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The Department of Homeland Security's (DHS) proposed rule, Inadmissibility on Public Charge Grounds, was **published** in the Federal Register on October 10; a 60-day public comment period will close on December 10.<sup>1</sup> DHS proposes significant changes to the standards it will use to determine whether an immigrant is likely to become a “public charge”—or dependent on the government for support—including, for the first time, the use of Medicaid benefits as a key factor in that analysis.

The Robert Wood Johnson Foundation's State Health and Value Strategies program hosted a **webinar** about the proposed rule, focusing in particular on how it could impact immigrants' use of Medicaid and other health benefits. This document provides answers to questions received during the webinar about who the rule will impact, what benefits are implicated by the rule, and how the rule might be administered. Due to the large number of questions received, the below Q&As condense questions into key categories of interest. If the proposed rule is finalized, it will be important to revisit these and other questions to assess the impact of the rule on immigrants as well as states, localities, and health care providers.

## GENERAL QUESTIONS

### 1. What is “public charge”?

Public charge is a longstanding concept—originating in immigration law—that refers to individuals who are likely to be dependent on the government for support. While the standard for determining whether an immigrant is likely to become a public charge has evolved over time, the immigration law is clear that an immigrant can be denied admission to the country or, once here, may be denied a green card if they are determined to be a public charge. (Public charge is not a factor when a green card holder is seeking to become a citizen; rather, it just applies to “admissibility” determinations, which is the focus of the new DHS proposed rule, and, in rare cases, to deportation decisions, which are governed by the Department of Justice.)

### 2. Who are the individuals subject to a public charge determination?

Individuals subject to a public charge determination are:

- › Individuals seeking to enter the United States—e.g., an individual outside of the United States applying for a visa.
- › Individuals seeking to adjust status to become a Lawful Permanent Resident—e.g., a visa holder residing in the United States seeking a green card.
- › Individuals seeking an extension of stay in the United States—e.g., a visa holder in the United States seeking to extend his/her visa to stay in the United States.
- › Individuals seeking a change of status in the United States—e.g., a visa holder seeking to change from one visa type to another visa type.

The proposed rule newly applies a public charge determination for the last two groups of individuals. Table 4 in the preamble to the proposed rule includes a crosswalk of immigrant categories subject to public charge.<sup>2</sup>

### 3. Does public charge apply to undocumented individuals, green card holders, and/or refugees and asylees?

Public charge determinations do not apply to undocumented individuals, refugees, asylees, and, in most circumstances, green card holders. Green card holders could become subject to a public charge determination when they return from a trip abroad of six-months or more, or if they meet certain other limited circumstances in which they are now considered individuals seeking to enter the United States.<sup>3</sup>

#### 4. What are the new benefits considered under the proposed rule?

Since 1999, public charge determinations have considered only receipt of cash assistance (such as Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), or state/local general assistance programs) and government support for “institutionalization” (such as Medicaid long-term care benefits). The proposed rule would redefine “public benefits” for purposes of a public charge determination; the proposed definition retains benefits considered today and adds the following benefits:

- › Medicaid<sup>4</sup>
- › Medicare Part D Low Income Subsidy
- › Supplemental Nutrition Assistance Program (SNAP)
- › Housing assistance under the Housing Choice Voucher Program
- › Section 8 Project-Based Rental Assistance
- › Subsidized housing under the Housing Act of 1937

The proposed rule also would establish monetary and durational thresholds that would be used by DHS to consider whether an individual used benefits to a sufficient degree that they should “count” in a public charge determination.

#### 5. Where can I find the proposed rule and how can I comment on it?

The proposed rule was published in the Federal Register on October 10 and is available [here](#). DHS will accept comments on the proposed rule through December 10; comments may be submitted to DHS via the regulations.gov website, [here](#).

## MEDICAID COVERAGE

#### 6. Does participation in Medicaid include applying for, enrolling in, and/or receiving benefits through a Medicaid program?

Both the preamble to the rule and the proposed regulatory text indicate that whether an immigrant has “applied for or received,” is “currently certified or approved to receive,” or has “been certified or approved to receive public benefits” will be considered as part of a public charge determination. DHS explains this standard by noting that current or past applications for, or receipt of public benefits, suggests that an immigrant’s “overall financial status is so weak that he or she is or was unable to fully support him or herself without government assistance” and that, in general, an immigrant “who is certified or preapproved for benefits in the future is likely to continue to receive public benefits in the future.”<sup>5</sup> The totality of the circumstances analysis would require DHS to consider whether other circumstances (including income, employment status, etc.) mitigate against past application and approval for benefits.

#### 7. Does the use of services provided through a state’s Medicaid Section 1115 waiver count for public charge purposes?

