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

Dear Sir/Madam:

The National Health Law Program (NHeLP) is a public interest law firm working to advance access to quality health care and protect the legal rights of low-income and underserved people. NHeLP provides technical support to direct legal services programs, community-based organizations, the private bar, providers and individuals who work to preserve a health care safety net for the millions of uninsured or underinsured low-income people.

For the reasons discussed below, we oppose the exclusion of young people granted deferred action by the U.S. Department of Homeland Security under the Deferred Action for Childhood Arrivals (DACA) policy, from the U.S. Department of Health and Human Services' list of immigration categories considered "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). The rule change lacks legal or policy justification and undermines the goals of the ACA.

This exclusion will negatively affect health outcomes for young immigrants and their children. Further, this decision will be particularly detrimental to immigrant women who will face severely restricted access to vital reproductive and sexual health care services and who already experience numerous barriers to health insurance and the health care they need. This decision will have lasting consequences for the health of these immigrant women and their families by restricting access to important preventive and pregnancy-related care.

Before the issuance of this Interim Final Rule and the August 28, 2012 Guidance from the Centers for Medicare and Medicaid Services to State Medicaid and Health Directors (SHO# 12-002), immigrants granted deferred action through DACA would have been considered "lawfully present," and, if they met other criteria, they would be eligible for expanded coverage options under the Affordable Care Act, specifically the ability to apply for and enroll in a Preexisting Condition Insurance Plan, to spend their own money to purchase insurance in the Health Insurance Exchanges ("exchanges"), and to apply for advanced premium tax credits (APTCs) to facilitate their participation in the Exchange. Additionally, pregnant women and those under 21 years of age with an income at or below a relevant level would have been eligible for expanded coverage under Medicaid and the Children's Health Insurance Program under the Children's Health Insurance Program Reauthorization Act in states that opted to cover lawfully pregnant women and children.

Excluding individuals granted deferred action under the DACA process from the PCIP program, the health insurance exchanges, APTCs, Medicaid, and CHIP does not eliminate their need for health care. According to recent estimates, 48% of the 1.78 million anticipated to the eligible for DACA are women, 72% are 15 years and older, over half are enrolled in K-12 education or college, and 58% were engaged in the labor force. This particular population is one that needs expanded, not restricted, access to healthcare, including sexual and reproductive health care. These young people, like all American youth, need access to quality and affordable preventive sexual and reproductive health care services and counseling including contraception to prevent, plan and space pregnancies; and to prevent sexually transmitted infection (STI) and gynecological cancers. Additionally, all immigrant women deserve coverage for the full range of vital maternity services that are necessary to promote positive maternal and newborn health outcomes.

The exclusions in the Interim Final Rule, in conjunction with the CMS Guidance, undermine the contributions of immigrants, as well goals of health reform and the Deferred Action for Childhood Arrivals (DACA) program. Immigrant youth who came to the United States as children have been deemed by the U.S. Government as particularly deserving of full integration in the fabric of our society. Their exclusion from health care coverage will only undermine that integration and will be particularly devastating to immigrant women, who face numerous injustices, including discrimination, in their efforts to pursue their dreams, care for themselves, and provide for their families. Prohibiting those who gain DACA status from important coverage options will only compromise their participation in educational and employment

opportunities, which in turn will diminish opportunities for entire immigrant families and communities.

The Rule Change that Excludes DACA beneficiaries from the ACA

In July 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 45 C.F.R. 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 Exchange eligibility rule, which indicates the immigration categories eligible to purchase un-subsidized 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" was adopted by the Department of Treasury in its final rule on eligibility for APTCs 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.

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 has been approved for deferred action under DACA, the ACA regulations would have classified them as "lawfully present" under the ACA provisions discussed above.

Yet, in an Interim Final Rule, 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).

