

Examining the Public Charge Draft Proposed Rule

October 1, 2018

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Questions? Email Heather Howard at heatherh@Princeton.edu.

About Manatt Health

Deborah Bachrach, Patricia Boozang, Allison Orris, Alice Lam, and Gayle Mauser with Manatt Health prepared this presentation. Manatt Health integrates legal and consulting expertise to better serve the complex needs of clients across the healthcare system. Combining legal excellence, first-hand experience in shaping public policy, sophisticated strategy insight, and deep analytic capabilities, we provide uniquely valuable professional services to the full range of health industry players. Our diverse team of more than 160 attorneys and consultants from Manatt, Phelps & Phillips, LLP and its consulting subsidiary, Manatt Health Strategies, LLC, is passionate about helping our clients advance their business interests, fulfill their missions, and lead healthcare into the future. For more information, visit <https://www.manatt.com/Health>.

Agenda

- **Context and Background**
- **Overview of Key Issues**
- **Potential Impacts**

Context and Background

Overview of Public Charge Draft Proposed Rule

- On September 22, the Department of Homeland Security (DHS) released a draft proposed rule, *Inadmissibility on Public Charge Grounds*
- The rule proposes to change how DHS determines whether immigrants—when seeking admission to the U.S., an extension of their stay, or adjustment of status to become a lawful permanent resident—are “likely at any time to become a public charge” (i.e., dependent on the government for financial support)
- Being determined a “public charge” puts an individual’s immigration status at risk
- The proposed rule departs from existing guidance by, among other things:
 - Expanding the list of public benefits considered
 - Increasing the importance of income and benefit use in the public charge analysis
- If finalized, the proposed rule would broadly impact consumers, states, localities and providers

*Comments will be due within
60 days of Federal Register publication*

Immigrant Eligibility for Medicaid, CHIP, Marketplace and Medicare Coverage

Medicaid, Children's Health Insurance Program (CHIP), Marketplace, and Medicare coverage are only available to lawfully present immigrants

Medicaid and CHIP

- Must meet additional immigration criteria, all Medicaid/CHIP program eligibility rules, and, typically, wait 5 years to access coverage
- States may – and the majority of states have – lifted the 5 year waiting period for immigrant children and pregnant women
- For undocumented immigrants, the federal government matches state costs for emergency Medicaid services

Marketplace

- No 5 year bar for accessing Marketplace coverage; immigrants ineligible for Medicaid during 5 year waiting period may access subsidized Marketplace coverage
- ACA requires that individuals are screened for Medicaid/CHIP eligibility before being determined eligible for tax credits

