WASHINGTON
LEGISLATIVE OFFICE

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

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

RE: **CMS–9995–IFC2**
Comments on the Centers for Medicare & Medicaid Services' (CMS) Interim Final Rule Changes to the Definition of "Lawfully Present" in the Pre-Existing Condition Insurance Plan Program of the Patient Protection and Affordable Care Act of 2010

To Whom It May Concern:

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than a half-million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to enforcing the fundamental rights of the Constitution and laws of the United States. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. The Washington Legislative Office (WLO) represents the interests of the ACLU before Congress and the executive branch of the federal government. The ACLU submits these comments to express its strong opposition to the exclusion from health coverage under the Patient Protection and Affordable Care Act of 2010 (ACA)[1] of individuals granted deferred action by the Department of Homeland Security (DHS) under the Deferred Action for Childhood Arrivals (DACA) initiative.

The Department of Health and Human Services' (HHS) change in the definition of who is considered "lawfully present" for purposes of the Pre-Existing Condition Insurance Plan program, as well as two other provisions

[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter "ACA"].

of ACA, is detailed in 77 Fed. Reg. 52614 (Aug. 30, 2012). HHS's rule change to exclude DACA beneficiaries is unsupported and therefore arbitrary and capricious agency action in violation of the Administrative Procedure Act (APA). It will jeopardize the health of vulnerable members of our communities, including immigrant women and adolescents, at great humanitarian and monetary cost. HHS should reverse its mistaken course of action and delete the following subsection 8 of 45 C.F.R. § 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.

I. Introduction

Section 1201 of the ACA prohibits health insurance issuers from denying coverage or inflating rates based on pre-existing conditions.[2] This provision does not take effect until January 1, 2014.[3] For the interim period, the ACA directs the Secretary of HHS to establish a temporary high-risk health insurance pool program.[4] HHS fulfilled its mandate by issuing an interim final regulation ("IFR") that was published on July 30, 2010.[5] This IFR made all persons eligible to participate in the program, known as the Pre-Existing Condition Insurance Plan program ("PCIP"), who are "citizen[s] or national[s] of the United States or lawfully present in the United States."[6] The IFR in turn defined noncitizens "currently in deferred action status" as "lawfully present."[7] This definition is identical to the relevant definitions of "lawfully residing" in HHS guidance letters defining eligibility for Medicaid and the Children's Health Insurance Program ("CHIP").[8]

Aside from the PCIP, HHS's rule change also alters eligibility for two other ACA benefits. Sections 1311 and 1401 of the ACA call for the establishment of state health insurance exchanges, which will allow individuals and businesses to compare policies and buy insurance—with tax credits and other subsidies, if eligible.[9] These sections give broad discretion to HHS and the Internal Revenue Service ("IRS") to implement and oversee the exchanges and tax credits, which begin on January 1, 2014. Both final regulations

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[2] *Id.* § 1201.
[3] Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52,614 (Aug. 30, 2012) (to be codified at 45 C.F.R. pt. 152).
[4] ACA § 1101.
[5] Pre-Existing Condition Insurance Plan Program, 75 Fed. Reg. 45013 (Jul. 30, 2010) (codified at 45 C.F.R. pt. 152).
[6] *Id.*
[7] *Id.*
[8] *Id.* Concurrently with its rule change excluding DACA recipients from PCIP eligibility, HHS also issued a guidance letter to state health officials and Medicaid directors dated August 28, 2012, that amended the definition of "lawfully residing" for purpose of Medicaid and CHIP eligibility. HHS should also rescind this guidance letter.
[9] ACA §§ 1311, 1401.

implementing the ACA's mandate to create exchanges and tax credits initially adopted a definition of "lawfully present" that would have included DACA beneficiaries by cross-referencing the definition in the IFR governing the PCIP. The exclusion of DACA recipients from eligibility for the PCIP also, therefore, excludes DACA recipients from the exchanges and the tax credits.[10]

HHS has failed to provide a sufficient rationale for its profoundly harmful deprivation of access to health insurance for DACA beneficiaries. The rule change should immediately be rescinded.

