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VIA ELECTRONIC SUBMISSION

October 21, 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 Madam or Sir:

This letter is to urge you to set our health insurance policies to be as inclusive as possible of everyone living in the United States, particularly our immigrant children. We make this request because it is healthier for our nation if everyone has access to health care, because it fulfills our national values as expressed by the Statue of Liberty, and because the problem of health care for immigrants impaired our ability to organize an effective community organization to serve immigrants in Tuscarawas County, Ohio.

The origin of Central American immigration to Tuscarawas County, Ohio

Our story begins with a chicken processing plant in Winesburg, Ohio, owned by Case Farms. In the 1990's, this plant employed hundreds of local workers. They began organizing a union with the United Food and Commercial Workers (UFCW), Local 880. UFCW represents the workers at Park Poultry in nearby Canton, Ohio. The wage difference of two to three dollars between the union and non-union plants was not enough to persuade workers to support the union. Soon, the English speaking workers who had supported the union at Case Farms were out, and Guatemalans and Salvadorans from the North Carolina plants were in.

We formed an informal group called Hispanic Support Group (HSG). We organized social events to allow the immigrant and native communities to mingle, and to distribute health and legal

information. We discovered that distribution of Spanish language written materials had little effect in an immigrant community with limited literacy, and spoke native Mayan languages (with Spanish as a second language). Soon we organized volunteer English classes and religious services, both Catholic and Protestant.

Meanwhile, UFCW did not give up the organizing drive. Its lead staff organizer, Tim Mullins, "salted" into the chicken plants. He got to know the immigrant workers as co-workers. He learned Spanish.

We create HMTC to organize English classes, computer classes, and leadership development

By 1997, HSG leaders and area clergy felt the immigrant community had grown so that a more formal organization, with paid staff, was needed. We incorporated Hispanic Ministries of Tuscarawas County, Inc. (HMTC), as a 501(c)(3) organization. We received grants from Catholic and Protestant denominations, employed a coordinator, and increased the number and types of classes and activities. Richard served as one of the presidents of HMTC. Two Kent State University graduate students produced a documentary movie about the Hispanic immigration to Tuscarawas County, and the community's adjustment. It is called *2000 Miles North*.

HMTC suffered a turnover of paid staff that made it difficult to develop long term projects. In our opinion, the principal problem was that immigrants needed to rely on any bilingual person they knew for transportation to and translation at medical visits. As the immigrant community continued to grow, the demand for health services quickly outpaced the abilities of even the most experienced staff. As board members, we worked with coordinators to have the strength to say no when immigrants called for rides to the doctor, dentist or even the hospital, but it is just too hard for anyone in a caring position to say no to someone who needs medical help, and depends on their only bilingual friend to take them. Even though Case Farms offered health insurance to its employees, the substantial portion of its workers who lack immigration documentation could not use the health insurance. The insurance company would not pay claims for workers using false papers (even if an agent of the employer secured those false papers for the worker).

In Morganton, North Carolina, the Laborers International Union won a union election at a Case Farms plant. The company and union, however, failed to agree on a first contract. Even with a labor-church coalition and a national corporate campaign (led by the National Immigrant Worker Justice Coalition in Chicago), Case Farms would not negotiate, and eventually got the union decertified.

Since our last coordinator resigned in 2003, HMTC has not employed any new staff. Fortunately, St. Joseph's Catholic Church, with support of the Immigrant Worker Project, filled the void for coordinating English classes, the new computer and literacy classes, and other programs and activities for the immigrant community. St. Joseph's Catholic Church employed Laura as Pastoral Associate for Hispanic Ministries. She provided support for the Spanish language congregation at St. Joseph's, led a women's group, assisted victims of domestic violence, coordinated a baptism class, and continued the individual services that are so often needed. The tension between doing her job and responding to medical needs was a daily struggle. In 2008, we moved to the Washington, DC, area to pursue other career opportunities. Yet, our heart still aches for all

that we could not accomplish for our community in Ohio due to the lack of adequate health insurance for immigrants.

Our main point

Here is our main point: When our nation fails to provide medical insurance and services to everyone, then the burden will fall on others. The burden falls particularly hard on those who are already working with immigrants and these people have plenty of important things to do that won't get done when our national policies leave millions of immigrants uninsured. It should be obvious enough that infectious diseases are more likely to spread when a significant population faces hurdles that prevent access to primary and preventative care. It is also obvious that chronic diseases will be more expensive when they are treated in hospital emergency rooms instead of through a family doctor. Let us also make clear that leaving immigrants uninsured imposes a burden on social services, community organizations, churches and anyone else in the community who responds to a neighbor's urgent medical need. But we all have other things to do. We are not particularly trained to provide health care. We tried to raise money for other programs that now cannot be accomplished.

In particular, 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.

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 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 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" 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).

Our 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.

Please delete this paragraph so that our neighbors with deferred action are counted as lawfully present and eligible for health insurance.

Our 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.¹ Many of the uninsured

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

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.

2) The Interim Final Rule could lead to higher 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 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. By increasing the number of young and healthy individuals who enter the insurance pool, insurers are able to reduce the health insurance premiums for all.

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 health insurance 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 of us. 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 leads to higher health care costs and unintended consequences

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

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>

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.

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.

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.”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 areas, is especially justified here.”⁵ 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 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.

5) The Interim Final Rule makes arbitrary distinctions and is unnecessary

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>.

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>.

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, 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.

Your decision to delete subsection 8 of 45 CFR § 152.2 can make an immediate and positive difference to the public health, and to the efforts of citizen volunteers working for a wide variety of community developments.

Thank you for your attention to these comments. Please do not hesitate to contact either of us if you have any questions.

Sincerely,



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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.