine the foundation of the state-federal partnership upon which SCHIP was built.

The requirements articulated in the CMS letter of August 17, 2007, fundamentally alter the authority given to states under SCHIP to craft and operate health care programs that best serve their constituents. Flexibility to set coverage levels is a basic tenet of this vital and successful program and one repeatedly endorsed by this Administration when it granted permission to multiple states to expand their coverage options. The CMS clarification reverses this policy by mandating administrative requirements that could result in hundreds of thousands of children and tens of thousands of adults losing health insurance.

States stand at the forefront of policy innovation and governors are leading the way to create meaningful and sustainable coverage options for their uninsured populations. Governors have repeatedly called upon Congress and the Administration to reauthorize SCHIP before it expires in September. The CMS decision to limit coverage options for states and unilaterally alter existing state plans is contrary to our shared responsibility of working cooperatively to provide health coverage for uninsured children.

Governors call upon CMS to reiterate its commitment to the state-federal partnership under SCHIP by immediately rescinding its August 17, 2007, letter and joining governors in our efforts to reauthorize SCHIP this year.

Sincerely,

Governor Eliot Spitzer  
State of New York

Governor Arnold Schwarzenegger  
State of California

Governor Christine O. Gregoire  
State of Washington

Governor Jon S. Corzine  
State of New Jersey

Governor Jennifer M. Granholm  
State of Michigan

Governor Kathleen Sebelius  
State of Kansas

Governor Ted Strickland  
State of Ohio

Governor Rod Blagojevich  
State of Illinois

Governor M. Jodi Rell  
State of Connecticut

Governor Brad Henry  
State of Oklahoma

Governor John Lynch  
State of New Hampshire

Governor Theodore R. Kulongoski  
State of Oregon

Governor Janet Napolitano  
State of Arizona

Governor Bill Richardson  
State of New Mexico

Governor Edward G. Rendell  
Commonwealth of Pennsylvania

Governor Ruth Ann Minner  
State of Delaware

Governor Chester J. Culver  
State of Iowa

Governor Kathleen Babineaux Blanco  
State of Louisiana

Governor James Douglas  
State of Vermont

Governor Mike Beebe  
State of Arkansas

Governor John Baldacci  
State of Maine

Governor Bill Ritter  
State of Colorado

Governor M. Michael Rounds  
State of South Dakota

Governor Dave Freudenthal  
State of Wyoming

Governor Deval Patrick  
Commonwealth of Massachusetts

Governor Martin O'Malley  
State of Maryland

Governor Donald L. Carcieri  
State of Rhode Island

Governor Joe Manchin III  
State of West Virginia

Governor Aníbal Acevedo Vilá  
Puerto Rico

Governor John deJongh, Jr.  
U.S. Virgin Islands

DEPARTMENT OF HEALTH & HUMAN SERVICES  
Centers for Medicare & Medicaid Services  
7500 Security Boulevard, Mail Stop S2-26-12  
Baltimore, Maryland 21244-1850



**Center for Medicaid and State Operations**

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AUG 17 2007

SHO #07-001

Dear State Health Official:

This letter clarifies how the Centers for Medicare & Medicaid Services (CMS) applies existing statutory and regulatory requirements in reviewing State requests to extend eligibility under the State Children's Health Insurance Program (SCHIP) to children in families with effective family income levels above 250 percent of the Federal poverty level (FPL). These requirements ensure that extension of eligibility to children at these higher effective income levels do not interfere with the effective and efficient provision of child health assistance coordinated with other sources of health benefits coverage to the core SCHIP population of uninsured targeted low income children.

Section 2101(a) of the Social Security Act describes the purpose of the SCHIP statute "to initiate and expand the provision of child health assistance to uninsured, low-income children in an effective and efficient manner that is coordinated with other sources of health benefits coverage." Section 2102(b)(3)(C) of the Act, and implementing regulations at 42 CFR Part 457, Subpart H, require that State child health plans include procedures to ensure that SCHIP coverage does not substitute for coverage under group health plans (known as "crowd-out" procedures). In addition, section 2102(c) of the Act requires that State child health plans include procedures for outreach and coordination with other public and private health insurance programs.

