DHS' Final Rule: Impact of Public Charge on Health Care and Benefits

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On August 12, 2019, the Department of Homeland Security (DHS) released a final rule redefining the term "public charge." The rule makes fundamental changes to the longstanding application of public charge to the receipt of public benefits for certain immigrants. Nine lawsuits were filed challenging the rule.[1] As of October 14, 2019 federal judges have issued five preliminary injunctions, including three nation-wide court orders, that prevent the rule from going into effect for the time being.[2]

The purpose of this issue brief is to provide background information about public charge with a focus on the impact of the rule in the health care context (although the rule also applies to receipt of other public benefits). While the rule has been temporarily blocked by the courts, the final outcome of the rule will not be known until the courts issue their final orders. Until that time, the current policies regarding public charge remain in place.[3]

This analysis includes three primary sections:

A. Background and Current Rule

1. What does the Immigration and Nationality Act require regarding public charge?

The Immigration and Nationality Act (INA) states that an individual seeking admission to the U.S. or seeking to adjust status to lawful permanent residence (also known as a "green card") is inadmissible if the individual "… at the time of application for admission or adjustment of status, is likely at any time to become a public charge.[4]"

The law generally requires a prospective "totality of circumstances" test so that someone who may have received benefits in the past but now does not should not automatically be

determined to be a public charge. (We explain the totality of circumstances test and the factoring of receipt of benefits in more detail below.) A public charge determination is made when an individual applies to enter the U.S. or to adjust to lawful permanent resident status (*e.g.*, green card holder). Lawful permanent residents who are applying for citizenship are **not** subject to a public charge determination unless the individual leaves the U.S. for 180 consecutive days or more.

Public charge can also be a basis for deportability. The INA addresses public charge on deportation grounds in a different section of the law, and the changes in the DHS final rule on inadmissibility do not apply to deportability. The Department of Justice, however, has drafted proposed changes to the rule which are currently under White House review.

2. What is a "public charge"?

The term public charge first appeared in the immigration statute in 1882. Under policies in effect since the 1990s, a person may be determined a "public charge" if the person is likely to become "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash for income maintenance, or institutionalization for long-term care at government expense."[5]

When Congress first enacted a public charge test, federal and state governments offered few public health benefits or programs. Rather, the government supported almshouses – most of them in deplorable conditions – which housed people with physical disabilities, abandoned children, drifters, people convicted of petty crimes, and a growing number of immigrants who were poor.[6] An immigrant who was a public charge was essentially an immigrant who was likely to end up in an almshouse.

3. How have federal agencies been making a public charge determination before this final rule?

As federal, state, and local governments began offering a range of benefits to citizens and immigrants, the Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS, formerly the Immigration and Naturalization Service or INS) and the Department of State were forced to consider how to take such benefits into account in determining whether an individual was likely to become a public charge. Congress did not provide specific guidance in this matter. Although public charge determinations were referenced in several sections of the INA (*e.g.*, with respect to deciding whom to exclude from entry), Congress never identified any specific types of government support that should be considered in a public charge determination.

After enactment of the Immigration Reform and Control Act (IRCA) in 1986 – the last comprehensive immigration reform law – INS (now USCIS) confirmed that public charge determinations must be based on the totality of circumstances at the time of the individual's application. INS would make a prospective "determination of financial responsibility" based on the individual's "age, health, income, and vocation."[7] If an individual's advanced age, poor health, lack of significant income, or lack of any foreseeable vocation indicated to INS that the individual may become completely destitute and reliant on the state for complete or primary support, the individual would be considered "likely to become a public charge."[8]

The most recent changes to the public charge provision occurred in the mid-1990's when Congress codified the longstanding "totality of the circumstances" test already in use.[9] This requires, at a minimum, consideration of an applicant's age; health; family status; assets, resources and financial status; and education and skills.[10] Congress also allowed immigration officials to consider an affidavit of support.[11]

4. Why did federal agencies issue policies in the 1990's regarding public charge?

After restrictions on immigrants' eligibility for benefits were enacted in 1996, concerns about public charge had a significant chilling effect on immigrants' receipt of benefits and particularly access to health care programs and services. Many immigrants were fearful of applying for benefits for which they or their children were eligible and feared even going to the doctor or the hospital. Confused about what benefits would be considered in a public charge determination, many immigrants consequently disenrolled from various public programs.

