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October 29, 2012

Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Attention: CMS-9995-IFC2  
P.O. Box 8016  
Baltimore, MD 21244-8016

RE: **CMS-9995-IFC2**  
**Comments on CMS' Interim Final Rule Changes to Definition of**  
**"Lawfully Present" in the Pre-Existing Condition Insurance Plan**  
**Program of the Affordable Care Act of 2010**

Dear Sir/Madam:

The National Immigration Law Center (NILC) respectfully submits the following comments to the Department of Health and Human Services, Centers for Medicare & Medicaid Services (CMS) in response to the [Interim Final Rule, CMS-9995-IFC2; Pre-Existing Condition Insurance Plan Program](#) (the Interim Final Rule).

NILC specializes in the intersection of health care and immigration laws and policies, offering technical assistance, training, and publications to government agencies, nonprofit organizations and health care providers across the country. In addition, NILC promotes policies such as the "Development, Relief, and Education for Alien Minors Act" (DREAM Act) that help reform the broken immigration system, and that create opportunities for immigrants to contribute and participate more fully to the nation's communities. For over 30 years, NILC has worked to promote and ensure access to health services for low-income immigrants and their family members.

Due to complex eligibility rules and other immigration-related barriers, noncitizens are three times more likely to lack health insurance than citizens.<sup>1</sup> This disparity in health coverage will increase under the Affordable Care Act of 2010 (ACA) because individuals who are not lawfully present are specifically ineligible to buy health insurance for themselves in the affordable insurance exchanges (exchanges) and remain ineligible for federal non-emergency Medicaid and the Children's Health Insurance Program (CHIP). Yet, despite this exclusion from affordable health care coverage, individuals, regardless of immigration status, will need to access the health care system at some point in their lives.

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<sup>1</sup> "Key Facts on Health Coverage for Low-Income Immigrants Today and Under Health Reform," Kaiser Commission on Medicaid and the Uninsured, Feb. 2012, *available at* <http://www.kff.org/uninsured/8279.cfm>.

For the reasons discussed below, we strongly oppose the exclusion of individuals granted deferred action by the U.S. Department of Homeland Security (DHS) under the Deferred Action for Childhood Arrivals (DACA) policy, from the U.S. Department of Health and Human Services' (HHS) list of immigration categories considered “lawfully present” for purposes of health coverage eligibility. Specifically, we oppose the amendment to the definition of “lawfully present” in the Pre-Existing Condition Insurance Plan (PCIP) program. (77 Fed. Reg. 52614, Aug. 30, 2012). This amendment to the PCIP also restricts access to other affordable coverage opportunities in the ACA for non-citizens because the PCIP’s definition of lawfully present is used to determine eligibility to purchase health coverage through the health insurance exchanges and obtaining affordability tax credits. As discussed below, the rule change lacks legal or policy justification and undermines the goals of both the ACA and the DACA policy.

## **Background**

In July 2010, the U.S. Department of Health and Human Services issued policy guidance in a letter to State Health Officials specifying which categories of non-citizens would be considered eligible as “lawfully residing” for Medicaid or CHIP. The July 2010 guidance helped states to implement the option enacted in the Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA) that provides affordable coverage to low-income children and pregnant women. HHS adopted the same definition used by Medicaid and CHIP for purposes of eligibility for the high-risk pool under the ACA, known as the Pre-Existing Condition Insurance Plan and codified at Title 45 Code of Federal Regulations Section 152.2. (75 Fed. Reg. 45013-45033, July 30, 2010). Under this definition, individuals granted deferred action by DHS are considered eligible as “lawfully present” for purposes of Medicaid, CHIP, and the PCIP. Thus, an individual granted deferred action who meets all other eligibility criteria should be able to enroll in the PCIP. 45 C.F.R § 152.2.

HHS adopted the PCIP’s definition of “lawfully present” for eligibility in the health insurance exchanges because the ACA allows only citizens and “lawfully present” non-citizens to purchase unsubsidized private health insurance through the ACA-created exchanges. (45 CFR § 155.20; 77 FR 18310, Mar. 27, 2012). To ensure consistency with HHS, the U.S. Department of Treasury adopted the PCIP’s definition of lawfully present to determine eligibility for the health insurance premium tax credits created under the ACA to help make private health insurance affordable. (26 CFR § 1.36B-1(g); 77 Fed. Reg. 30377, May 23, 2012). As a result, individuals granted deferred action are included among the “lawfully present” individuals eligible for these key provisions of the ACA.

On June 15, 2012, DHS announced that it would grant deferred action under its administrative authority to individuals residing in the United States who meet specific requirements. The DACA program was officially launched on August 15, 2012. Once an individual had been approved for deferred action under DACA, they would have been considered “lawfully present” under the definitions used by HHS for Medicaid, CHIP, and affordable coverage options under the ACA.

