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VIA ELECTRONIC SUBMISSION

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

To Whom it May Concern:

On behalf of the National Council of La Raza (NCLR), the largest national Latino civil rights and advocacy organization in the U.S., we write to request that the U.S. Department of Health and Human Services (HHS) retract the amendment to its interim final rule (45 C.F.R § 152.2.) which bans individuals from seeking access to health care coverage programs established by the Affordable Care Act (ACA) if they are eligible for immigration relief under the Deferred Action for Children Arrivals (DACA) policy. The ban to health care services advanced by this rule and under similar guidance issued regarding Medicaid and the Children's Health Insurance Program (CHIP) fundamentally undermines the coverage goals under ACA. The rule is entirely absent of legal or policy justification and will leave up to 1.4 million individuals directly vulnerable to uninsurance.

NCLR respectfully requests consideration of these comments which call for the reinstatement of individuals granted deferred action by the U.S. Department of Homeland Security under the DACA policy as "lawfully present" for purposes of health coverage eligibility. Specifically, we oppose the change in the definition of "lawfully present" in the Pre-Existing Condition Insurance Plan program as well as the use of this definition in other provisions of the Affordable Care Act of 2010 (ACA) (77 Fed. Reg. 52614, Aug. 30, 2012) and related Medicaid and CHIP guidance.

In addition to removing health insurance for persons who would otherwise be considered lawfully present, this rule also jeopardizes coverage for many individuals who remain eligible for coverage and could cause great significant confusion and operationalization challenges as the ACA is fully implemented. Under the anticipation that more than seven in 10 individuals eligible for DACA will be Latino, NCLR has particular concern that this rule will further disenfranchise a community that faces systemic barriers to health care.

The Rule Change that Excludes DACA recipients from the ACA

On July 30, 2010, the U.S. Department of Health and Human Services (HHS) issued its definition of “lawfully present” for the purposes of determining which individuals would be considered eligible non-citizens under the Affordable Care Act. HHS codified the list of immigration categories considered “lawfully present” at Title 45 Code of Federal Regulations Section 152.2 for purposes of eligibility for the high-risk pool under the ACA, known as the Pre-Existing Condition Insurance Plan (PCIP). (75 Fed. Reg. 45013-45033, July 30, 2010). Under that definition, individuals granted deferred action by the U.S. Department of Homeland Security (DHS) are considered “lawfully present” for purposes of PCIP eligibility and can enroll in the PCIP if they meet all other eligibility criteria. 45 C.F.R § 152.2.

HHS adopted the same definition of “lawfully present” in its final eligibility rule, which indicates the immigration categories eligible to purchase private health insurance through the ACA-created health insurance exchanges. (45 CFR § 155.20; 77 FR 18310, Mar. 27, 2012). To ensure consistency with HHS, the PCIP definition of “lawfully present” also was adopted by the U.S. Department of Treasury in its final rule on eligibility for the ACA’s health insurance premium tax credits that will be available to taxpayers 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 other lawfully present individuals as eligible for these key provisions of the ACA.

This treatment of individuals with deferred action as lawfully present is consistent with other policies regarding eligibility for services. On July 1, 2010, The Centers for Medicare and Medicaid Services (CMS) issued a letter to state health officials (SHO) to extend federally-funded Medicaid and the Children’s Health Insurance Program (CHIP) to lawfully residing children and pregnant women as a state option, included a definition of “lawfully present” that made individuals granted deferred action eligible for these programs. Furthermore, individuals granted deferred action are designated as lawfully present for the issuance of other types of benefits and social services, including access to driver’s licenses.

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 for their arrival as a child. The DACA program was officially launched on August 15, 2012. Once an individual has been approved for deferred action under DACA, the ACA regulations would have classified them as “lawfully present” under the ACA provisions discussed above.

In an Interim Final Rule adjusting the PCIP program, HHS excluded individuals granted deferred action under DACA from the definition of “lawfully present” by carving out an exception 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). The DHS

decision to reverse health care eligibility policies for DACA recipients, and essentially to continue to treat them as undocumented, is not only harmful to their health insurance access but goes against the grain of traditional policies for deferred action individuals.