To alleviate the confusion, the Department of Justice (DOJ) took efforts to clarify which federal programs would – and more importantly would not – lead to a public charge determination. As noted in a 1999 proposed rule from DOJ:

> By defining ''public charge,'' the Department seeks to reduce the negative public health consequences generated by the existing confusion and to provide [immigrants] with better guidance as to the types of public benefits that will and will not be considered in public charge determinations.[12]

5. Why were certain benefits excluded in the 1990's?

When DOJ issued its proposed rule, DOJ reasoned that noncash benefits such as health, nutrition, and housing assistance provide **supplemental** support and do not lead to complete subsistence on the government. According to the Department of Health and Human Services (HHS):

> It is extremely unlikely that an individual or family could subsist on a combination of non-cash support benefits or services alone. . . . HHS is unable to conceive of a situation where an individual, other than someone who permanently resides in a long-term care institution, could support himself or his family solely on non-cash benefits so as to be primarily dependent on the [G]overnment.[13]

6. Under <u>current</u> policies, which benefits does DHS consider in a public charge determination?

Currently, and until a new final rule goes into effect, receipt of only the following types of benefits could result in a public charge determination:

- Federal, state, local, or tribal cash benefits for income maintenance (*e.g.*, TANF or state-funded cash assistance);
- Supplemental Security Income; and
- Institutionalization for long-term care at government expense.[14]

But even receipt of these benefits would not automatically result in a public charge determination since the evaluation must be prospective based on the totality of the circumstances.[15]

B. <u>Changes Under the Final Rule</u>

The final rule was scheduled to go into effect on October 15, 2019, however it has been temporarily blocked from implementation.

7. Under the <u>final rule</u>, what health programs will DHS consider in making a public charge determination?

The final rule includes receipt of public benefits under the existing policy plus additional public benefit programs. New public benefits that will be considered include federally-funded Medicaid, with some exceptions listed in Q8.

Beyond health programs, the final rule also includes consideration of other public benefits (e.g. SNAP and some federal housing assistance programs).[16] If an individual receives Medicaid or any of the included benefits for the aggregate of more than 12 months in any 36-month period prior to applying for admission or applying for a green card, the receipt of those benefits would be included in a public charge determination. Receipt of two or more benefits during the same month will count as two or more months.

8. Under the final rule, what health programs and services are excluded from consideration as a public benefit?

The rule does not consider receipt of certain Medicaid services as a public benefit and excludes the following:

- Emergency Medicaid,
- School-based Medicaid, including services provided under the Individuals with Disabilities Education Act,
- Medicaid programs that are fully state, county, or locally funded,
- Receipt of Medicaid services by a child or young adult under 21 years of age,
- Receipt of Medicaid services during pregnancy and up to 60 days after delivery, and
- Receipt of public benefits (including Medicaid) by an active duty member of the U.S. Armed Forces and their families.

Further, any other state, local, or tribal public benefit that is not cash assistance for income maintenance, or another public benefit program not specifically listed in the regulation will not be considered a public benefit under the rule. Some examples include:

- Children's Health Insurance Program (CHIP);
- Medicare;
- Premium Tax Credits or Advance Premium Tax Credits under the ACA;
- employer health insurance;
- fully state-funded health insurance;
- other health insurance including VA and TRICARE;
- Ryan White HIV/AIDS Program;
- Title X;
- Special Supplemental Nutrition Program for Women, Infants and Children program (WIC);
- Health services including public assistance for immunizations and for testing and treatment of symptoms of communicable diseases;
- Use of health clinics; and
- Short-term rehabilitation.

The final rule removed long-term institutionalization at government expense as a listed benefit in recognition that such institutionalization is largely covered by the addition of Medicaid.

9. If an individual receives benefits before the final rule goes into effect, will receipt of those benefits count in a public charge determination?

Public charge is a forward-looking test and is not retroactive. Receipt of Medicaid or other currently excluded public benefits before the date the rule goes into effect will not be considered. Only those benefits listed in the answer to Q. 6 regarding benefits that are considered under the current rule would be included in a public charge determination prior to the final effective date.

10. If an individual receives a service that is excluded from consideration as a public benefit under the final rule, does that mean they are also exempt from the public charge test?