Yet, in an Interim Final Rule released and immediately effective August 30, 2012, HHS amended the PCIP’s definition of “lawfully present” to specifically exclude only those individuals granted deferred action under DACA from the definition of “lawfully present” by carving out an exception from the definition for these individuals at 45 CFR § 152.2(8). (77 Fed. Reg. 52614, Aug. 30, 2012). The Interim Final Rule’s new subsection provides that “[a]n individual with deferred action under the Department of Homeland Security’s deferred action for childhood arrivals process shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.” (45 CFR § 152.2(8); 77 Fed. Reg. 52614, 52616, Aug. 30, 2012).

### **Recommendation**

For the reasons discussed below, we recommend deletion of subsection 8 of 45 CFR § 152.2, effective immediately.

*(8) Exception. An individual with deferred action under the Department of Homeland Security’s deferred action for childhood arrivals process, as described in the Secretary of Homeland Security’s June 15, 2012, memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition.*

### **Rationale**

We recommend the deletion of subsection 8 of 45 C.F.R. § 152.2 for the following reasons:

- 1) The Interim Final Rule contradicts the purposes of the ACA.

The August 30<sup>th</sup> Interim Final Rule runs directly counter to the primary goals of the ACA—to expand access to affordable health care coverage to millions of currently uninsured individuals, to reduce overall health care costs, and to ensure that all consumers pay their fair share. The amendment to exclude individuals granted deferred action under the DACA process from those considered “lawfully present” under the ACA increases the number of individuals who will remain uninsured and blocks predominantly young and healthy individuals from buying their own health insurance.

Based on DACA’s eligibility requirements, individuals who may be granted deferred action under DACA are between the ages of 15 and 31 and live predominately in states such as California, Texas, New York, Illinois, and Florida, which have among the highest number of uninsured residents.<sup>2</sup> Many of the uninsured live in low-income, working families, with parents working in industries where employers do not offer health

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<sup>2</sup> “Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible under the Deferred Action Policy,” Migration Policy Institute, Aug. 2012, available at [http://www.migrationpolicy.org/pubs/FS24\\_deferredaction.pdf](http://www.migrationpolicy.org/pubs/FS24_deferredaction.pdf); see also “Health Insurance Coverage of Nonelderly 0-64, states (2009-2010), U.S. (2010),” Kaiser Commission on Medicaid and the Uninsured, available at <http://www.statehealthfacts.org/comparetable.jsp?typ=1&ind=126&cat=3&sub=39>.

coverage.<sup>3</sup> They are likely to be among those who do not have a regular source of care due to their income, lack of insurance, and immigration status.<sup>4</sup> But for this amendment, uninsured individuals granted deferred action under DACA would have had new options for affordable health coverage. Instead, because of the Interim Final Rule’s exclusion, uninsured DACA recipients, including many adolescents and women of child-bearing age, as well as some individuals with severe disabilities and chronic illnesses, are forced to remain uninsured and without a regular source of care for their health needs, even if they are willing and able to purchase their own health coverage.

2) The Interim Final Rule could lead to higher health insurance premiums for everyone.

By denying coverage opportunities to individuals granted deferred action under DACA, individuals who are healthier and younger than the general population will not be included in the health insurance risk pools created by the exchanges. However, in order to prevent adverse selection, where only those who need health insurance because they are sick or have chronic health conditions purchase insurance, sound health policy would allow as many people as possible to participate in the insurance pool so that the costs and contributions to the health system are spread more broadly. By increasing the number of young and healthy individuals who enter the insurance pool, insurers are able to reduce health insurance premiums for all.<sup>5</sup> In preventing DACA recipients from buying their own health insurance, the Interim Final Rule is likely to increase premium costs for everyone.

Because of their younger age, DACA recipients are expected to be healthy individuals with low medical costs. According to an analysis of the 2009 Medical Expenditure Panel Survey by the Center on Budget and Policy Priorities, people ages 15 to 30 years old have average per-capita medical spending of less than \$2,000 per year, a mere 44 percent of the \$4,456 per year that is spent on average by 31 to 64-year-olds. The majority of this age group—73 percent of people ages 15 to 30—also reports being in excellent or very good physical health, and 76 percent reports being in excellent or very good mental health.

Including individuals granted deferred action under DACA in the ACA’s definition of “lawfully present” would benefit all of us. These young, healthy individuals would be able to buy health insurance under the new health insurance exchanges, would be able to pay their fair share of their health care costs, and would be able to see a doctor on a

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<sup>3</sup> “Five Facts About the Uninsured Population,” Kaiser Commission on Medicaid and the Uninsured, Sept. 2012, available at <http://www.kff.org/uninsured/7806.cfm>.

