Submitted via www.regulations.gov

Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
Attention: CMS–9894–P
Mail Stop C4–26–05
7500 Security Boulevard
Baltimore, MD 21244–1850

Re: CMS 9894-P: Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reductions, a Basic Health Program, and for Some Medicaid and Children's Health Insurance Programs

The undersigned [number] national, state and local organizations in [number] states and Washington, DC, are writing to share our support for, as well as recommendations to improve on, the notice of proposed rulemaking (NPRM) published in the Federal Register on April 26, 2023.

Clarifies Health Coverage for DACA Recipients

People with Deferred Action for Childhood Arrivals are lawfully present and should be treated as such for health insurance purposes. The Affordable Care Act (ACA) created the "lawfully present" standard for eligibility for the Pre-Existing Condition Insurance Plan (PCIP) and the marketplace. Because the ACA did not define lawfully present, HHS issued an interim final rule that adopted the definition of lawfully residing from a 2010 HHS letter that defined this standard for the CHIPRA state option providing coverage for "lawfully residing" children and pregnant women. It included *all those granted deferred action* as well as other temporary immigration categories, such as Temporary Protected Status and Deferred Enforced Departure.

In March 2012, HHS issued a rule adopting the PCIP definition of lawfully present for eligibility determinations in the ACA marketplaces. Three months later, when DHS announced the DACA as its newest deferred action category, people with DACA would have been classified as "lawfully present" and "lawfully residing" under the existing HHS definition and therefore eligible for CHIPRA's state option. However, in August 2012, the Centers for Medicare & Medicaid (CMS) issued a letter to states stating that health benefits *should not be extended* as a result of DHS deferring action under DACA.[1] HHS then issued an interim final rule that modified the PCIP program definition of lawfully present to *explicitly exclude people with DACA*.[2] HHS and Treasury's marketplace regulations then cross-referenced the PCIP definition, leaving

[1] State Health Official Letter (SHO #12-002) from Cindy Mann, Director, Center for Medicaid and CHIP Services, U.S. Department of Health and Human Services, "Individuals with Deferred Action for Childhood Arrivals," August 28, 2012, available at: https://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-12-002.pdf.
7 Pre-Existing Condition Insurance Plan Program, 77 Fed. Reg. 52614, August 30, 2012, available at: https://www.govinfo.gov/content/pkg/FR-2012-08-30/pdf/2012- 21519.pdf.
[2] ibid.

people with DACA excluded from the marketplace and all other health insurance affordability programs.[3]

People with DACA should have been classified as "lawfully present" and "lawfully residing" under the existing HHS definitions for deferred action in the PCIP program, Medicaid, CHIP, the Basic Health Program (BHP) and the marketplace. HHS has maintained eligibility for insurance affordability programs for all others granted "deferred action" over the years. It's time for people with "Deferred Action" for Childhood Arrivals status to be included. HHS estimates that about 129,000 people with DACA are likely to benefit from this change.[4]

In the height of the COVID pandemic and today, people with DACA care for us. More than three quarters of DACA recipients in the workforce were employed in jobs deemed "essential" by the Department of Homeland Security.[5] Of these, 34,000 were healthcare workers providing patient care, and another 11,000 were working in health care settings keeping the facilities functioning.[6]

Increasing access to health coverage for DACA recipients will increase the rate of health coverage for children. About 29 percent of people with DACA are parents, the majority to U.S. citizen kids.[7] Children are more likely to have insurance coverage when their parents are also insured and a parent's receipt of health care services often dictates that of their children.[8]

Including people with DACA may improve the overall marketplace risk pool because they are generally healthy young adults. Almost 7 in 10 (64 percent) people with DACA report their health as excellent or very good and an additional 28 percent report their health as good. These findings reflect that people with DACA tend to be healthy and are largely consistent with the self-reported health status of citizens in the same age group.[9]

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[3] The marketplace eligibility regulations define "lawfully present" at 45 C.F.R. § 155.20 by cross-referencing the PCIP definition at 45 C.F.R. § 155.2, which means the marketplace also excludes people with DACA.

