CLASP
policy solutions that work for low-income people

VIA ELECTRONIC SUBMISSION

October 18, 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:

CLASP is a national organization that works to improve the lives of low income people through developing and advocating for federal, state and local policies that strengthen families and create pathways to education and work. We appreciate this opportunity to comment on the rule changes regarding health access provisions for immigrants granted deferred action through Deferred Action for Childhood Arrivals (DACA).

We have significant concerns about the exclusion of individuals granted deferred action by the U.S. Department of Homeland Security (DHS) under the 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. Intentionally excluding one category of people who would otherwise be eligible to access health coverage under the Affordable Care Act (ACA) of 2010 undermines the goals of the law to ensure access to affordable health care. In fact, it does quite the opposite by creating a barrier to health care access. We oppose the change in the definition of "lawfully present" in the Pre-Existing Condition Insurance Plan (PECIP) program as well as the use of this definition in other provisions of the ACA (77 Fed. Reg. 52614, Aug. 30, 2012) to restrict individuals from access to health coverage programs.

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, they would have been classified as "lawfully present" under the ACA regulations issued in July 2010 (75 Fed. Reg. 45013-45033, July 30, 2010).

However, in the Interim Final Rule issued in August 2012, 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 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. Moreover, it is contrary to the overall goal of the ACA to include as many people as possible in health care coverage in order to pool risks and remove the burden of providing for uninsured individuals from hospitals and other health care providers.

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.[1] 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.

Individuals granted deferred action have long been considered to be "lawfully present" by federal agencies as well as Congress.[4] In fact, individuals granted deferred action based on grounds other than DACA remain eligible under the lawfully present definition at 45 CFR§152.2.

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[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

[4] *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.

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 has no legal basis.

CLASP strongly recommends the deletion of subsection 8 of 45 CFR § 152.2:

~~*(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.*~~

Thank you for your attention to these comments and we welcome any questions you may have.

Sincerely,

Helly Lee
Senior Policy Analyst