Existing regulations at 42 C.F.R. 457.805 provide that States must have "reasonable procedures" to prevent substitution of public SCHIP coverage for private coverage. In issuing these regulations, CMS indicated that, for States that expand eligibility above an effective level of 250 percent of the FPL, these reasonable crowd-out procedures would include identifying specific strategies to prevent substitution. Over time, States have adopted one or more of the following five crowd-out strategies:

- Imposing waiting periods between dropping private coverage and enrollment;
- Imposing cost sharing in approximation to the cost of private coverage;
- Monitoring health insurance status at time of application;
- Verifying family insurance status through insurance databases; and/or
- Preventing employers from changing dependent coverage policies that would favor a shift to public coverage.

As CMS has developed more experience and information from the operation of SCHIP programs, it has become clear that the potential for crowd-out is greater for higher income beneficiaries. Therefore, we are clarifying that the reasonable procedures adopted by States to prevent crowd-out pursuant to 42 C.F.R. 457.805 should include the above five general crowd-out strategies with certain important components. As a result, we will expect that, for States that expand eligibility above an effective level of 250 percent of the FPL, the specific crowd-out

strategies identified in the State child health plan to include all five of the above crowd-out strategies, which incorporate the following components as part of those strategies:

- The cost sharing requirement under the State plan compared to the cost sharing required by competing private plans must not be more favorable to the public plan by more than one percent of the family income, unless the public plan's cost sharing is set at the five percent family cap;
- The State must establish a minimum of a one year period of uninsurance for individuals prior to receiving coverage; and
- Monitoring and verification must include information regarding coverage provided by a noncustodial parent.

In addition, to ensure that expansion to higher income populations does not interfere with the effective and efficient provision of child health assistance coordinated with other sources of health benefits coverage, and to prevent substitution of SCHIP coverage for coverage under group health plans, we will ask for such a State to make the following assurances:

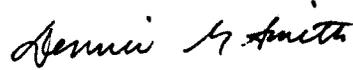
- Assurance that the State has enrolled at least 95 percent of the children in the State below 200 percent of the FPL who are eligible for either SCHIP or Medicaid (including a description of the steps the State takes to enroll these eligible children);
- Assurance that the number of children in the target population insured through private employers has not decreased by more than two percentage points over the prior five year period; and
- Assurance that the State is current with all reporting requirements in SCHIP and Medicaid and reports on a monthly basis data relating to the crowd-out requirements.

We will continue to review all State monitoring plans, including those States whose upper eligibility levels are below an effective level of 250 percent of the FPL, to determine whether the monitoring plans are being followed and whether the crowd-out procedures specified in the SCHIP state plans are reasonable and effective in preventing crowd-out.

CMS will apply this review strategy to SCHIP state plans and section 1115 demonstration waivers that include SCHIP populations, and will work with States that currently provide services to children with effective family incomes over 250 percent of the FPL. We expect affected States to amend their SCHIP state plan (or 1115 demonstration) in accordance with this review strategy within 12 months, or CMS may pursue corrective action. We would not expect any effect on current enrollees from this review strategy, and anticipate that the entire program will be strengthened by the focus on effective and efficient operation of the program for the core uninsured targeted low-income population. We appreciate your efforts and share your goal of providing health care to low-income, uninsured children through title XXI.

If you have questions regarding this guidance, please contact Ms. Jean Sheil, Director, Family and Children's Health Programs, who may be reached at (410) 786-5647.