[4] Clarifying Eligibility for a Qualified Health Plan Through an Exchange, Advance Payments of the Premium Tax Credit, Cost-Sharing Reduction, a Basic Health Program, and for Some Medicaid and Children's Health Insurance Programs, 88 Fed. Reg. at 25313 at 25327, April 26, 2023.

[5] Center for American Progress, "New CAP Data Confirm DACA is a Positive Force For Recipients and Their Families," Nov 24, 2021, available at:
https://www.americanprogress.org/press/release-new-cap-data-confirm-daca-is-a-positive-force-for-recipients-and-their-families/

[6] ibid.

[7] ibid.

[8] Georgetown University Center for Children and Families, "Research Update: How Medicaid Coverage for Parents Benefits Children, January 12, 2018, available at:
https://ccf.georgetown.edu/2018/01/12/research-update-how-medicaid-coverage-for-parents-benefits-children/

[9] Kaiser Family Foundation, "Key Facts on Individuals Eligible for the Deferred Action for Childhood Arrivals Program," February 1, 2018, available at:
https://www..kff.org/disparities-policy/fact-sheet/key-facts-on-individuals-eligible-for-the-deferred-action-for-childhood-arrivals-daca-program.

We urge HHS to allow these changes to go into effect as soon as the final rule is published. We strongly suggest that HHS allow states to implement changes for CHIPRA s. 214 coverage, in state marketplaces, and in the BHP, anytime from the day the final rule is published until November 1, 2023. We also encourage you to allow a special enrollment period for the federal marketplace beginning on the date the final rule is issued, and then open for open enrollment Nov 1, 2023.

Clarifies Health Coverage for Other Noncitizens

People granted Special Immigrant Juvenile status (SIJ) --and not just those applying—should also be lawfully present for eligibility purposes. Years ago, people used to receive SIJ and lawful permanent status nearly simultaneously, which allowed people granted SIJ to remain eligible for health insurance affordability programs as lawful permanent residents (green card holders). However, due to backlogs in processing green card applications, many people who are granted SIJ now wait years for their green cards. This has caused confusion for advocates and legal and social service providers working to ensure that people granted SIJ continue to access health care. By definition, youth applying for SIJ cannot reunify with their parents due to abuse, neglect or abandonment by caregivers and need access to coverage for mental health supports and other services.

Simplifies enrollment for nonimmigrant visa holders by eliminating 'not in violation of terms of status' language. This change will ensure a clear pathway to eligibility for additional groups of immigrants, and make it easier for states to determine eligibility. The changes would allow people with the following statuses to enroll in the marketplace (and the state Medicaid option for children and pregnant women).

- All people granted employment authorization documents (EADs) under 8 CFR 274a.12(c)(by eliminating a reference to specific sections of the regulation granting EADs)
- Applicants for adjustment to LPR status (by eliminating requirement for approved visa petition)
- Children under age 14 who are applying for asylum, withholding of removal, or relief under the Convention Against Torture (CAT) (eliminates a 180 day waiting period)
- Migrants under the Compact of Free Association who are lawfully present as "nonimmigrants"
- Noncitizens who are treated like refugees, such as Afghans and Ukrainians with Humanitarian parole

Provides Funding and Flexibility for States to Make Progress on the Uninsured

It supports states that use state-only funds to pay for Medicaid for people with DACA to be partially reimbursed. A number of states, such as New York, and California, cover people with DACA in Medicaid with state only funds. This change will provide federal matching funds for states that cover pregnant people or children with DACA. Funds that states save could be used to provide state-only funded coverage to others who are uninsured.

Provides flexibility for states to cover additional immigrants with state-only funds. We also encourage HHS to finalize the language about states pursuing Section 1332 waivers to allow people who are not "lawfully present" to enroll in Marketplace or the BHP and use state funds-only to subsidize their coverage. This would allow the 18 state marketplaces and two BHPs that choose to do so to continue to reduce the number of uninsured people in their state.

Respectfully submitted,