Medicare

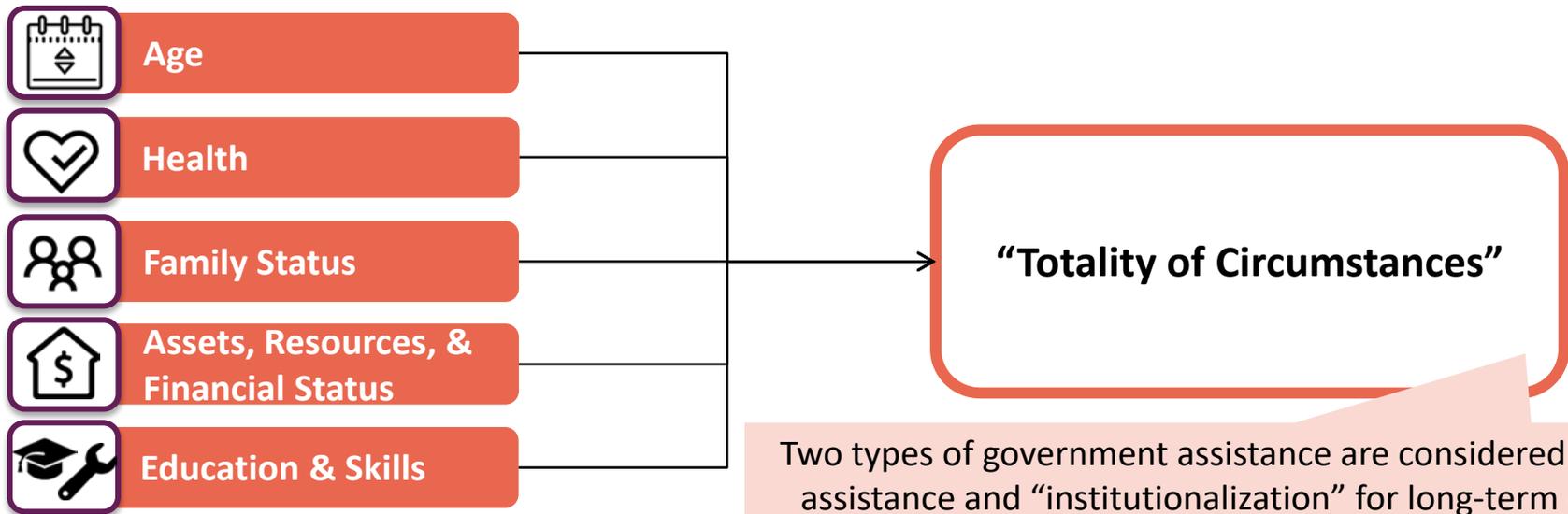
- Must meet additional immigration criteria, waiting period and other requirements to be eligible for Medicare

The proposed rule does not modify these standards

Public Charge Today

Immigrants determined to be or “likely at any time to become” a public charge may be denied entry or, if they live in the U.S., barred from changing their temporary status to permanent residency

To make a public charge determination, the following statutorily-required factors are considered – and no single factor is determinative:



Existing statute also includes an “affidavit of support” requirement for certain immigrants

Changing Regulatory Landscape

The proposed rule would supersede the 1999 guidance

**Current:
1999 Field Guidance**



DHS Draft Proposed Rule



The DHS draft proposed rule would only apply to immigrants seeking admission, extension, or adjustment of status. Reports indicate that a yet-to-be-released Department of Justice rule will address deportability on the grounds of public charge

Sources: Field Guidance on Deportability and Inadmissibility on Public Charge Grounds ("Field Guidance"), 64 Fed. Reg. 28689 (May 26, 1999); Inadmissibility on Public Charge Grounds, DHS Docket No. USCIS-2010-0012. Available at: https://www.dhs.gov/sites/default/files/publications/18_0921_USCIS_Proposed-Rule-Public-Charge.pdf

Key Differences Between Current Guidance and Proposed Rule

Immigrants Subject to Public Charge



1999 Field Guidance

- ✓ Individuals seeking to legally enter the U.S.
- ✓ Individuals legally in the U.S. and seeking to become a Lawful Permanent Resident (i.e., obtain a “green card”)



Proposed Rule

- ✓ Individuals seeking to legally enter the U.S.
- ✓ Individuals legally in the U.S. and seeking to become a Lawful Permanent Resident (i.e., obtain a “green card”)
 - **Individuals seeking an extension of stay (e.g., extending a current visa)**
 - **Individuals seeking to change visa types (e.g., from a student to employment visa)**

Refugees, asylees, and certain Cuban, Haitian, Central American and various other categories of immigrants are statutorily exempt from public charge. DHS also proposes to allow victims of trafficking, witnesses or informants, and several other categories of immigrants to apply for waivers so that the public charge determination is not applied to them.