Sincerely,



Dennis G. Smith  
Director

cc:

CMS Regional Administrators

CMS Associate Regional Administrators,  
Division of Medicaid and Children's Health

Martha Roherty  
Director, Health Policy Unit  
American Public Human Services Association

Joy Wilson  
Director, Health Committee  
National Conference of State Legislatures

Matt Salo  
Director of Health Legislation  
National Governors Association

Debra Miller  
Director for Health Policy  
Council of State Governments

Christie Raniszewski Herrera  
Director, Health and Human Services Task Force  
American Legislative Exchange Council

Jacalyn Bryan Carden  
Director of Policy and Programs  
Association of State and Territorial Health Officials



# OFFICES OF THE GOVERNORS

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ARNOLD SCHWARZENEGGER  
CALIFORNIA

ELIOT SPITZER  
NEW YORK

August 29, 2007

The President  
The White House  
Washington, DC 20500

Dear Mr. President,

The federal Centers for Medicare and Medicaid Services (CMS) is proposing new rules that will set Medicaid and state programs back forty years. These rules, which are being promulgated without proper review, impose eligibility standards that would both deny health care to vulnerable children and pregnant women *and* greatly restrict the flexibility of states to reach your administration's stated goals of efficiently providing coverage. The rules must be withdrawn.

Since Medicaid's inception four decades ago, states and the federal government have worked as partners to help provide health care for those who do not have access to affordable coverage or who have chronic diseases.

California and New York cover more than 1.4 million children and pregnant women using State Children's Health Insurance Program (SCHIP) funds – nearly one out of every four SCHIP recipients in the country. We have a long and productive relationship with CMS in leveraging SCHIP to innovatively provide maximum benefit with minimum resources.

We agree with your push for states to be a force for change in the delivery of health care to tens of millions of our fellow Americans who remain without meaningful coverage. But as you rally governors to do more to help fix our broken health care system, your administration has repeatedly modified existing Medicaid and SCHIP rules, harming states' capacity to help you achieve our shared objectives.

The recently proposed SCHIP rules will reverse longstanding agreements with the states and *reduce* the number of children who receive health care. We strongly urge you to reconsider these recent policy changes, which simply diminish state flexibility.

We agree with your administration's goal of trying to deter families from dropping private coverage in favor of SCHIP, which is why most states have adopted reasonable waiting periods with limited exceptions for involuntary loss of coverage. But the rules proposed by CMS would install thresholds that are impossible to meet for nearly every state and impose a one-size-fits-all solution to a dynamic and complex problem. As examples, the CMS SCHIP rules would:

The President  
August 29, 2007  
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- Require children to go without coverage for a full year. This is an incredibly harsh standard inconsistent with the goal of getting uninsured children health care they need. CMS will allow no exceptions. Thus, even if a parent dies or loses their job, a child must wait twelve months before she can apply for affordable health insurance under SCHIP.
- Ban state SCHIP expansion unless there has been less than a 2 percent decline in employer-sponsored insurance. This fails to recognize that employer-based coverage is declining for lower income families, but not because public coverage is available for children.
- Levy a costly administrative burden. One rule would require cost-sharing to be established on a family-by-family basis. Another requires enrollment of 95 percent of eligible children under 200 percent of the federal poverty level. While we are committed to enrolling all eligible children, achieving a standard of 95 percent is virtually impossible. This is not a static population, and there is no valid way to measure this standard.

The administration should maintain the innovative responsibility granted to governors under SCHIP, thereby continuing the enormous success of the program. Flexibility in benefit design and administration under SCHIP, as well as Medicaid, has improved efficiency and contributed to a one-third reduction in the rate of uninsured low-income children since 1997.

Millions of Americans, including some of the most vulnerable, have seen real help through SCHIP funding over the years. These rule changes would make it that much harder to help millions more. We ask that you carefully consider changes that would undermine an incredibly valuable program, and we stand ready if California and New York can be of any assistance.

Sincerely,



Governor Arnold Schwarzenegger



Governor Eliot Spitzer



September 4, 2007

Secretary Michael Leavitt  
Department of Health and Human Services  
200 Independence Avenue, S.E.  
Washington, DC 20201

Dear Secretary Leavitt:

On behalf of the American Public Human Services Association (APHSA) and its affiliate, including the National Association of State Medicaid Directors (NASMD), we are writing to express our deep concern regarding the August 17, 2007, State Health Official letter on crowd-out in the State Children's Health Insurance Program. The letter effectively changes the nature of the SCHIP program by seriously limiting the states' flexibility in designing programs, imposing mandatory cost sharing requirements, requiring additional reporting mandates, and imposing burdensome waiting periods.

