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

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Headquarters:
450 Sutter Street
Suite 600
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Main 415-954-9988
Fax 415-954-9999
www.apiahf.org

Washington D.C. Office:
1828 L Street N.W.
Suite 802
Washington, D.C. 20036
Main 202-466-7772
Fax 202-466-6444

*National Advocates for
Asian American,
Native Hawaiian &
Pacific Islander Health*

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 Asian & Pacific Islander American Health Forum (APIAHF) thanks the Centers for Medicare and Medicaid Services (CMS) at the Department of Health and Human Services (HHS) for the opportunity to comment on and voice our opposition to the Interim Final Rule excluding DACA-eligible youth from accessing many of the affordable health insurance options available under the Affordable Care Act (ACA).

APIAHF is a national health justice organization that influences policy, mobilizes communities, and strengthens programs and organizations to improve the health of Asian Americans, Native Hawaiians, and Pacific Islanders. For 26 years, APIAHF has dedicated itself to improving the health and well-being of the 18.5 million Asian Americans, Native Hawaiians and Pacific Islanders living in the United States and its jurisdictions.

For the reasons discussed below, we oppose the exclusion of individuals 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.

APIAHF believes every individual, regardless of immigration status, should have a fair opportunity to attain optimal health and well-being. We are dismayed at the Interim Final Rule, which perpetuates inequity by treating DACA youth as less deserving than other lawfully present immigrants. Recent data from the Migration Policy Institute and Immigration Policy Center indicate that 8-9% of DACA-eligible youth are Asian, which amounts to more than 100,000 individuals. A significant number of Asians and Pacific Islanders are among the 82,361 immigrant youth who have already applied for deferred status under DACA, including 3,551 Koreans,

1,192 Filipinos, and 1,080 Indians.¹ The Interim Final Rule harms these Asian and Pacific Islander DACA youth by denying them access to crucial health care services.

Background

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 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.

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).

¹ New York Times *Quick Start to Program Offering Immigrants a Reprieve* published on September 11, 2012 retrieved from: http://www.nytimes.com/2012/09/12/us/program-offering-immigrants-reprieve-is-off-to-quick-start.html?_r=3&hp; See also <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DASStats-Sep.pdf>

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 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 individuals granted deferred action under the DACA process from those considered “lawfully present” under the ACA eliminates access to affordable coverage for vulnerable, uninsured individuals.

The individuals who may be granted deferred action under DACA are between the ages of 15 and 30, and live predominately in states such as California, Texas, New York, Illinois, and Florida, which have among the highest number of uninsured residents.² Many of the uninsured live in low-income, working families with family members that work for employers that do not offer health coverage.³ DACA-eligible individuals are likely to be among those who do not have a regular source of care due to their income and immigration status.⁴ 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.

Additionally, the Interim Final Rule undermines the ACA's goal of streamlining eligibility and enrollment. Instead, the Interim Final Rule will introduce additional complexity to eligibility rules and confusion for state agencies, eligibility workers, and patient navigators. 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. This exception will also exacerbate public confusion about program eligibility as states begin their enrollment outreach to immigrant communities.

2) The Interim Final Rule could increase health insurance premiums for everyone

Denying coverage to individuals granted deferred action under DACA excludes individuals who are healthier and younger than the general population from the

² “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/comparabletable.jsp?typ=1&ind=126&cat=3&sub=39>

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

⁴ “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>

newly created health insurance risk pools in the exchanges. In order to prevent adverse selection, where only those who need health insurance purchase insurance, the ACA creates incentives and opportunities for more people to enter the insurance pool so that insurers can spread the risk and reduce the health insurance premiums for everyone. However, the Interim Final Rule excludes young, healthy individuals of working age from the new health insurance pool in the exchanges. Preventing them from buying health insurance with or without tax credits will keep this healthy population out of the insurance pool and thereby increase the likelihood of adverse selection, which ultimately will keep premium costs high for everyone in the pool. If health insurance is too costly, individuals may find purchasing insurance through the exchange unaffordable and are likely to remain uninsured, further reducing the number of individuals in the insurance pool.

Including individuals granted deferred action under the DACA process in the definition of “lawfully present” under the ACA, would benefit all Americans. 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 regular basis instead of remaining uninsured.

3) The Interim Final Rule will lead to higher health care costs

Excluding individuals granted deferred action under the DACA process from the PCIP program, health insurance exchanges, and 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 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 individuals 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.

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 (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.”⁵ 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

⁵ “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>.

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.”⁶ 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 recognition of these individuals’ circumstances, the Interim Final Rule sends a mixed-message by allowing them the opportunity to work while preventing them from buying health insurance, thereby undermining their ability to participate and contribute fully to the economy and to their communities.

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.” 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.⁷ 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.

Conclusion

We support the comments submitted by the National Immigration Law Center and urge CMS to delete subsection 8 of 45 CFR § 152.2. Thank you for your attention to these comments. Please do not hesitate to contact Priscilla Huang, Policy Director, at phuang@apiahf.org if you have any questions.

Respectfully,



Kathy Lim Ko, President and CEO
Asian & Pacific Islander American Health Forum
(San Francisco, CA and Washington, DC)

⁶ “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>.

⁷ 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.