The final rule states that any public benefits received by active duty members of the U.S. Armed Forces, their spouse, or child(ren) will not be considered. In addition, Medicaid services received by children or young adults under 21 years of age, and Medicaid services received during pregnancy and 60-days postpartum will not be counted as use of public benefits. These groups, however, will still be subject to a public charge determination under the totality of circumstances test even though receipt of certain public benefits will not be counted in the determination. Some immigrant groups are exempt from public charge altogether (explained in Q. 12).

11. Who is subject to public charge under the final rule?

Any individual **in the U.S.** applying for lawful permanent residency (also known as a "green card") or admission is subject to a public charge assessment for inadmissibility unless they are in an immigrant category that is exempt from public charge. The final rule applies a similar test to individuals with a non-immigrant visa applying to extend their visa or adjust their visa to a different non-immigrant status (*e.g.*, from a student visa to an employment visa).

Individuals who seek admission from **outside the U.S.** at an embassy or consular office abroad are subject to a public charge assessment guided by the Foreign Affairs Manual (FAM), which is published by the Department of State (DOS). DOS made amendments to these sections of the FAM without prior notice or an opportunity for public comment in January 2018. On October 11, 2019, DOS issued an interim final rule intended to align its public charge regulations with the DHS final rule. The interim final rule will supersede the FAM changes, once they go into effect.[17] The January 2018 FAM changes are also facing legal challenges.[18]

Green card holders are not subject to a public charge determination either when they apply for naturalization or renew their green card. However, green card holders who leave the United

States for a continuous period in excess of 180 consecutive days are subject to the grounds of inadmissibility and thus could be questioned as to their likelihood of becoming a public charge when they seek reentry at a port of entry.

12. Who is exempt from public charge?

Some immigrants are exempt from the public charge determination because they are exempt by law (*e.g.*, asylees, refugees, survivors of domestic violence, and other protected groups) or they are in an immigration status that cannot adjust (*e.g.*, temporary protected status). For a complete list of exemptions, see amended 8 C.F.R. § 212.23 in the final rule.[19]

13. How will DHS evaluate whether receipt of Medicaid or other benefits makes an individual likely to become a public charge?

The statute requires consideration of a number of factors in the "totality of the circumstances." Even if an individual received Medicaid or other specified public benefits, an immigration official must still consider a number of factors in light of the totality of that person's circumstances before DHS can determine that the individual would be likely to become a public charge. These factors are:

- Age;
- Health;
- Family status;
- Assets, resources, and financial status;
- Education and skills;
- Affidavit of support; and
- Any other factor or circumstance that may warrant consideration.

If the negative factors outweigh the positive factors, then the individual would be deemed "inadmissible" and unable to obtain a green card as likely to become a public charge. If the positive factors outweigh the negative factors, then the immigrant would not be found inadmissible as likely to become a public charge.

The factors in the totality of circumstances test cannot be changed by regulation, however the final rule creates new standards and gives more weight to certain positive and negative considerations in assessing whether an individual is likely to become a public charge. The designated "heavily weighted" negative factors include:

- Receipt of non-emergency Medicaid or other public benefits listed in Q7 for an aggregate of 12 months within any 36 month period prior to the date of application;

- Lack of private health insurance or the financial resources to pay for reasonably foreseeable medical costs related to a health condition that is likely to require extensive medical treatment or institutionalization or that will interfere with the individual's ability to provide care for themself, to attend school, or to work; and
- Other factors listed in the final rule.

"Heavily weighted" positive factors include:

- Having unsubsidized, private health insurance (i.e. enrollment in a health insurance plan that is not supported by ACA premium tax credits, including advance premium tax credits);
- Having an income of over 250 percent of the federal poverty level ($64,375 for a family of 4); and
- Other factors listed in the final rule.

See 8 C.F.R. § 212.22(b)-(c) for a list of the factors that must be considered in the totality of the circumstances test, including positive and negative weighted factors.

14. If someone is found likely to be a public charge, do they have any options?

The final rule describes a process where DHS may accept a "public charge bond" to overcome a determination of public charge. The final rule establishes a minimum bond amount of $8,100 (adjusted annually for inflation), processing fees for the bond, and specific conditions under which a public charge bond is breached or cancelled.

The rule states that the purpose of the public charge bond is to allow DHS to admit an immigrant who is inadmissible as likely to become a public charge but who warrants a favorable exercise of discretion. Offering a public charge bond in the adjustment of status context would generally only occur in limited circumstances in which the immigrant has no heavily weighed negative factors. A public charge bond would remain in effect until the immigrant naturalizes or otherwise obtains U.S. citizenship, permanently departs the United States, or dies, until the bond is substituted with another bond, or until the bond is otherwise cancelled by DHS. There is no right to posting a public charge bond; the decision to allow submission of a public charge bond is a discretionary one made by DHS.