Public Charge Definition



1999 Field Guidance

- An individual may be considered to be (or likely to become) a public charge if he/she is “*primarily dependent*” on public benefits
- ✓ Use of benefits is one component of the “totality of circumstances” analysis used to make a public charge determination



Proposed Rule

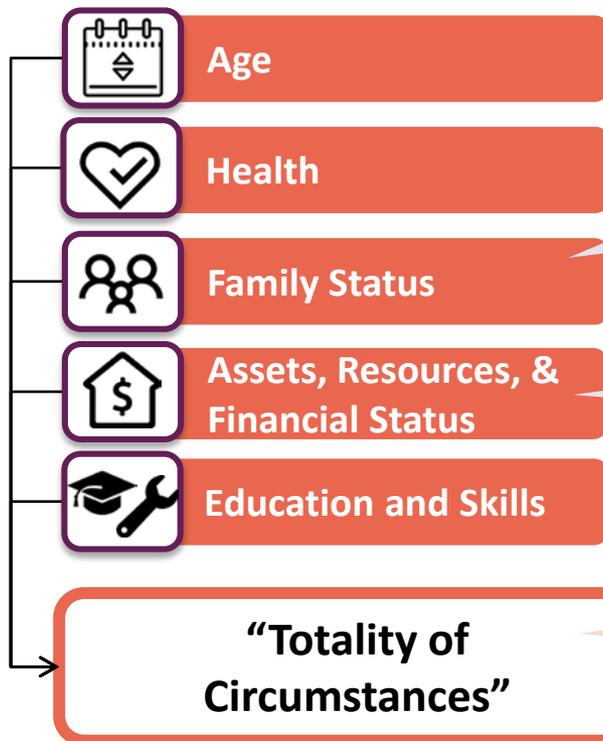
- **An individual may be considered a public charge if he/she “receive[s] *one or more public benefits*”**
- ✓ Use of benefits is one component of the “totality of circumstances” analysis used to make a public charge determination

Factors in Public Charge Determination

The proposed rule maintains the “totality of circumstances” framework and newly prescribes considerations under each of the factors

Factors:

Examples of New Considerations:



Includes assessment of whether household size makes immigrant more/less likely to become a public charge

Includes assessment of use of certain public benefits and whether income \geq 125% of poverty level

Certain immigrants who do not submit sufficient affidavits of support may be deemed likely to become a public charge on this basis alone

Public Benefit Definition

The proposed rule would expand the list of public benefits considered in a public charge determination

The rule would establish standards by benefit category for the level of use that results in a countable benefit:



“Monetizable” benefits, tied to monetary thresholds



“Non-Monetizable” benefits, tied to durational thresholds

Benefit Programs	Existing (✓) and Additional Proposed (+) Benefits	Benefit Type
Supplemental Security Income (SSI)	✓	
Temporary Assistance for Needy Families (TANF)	✓	
Federal, state, or local cash benefit programs	✓	
Institutionalization for long-term care	✓	
Non-emergency Medicaid (<i>exclusions listed on next slide</i>)	+	
Medicare Part D Low Income Subsidy (LIS)	+	
Supplemental Nutrition Assistance Program (SNAP)	+	
Housing Assistance under the Housing Choice Voucher Program or Section 8 Project-Based Rental Assistance	+	
Subsidized Housing under the Housing Act of 1937	+	

Health Benefits Excluded

Select Set of Medicaid Benefits

- Emergency Medicaid
- School-based Medicaid benefits
- Medicaid benefits under the Individuals with Disabilities Education Act (IDEA)
- Medicaid for certain children of U.S. citizens with citizenship pending

CHIP

- *Although not included in the proposed list of benefits, DHS is seeking comment about whether CHIP should be included*

Marketplace Subsidies

The proposed rule indicates that DHS will not consider benefit use by an immigrant's dependents when determining whether the immigrant is likely to become a public charge; benefit use by members of the Armed Services also will not be considered.