II. The sole rationale supporting HHS's rule change, that the reasons "DHS offered for adopting the DACA process do not pertain to eligibility for Medicaid or CHIP" is incorrect.

HHS's rule change is premised on the assertion that: "As DHS has explained, the DACA process is designed to ensure that governmental resources for the removal of individuals are focused on high priority cases, including those involving a danger to national security or a risk to public safety, and not on low priority cases." Operating in a field – immigration law – which does not qualify for deference based on HHS's expertise,[11] the agency concluded in cursory fashion that DHS's purported explanation is irrelevant to eligibility for health coverage.

In fact, however, there is far more to DACA than DHS's resource prioritization. Indeed, the setting of priorities and exercise of prosecutorial discretion by DHS are simply a means to the end of formally including DACA beneficiaries within the American community based on their social and economic contributions, past and future. Such categorical recognition by DHS and the administration as a whole is what distinguishes DACA beneficiaries from those who similarly lack a permanent immigration status and are not DHS priorities, but have not been granted deferred action.

HHS's exclusive reliance on DHS Secretary Napolitano's June 15, 2012, DACA announcement ignores the wider context and intent of the initiative, which directly supports eligibility for health coverage. President Obama's statement that day underscored the affirmative goal of keeping DACA-approved young people in the United States: "[I]t makes no sense to expel talented young people, who, for all intents and purposes, are Americans – they've been raised as Americans; understand themselves to be part of this country – to expel these young people who want to staff our labs, or start new businesses,

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[10] *Id*.

[11] No deference is given to an agency's interpretation of a statute that it does not administer or is outside of its expertise. *See, e.g.*, *Trung Thanh Hoang v. Holder*, 641 F.3d 1157, 1163-64 (9th Cir. 2011); *Mandujano-Real v. Mukasey*, 526 F.3d 585, 589 (9th Cir. 2008); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003).

or defend our country."[12] Cecilia Muñoz, Director of the White House Domestic Policy Council, added that "[t]he young immigrants who will be eligible under this policy are earnest, productive young people ready to contribute back to America in the fullest possible sense. . . . [S]upporting immigrant young people is smart policy. It makes sense for our communities, families, and schools. This policy makes sense for America."[13] Secretary Napolitano's announcement itself emphasized that "[our Nation's immigration laws are not] designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways." [14]

These statements are evidence that DACA is not only about putting eligible individuals at the back of the deportation line. The President said "these young people are going to make extraordinary contributions, and are already making contributions to our society. I've got a young person who is serving in our military, protecting us and our freedom. The notion that in some ways we would treat them as expendable makes no sense."[15] He was describing young people like Benita Veliz, invited to captivate this summer's Democratic National Convention by telling her story of graduating as valedictorian of her high school class at the age of 16 and proceeding to earn a double major degree four years later.[16]

By excluding DACA beneficiaries like Benita Veliz, HHS's rule change institutes, through the withholding of health care coverage, precisely the second-class expendability President Obama decried. In offering renewable two-year lawful status and work authorization, the administration clearly signaled its intent to integrate DACA-approved young people fully into American life. In order to ensure that they are healthy and productive at work, these individuals need access to affordable health insurance, as the ACA ensures for everyone else in the authorized workforce. Integration must include health coverage to prevent these community members from continuing to "live in the shadows of America, without the possibility to realize their dreams."[17]

III. HHS acted in arbitrary and capricious fashion by excluding DACA-approved individuals because it is irrational (i) to differentiate among persons based on their type of deferred action; and (ii) to exclude from the ACA, and relegate to higher-cost alternatives such as emergency rooms, DACA beneficiaries who are healthy young people ready to ameliorate the risk pool.

