

October 29, 2012

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-9995-IFC2
P.O. Box 8016
Baltimore, MD 212-8016

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 Children's Defense Fund appreciates the opportunity to submit comments on the Interim Final Rule for the Pre-Existing Condition Insurance Plan (PCIP) Program of the Affordable Care Act of 2010 (ACA). CDF's Leave No Child Behind® mission is to ensure every child a *Healthy Start*, a *Head Start*, a *Fair Start*, a *Safe Start* and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. CDF provides a strong, effective and independent voice for *all* the children of America who cannot vote, lobby or speak for themselves. We pay particular attention to the needs of poor and minority children and those with disabilities. CDF educates the nation about the needs of children and encourages preventive investments before they get sick, drop out of school, get into trouble or suffer family breakdown.

For years CDF has worked to ensure health coverage for ***all*** children that is comprehensive, accessible and affordable and we believe the Affordable Care Act (ACA) moves us closer to that goal. The ACA took important steps to address the unique health needs of ***all*** children in America – including young immigrants. Therefore, we strongly oppose the new definition of "lawfully present" in the PCIP that excludes certain immigrant children and young adults from health coverage eligibility in the PCIP and as a result from other parts of the ACA where this definition of "legally present" will be used. The Rule's restrictive exception of youth benefiting from the Deferred Action for Childhood Arrivals (DACA) policy from the definition of "lawfully present" moves us backward rather than forward in meeting the goal of ensuring health care for all children. Similarly, we also oppose the exclusion of these youth from eligibility for Medicaid and CHIP, recently announced in a separate Administration policy issued simultaneously with the Interim Final Rule for the PCIP Program. The change in the Interim Final Rule lacks either legal or policy justification and, as we mentioned, undermines the coverage goals of the ACA. We are also concerned that this new policy will complicate the eligibility process and result in many children who are eligible under the ACA experiencing barriers to enrollment.

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 ACA.[1] 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.[2] HHS then adopted the same definition of "lawfully present" in its final eligibility rule, which indicates the immigration categories eligible to purchase an un-subsidized private health insurance plan through the ACA-created health insurance exchanges.[3] To ensure consistency with HHS, the PCIP definition of "lawfully present" was also 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.[4] 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 then announced that it would grant deferred action under its administrative authority to individuals residing in the United States who meet specific requirements. The Deferred Action for Childhood Arrivals (DACA) program was officially launched on August 15, 2012 and ensures these young people will be issued Social Security numbers and are authorized to work in the United States. 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 the Interim Final Rule that was subsequently released on August 30, 2012, HHS *excluded* individuals granted deferred action under DACA from the definition of "lawfully present" by carving out an exception for these individuals: "[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."[5] This makes DACA youth not eligible:

- For the currently-operational high-risk insurance pool (PCIP), unless there is a separate state-funded program;
- To purchase private, comprehensive health insurance in the exchanges when they become available January 1, 2014;
- For federal tax credits to help purchase private health insurance in the exchanges (even if these young people are paying federal taxes); and
- For the Basic Health Plan if their state creates the program.

CDF also strongly opposes the exclusion of DACA children and young adults from coverage through Medicaid and CHIP, as detailed in a separate Administration policy issued simultaneously with the Interim Final Rule.[6]

---

[1] HHS codified the list of immigration categories as 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 (75 Fed. Reg. 45013-45033, July 30, 2010).

[2] 45 CFR §152.2

[3] 45 CFR §155.20; 77 Fed. Reg. 18310, March 27, 2012

[4] 26 CFR § 136B-1(g); 77 Fed. Reg. 30377, May 23, 2012

[5] 45 CFR §152.2(8); Fed. Reg. 52614, 52616 August 30, 2012

[6] 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.

For the reasons discussed below, CDF strongly opposes the Rule's exclusion of certain immigrant children from health coverage eligibility and urges you to delete subsection 8 of 45 CFR § 152.2, effective immediately.

(1) The Interim Final Rule undermines the purpose of the ACA and is not sound health policy.

The Interim Final Rule contradicts one of the primary goals of health care reform: to expand access to health coverage to the millions of uninsured individuals, including noncitizens who are lawfully present in the United States. It also contradicts the policy of the 2009 Children's Health Insurance Program Reauthorization Act (CHIPRA), which made federal funds available for health coverage of lawfully present immigrant children and pregnant women.

