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RE: **CMS-2334-P**
Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing

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 protecting the principles of liberty and equality set forth in the Constitution and in our nation's civil rights law. 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 unlawful and unwise 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. We urge the Administration to reverse course on this exclusion, and thereby avoid violating the Administrative Procedure Act (APA) through enactment of an arbitrary and capricious rule

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

I. Introduction

The Department of Health and Human Services' (HHS) change in the definition of who is considered "lawfully present" for purposes of Medicaid and Children's Health Insurance Programs (CHIP) under the CHIPRA state option is detailed in 78 Fed. Reg. 4594 (Jan. 22, 2013). HHS's rule change to exclude DACA beneficiaries is an arbitrary and capricious agency action in violation of the APA. It will jeopardize the health of vulnerable members of our communities, including immigrant women and adolescents, at great humanitarian and monetary cost. Under § 435.4(4)(vi), under the definition of "lawfully present," individuals with Deferred Action status are within the definition of lawful presence conferring eligibility for health coverage under Medicaid, CHIP, and the Exchanges. However, § 435.4(10) prohibits eligibility of young people granted deferred action under the Department of Homeland Security (DHS) DACA program. HHS should reverse its mistaken course of action and delete the exception for DACA individuals.

HHS issued an interim final regulation ("IFR") that was published on July 30, 2010.² 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."³ The IFR in turn defined noncitizens "currently in deferred action status" as "lawfully present."⁴ 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").⁵ On August 30, 2012 HHS issued an interim final rule to the PCIP excluding DACA recipients.

Aside from the PCIP, HHS's August 30, 2012 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.⁶ 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 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

² Pre-Existing Condition Insurance Plan Program, 75 Fed. Reg. 45013 (Jul. 30, 2010) (codified at 45 C.F.R. pt. 152).

³ *Id.*

⁴ *Id.*

⁵ *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 Children's Health Insurance Program (CHIP) eligibility. HHS should also rescind this guidance letter.

⁶ ACA §§ 1311, 1401.

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.⁷

The current HHS rule would exclude DACA beneficiaries from the Medicaid and CHIP programs.

HHS has failed to provide a sufficient rationale for its profoundly harmful deprivation of access to health insurance for DACA beneficiaries; its rule therefore constitutes arbitrary and capricious agency action. The rule change excluding DACA beneficiaries should immediately be rescinded.

II. HHS acted in arbitrary and capricious fashion by excluding DACA-approved individuals because it is irrational to differentiate among persons based on their type of deferred action

It is unreasonable and unfair to distinguish between individuals granted deferred action through the DACA process and individuals granted deferred action for other reasons. Because this population was granted a form of relief that is already considered by HHS and other agencies to be “lawfully present,” the decision to exclude these particular individuals from eligibility is arbitrary and capricious.

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.”⁸ 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.”⁹ 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.

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

⁷ *Id.*

⁸ *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).

⁹ *Id.*

III. The 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.

The rationale for HHS's rule change is based on an errant and outdated rationale provided in the interim final rule with request for comments to the Pre-Existing Condition Insurance Plan (PCIP) Program (77 FR 52614, Aug. 30, 2012). It is for the same reasons that ACLU opposed the PCIP rule change that we oppose the Medicaid and CHIP rule change.¹⁰

As recently as January 16, 2013, according to the press secretary for U.S. Citizenship and Immigration Services (USCIS), "[t]he relief an individual receives through the Deferred Action for Childhood Arrivals process is the same for immigration purposes as that obtained by any other person who receives deferred action."¹¹ And on January 18, 2013, USCIS clarified that "[a]n individual who has received deferred action is authorized by [DHS] to be present in the United States, and is therefore considered by DHS to be *lawfully present* during the period deferred action is in effect"¹² (emphasis added).

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."

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 others who lack a permanent immigration status, but are not DHS priorities and have not been granted deferred action.

¹⁰ ACLU 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 are available at <http://www.aclu.org/immigrants-rights/aclu-comments-aca-coverage-daca-beneficiaries>.

¹¹ Craig LeMoult, NPR All Things Considered, "Some States Put Brakes On Driver's Licenses For Illegal Immigrants," available at <http://www.npr.org/2013/01/16/169526603/some-states-put-brakes-on-drivers-licenses-for-illegal-immigrants>

¹² United States Citizenship and Immigration Services, "Frequently Asked Questions About Deferred Action for Childhood Arrivals," available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD> *Id.* USCIS also goes on to clarify that deferred action under the DACA process is identical to deferred action granted under other processes (A7: "Deferred action for childhood arrivals is one form of deferred action. The relief an individual receives pursuant to the deferred action for childhood arrivals process is identical for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion.").

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, or defend our country."¹³ 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."¹⁴ 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."¹⁵

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."¹⁶ 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.¹⁷

By excluding DACA beneficiaries like Benita Veliz, HHS's rule change institutes, through the withholding of health care coverage, precisely the second-class expendability the President 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

¹³ "Remarks by the President on Immigration." (June 15, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>

¹⁴ "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>

¹⁵ "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>

¹⁶ "Remarks by the President," *supra*.

¹⁷ Benita Veliz, Speech of Sept. 5, 2012, available at "http://www.demconvention.com/speech/benita-veliz/

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.”¹⁸

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.¹⁹ These states are leaders in the number of residents lacking health insurance.²⁰ Many uninsured persons live in low-income families, with parents employed in industries where health coverage is absent.²¹ DACA-approved adolescents are extremely likely to be among those without access to health care due to their income and immigration status.²² 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 46% of the 1.76 million people anticipated to be eligible for DACA are women.²³ 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.²⁴

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 . . .

¹⁸ “Deferred Action Process,” *supra*.

¹⁹ “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

²⁰ “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>

²¹ “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>

²² “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>

²³ “Relief from Deportation: Demographic Profile,” *supra*, 7.

²⁴ Kaiser Commission on Medicaid and the Uninsured. “Connecting Eligible Immigrant Families to Health Coverage and Care: Key Lessons from Outreach and Enrollment Workers.” 4 (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>; Urban Initiative for Reproductive Health, “Safeguard and Expand the Rights of Immigrants to Reproductive Health Care.” 2 (Dec. 2009), *available at* <http://www.urbaninitiative.org/SiteContent/Static/Docs/AgendaCh10Immigrants.pdf>

with no cost-sharing.”²⁵ The ACA also recognizes that maternity and newborn health services are “essential.”²⁶ 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 §435.4(4)(vi),’s definition of “lawfully present.” This approach avoids an APA violation, 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 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@dcacclu.org or 202-544-1681 if you have any questions.

Sincerely,

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²⁵ 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.

²⁶ See “Essential Health Benefits: HHS Informational Bulletin.” (Feb. 24, 2012), available at <http://www.healthcare.gov/news/factsheets/2011/12/essential-health-benefits12162011a.html>