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[12] "Remarks by the President on Immigration." (June 15, 2012), available at http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration

[13] "Deferred Action Process for Certain Young People: Smart and Sensible Immigration Policy." (June 15, 2012), available at http://www.whitehouse.gov/blog/2012/06/15/deferred-action-process-certain-young-people-smart-and-sensible-immigration-policy

[14] "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." (June 15, 2012), available at http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf

[15] "Remarks by the President," supra.

[16] Benita Veliz, Speech of Sept. 5, 2012, available at http://www.demconvention.com/speech/benita-veliz/

[17] "Deferred Action Process," supra.

Courts evaluating an agency rule must determine whether the issuing agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[18] In reviewing this explanation, courts determine "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[19] HHS's rule change fails this legal test by making arbitrary distinctions among deferred action recipients, and by omitting any analysis of the ACA's purpose to guarantee affordable health insurance and avoid adverse selection of insured persons.

First, HHS's rule runs counter to 45 C.F.R. § 152.2's existing inclusion of "[a]liens currently in deferred action status," thereby drawing an artificial line between those granted deferred action under DACA and other deferred action grantees. This distinction lacks a rational basis, as HHS has not explained how the provisions of immigration law under which others have been granted deferred action explicitly support health coverage under the ACA or why that is the only applicable criterion informing HHS's decision.

Moreover, an agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[20] The ACA's legislative history is replete with references to problems caused by adverse selection, a phenomenon whereby "[i]ndividuals who expect high health care costs differentially prefer more generous and expensive insurance plans; [while] those who expect low costs choose more moderate plans," or none at all.[21] In order to prevent adverse selection, which results in only those who need health insurance purchasing it, the ACA creates incentives and opportunities for more people to enter the insurance pool so insurers can spread the risk and reduce premiums for everyone.

In an address delivered to a joint session of Congress on health care legislation, the President emphasized the importance of avoiding adverse selection:

> [T]here may be those—especially the young and the healthy—who still want to take the risk and go without coverage. . . . The problem is, such irresponsible behavior costs all the rest of us money. If there are affordable options and people still don't sign up for health insurance, it means we pay for these people's expensive emergency room visits. . . . And that's why under my plan, individuals will be

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[18] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).
[19] *Id.*
[20] *Id.*
[21] David M. Cutler and Richard J. Zeckhauser, "Adverse Selection in Health Insurance." in Alan M. Garber (ed.), *Frontiers in Health Policy Research* (Vol. 1) (1998), available at http://www.nber.org/chapters/c9822.pdf

required to carry basic health insurance—just as most states require you to carry auto insurance.[22]

Indeed, in Congress's statement of findings, the ACA itself sets forth the case for pooling risk and preventing adverse selection:

> [I]f there were no [mandate], many individuals would wait to purchase health insurance until they needed care. By significantly increasing health insurance coverage, the [mandate], together with the other provisions of this Act, will minimize this adverse selection and broaden the health insurance risk pool to include healthy individuals, which will lower health insurance premiums.[23]

In excluding young, healthy individuals aged 15 to 30 who are DACA's qualifying beneficiaries from the ACA's interim high-risk pools, long-term exchanges, and tax credits, HHS's rule change contravenes one of the clearest purposes of the ACA: to reduce healthcare costs and increase coverage by pooling risk. Preventing DACA beneficiaries from buying health insurance will keep this healthy population out of the insurance pool and thereby increase the likelihood of adverse selection and higher premiums for everyone. If health insurance is too costly, a vicious circle ensues as some individuals will find purchasing insurance through the exchanges unaffordable and remain uninsured, further shrinking the insurance pool.

Given the ACA's purpose and the agency's inclusion of others granted deferred action, HHS acted arbitrarily and capriciously by excluding DACA beneficiaries. The rule change is therefore in violation of the Administrative Procedure Act's requirement that "agency action, findings, and conclusions [not be] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

IV. HHS's exclusion of DACA beneficiaries from health coverage endangers vulnerable groups, including adolescents, and damages immigrant women's health.