C. Potential Impacts of the Final Rule

15. Who will be the most affected by the changes to the final rule?

The individuals most affected by the public charge ground of inadmissibility are those seeking lawful permanent resident (LPR, also known as "green card") status based on a family relationship. These include the spouses, unmarried children under the age of 21 years old, and unmarried adult sons and daughters of a U.S. citizen or LPR and the parents, siblings, and married sons and daughters of a U.S. citizen. Approximately two-thirds of the one million non-citizens who obtain LPR status every year base it on a family relationship.[20] The majority of immigrants who gain lawful status through a family relationship are from Mexico and countries in Central America, South America, Asia, the Caribbean, and Africa.

16. How does public charge impact individuals with disabilities or chronic health conditions?

Since health is one of the mandatory factors in the public charge test, an individual with a disability or chronic condition may face additional barriers to overcoming a negative public charge determination. DHS says it will consider an individual's disability because it may affect the individual's ability to work, attend school, or otherwise care for themself. DHS states that the consideration of disability does not violate nondiscrimination requirements in federal statutes and regulations such as the Rehabilitation Act or Americans with Disabilities Act (ADA). The final rule states:

> An alien's health is not outcome determinative – that is, an alien's health cannot be the sole basis for a finding that an alien is inadmissible as likely to become a public charge… As with any other medical condition identified in the alien's application and supporting documentation, the alien's disability will be considered in the totality of the circumstances framework.[21]

Plaintiffs in some of the cases challenging the final public charge rule included claims that the rule does violate the Rehabilitation Act and the ADA.[22]

17. How many immigrants will be subject to a public charge determination if they receive public benefits?

If the final rule goes into effect, it will have both direct and indirect impacts on immigrants and their families. Directly, many immigrants, and particularly family-based immigrants, will be subject to the expanded definition of public charge that could preclude their admission into the U.S. or ability to obtain a green card. The rule also expands the types of immigrants who will

be subject to public charge considerations. Certain non-immigrant visa holders seeking to change their status or file an extension of stay will be affected if the rule goes into effect (see Q. 11 for more information).

The indirect impact of the proposed rule will likely be even greater as many immigrants and their families (including both immigrant and U.S. citizen family members) will likely forego receipt of benefits for fear of real or perceived consequences on their ability to apply for lawful permanent residency. In the 1990's, many immigrants and their family members were confused about what benefits would be considered and whether they would be subject to a public charge determination, resulting in disenrollment from public benefit programs including Medicaid. Similarly, there is already evidence of the "chilling effects" of the DHS rule even before it was finalized.[23] States have reported disenrollments from Medicaid and SNAP from immigrants and family members who are not even affected by the rule. In addition, there is evidence of the "spillover effects" of the rule in other public benefit programs that are not considered in the rule such as WIC.[24]

18. From a policy perspective, should receipt of public benefits be considered in a public charge determination?

No. The programs potentially affected by the proposed rule are essential, not only for immigrants and their family members, but for the health and well-being of the broader community. The broad fear generated by earlier leaked versions of the public charge rule already threatens to undermine public health, healthy pregnancies, newborn development, and children's growth and learning.

Many reasons exist as to why immigrants may access public benefits in the U.S. As noted in an interview of a visiting assistant professor at City College of New York, expanding the public charge ground of inadmissibility reinforces the discriminatory intent and impact of our immigration laws:

> The "likely to become a public charge" clause—poverty-based immigration control—can be really dangerous, precisely because it seems racially and ethnically neutral. Historically, the clause allowed racial and religious bigotry to flourish by giving too much power to law enforcers.[25]

For more information, please contact NHeLP or visit the website of the Protecting Immigrant Families campaign, www.protectingimmigrantfamilies.org.