Recommendation:

For the reasons discussed below, we oppose the exclusion of those granted DACA from eligibility for federal programs available to other individuals granted deferred action. As such 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 Interim Final Rule 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 young people granted deferred action under the DACA process from those considered "lawfully present" under the ACA eliminates access to affordable coverage for these vulnerable, uninsured individuals. The individuals who may receive deferred action under DACA are between the ages of 15 and 30, and live predominately in states that have among the highest number of uninsured residents.[1] Specifically, states with high instances of uninsured youth -- such as California (11.8%), Texas (15.6%), New York (6.6%), Illinois (6.2%), and Florida (13.0%) -- also have the largest number of people eligible for DACA.

But for this amendment to the PCIP rule, individuals granted deferred action under DACA would have seen new options for affordable health insurance and would have benefited under the ACA. Additionally, an estimated 500,000 children ages 5-14 will become eligible for DACA in the future. Many of these uninsured young people 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] Denying them access to health coverage due to their DACA status will not help or improve their long-term health outcomes.

2) The Interim Final Rule leads to higher health care costs and unintended consequences

[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

Excluding individuals granted deferred action under the DACA process from the PCIP program, Exchanges, and APTCs 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 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.

Excluding the teenagers and young adults granted deferred action under DACA from affordable health care options under the ACA will shift the costs of their care to health care providers and local and state governments.

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 confusion for state agencies, eligibility workers, and patient navigators. The exception will exacerbate the confusion as states reach out to immigrant communities to encourage them to enroll. States will now have to train patient navigators, consumer assistance programs, and eligibility workers about the distinction between those granted deferred action under the DACA process and those granted deferred action on other grounds.

3) 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 (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. 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.[4]

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

[4] "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.

areas, is especially justified here."[5] The DACA program ensures that eligible teenagers and young adults 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. To ensure that they are healthy and productive at work, these individuals need access to affordable health insurance. Despite the recognition of their individual circumstances, the Interim Final Rule sends a mixed-message by allowing them the opportunity to work but preventing them from accessing health insurance that would otherwise be available to them, thereby undermining their ability to participate and contribute fully to the economy and to their communities. The Interim Final Rule also prevents these young people and their families from the safety, relief, and assurance that health care coverage provides.

4) <u>The Interim Final Rule may have long-lasting health consequences for immigrant women by limiting access to coverage for preventive reproductive and sexual health care.</u>

The Interim Final Rule, in conjunction with the August 28, 2012 Guidance from CMS (SHO# 12-002), will significantly limit immigrant women's access to coverage of preventive care services. This in turn, may have long-lasting impacts on the health of immigrant women.

Immigrant women are less likely than U.S. born women to access preventive reproductive and sexual health care. Lack of health insurance and high out-of pocket costs are cited as one of the main factors limiting immigrant women's access to preventive health care, including reproductive and sexual health care.

And this lack of insurance has long-term health implications for immigrant women. Immigrant women, particularly of Latina and Asian descent, have higher cervical cancer incidence and mortality rates and lower screening rates compared to U.S. born women. Studies demonstrate that lack of health insurance is associated with a late stage cervical cancer diagnosis. Additionally, lack of health insurance and out-of-pocket costs are cited as principal reasons for not being screened. This lack of access to health insurance limits immigrants' access to other important preventive sexual and reproductive health care, including family planning services and testing for sexually transmitted infections (STIs) including HIV.

Immigrant women who will gain DACA status will be between the ages of 15 and 30, a key demographic in need of the full range of preventive reproductive and sexual health services to be productive and healthy. Expanding access to health coverage will help these women prevent the preventable (like cervical cancer, sexually transmitted

[5] "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.

infections, and unplanned pregnancy), establish healthy habits, and will have long-term positive impacts on immigrant women's health and their future families.

However, due to the Interim Final Rule, immigrant women granted DACA will be excluded from the important expansions in coverage for preventive services under the ACA. As of August 1, 2012 new private health insurance plans will provide a range of women's preventive health services with no additional co-pays, deductibles, or co-insurance. Some of these preventive health services include contraception (including patient education and counseling), cervical cancer testing, and testing and counseling for STIs and HIV. And starting in 2014, these services will be offered without cost sharing in plans offered on the exchanges. However, under the Interim Final Rule, hardworking immigrant women are prohibited from utilizing their own resources to purchase health insurance on the exchanges that would cover these important services.