It depends. Some waivers either expand eligibility to new Medicaid populations or alter the way that Medicaid services are delivered to existing Medicaid populations. In such cases, services provided through a Social Security Act Section 1115 waiver would count for public charge purposes.

Other Section 1115 waivers authorize Medicaid funding to support “uncompensated care pools” or “low-income pools,” recognizing that providers incur high costs in delivering care to low-income populations that are not eligible for Medicaid. These pools do not provide “coverage” to individuals; rather, they provide reimbursement to institutions and therefore would not seem to be implicated by the proposed rule.

That said, the preamble to the proposed rule does not discuss 1115 waivers specifically and it will be important to review any final rule carefully to consider these interactions. Notably, this is another factor that could complicate implementation of any final rule.

## 8. Which Medicaid benefits are excluded from consideration?

The rule proposes to consider most Medicaid benefits as part of a public charge determination, but specifically exempts certain Medicaid services, including:

- **Benefits paid for an emergency medical condition:** Recognizing that treatment for emergency medical conditions are often involuntary and must be provided by doctors and hospitals regardless of the ability to pay, DHS will not consider treatment for emergency medical conditions funded by Medicaid in the context of a public charge determination.
- **School-based benefits provided to children who are at or below the oldest age of children eligible for secondary education as determined under state law:** Medicaid pays for health and related services provided in schools when covered services are provided to Medicaid-enrolled students. Medicaid also reimburses states for payments to schools for outreach and enrollment activities and other school-based administrative services, such as care coordination, referrals, and transportation to and from school on a day a child receives a Medicaid-covered service.<sup>6</sup>
- **Services or benefits funded by Medicaid but provided under the Individuals with Disabilities Education Act (IDEA):** IDEA requires school districts to make free, appropriate education available to all children with disabilities and permits school districts to receive Medicaid reimbursement for the cost of providing special education and related services, such as speech or physical therapy, which support a child's ability to learn. DHS notes that "[b]y excluding services provided under IDEA that may be funded in whole or in part by Medicaid, DHS would better ensure that schools continue to receive financial resources to cover the cost of special education and related services, which they would be legally required to provide at no cost to the parents regardless of the outcome of this rulemaking."<sup>7</sup>
- **Medicaid services provided to foreign-born children of United States citizens:** The rule would not consider Medicaid benefits received by children of United States citizens whose lawful admission will result in citizenship (either by adoption or by virtue of permanently residing with their United States citizen parent).

## MEDICARE COVERAGE

### 9. How would the proposed rule affect individuals dually-eligible for Medicaid and Medicare?

Immigrants who are eligible for both Medicare and Medicaid—"dual eligibles"—could be impacted by the proposed rule in at least two ways. The proposed rule includes both Medicaid and Medicare Part D Low Income Subsidy benefits (help paying for the cost of Medicare prescription drugs) as public benefits under a public charge determination. In addition, DHS will also look at a number of other household factors for public charge purposes, including age and household income. An individual who is dually-eligible for Medicaid and Medicare may be elderly and is likely to have a low income level, both of these circumstances would be assessed negatively in a public charge determination.

### 10. Would individuals who receive help through the Medicare Savings Program be counted as receiving public benefits?

Medicare Savings Programs help lower-income Medicare beneficiaries afford the cost of their Part A and B premiums, deductibles, and co-insurance.<sup>8</sup> These programs are authorized by the Medicaid statute and states receive federal Medicaid matching funds for these programs. Therefore, Medicare Savings Programs appear to be encompassed as public benefits under the proposed rule since the proposed rule includes Medicaid with only limited exclusions. In addition, individuals enrolled in Medicare Savings Programs are automatically eligible for and enrolled in the Medicare Part D Low Income Subsidy. As discussed above, the proposed rule includes the Part D Low Income Subsidy as a public benefit in public charge determinations.

## OTHER FEDERAL HEALTH CARE PROGRAMS

### 11. Would individuals who receive subsidies through the marketplace be counted as receiving public benefits? How would the proposed rule impact households with mixed eligibility for Medicaid and marketplace subsidies?

The proposed rule **does not consider** marketplace coverage and subsidies for marketplace coverage as public benefits for public charge purposes.

With respect to families in which members receive both Medicaid and marketplace subsidies, the proposed rule is also clear that DHS may only consider use of public benefits by the immigrant subject to the public charge determination, and not the use of public benefits by the immigrant's household members. However, DHS will look at a number of other household factors for public charge purposes, including household size and household income. In many states, a household with members eligible for Medicaid and marketplace subsidies is likely to have a low income level that would be assessed negatively in a public charge determination.

### 12. Would individuals who are covered by the Children's Health Insurance Program (CHIP) be counted as receiving public benefits?