<sup>4</sup> “Key Facts on Health Coverage for Low-Income Immigrants Today and Under Health Reform,” Kaiser Commission on Medicaid and the Uninsured, Feb. 2012, available at <http://www.kff.org/uninsured/8279.cfm>.

<sup>5</sup> “The Affordable Care Act: Helping the ‘Young Invincibles,’” Sargent Shriver Center National Center on Poverty Law, Aug. 31, 2012, available at <http://www.theshriverbrief.org/2012/08/articles/health-care-justice/the-affordable-care-act-helping-young-Invincibles>.

regular basis instead of remaining uninsured.<sup>6</sup> If these individuals are given access to affordable care under the exchanges, they will have access to preventive services, reducing their need for more costly emergency services.<sup>7</sup> Preventive services will also result in improved health outcomes. Decreased use of expensive emergency services, along with improved health outcomes, will benefit the entire health system.

3) The Interim Final Rule leads to higher health care costs, additional administrative burdens, and other unintended consequences.

Excluding individuals granted deferred action under DACA from the PCIP program, the health insurance exchanges, and the health insurance premium tax credits, does not eliminate their need for health care. Individuals granted deferred action under DACA who are of school- and working-age will still need access to affordable health care. Yet, due to the Interim Final Rule, they will remain without a regular source of care and instead will ignore or delay care and would be forced to rely on community health centers, hospital emergency rooms, and other safety net providers. As a result, health care costs for these individuals, as well as costs to the overall health care system, will remain high and could lead to poor health outcomes and increased health disparities. This exclusion will also shift the costs of their care to health care providers and local and state governments.

Moreover, instead of creating a more streamlined eligibility and enrollment system under the ACA, the Interim Final Rule will introduce additional complexity in eligibility rules and added administrative burdens and confusion for state agencies, eligibility workers, and patient navigators. Determining current immigrant eligibility rules for health care programs is already prone to error given the complexity of immigration law and inconsistent rules among different programs and states. These rules prevent many eligible immigrants and their citizen family members from participating in health programs.<sup>8</sup> Despite the ACA's attempts to streamline eligibility, states will need to navigate the differences in immigrant eligibility across public and private health coverage under the ACA. By further complicating the eligibility rules for "lawfully present" individuals under the ACA in this Interim Final Rule, states will need to create special business rules for their IT systems, and train patient navigators, consumer assistance programs, and

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<sup>6</sup> S. R. Collins, R. Robertson, T. Garber, and M. M. Doty, "Young, Uninsured, and in Debt: Why Young Adults Lack Health Insurance and How the Affordable Care Act Is Helping," The Commonwealth Fund, June 2012.

<sup>7</sup> *Id.* According to the Commonwealth Fund, "[n]early two of five (39%) young adults ages 19 to 29 went without health insurance at some time in 2011, and more than one-third (36%) had medical bill problems or were paying off medical debt. Of those who reported problems with medical bills or debt, many faced serious financial consequences such as using all of their savings (43%), being unable to make student loan or tuition payments (32%), delaying education or career plans (31%), or being unable to pay for necessities such as food, heat, or rent (28%)."

<sup>8</sup> "Gains for Children: Increased Participation in Medicaid and CHIP in 2009," Genevieve M. Kenney, Victoria Lynch, Jennifer Haley, Michael Huntress, Dean Resnick and Christine Coyer, Urban Institute, Aug. 2011, available at <http://www.rwjf.org/content/dam/farm/reports/reports/2011/rwjf70806>.

eligibility workers to distinguish among individuals granted deferred action under the DACA process and those granted deferred action on other grounds.

The exception to the definition of “lawfully present” will also exacerbate confusion about the ACA and frustrate states’ efforts to reach out to immigrant communities to encourage eligible individuals to enroll in coverage through the exchanges. Eligible non-citizens and their citizen family members are often reluctant to enroll in health coverage because of the complicated immigrant eligibility rules, difficult enrollment processes, and wrongful denials of eligibility. The Interim Final Rule further confuses immigrants and is likely to deter eligible families from enrolling. Thus, despite targeted outreach and education, the Interim Rule contributes to the overall message that immigrants, including those who are authorized to live and work in the United States, are excluded from health coverage. As a result, it will be difficult for states and HHS to accomplish the ACA’s goals of reducing health disparities and lowering overall health care system costs.

4) The Interim Final Rule sends mixed messages to lawfully present immigrants.