Additionally the Interim Final Rule works in conjunction with the exclusion from Medicaid and CHIP in the states that took the CHIPRA option by reducing access to important preventive and sexual reproductive health care. Medicaid and CHIP are important sources of preventive sexual and reproductive health care, including family planning services and supplies and testing for STIs and cervical cancer. While these immigrant women will be eligible for services under Emergency Medicaid, this program generally does not cover important preventive care, like contraception.

5) <u>The Interim Final Rule could lead to negative reproductive health outcomes by limiting options for vital maternity care coverage</u>

The Interim Final Rule, in conjunction with the CMS Guidance (SHO# 12-002), will limit DACA-granted immigrant women's access to important coverage for their pregnancies, which may have lasting consequences on maternal and newborn health outcomes. The two policy changes will mean that the approximately 850,000 women who are expected to gain DACA status will have few options for health coverage during their pregnancies.

By excluding immigrant women granted DACA from the CHIPRA state option to provide Medicaid and CHIP to lawfully pregnant immigrant women and children, states will increasingly rely on the "unborn child" option in the Children's Health Insurance Program and Emergency Medicaid to provide vital maternity services to immigrant women. While these programs provide important coverage, they do not center the health care needs of women. The "unborn child" option in CHIP provides health coverage specifically for a woman's pregnancy, but not for the woman herself. This option may not include coverage for vital services, including post-partum care, which are important to promote positive maternal and child health outcomes.

The policy changes also mean that states may increasingly rely on Emergency Medicaid to provide coverage for this important care. While Emergency Medicaid covers emergency labor and delivery services for immigrant women, the program generally does not cover important prenatal and post-partum care. Additionally, these programs are not effective in containing costs or promoting positive health outcomes. Women

without prenatal care are four times more likely to deliver low-weight infants and seven times more likely to deliver prematurely than women who do receive prenatal care. Additionally, expanding access to prenatal care is a cost-effective strategy, as this care prevents complications and costly hospitalizations.

The Interim Final Rule additionally excludes immigrant women from important gains under the ACA to expanded access to quality and affordable pregnancy-related care. Under the reforms, all new private plans will cover important preventive health services, including pregnancy-related care, at no additional cost-share to patients. These services include prenatal visits, STI screenings, folic acid supplements, breast feeding supports, alcohol cessation supports, iron deficiency anemia screening, and gestational diabetes screenings. Under the ACA, maternity and newborn health care are one of the ten health services considered "essential health benefits" that must all plans offered on the exchanges must provide, as well as individual and small group plans offered outside the exchanges. Additionally, the ACA's prohibitions on certain insurance company practices -- including imposing caps on care, prohibiting gender rating and denying health insurance because of a pre-existing condition-- will expand coverage to health insurance for women before pregnancy. Yet immigrant women granted DACA will largely be left out of these tremendous gains, to the detriment of their health and the health of their families.

Lastly, the Interim Final Rule creates a patchwork of coverage options for immigrant women across the states and places further strain on an already-stressed safety net. Currently, only 15 states offer coverage under the "unborn child" option in CHIP. Access to safety net program and other state-based health care options for immigrants vary widely from state to state, and safety net programs have been greatly strained due to budgetary cuts and increased demand. For example, the Title X program has seen a loss of $24 million or 7.4% to its budget in two fiscal years, while the patient population has increased by 5% since 2007.

6) <u>The Interim Final Rule makes arbitrary distinctions and is unnecessary</u>

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." 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.[6] In fact, people granted deferred action based on grounds other than DACA

[6] *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.

remain eligible under the lawfully present definition at 45 CFR§152.2. It is unreasonable and unfair to distinguish between teenagers and young adults 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

Thank you for your attention to these comments. Please do not hesitate to contact Mara Youdelman, Managing Attorney at (202) 289-7661 or Youdelman@healthlaw.org if you have any questions.

Sincerely,

Emily Spitzer
Executive Director