The proposed rule **does not consider** CHIP coverage as public benefits for public charge purposes, but DHS indicates that it is evaluating whether to include CHIP in the final rule and seeks comment from the public about whether to do so. Even if CHIP is not a public benefit considered for purposes of a public charge determination, the proposed rule is likely to deter enrollment in CHIP, which is both a financing source for Medicaid coverage (nearly 60 percent of CHIP enrollees were enrolled in Medicaid coverage financed by CHIP in 2016) and a standalone source of coverage that families may find difficult to distinguish from Medicaid.

### 13. How would the proposed rule impact immigrant children and pregnant women who receive coverage through Section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA)?

The answer depends on how a state operationalizes the CHIPRA Section 214 option, which allows states to provide Medicaid and CHIP coverage to lawfully residing immigrant children and pregnant women even if they have not met the five-year waiting period that would otherwise be required to enroll.<sup>9</sup> Like other individuals subject to public charge, these immigrant children and pregnant women will face a public charge determination when they seek to extend their visa, change their visa or change their visa to a green card. Depending on the state, immigrant children and pregnant women under the Section 214 CHIPRA option could be enrolled in Medicaid, Medicaid financed by CHIP, or CHIP. Under the proposed rule, DHS will consider the immigrant's use of Medicaid but not CHIP. In practice, immigrant families are likely to be deterred from enrolling in Medicaid and CHIP because they will find it difficult to untangle the distinctions among Medicaid, CHIP-financed Medicaid, and CHIP.

## STATE-FUNDED HEALTH CARE PROGRAMS

### 14. Under the proposed regulation, would participation in a state or locally-funded health care program—such as the receipt of state-only Medicaid services—count as participating in a public benefit for public charge purposes?

For public charge purposes, the proposed rule would count only the following state and local programs as public benefits:

- › State and local cash benefit programs for income maintenance (such as general assistance programs), and
- › Benefits provided for institutionalization for long-term care at government expense (such as Medicaid-funded institutionalization or state long-term care programs or wholly state or locally funded long-term care facility benefits).

The preamble to the proposed rule notes that any state or local public benefits not specifically named would not be included in the definition of public charge.<sup>10</sup>

## CONSEQUENCES FOR CONSUMERS AND HEALTH CARE ACCESS

### 15. How many individuals in the United States could be affected by this rule?

Immigrants who are seeking to enter the United States, seeking to extend or change a visa, or adjust from a visa to a green card are subject to public charge determination. According to DHS estimates, in 2016, more than 560,000 individuals sought to adjust their immigration status; of those, DHS estimates that approximately 382,000 people would have been subject to a public charge determination.<sup>11</sup> However, various analyses issued since the rule was released indicate that the proposed rule could impact a much broader group of individuals. At maximum, any noncitizen or family member of a noncitizen may stop using or not participate in public benefits, programs, or services because they believe they might be affected by the new rule. Using data from the American Community Survey, this “potentially chilled population” is estimated to comprise 22.2 million noncitizens and a total of 41.1 million noncitizens and their family members currently residing in the United States, and could also impact an unknown additional number of noncitizen individuals seeking to enter the country (and their family members) who would not be observed in a survey of American households.<sup>12</sup>

### 16. Is it anticipated that this proposed regulation will have a “chilling effect” on participation in public benefits among immigrants and their family members?

In the preamble of the proposed rule, DHS acknowledges research on the “chilling effect” that may occur when rules are changed and immigrants and their family members are discouraged from using public benefits for which they are eligible due to fear of real or perceived immigration consequences.<sup>13</sup> Despite acknowledging the “chilling effect,” DHS does not estimate disenrollment or other chilling impacts among family members of noncitizens; rather, the agency estimates disenrollment only among individuals who are directly affected by the proposed rule. DHS assumes that (over a five-year period) 2.5 percent of the noncitizen population would seek to adjust their status and then assumes a 2.5 percent rate of disenrollment or foregone enrollment among noncitizens enrolled in impacted public benefit programs, concluding that approximately 324,000 people each year would likely disenroll or forego enrollment. The Kaiser Family Foundation recently published an evaluation of the methodology used by DHS to estimate the impacts of the proposed rule.<sup>14</sup>

DHS’ analysis focuses narrowly on immigrants who are seeking to adjust status, and on households with members receiving public benefits and members who are foreign-born. However, the proposed rule could impact a much broader group of individuals: all noncitizens and their family members who may drop, or not apply for, benefits because they believe they might be affected by the new rule. As noted above, using data from the American Community Survey, Manatt Health estimates that the “potentially chilled population” comprises 22.2 million noncitizens and a total of 41.1 million noncitizens and their family members currently residing in the United States.<sup>12</sup> With respect to Medicaid and CHIP, the Kaiser Family Foundation estimates that if the proposed rule leads to disenrollment rates ranging from 15 percent to 35 percent among certain noncitizens and their family members, between 2.1 million and 4.9 million individuals currently covered by Medicaid/CHIP would disenroll.<sup>14</sup> Another recent study by the Fiscal Policy Institute (FPI) adopts a similar range of potential disenrollment rates for Medicaid/CHIP, SNAP and housing benefits.<sup>15</sup> Unlike the DHS estimate, Kaiser and FPI estimates consider both immigrants who are seeking to adjust their status, as well as other immigrants and their citizen family members who might be chilled due to increased fear and confusion about the rule.