The Interim Final Rule contradicts the purposes and goals of the DACA program as described by the Secretary of the U.S. Department of Homeland Security and by the President of the United States on June 15, 2012. One of the motivating factors for the DACA program is to integrate individuals who meet certain requirements into the fabric of their communities, despite their previously undocumented status. As the President stated in his remarks at the Rose Garden on June 15, 2012, “[t]hese are young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper.”<sup>9</sup> The President and DHS singled out these immigrant children and youth as a particularly compelling group of individuals who do not fit under the administration’s immigration enforcement priority goals and should therefore be granted temporary relief from deportation. As the Secretary of DHS stated, “many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.”<sup>10</sup>

The DACA program ensures that eligible individuals can live in the United States without fear of deportation, and that they are able to work with authorization so that they might provide for themselves and their families. In order to ensure that they are healthy and productive at work, these individuals need access to affordable health insurance. Despite the administration’s recognition of these individuals’ circumstances and demonstrated value to our country, the Interim Final Rule sends a mixed-message by allowing them the opportunity to work and at the same time preventing them from buying

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<sup>9</sup> “Remarks by the President on Immigration,” President Barack Obama, June 15, 2012, *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>.

<sup>10</sup> “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” Memorandum from Secretary of Homeland Security, Janet Napolitano, June 15, 2012, *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

health insurance in the exchanges, even at full price, thereby undermining their ability to participate and contribute fully to the economy and to their communities. Now authorized to work, and pay state and federal income taxes, DACA recipients will be expected to fulfill their responsibilities as taxpayers without receiving the same benefits as other taxpayers: the opportunity to obtain affordable health care for themselves and their families. Their exclusion from the community of residents who could benefit from the ACA undermines the purposes of both the ACA and the DACA policy, which was meant to embrace immigrant youth as valued members of society.

5) The Interim Final Rule makes arbitrary distinctions and is unnecessary.

We disagree with the rationale provided in the Interim Final Rule for waiving the opportunity for public comment generally required before the promulgation of regulations. The reason given for waiving the delay of the effective date—that individuals eligible for the DACA process were a “new and unforeseen group” and that the PCIP program is a temporary program with limited funds—is not good cause for excluding individuals eligible for the DACA process from the definition of “lawfully present.” Although there is no single definition of lawfully present under the Immigration and Naturalization Act (INA), United States Citizenship and Immigration Services (USCIS) has stated that individuals granted deferred action under the DACA process will not accrue “unlawful presence” during the period of their deferred action status.<sup>11</sup> Granting deferred action to individuals or groups of individuals has been a long-standing practice. Furthermore, individuals granted deferred action by DHS have long been considered to be “lawfully present” by Congress and federal agencies. For example, the Real ID Act, passed by Congress in 2005, defines “approved deferred action status” as one form of “lawful status.”<sup>12</sup> Similarly, the Social Security Administration recognizes those with deferred action as lawfully present for purposes of Title II Social Security benefits.<sup>13</sup> Given the history and consistent recognition of individuals granted deferred action as lawfully present, the Interim Final Rule’s rationale that eligibility for this group of individuals granted deferred action was “unforeseen” is questionable.

Moreover, individuals granted deferred action based on grounds other than DACA remain eligible under the “lawfully present” definition at 45 CFR §152.2. It is unfair to distinguish between individuals granted deferred action through the DACA process and individuals granted deferred action for other reasons. Since this population was granted a form of relief already considered by HHS and other agencies to be “lawfully present,” the decision to exclude these particular individuals from eligibility is arbitrary and unnecessary.<sup>14</sup>

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<sup>11</sup> See <http://www.uscis.gov/childhoodarrivals>.

<sup>12</sup> See [Pub.L. 109-13](#), § 202(c)(2)(B)(viii) (May 11, 2005), codified at 49 U.S.C. § 30301 note.

<sup>13</sup> See Social Security Administration regulations at 8 C.F.R. §1.3(a)(4)(vi).

<sup>14</sup> It is equally unreasonable to rely on the rationale that this policy change is consistent with the policy under S. 3992, the Development, Relief, and Education for Alien Minors (DREAM) Act of 2010. Only the Senate version of the DREAM Act, which was never passed, excluded those eligible for the DREAM Act

Thank you for your attention to these comments. Please do not hesitate to contact me at 213.674.2829 or [huerta@nilc.org](mailto:huerta@nilc.org) if you have any questions.

Sincerely,

/s/

Alvaro M. Huerta  
Staff Attorney  
National Immigration Law Center

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from obtaining premium tax credits and cost-sharing reductions. The House version of the bill, HR 6497, which did pass, did not include a similar exclusion. S. 3992 is not valid legislative authority on which to base administrative regulations.