The pool of individuals eligible for deferred action under DACA consists primarily of young people living in states such as California, Texas, New York, Illinois, and Florida.[24] These states are leaders in the number of residents lacking health insurance.[25] Many uninsured persons live in low-income families, with parents employed in industries

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[22] Remarks by the President to a Joint Session of Congress, Office of the Press Secretary (Sept. 9, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-a-joint-session-congress-health-care

[23] 42 U.S.C. § 18091(2)(I).

[24] "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

[25] "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

where health coverage is absent.[26] DACA-approved adolescents are extremely likely to be among those without access to health care due to their income and immigration status.[27] Yet HHS's rule change will leave teenagers to fend for themselves outside the ACA's protections.

Vulnerable immigrant women are also marginalized by HHS's decision, which denies them the benefit of health care coverage compliant with the ACA's standards and requirements. An estimated 810,000 of the 1.76 million people anticipated to be eligible for DACA are women.[28] Immigrant women have much more limited access to private health insurance than their American-born counterparts, and have an acute need for the ACA's coverage.[29]

HHS itself promotes the importance of the ACA's requirement that insurance plans cover key preventive services for women like "mammograms, screenings for cervical cancer, prenatal care, . . . regular well-baby[,] well-child [and] well-woman visits, screening for gestational diabetes, domestic violence screening, breastfeeding supplies, and contraceptive services . . . with no cost-sharing."[30] The ACA also recognizes that maternity and newborn health services are "essential."[31] Yet despite these advances for women's health in the ACA, HHS's decision will severely restrict access for immigrant women to vital reproductive and other health care services that the ACA otherwise makes available. HHS should not implement this regressive change which harms the health of vulnerable immigrant women and children.

In sum, HHS should reverse its decision and resume including all deferred action recipients in 45 C.F.R. § 152.2's definition of "lawfully present." This approach is consistent with the spirit of, and rationale for, President Obama's DACA initiative, as well as being good policy in the best interests of the country's public health. HHS must act promptly to avert the dire outcomes facing vulnerable immigrant adolescents and women if

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[26] "Five Facts About the Uninsured Population." (Kaiser Commission on Medicaid and the Uninsured, Sept. 2012), *available at* http://www.kff.org/uninsured/upload/7806-05.pdf

[27] "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

[28] "Relief from Deportation: Demographic Profile," supra, 7.

[29] "Connecting Eligible Immigrant Families to Health Coverage and Care: Key Lessons from Outreach and Enrollment Workers." 4 (Kaiser Commission on Medicaid and the Uninsured, Oct. 2011), available at http://www.kff.org/medicaid/upload/Connecting-Eligible-Immigrant-Families-to-Health-Coverage-and-Care-Key-Lessons-from-Outreach-and-Enrollment-Workers-full-report-pdf.pdf; "Safeguard and Expand the Rights of Immigrants to Reproductive Health Care." 2 (Urban Initiative for Reproductive Health, Dec. 2009), available at http://www.urbaninitiative.org/SiteContent/Static/Docs/AgendaCh10Immigrants.pdf

[30] Alison Cuellar, Adelle Simmons, and Kenneth Finegold, "The Affordable Care Act and Women." HHS ASPE (Assistant Secretary for Planning and Evaluation) Research Brief (2012), available at http://aspe.hhs.gov/health/reports/2012/ACA&Women/rb.shtml. Insurance exchanges will cover these services in 2014.

[31] "Essential Health Benefits: HHS Informational Bulletin." (Feb. 24, 2012), available at http://www.healthcare.gov/news/factsheets/2011/12/essential-health-benefits12162011a.html

DACA beneficiaries are treated as second-class community members unworthy of ACA inclusion.

Thank you for your attention to these comments. Please do not hesitate to contact Christopher Rickerd, Policy Counsel in ACLU's Washington Legislative Office at crickerd@dcaclu.org or 202-544-1681 if you have any questions.

Sincerely,

Laura W. Murphy
Director

Christopher Rickerd
Policy Counsel

ACLU Washington Legislative Office

Michael Tan
Staff Attorney

ACLU Immigrants' Rights Project