



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:

Georgetown University's Center for Children and Families (CCF) is an independent, nonpartisan policy and research center whose mission is to expand and improve health coverage for America's children and families. Central to our work is providing research and policy assistance to federal and state policymakers and other interested parties on strategies for covering children and their families particularly those with low and moderate incomes. We do considerable analysis and research to improve Medicaid and the Children's Health Insurance Program (CHIP), particularly around streamlining enrollment and renewal systems.

We appreciate the opportunity to comment on the Interim Final Rule (77 *Fed. Reg.* 52614, Aug. 30, 2012) - Changes to Definition of "Lawfully Present" in the Pre-Existing Condition Insurance Plan Program of the Affordable Care Act of 2010 (ACA). In order to ensure that the unique health needs of young immigrants in America are addressed as the ACA continues to be implemented, CCF does not support the Rule's exclusion of certain immigrants from health coverage eligibility. We oppose the Rule's restrictive exception of youth considered "lawfully present" under the recently announced Deferred Action for Childhood Arrivals (DACA) to the definition of "lawfully present" in the Pre-Existing Condition Insurance Plan program (PCIP), as well as the use of this definition in other provisions of the ACA. In addition, under a separate Administration policy issued simultaneously with the Interim Final Rule, these youth will not be eligible for health care or coverage under Medicaid or CHIP. The rule change lacks legal or policy justification and undermines the coverage goals of the ACA. We are also concerned that this policy will complicate the eligibility process and result in children who are eligible experiencing barriers to enrollment. We recommend rescission of the Interim Final Rule for the reasons specified in more detail below.

Background

In July 2010, the Department of Health and Human Services (HHS) issued a definition of the term "lawfully present," to include the many categories of lawful immigration status that make a non-citizen "lawfully present" and eligible for coverage under the ACA. Included on the list are individuals granted deferred action by the Department of Homeland Security (DHS) in its exercise of administrative discretion. Initially, HHS codified the list at 45 CFR §152.2 to govern eligibility for the PCIP¹ and in subsequent rulemaking, HHS adopted the same definition of "lawfully present" in regulating which immigrants are eligible for medical coverage through the health insurance

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exchanges.ⁱⁱ Aligning with HHS, this definition was adopted by the Department of Treasury in its final rule on eligibility for the premium tax credits.ⁱⁱⁱ As such, individuals with a grant of deferred action from DHS are lawfully present individuals eligible for all key provisions of the ACA.

On June 15, 2012, DHS announced a new program to make deferred action available to certain deserving youth. Deferred Action for Childhood Arrivals (DACA) provides the status to young people in America between the ages of 15 and 30 who have completed high school, are currently enrolled in school, or are honorably discharged from the military, and who meet other specific requirements. The DACA program was officially launched on August 15, 2012. Once a young non-citizen has been approved for deferred action under DACA, he or she is “lawfully present.” However, on August 30, HHS issued the Interim Final Rule excluding these DACA youth from access to medical coverage under health reform, by carving out a DACA exception to the definition of “lawfully present.” The Rule requires 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.”^{iv}

A motivation for creating the DACA program is to integrate certain individuals 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.” The President and DHS singled out this group of immigrants 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.

The DACA program ensures that these young people are issued Social Security numbers and are authorized to work in the US, yet the prohibitions on eligibility for coverage and care promulgated by the Interim Final Rule erect the barriers to the benefits of health reform,^v making DACA youth:

- Not eligible for the currently-operational high-risk insurance pool (“PCIP”), unless there is a separate state-funded program.
- Not eligible to purchase private, comprehensive health insurance in the exchanges when it becomes available January 1, 2014.
- Not eligible for federal tax credits to make private health insurance affordable in the exchanges (even if these young people are paying federal taxes).
- Not eligible for the Basic Health Plan if their state creates this program.

Allowing these deserving young people the opportunity to work while at the same time preventing them from buying health insurance undermines their ability to participate and contribute fully to the economy and to their communities. It also undermines progress made in reducing disproportionately high rates of uninsurance among the nation’s young adults, whose jobs often do not provide them with coverage.

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 is inequitable. Deferred action is a form of relief that is available to a range of individuals in the United States, under the discretion of the Secretary of DHS. Individuals granted deferred action have long been considered to be “lawfully present” by federal agencies, as well as Congress. Despite the change in definition under the Interim Final Rule, individuals granted deferred action based on grounds other than DACA, such as a need for a medical procedure or treatment in the U.S., remain eligible for all ACA benefits, as they are considered to be “lawfully present.” It is unreasonable and unfair to distinguish between the youth granted deferred action through the DACA process and individuals granted deferred action for other reasons. The Rule treats DACA youth as different and “less than” other lawfully present immigrants and emboldens state lawmakers to discriminate against this group in providing other state services, as evidenced by the statements of Arizona’s Governor who found support in the Rule for restrictions on driver’s licenses and other services. The decision to exclude DACA beneficiaries from eligibility for the ACA’s medical coverage is unfair and unnecessary from any reasonable policy standpoint.