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:

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

The August 30th, amendment to 45 CFR § 152.2 runs counter to one of the primary goals of the ACA – to expand access to affordable health coverage to millions of currently uninsured individuals. The amendment to exclude individuals granted deferred action under the DACA process from those considered “lawfully present” under the ACA eliminates access to affordable coverage for a group of individuals who has disproportionately high levels of uninsurance.

The individuals who may be granted deferred action under DACA are between the ages of 15 and 30, the age range of individuals who are within the age range of individuals who are most likely to be uninsured in the U.S.¹ For instance, without accounting for immigration status, more than two-fifths of Latinos in this age range are uninsured. Many of the uninsured live in low-income, working families, with parents working in industries where employers do not offer health coverage.² They are likely to be among those who do not have a regular source of care due to their income, insurance, and immigration status.³ Individuals granted deferred action under DACA would have had new options for affordable health insurance and could have benefited under the ACA, but for this amendment to the rule.

¹ “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; 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>

² “Five Facts About the Uninsured Population,” Kaiser Commission on Medicaid and the Uninsured, Sept. 2012, *available at* <http://www.kff.org/uninsured/7806.cfm>

³ “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>

Denying DACA recipients pathways to insurance through conventional systems is also likely to expose these children and youth to exploitation that was supposed to end with the establishment of the ACA. If they are unable to find alternative pathways through employers, parents, or even schools, many will be forced to seek health care in the new “black market” of health insurance external to the individual exchanges, where premiums are already anticipated to be at least 15% higher than today’s extreme individual market prices. This will put health care out of reach for many, simply because of costs. There are also concerns the health care ban will create particular challenges for individuals whose employers decide to send workers to the individual exchange market for insurance, forcing them to expose the nature of their status to eliminate their employers risk for penalties.

2) The Interim Final Rule creates multiple ACA administrative challenges.

The Interim Final Rule will make it more difficult to streamline processes for individuals seeking health coverage, create more need for specialized training and systems. This could result in higher costs for states and for other administrators of ACA eligibility and enrollment. For example, two major issues that would need to be addressed include:

- a) **Individuals granted deferred action outside of the DACA policy will still be rightfully eligible for health insurance through the PCIP, exchanges, Medicaid, and CHIP.** Systematic Alien Verification for Entitlements (SAVE) – expected to be the underlying verification system for immigrant status – would need to be overhauled to make these distinctions and facilitate a process that ensures access for eligible individuals in the deferred action category. Such a nuance creates more possibility of errors in eligibility determinations during verification and more need for added secondary processes to ensure the enrollment of eligible individuals. Administrators would have to invest in training of health coverage facilitators to ensure fair access to health insurance.
- b) **DACA recipients would need a process to claim exemptions from mandates under the ACA.** Given that individuals granted DACA status would now be treated as “not lawfully present” for this purpose, the system would need to be built to ensure that they could claim a rightful exemption as such. This is particularly difficult given that these individuals are lawfully present for all other intents and purposes and may even carry documentation such as work permits and social security numbers that enable that that provide evidence of lawful status. These individuals are at high risk for undue penalties and other burdens due to confusion.

3) The Interim Final Rule may lead to higher health insurance premiums for everyone.

Denying coverage to individuals granted deferred action under DACA excludes individuals who are more likely healthier and younger than the general population from the newly created individual health insurance exchanges. In order to prevent a situation where only those who need health insurance purchase insurance, the ACA creates incentives and opportunities for more people and expand markets for insurance so that insurers can spread the risk and reduce the health insurance premiums for everyone. By increasing the number of young and healthy

individuals who enter the insurance markets, insurers are able to reduce the health insurance premiums for all. Preventing them from buying health insurance with or without tax credits will keep the DACA populations out of the insurance pool and thereby decrease the numbers of attractive participants for insurance markets.

4) The Interim Final Rule is likely to lead to higher health care costs.