Benefit Thresholds Illustrative Examples

Immigrants may very quickly reach the newly prescribed “monetizable” and “non-monetizable” benefit thresholds

THRESHOLD



- 1+ benefits with a cumulative value >15% of FPL for one-person household within any consecutive 12-month period (approx. \$1,800/year)

e.g., received \$300/mo in TANF benefits for one year

SAMUEL



- 1+ benefits for an aggregate of >12 months within a 36-month period (*2 benefits in 1 month = 2 months*)

e.g., Medicaid-enrolled for 7 months of her last pregnancy and lived in subsidized housing for 6 of those months

CARLA



- 1+ benefits where the cumulative value is $\leq 15\%$ of FPL for a one-person household within any consecutive 12-month period; *AND*
- 1+ (non-monetizable) benefit for >9 aggregate months within a 36-month period (*2 benefits in 1 month = 2 months*)

e.g., received \$100/mo in SNAP benefits and Medicare Part D LIS for 10 months in the last 3 years

ROBERT



Weighting Circumstances in Public Charge Determination

The proposed rule outlines which circumstances weigh heavily for – or against – an immigrant’s determination as a public charge

Heavily-weighted positive circumstances include:

- + Having financial resources, assets, and support $\geq 250\%$ of the federal poverty level (~\$63,000 for a family of four)
- + Being authorized to work and currently employed with an income $\geq 250\%$ of the federal poverty level

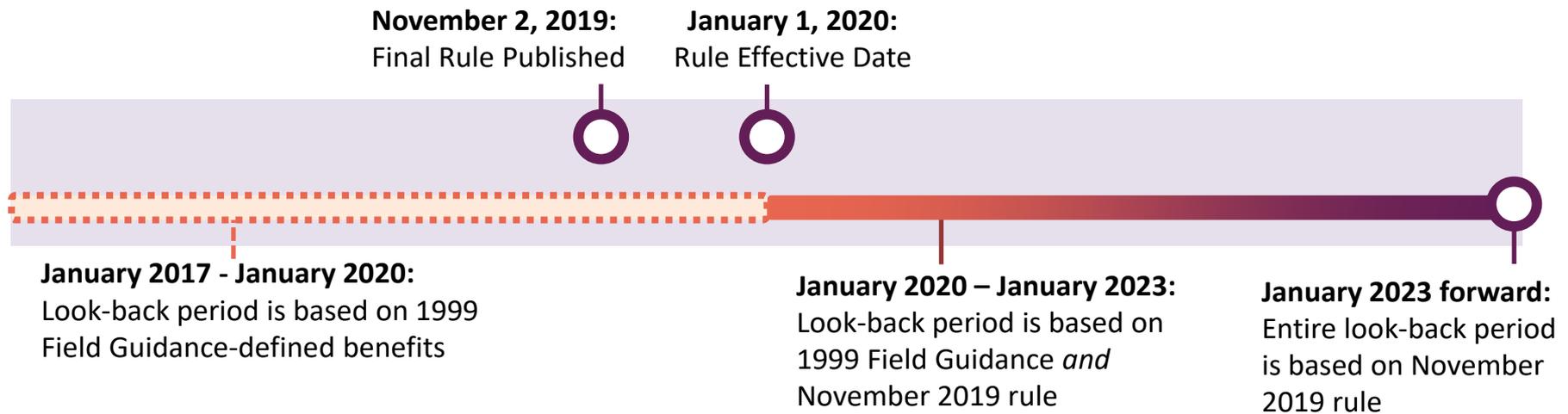
Heavily-weighted negative circumstances include:

- Current receipt (or approval to receive) 1+ public benefits
- Receipt of 1+ benefits in the last 3 years
- Having a medical condition that is likely to require extensive medical treatment/institutionalization or interfere with work/school without insurance or financial resources
- Lack of employment (current, recent, or reasonable prospect)
- Having previously been found inadmissible/deportable based on public charge

DHS emphasizes that heavily-weighted circumstances would still be considered in the “totality of circumstances”

Effective Dates and Benefit Assessment Periods

For illustrative purposes: assuming a final rule is published in November 2019, this example outlines how a prospective determination could include negative weighting of both current and past benefit use



- May 2016: Jane is living and working in the U.S.
- March 2019 - December 2019: Jane receives Medicaid benefits
- February 2020: Jane applies for a green card