2. The Interim Final Rule undermines sound public health policy. The Interim Final Rule contradicts a primary goal of health reform – to expand access to affordable health coverage to millions of currently uninsured individuals, including noncitizens that are lawfully present. It also contradicts the policy of the 2009 Children’s Health Insurance Reauthorization Act which provided federal funds for medical coverage of lawfully present immigrant youth and pregnant women.

The Rule blocks access to affordable coverage by largely vulnerable, uninsured youth and young adults, exacerbating disparities and putting the health of a group of young people in America at risk. The individuals who may be granted deferred action under DACA live predominately in states such as California, Texas, New York, Illinois, and Florida, which have among the highest number of uninsured residents.^{vi} Many of the uninsured live in low-income, working families, with parents working in industries where employers do not offer health coverage.^{vii} They are likely to be among those who do not have a regular source of care due to their income, insurance, and immigration status.^{viii} Having a regular source of care eliminates costly emergency room visits and reduces overall future health care needs. Excluding the DACA youth from the coverage options in reform does not eliminate their need for health care, it merely blocks opportunities for preventive care and maintains a reliance on the health care safety net which research has shown contributes to poor health outcomes and increased health disparities.

3. The Interim Final Rule undermines the ACA’s goal of streamlined health care administration. Congress contemplated a streamlined eligibility and enrollment system under the ACA, yet the Interim Final Rule introduces unnecessary confusion and complexity. Administering the exclusion of DACA beneficiaries who, like many others with lawful presence will have a Social Security number and employment authorization, will require a level of inquiry into an applicants’ status that will increase processing time and the likelihood of erroneous eligibility determinations. Further, the Rule introduces an added level of confusion for applicants as well as those conducting outreach to immigrant communities to encourage noncitizens, especially the citizen and lawfully present children in mixed-status immigrant families, to sign up for coverage. States will now have to train navigators and other consumer assistance programs, as well as eligibility workers, about the

distinction between those with lawful presence under the DACA process and those with lawful presence based on other grounds. Eligible children in immigrant families will have to face additional barriers to enrolling in coverage, delaying access to health care.

4. The Interim Final Rule will increase health care costs for everyone. The exclusion of DACA beneficiaries increases the expense for states and other entities administering ACA eligibility, but the costs of coverage for everyone. DACA beneficiaries, who must be under the age of 30, are younger and healthier than the general population. Excluding them increases the proportion of unhealthy individuals in the newly-created exchanges, which would likely raise the costs of premiums for everyone. Additionally, many DACA beneficiaries will have to use emergency Medicaid, which is more costly to the state and federal governments than is providing access to a regular source of medical care. The young people will remain eligible for safety net care, also at increased costs to state and local governments. If they are excluded from the coverage under reform, health care costs for DACA beneficiaries, as well as costs to the overall health care system, will be higher.

Thank you for your attention to these comments. For further information, please contact Joan Alker, Co-Executive Director, Georgetown University Center for Children and Families at jca25@georgetown.edu or Dinah Wiley at dinahwiley@gmail.com.

ⁱ 75 *Fed. Reg.* 45013-45033 (July 30, 2010).

ⁱⁱ 45 *CFR* §155.20 (2012).

ⁱⁱⁱ 26 *CFR* §1.36B-1(g) (2012).

^{iv} 45 *CFR* §152.2(8) (2012).

^v In addition to the health care programs in the list below, under a separate Administration policy issued simultaneously with the Interim Final Rule, DACA youth will not be eligible for health care or coverage under Medicaid or CHIP. Department of Health and Human Services, Centers for Medicare and Medicaid Services, Center for Medicaid and CHIP Services: Individuals with Deferred Action for Childhood Arrivals, SHO# 12-002, August 28, 2012. Exceptions exist in states that have a separate, state-funded program, or that have elected a federal option to provide prenatal care regardless of immigration status.

^{vi} Migration Policy Institute, "Relief from Deportation: Demographic Profile of the DREAMers Potentially Eligible under the Deferred Action Policy" (August 2012); and Kaiser Commission on Medicaid and the Uninsured, "Health Insurance Coverage of Nonelderly 0-64, states (2009-2010)" (2010).",

^{vii} Kaiser Commission on Medicaid and the Uninsured, "Five Facts About the Uninsured Population" (September 2012).

^{viii} Kaiser Commission on Medicaid and the Uninsured, "Key Facts on Health Coverage for Low-Income Immigrants Today and Under Health Reform" (February, 2012).