First authorized ten years ago, SCHIP now covers more than six million children and pregnant women. As states, we are proud of the success of the SCHIP program and are working with the Administration and Congress to ensure its timely reauthorization.

At a time when the number of Americans without health insurance has now grown to 47 million, this reversal of a decade-long policy of state flexibility to expand coverage is inexplicable and deeply troubling. Even more troubling was the manner in which the new policy was communicated without any consultation with the states. We have worked hard to promote the state and federal partnership on health care and hope to continue this relationship in the future.

This letter limits the authority given to states to craft and operate programs that are best tailored to their constituents. The stated reason for the release of the letter is that the Administration is concerned that there will be crowd-out of private payers for health insurance, but to date, there is limited evidence to suggest that there is a problem for this population.

According to the new requirements, states would no longer be allowed to expand their coverage above 250 percent of poverty unless they can guarantee that they have successfully enrolled 95 percent of the eligible children who are below 200 percent of poverty in either SCHIP or Medicaid. There is no information included in the letter as to whether the Administration is referring to 250 percent of gross or net income. For all of these reasons, states have indicated that this essentially will eliminate the opportunity to expand the program.

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States would further be required to provide the Administration with evidence that the number of children in the target population insured through private employers has not decreased by more than two percentage points over the prior five-year period. This new rule does not take into account that nationwide employer-sponsored health insurance is declining. There is no evidence to link the decline in employer-sponsored health insurance to public coverage for children.

The letter also requires states to impose a one-year waiting period for coverage regardless of circumstances. While most states have already imposed waiting periods in an effort to deter families from dropping private coverage, this rule would have the effect of forcing children to go without preventive care for a full year. This one year waiting period is also extended to pregnant mothers which could result in no prenatal care.

We urge the Administration to reaffirm its commitment to providing health care to low-income, uninsured children through Title XXI by rescinding the August 17, 2007, state health official letter and by working with the states to ensure a timely reauthorization of the SCHIP program. Please do not hesitate to contact Martha Roherty, Director of the National Association of State Medicaid Directors, at (202) 682-0100 if we can be of assistance.

Sincerely,



Bruce Goldberg  
Chair, Policy Council  
American Public Human Services Association



David Parrella  
Chair, Executive Committee  
National Association of State Medicaid Directors



Jerry W. Friedman  
Executive Director  
American Public Human Services Association



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ONE HUNDRED TENTH CONGRESS

**U.S. House of Representatives**  
**Committee on Energy and Commerce**  
**Washington, DC 20515-6115**

JOHN D. DINGELL, MICHIGAN  
CHAIRMAN

September 6, 2007

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GREGG A. ROTHSCHILD, CHIEF COUNSEL

The Honorable Michael O. Leavitt  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, D.C. 20201

Dear Mr. Secretary:

The reauthorization of the Children's Health Insurance Program (CHIP) is one of our top priorities for this Congress. CHIP, along with Medicaid, has cut the low-income uninsured rate for children in this country by one-third. The recent Census estimates show the number of uninsured children under the age of 18 grew by 1 million between 2004 and 2006, which underscores the importance of CHIP reauthorization. The House-passed CHIP bill (H.R. 3162) would reverse this trend, protecting the coverage of six million children currently covered by CHIP and providing new coverage through CHIP and Medicaid for an additional five million children who were previously uninsured.

Over the past seven years, the Administration has neglected its duty to protect the health of America's children, resulting in the dire situation that millions of families face today in securing affordable health coverage for their children. The Administration has threatened to veto the House-passed legislation in an attempt to derail a successful reauthorization that would reduce the number of uninsured children in the United States. Worse yet, the directive from the Centers for Medicare and Medicaid Services (CMS), released on the evening of Friday, August 17, 2007, would further exacerbate the situation. The CMS directive would limit the flexibility of States to extend CHIP coverage to uninsured children whose families are unable to afford private insurance coverage. According to the National Association of State Medicaid Directors, children in at least 18 States would be adversely affected by the CMS directive.<sup>1</sup>

The August 17 directive is a radical departure from current CHIP and Medicaid policy as set forth in Federal statute and CMS's own regulations. We are very concerned this directive would severely undermine the ability of States to make headway against the rising tide of uninsured and would result in tens of thousands of children losing their affordable insurance coverage.