RESULT: Jane's use of public benefits between February 2017 and January 2020 is assessed under the terms of the 1999 Field Guidance (*does not include Medicaid*) and from January 2020 to February 2020 as defined by the November 2019-finalized rule (*Jane used no public benefits during this period*)

Potential Impacts of Proposed Rule

The Proposed Rule Could Have a “Chilling Effect” on Legal Immigrants and Their Families



Consumers

- The rule may **deter legal immigrants and their family members (including citizens) from using public benefits** they are eligible to receive due to:
 - New definition of public benefits
 - The complexity of the rule’s structure
 - Discretionary application of the rule
- DHS acknowledges that the proposed rule could **increase poverty, including among families with citizen children** – and that immigrants foregoing benefits could experience:
 - Lost productivity
 - Adverse health effects
 - Medical expenses due to delayed health care
 - Reduced productivity and educational attainment

States and Localities May Experience Increased Implementation and Social Services Costs



States / Localities

- **Implementation costs**, including:
 - Costs related to re-working their Medicaid, human services, and/or Marketplace IT eligibility and enrollment systems and processes
 - Costs to update/develop systems to better track other benefit use and, potentially, share that information with DHS
- **Uncompensated health care**
- **Added costs for social services** as some families may increasingly rely on emergency food banks, shelters, and other safety net resources

Providers May See Uptick in Uncompensated Care



Providers

- “Chilling effect” likely to result in **increased uncompensated care**
- Hospitals and community health centers likely to see **more uninsured patients**
- Immigrants and their families may forego preventive care or chronic care management, driving an **increase in costly emergency and acute care**
- Safety net providers – including **hospitals and community health centers** – may feel the **greatest impact**
- DHS also notes that pharmacies that provide prescriptions to Medicare Part D LIS beneficiaries and **companies that manufacture medical supplies/pharmaceuticals could experience a drop in revenues**

Q&A

Thank You

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Appendix

Considerations in Public Charge Determination

Factor	Standards/Considerations
Age	<ul style="list-style-type: none"> • Whether the immigrant is between 18 and the minimum early retirement age (i.e., between 18 and 61) • Whether age otherwise makes immigrant more/less likely to become a public charge such as by impacting ability to work
Health	<ul style="list-style-type: none"> • Whether health makes the immigrant more/less likely to become a public charge • Whether diagnosed with condition that is likely to require extensive medical treatment or institutionalization • Whether diagnosed health condition will interfere with ability to provide and care for himself, to attend school, or to work
Family Status	<ul style="list-style-type: none"> • Household size • Whether household size makes person more/less likely to become a public charge
Assets, Resources, & Financial Status	<ul style="list-style-type: none"> • Whether household income is at least 125% of the FPL (based on household size) • If income is less than 125% of the FPL, whether total value of household assets and resources is at least 5 times the difference between household gross income and poverty level for the household size involved • Whether immigrant has sufficient household assets and resources to cover any reasonably foreseeable medical costs related to a medical condition that is likely to require extensive medical treatment, institutionalization, or interfere with ability to provide care, attend school, or work • Any financial liabilities • Any past receipt of public benefits
Education & Skills	<ul style="list-style-type: none"> • Adequate education and skills to obtain or maintain sufficient employment (if authorized for employment) to avoid becoming a public charge

Changes to “Public Charge Bond” Rules

- Today, DHS has discretion to provide individuals who are seeking a green card but were found inadmissible on public charge grounds the option of posting a “public charge bond” to guarantee that the individual will not use public benefits while the bond is in effect
- The proposed rule underscores DHS discretion to offer this option and states that public charge bonds generally would not be available to individuals with one or more heavily weighted negative factors – including past use of public benefits
- DHS proposes to increase the minimum bond amount from \$1,000 to \$10,000
- DHS also proposes to make it more difficult to cancel a public charge bond, generally extending the period of time the bond would remain in effect