The Rule blocks access to affordable health coverage for vulnerable, uninsured children and young adults, exacerbating disparities and putting the health and well-being of this group of young people in America at serious risk. Those individuals who may be granted deferred action under DACA are between the ages of 15 and 30 and live predominantly in states such as California, Texas, New York, Illinois and Florida, which have among the highest number of uninsured residents.[7] Many uninsured children and young adults live in low-income, working families, with parents working in industries where the high cost of health coverage has forced their employers to drop coverage for employees and their families.[8] These families are more likely to be among those who do not have a regular source of care due to their income, insurance and immigration status.[9] Excluding the DACA youth from coverage options under the Interim Final Rule does not eliminate their need for health care, but merely reduces their opportunities for preventive care, thereby maintaining reliance on community health centers, hospital emergency rooms and other safety net providers, which contributes to poor health outcomes and increased health disparities, as well as increased costs to the individual and the community.

(2) The Interim Final Rule will increase health care costs for states and local communities.

In order to prevent adverse selection, where only those who need health insurance purchase health insurance, the ACA creates incentives and opportunities for more people to enter the health insurance pool so that insurers can spread the risk and reduce health insurance premiums for all. DACA beneficiaries, who must be under the age of 30, are younger and healthier than the general population. Excluding them from coverage increases the proportion of unhealthy

---

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.

[7] 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)."

[8] Kaiser Commission on Medicaid and the Uninsured, "Five Facts About the Uninsured Population" (September 2012).

[9] Kaiser Commission on Medicaid and the Uninsured, "Key Facts on Health Coverage for Low-Income Immigrants Today and Under Health Reform" (February. 2012).

individuals in the newly-created health insurance exchanges, which is likely to raise the costs of premiums for everyone. Additionally and as noted earlier, health needs do not magically disappear when public or private insurance coverage is not available. Many DACA beneficiaries will seek emergency care when they become sick, requiring state and local communities to absorb the entire cost of care for these uninsured youth. The costs of caring for the uninsured are substantial and it is far less cost-effective than providing access to a regular source of medical care. For example, an uninsured child costs the local community $2,100 more than providing coverage for a child through Medicaid or CHIP.[10]

(3) The Interim Final Rule undermines the ACA's goal of streamlined access to health coverage.

Through the ACA, Congress sought to create a streamlined eligibility and enrollment system that would make it *less* burdensome for families to navigate their health coverage options and gain access to that for which they are eligible. The DACA exemption only complicates the process for families and undermines this important goal of the ACA. Determining the exclusion of DACA youth 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 an incorrect eligibility determination. The Rule adds a level of confusion to the eligibility process for not only the applicant, but those engaged in outreach and enrollment efforts to immigrant communities to enroll in coverage. We are particularly concerned about this effect on immigrant children, as even if eligible, they will face additional barriers to enrolling in coverage resulting in delayed access to health services during critical developmental years.

(4) The Interim Final Rule is unjust.

"Deferred action" is a form of relief already available to a range of individuals in the United States under the Secretary of the Department of Homeland Security, and individuals who have been granted deferred action have long been considered by both Congress and federal agencies to be "lawfully present" in the United States. Individuals granted deferred action based on grounds other than DACA (e.g. need for a medical procedure or treatment in the United States), will remain eligible for all other relevant benefits under the ACA based on their "lawfully present" status; it is only eligibility for children and young adults receiving "deferred action for children arrivals" status who will be ineligible for coverage. Because the Interim Final Rule treats DACA children and young adults differently than other lawfully present immigrants, we are concerned this could become a very damaging precedent for policymakers looking further discriminate against immigrants.

Thank you for the opportunity to respond to the request for comments on the Interim Final Rule for the Pre-Existing Condition Insurance Plan Program of the Affordable Care Act of 2010 (ACA). We appreciate your consideration of our comments and would be pleased to discuss them with you further. Thank you for your leadership in promoting quality, affordable health care for children.

[10] Rimsza, M. et al. Impact of Medicaid Disenrollment on Health Care Use and Cost. Pediatrics, 119. e1026-e1032. 2007

Sincerely yours,



Alison Buist, PhD
Director, Child Health
abuist@childrensdefense.org; 202-662-3586



Kathleen King
Senior Policy Associate, Child Health
kking@childrensdefense.org; 202-662-3576