<sup>1</sup> www.stateline.org "Medicaid Directors Object to SCHIP Rules," August 23, 2007.

CMS's sharp departure from existing policy is all the more egregious in that it was announced without any consultation with Congress, the States, or other stakeholders about the changes that were being considered or the nature of those changes.

It is very important that Congress understand the implications of and evidence behind CMS's radical policy shift that will further increase the number of uninsured children prior to the completion of CHIP reauthorization in September. In order to understand the implications of the August 17 directive for the CHIP program and the low-income children it covers, we request your response to the following questions by no later than September 14, 2007.

1. The CMS directive significantly changes the criteria for review and approval of State initiatives to provide low-income uninsured children with insurance coverage. The new directive requires States to make the following assurances:
  - Assurance that the State has enrolled at least 95 percent of the children in the State who are in families with annual incomes below \$34,340 for a family of three who are eligible for either CHIP or Medicaid;
  - Assurance that employer-sponsored coverage for children targeted by the State's program has not declined by more than two percentage points over the prior five-year period; and
  - Assurance that the State is current with all reporting requirements in CHIP and Medicaid along with monthly reports to prove that CHIP and Medicaid coverage is not causing employers to drop insurance coverage.
    - (a) Please provide a citation in the Federal statute or your own regulation where each of these tests appears both for States that have used their CHIP funds to expand Medicaid and for States that have operate a separate Title XXI program.
    - (b) Please cite each State that currently complies with each test.
    - (c) Please provide a list of the criteria used to approve State plans prior to the issuance of this guidance and a comparison of how each State will be affected under the new policy.
2. The directive indicates that States that currently provide healthcare services to children with annual family incomes over \$42,925 for a family of 3 will be expected to amend their program within 12 months to meet new requirements geared toward preventing employer-sponsored coverage from declining or no longer being offered, so called "crowd-out." States that wish to expand insurance coverage for children in families with annual incomes above \$42,925 for a family of 3 must meet new requirements in this regard as well.

- (a) Please identify each of the States that will be required to amend their current program to comply with the August 17 directive.
  - (b) Please identify each State that is currently planning to expand health insurance coverage to uninsured children that would be affected by the August 17 directive.
  - (c) For each affected State in (a) and (b) above, please inform the Committee of the number of children who would be affected and the amount of Federal Title XXI dollars at risk. If your list only includes States that have submitted State plans or 1115 waiver requests to CMS, please identify whether you are aware of other States that have enacted legislation to expand coverage but have not yet submitted a State plan amendment or section 1115 waiver request to CMS.
3. Half of all bankruptcies are caused by illness and medical debt, a problem pervasive even among those with insurance.<sup>2</sup> CHIP is intended to make insurance coverage more affordable for working families. Yet, the Administration's new guidance would appear to preclude States from protecting families from incurring potentially crushing out-of-pocket medical costs for children.
  - (a) What is the policy rationale for prohibiting States from protecting families from unaffordable out-of-pocket costs for children's health care?
  - (b) What studies or evidence did CMS use to develop and justify this new requirement that prevents States from ensuring coverage is affordable for all eligible children?
  - (c) Please describe the test that will be used to demonstrate that the cost-sharing requirements under a State's Medicaid or CHIP program is not better for children than the cost-sharing requirements under "competing private plans"?
  - (d) Which private plans will a State's coverage for children be compared to? Plans offered by employers? Plans offered in the non-group insurance market? Will there be any requirement that a plan used for comparison provide coverage to children?
  - (e) In order to make comparisons about the value of benefits or cost-sharing between different insurance products, actuaries must make certain assumptions with respect to utilization of services. Please describe the assumptions CMS will use in this regard.
4. According to data we have reviewed, few if any States will be able to meet the new CMS requirement that 95 percent of eligible children in families with annual incomes under \$34,340 for a family of 3 must participate in either the Medicaid or CHIP programs.<sup>3</sup> For this reason, the House-passed CHIP bill (H.R. 3162) targeted resources to States

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<sup>2</sup> U.S. News and World Report, "Medical bills lead to personal bankruptcy," February 2, 2005.

