

Holland & Knight

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Memorandum

Date: October 9, 2018

To: Health Care Clients

From: Holland & Knight

Re: Trump Administration Proposed Rule Regarding “Public Charge” Provisions of Immigration Law

Background

Currently, U.S. Citizenship and Immigration Services (USCIS) defines a “public charge” as someone who is or is likely to become “primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense.”¹ Existing federal policy dictates that a public charge may be denied permanent resident (green card) status or lawful entry into the United States. However, current policy does *not* allow the federal government to consider non-cash benefits, such as benefits associated with enrollment in health (Medicaid/CHIP enrollment) or nutrition (Supplemental Nutrition for Women, Infants, and Children (WIC) and Supplemental Nutrition Assistance Program (SNAP)) programs, in public charge determinations. In response to current policy regarding public charge determinations, the Department of Homeland Security (DHS) developed a draft proposed rule to expand public charge criteria that published on March 28, 2018. In late September, DHS published an updated proposed rule, with the current and final proposed [rule](#) released for official public viewing on the Federal Register on October 5. There are only minor differences in formatting between the late September and early October proposed rule drafts.

Proposed Rule Content

The proposed rule would greatly expand the criteria used to make a public charge determination, which would include the previously excluded criteria of the use of noncash assistance or services that are means tested, such as Medicaid (with limited exceptions), Medicare Part D Low Income Subsidy, SNAP, institutionalization for long-term care under government expense, Section 8 Housing Choice Voucher Program, and Public Housing.

In addition, DHS lists a number of other factors that would be taken into account to make an overall determination of an individual being a public charge. These include education level, proficiency in English and/or other languages, occupational skills, and employment history. These standards would result in detrimental consideration for applicants with limited English proficiency and those with physical or mental health conditions that could affect their ability to work or care for themselves.

Unlike the leaked draft of the rule that was published last spring, which explicitly included the Children’s Health Insurance Program (CHIP) as an applicable public benefit for a public charge determination, the

¹ 64 Federal Register 28689.

proposed rule has modified this to be a consideration rather than an automatic inclusion in the final rule and is collecting public comment specifically on whether CHIP should be included as a public benefit with regard to public charge determinations.

Finally, DHS stepped back in the proposed rule from a policy in the leaked draft that would extend the new qualifying factors for public charge to the applicants' dependents and would apply the public charge criteria to individuals who make any use of these programs as compared to the current policy,² which states that an individual must be "primarily dependent" on public case assistance.

Potential Effects of the Proposed Rule

Previous analysis of the leaked draft of the rule indicated an extensive potential impact on the noncitizen population and would increase the share of noncitizens who would face a public charge determination from 3% to 47% by one analysis, including a 29 percentage point increase in the number of U.S. born individuals that would now be eligible for a public-charge determination.³

Although the proposed rule has reduced the scope of criteria for public charge as compared with the leaked draft, any expansion of the scope of public charge determinations, including additional social and educational factors, could affect overall immigration status. It is expected that a number of newly eligible individuals for public charge could not enroll themselves in Medicaid or other programs in the future and that a potentially sizeable portion of current enrollees would either disenroll from these programs out of fear for their current immigration status or receive public charge status through evaluation of their social and employment factors. Projected chilling effects of this proposed rule have been bolstered by data from a similar policy implemented following welfare reform in the mid-1990s that saw a 17% drop in Medicaid use among the noncitizen population.⁴ It is generally recognized that a lack of coverage for these programs could increase financial instability of families and would create a burden to receiving necessary care.

By its own figures, DHS estimates that the rule would affect approximately 382,000 individuals based on a five-year average of estimated total population subject to public charge review for inadmissibility from FYs 2012-2016.

Current Status

The proposed rule has been placed for display on the Federal Register public inspection desk and will be officially published on October 10 (Docket No. USCIS-2010-0012). The public will have a period of 60 days from the date of publication, or December 9, 2018, to submit comments in relation to the rule. Following review of public comment, DHS will publish a final rule with an effective date to be set no earlier than 60 days following publication of the final rule.

Activity of External Groups

The Center for Law and Social Policy (CLASP) and the National Immigration Law Center (NILC) are co-running the Protecting Immigrant Families, Advancing our Future Campaign. More information [here](#).

For more information, please contact Ethan Jorgensen-Earp at ethan.jorgensen-earp@hklaw.com.

² "Any use" refers to any amount greater than 3% of the federal poverty line, or approximately \$1 per day for a single person.

³ Batalova J et al. Chilling effects: The expected public charge rule and its impact on legal immigrant families' public benefits use. *Migration Policy Institute*. June 2018.

⁴ *Ibid*.