ENDNOTES

[1] For additional information and status updates about the cases, *see* Protecting Immigrant Families Campaign, *Public Charge Litigation Tracker*, https://docs.google.com/spreadsheets/d/e/2PACX-1vTIHxPL3tRDeRYEG3ORXRVZkk11MZRtkM-HszfAs7l8D02KO5T5T3qeM1j4IFvWEPRK2KAAY8uvd2Vj/pubhtml?widget=true&headers=false.
[2] *Id.*
[3] For additional resources on "public charge," see materials from the Protecting Immigrant Families campaign, www.protectingimmigrantfamilies.org.
[4] *Id.*
[5] *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999).
[6] *See* David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic*, at 198-200, 290-221 (1971).
[7] 8 C.F.R. § 245a.4(i).
[8] A specific statutory provision for immigrants seeking legalization under IRCA establishes a special rule for such individuals even if they are found, under the totality of the circumstances test, to be public charges. 8 U.S.C. § 1225a(d)(2)(B)(iii). This special rule focuses on a prospective determination that includes the "past acceptance of public cash assistance within a history of consistent employment." *Id., see also* 8 C.F.R. § 245a.3(g)(4)(iii). Non-cash benefits were explicitly excluded from this assessment. 8 C.F.R. § 245a.1(i).
[9] 8 U.S.C. § 1182(a)(4)(B).
[10] 8 U.S.C. § 1182(a)(4).
[11] INA § 212(a)(4)(C)-(D).
[12] *Proposed Rule: Inadmissibility and Deportability on Public Charge Grounds,* 64 Fed. Reg. 28676 (May 26, 1999).This rule was not finalized. DOJ also issued guidance that currently governs public charge determinations which clarified longstanding policy and practice. *See,* Department of Justice, *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (May 26, 1999), https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-54070/0-0-0-54088/0-0-0-55744.html.
[13] 64 Fed. Reg. 28676, 28686 (May 26, 1999), Letter to INS Commissioner Doris Meissner from HHS Deputy Secretary Kevin Thurm, dated March 25, 1999.
[14] *Id.*
[15] 8 C.F.R. § 212.106 (as proposed in 1999). The final rule, however, rescinds the prior proposed rule so this provision would no longer be in effect but newly amended 8 C.F.R. § 212.22(d) continues to consider receipt of these benefits and 8 C.F.R. § 212.21(b) includes these benefits in the definition of public charge.
[16] Protecting Immigrant Families Campaign, *Changes to Public Charge: Analysis and Frequently Asked Questions* (updated September, 2019), https://docs.google.com/document/d/1zHLRaciDqIZfkI_icRGVJWKWcinP6cAwvkuAeae8eog/edit (last visited on Oct. 4, 2019).
[17] The IFR was scheduled to go into effect on October 15, 2019, however DOS is seeking emergency OMB approval of a form (DS-5540) needed to implement the IFR. OMB has yet to provide the requested clearance. As such, the DOS IFR has not yet gone into effect.
[18] *Mayor and City of Baltimore v. Trump et al*, 1:18-cv-03636, 2019 WL 4598011 (D.MD. Sept. 20, 2019).
[19] *Inadmissibility on Public Charge Grounds*, 84 Fed. Reg. 41292, 41504-41505 (Aug. 17, 2019), https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-17142.pdf.

[20] DHS, Office of Immigration Statistics, *Annual Flow Report Lawful Permanent Residents: 2017* (Aug. 2018), Table 2, https://www.dhs.gov/sites/default/files/publications/Lawful_Permanent_Residents_2017.pdf.
[21] *Inadmissibility on Public Charge Grounds*, *supra* note 17 at 41410.
[22] *See State of New York et al., v. U.S. Department of Homeland Security et al*., 1:19-cv-07777-GDB (S.D. N.Y. Oct, 11, 2019); *State of Washington et al., v. U.S. Department of Homeland Security et al.*, 4:19-cv-05210-RMP (E.D. WA Oct. 11, 2019); and *City and County of San Francisco, et al. v. U.S. Citizenship and Immigration Services, et al.*, 4:19-cv-04975-PJH (Oct. 11, 2019 N.D. CA).
[23] For the results of a national survey on chilling effects of the proposed changes to the public charge rule, *see* Hamutal Bernsteing, Urban Institute, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018* (May 22, 2019), https://www.urban.org/research/publication/one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018.
[24] Helena Bottemiller Evich, Politico, *Immigrants, fearing Trump crackdown, drop out of nutrition programs* (Sept. 3, 2018), https://www.politico.com/story/2018/09/03/immigrants-nutrition-food-trump-crackdown-806292.
[25] Emma Green, *First, They Excluded the Irish* (Feb. 2, 2017), https://www.theatlantic.com/politics/archive/2017/02/trump-poor-immigrants-public-charge/515397/.