<sup>3</sup> Georgetown University Health Policy Institute Center for Children and Families, "Medicaid/SCHIP Participation Rate Among Low-Income Children Under 19, 2004-2005," August 29, 2007.

explicitly for the enrollment of children in such families. Yet the Administration provides no new funding for States that increase enrollment of eligible children, potentially leaving States that raise their coverage levels to comply with the 95 percent standard without sufficient funding to cover those children.

- (a) Please provide us the basis for your determination that 95 percent was the appropriate level to select for this new policy.
  - (b) Given the chronic problems with the accuracy of both current population survey (CPS) and American Community Survey (ACS) data, please identify the data sources a State may use in order to satisfy CMS that this 95 percent standard is met.
  - (c) Will States with existing programs that cover children within families with annual incomes above \$42,925 for a family of 3 be required to roll back their eligibility levels for children if they do not comply with all of the new conditions imposed, including the 95 percent participation rate?
  - (d) Given that few if any States will meet this new 95 percent participation test, please explain the statement in the last paragraph of the letter that CMS does not "expect any effect on current enrollees"?
5. Congress and the States have extensively reviewed the issue of "crowd-out" -- families substituting public coverage for employer-sponsored coverage -- over the course of the CHIP program. The Bush Administration's own 2001 report found that "crowd-out" is not a problem and CHIP is primarily serving children who would otherwise be uninsured.<sup>4</sup> Professor Jonathan Gruber, renowned "crowd-out" expert, has found that expanding coverage through public programs such as CHIP and Medicaid would have significantly less crowd-out than tax-based approaches such as those advocated by President Bush.<sup>5</sup> Yet, the CMS directive requires States to adopt a number of new procedures purported to address this issue. One such requirement in the new directive would force children to spend one year without any insurance coverage prior to receiving CHIP coverage.
- (a) Please provide the data and other evidence in literature CMS used to justify the imposition of this new requirement that children must forgo insurance coverage for one year.
  - (b) Please identify the specific provision in Federal statute and in CMS regulations where this one-year uninsurance period is expressly set forth.
  - (c) Please list each State that currently complies with this requirement that children forgo insurance coverage for one year.

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<sup>4</sup> J. Wooldridge, G. Kenney, C. Trenholm, *et al.*, "Congressionally-Mandated Evaluation of the State Children's Health Insurance Program," U.S. Department of Health and Human Services, conducted by Mathematica Policy Research and the Urban Institute, Oct. 25, 2005.

<sup>5</sup> Letter from Professor Gruber to Chairman John D. Dingell, February 28, 2007.

- (d) Please explain what medical or other benefit children will gain from being forced to forgo medical coverage for an entire year.
  - (e) Please describe the requirements of the one-year waiting period. Under what circumstances, if any, will exceptions be permitted?
6. The CMS directive would also require States to provide assurances that employer-sponsored coverage has not declined for children targeted by the State's program by more than two percentage points over the previous five years.
- (a) Does CMS have State-level data on private coverage changes over the past five years? If so, please provide this to the Committee.
  - (b) Please identify the basis for selecting the two percent standard adopted in the CMS directive.
  - (c) Please identify the specific data sources that a State may use in order to satisfy CMS that the 2 percentage point standard is met.
  - (d) Will CMS allow exceptions to the 2 percentage point standard, for example if a large employer in the State went out of business causing a pronounced drop in the number of children without health coverage?

If you have questions regarding this request, please contact us or have your staff contact Bridgett Taylor or Amy Hall with the Committee on Energy and Commerce staff at (202) 225-2927.

Sincerely,



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John D. Dingell  
Chairman



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Bart Stupak  
Chairman  
Subcommittee on Oversight and Investigations



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Frank Pallone  
Chairman  
Subcommittee on Health