Excluding individuals granted deferred action under the DACA process 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 need to rely on community health centers, hospital emergency rooms, and safety-net providers. As a result, health care costs for these individuals will be absorbed in unpredictable ways across the system. DACA recipients excluded from the ACA will average higher out-of-pocket costs for health care, eating in to their ability to provide for their families and invest in their communities. Those who experience emergency health situations will also be at risk to incur unmanageable health care expenses.

5) The Interim Final Rule sends mixed messages to DACA recipients.

The Interim Final Rule conflicts with the purposes and goals of the DACA program as described by the Secretary of the U.S. Department of Homeland Security (DHS) 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. The President and DHS singled out this group of immigrant children and youth as a particularly compelling group of individuals who do not fit under the administration's enforcement priority goals and should therefore be granted immigration relief. 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."⁴ 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. Despite the recognition of these individuals' circumstances, the Interim Final Rule sends a mixed-message by allowing them the opportunity to work and at the same time preventing them from buying health insurance, thereby undermining their ability to participate and contribute fully to the economy and to their communities.

⁴ "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>.

6) The Interim Final Rule makes arbitrary distinctions.

NCLR disagrees 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.” In fact, under the discretion of the Secretary of DHS, deferred action may be available to a range of individuals in the United States. Individuals granted deferred action have long been considered to be “lawfully present” by federal agencies as well as Congress.⁵ In fact, individuals granted deferred action based on grounds other than DACA remain eligible under the lawfully present definition at 45 CFR§152.2. It is unreasonable and 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. Finally, the decision to modify the PCIP reaches far beyond this program impacting the most extensive health coverage expansion and benefits under the ACA, provisions that were not intended to be temporary.

7) There are multiple indirect consequences of the Interim Final Rule.

NCLR is deeply concerned about the additional negative consequences for DACA recipients, immigrant communities, and Latinos writ large. If the rules become more complicated to implement, states may be deterred from taking up options that would promote coverage for lawfully present immigrants – including the Medicaid and CHIP option for children and pregnant women that includes lawfully present individuals. States may use the Administration’s rule as justification to make further restrictions on DACA recipients, a behavior already exhibited in states, such as Arizona, where those within governance structures are pervasively hostile to immigrants. Other states have also noted that this is equivalent to the administration “passing the buck,” by withdrawing resources that would have been previously been available to this group – a problematic political issue for future discussions about immigrants.

Immigrant health care and social service eligibility rules already are complex, but this action further complicates the policy by actually creating a pool of individuals who are sometimes considered lawfully present and at other times not. Beyond the confusion this creates for DACA recipients, this rule reinforces the myths that lawfully present immigrants are arbitrarily eligible for certain services or that they will be penalized for seeking care. It may discourage many

⁵ See, e.g., Social Security Administration regulations at 8 C.F.R. §1.3. The Real ID Act similarly defines “approved deferred action status” as one form of “lawful status.” [Pub.L. 109-13](#), § 202(c)(2)(B)(viii)(May 11, 2005), codified at 49 U.S.C. § 30301 note.

eligible individuals from taking up options for health care for which they are eligible. Finally, the rule creates further confusion for community-based organizations that are being inundated with questions from their clients about DACA. Even before the rule was announced, many community-based organizations were concerned about the confidentiality provisions of the DACA process and were hesitant to encourage their clients to apply. This rule makes it harder for organizations that are encouraging individuals to apply to assure their clients that they will not face negative consequences. NCLR Affiliates who are on the front lines of assisting DACA eligible youth with their applications have contacted us to ask about the rule and question whether they should encourage their clients to come forward to apply for DACA or if they should wait. This rule puts an obstacle in the way of a successful nationwide implementation of the DACA policy.

Thank you for your attention to these comments. NCLR believes that overturning the DACA health care ban would be firmly aligned with the Administration's stated intention to eventually ensure that DACA recipients can achieve a permanent legal 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."⁶ Unfortunately, this rule not only flies in the face of this sentiment, but may actually undermine the long-term efforts to ensure that immigrants have a full opportunity to integrate as they head down a pathway to citizenship. Please contact us via the contact information below should if you have any questions regarding these recommendations.

Sincerely,

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⁶ "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>.