Studies examining the impact of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)—which restricted immigrant eligibility for a number of public benefit programs—support the likely “chilling effect” of DHS’ proposed rule. Various studies found that rates of benefit use fell sharply among groups such as refugees and United States citizen children whose eligibility for benefits was not impacted by PRWORA.<sup>16</sup> For example, the U.S. Department of Agriculture (USDA) found that food stamp use between 1994 and 1997 fell by 54 percent among legal permanent immigrants and that participation among United States citizen born children living

with legal immigrant parents fell faster than participation among children living with native born parents.<sup>17</sup> Another study covering the same time period found that Medicaid use among refugees fell by 39 percent, compared to 17 percent among noncitizens, even though refugees remained eligible for Medicaid after PRWORA.<sup>18</sup>

## CONSEQUENCES FOR STATE MEDICAID AGENCIES AND MARKETPLACES

17. For the past several years, states have sought to integrate their eligibility and enrollment policies, operations and systems for Medicaid, marketplace subsidies, and other public programs. How might this rule affect state efforts for integration?

Federal requirements and state efforts have focused on streamlining eligibility and enrollment processes to increase access to health coverage programs, providing 12-months continuous health coverage to mitigate disruptions in care, and coordinating eligibility and enrollment across multiple health coverage and human services programs like Medicaid, TANF, and SNAP to address health and social factors. Due to public charge concerns, immigrants could seek to limit their use of public benefits. States will need to evaluate their policy, operational and systems configurations to understand how to support legal immigrants who are eligible for these programs as they navigate the new environment, including facilitating changes to avoid automatically enrolling immigrants in public benefits that could jeopardize their immigration status.

## CONSUMER NOTICING CONSIDERATIONS

18. Would the proposed rule require state Medicaid departments to advise lawful immigrants about how enrolling in coverage would impact their immigration status?

Until the rule is finalized, Medicaid agencies and health departments should refrain from warning immigrants about potential consequences of using benefits that DHS proposes to add to the public charge determination and for which they are eligible because the rule would only be applied prospectively once it goes into effect. (Agencies may already alert beneficiaries about the potential consequences of using cash assistance or long-term care benefits based on the guidance that is currently in effect.) If the rule is finalized, health departments may decide that it is appropriate to advise Medicaid applicants or enrollees of the potential immigration consequences of applying for or receiving Medicaid, but the proposed rule does not specifically require them to do so.

Recent case law in the criminal context does not extend to notification obligations about benefit use. A recent Supreme Court decision, *Padilla v. Kentucky*, 559 U.S. 356 (2010), held that the Sixth Amendment's guarantee of effective assistance of counsel requires a defense attorney to inform his or her client whether the client's guilty plea carries a risk of deportation. *Padilla* imposes requirements on attorneys representing clients in connection with criminal matters (i.e., defense counsel). Health departments do not serve as defense counsel to Medicaid applicants or enrollees and, therefore, are not bound by the requirements of *Padilla*.

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#### ABOUT MANATT HEALTH

This Q&A was prepared by Deborah Bachrach, Patti Boozang, Alice Lam, and Allison Orris. Manatt Health integrates legal and consulting expertise to better serve the complex needs of clients across the healthcare system.

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## Endnotes

1. "Inadmissibility on Public Charge Grounds; Notice of Proposed Rulemaking," 83 Federal Register 196 (10 October 2018), pp. 51114-51296. Available at: <https://www.gpo.gov/fdsys/pkg/FR-2018-10-10/pdf/2018-21106.pdf>.
2. "Inadmissibility on Public Charge Grounds; Notice of Proposed Rulemaking," 83 Federal Register 196 (10 October 2018), pp. 51137.
3. "Inadmissibility on Public Charge Grounds; Notice of Proposed Rulemaking," 83 Federal Register 196 (10 October 2018), pp. 51135.
4. As described below, certain Medicaid benefits are excluded, including: coverage of emergency medical conditions, school-based Medicaid, Medicaid provided to individuals pursuant to the Individuals with Disabilities Education Act (IDEA), and benefits provided to immigrant children of U.S. citizens, such as during an adoption proceeding.
5. "Inadmissibility on Public Charge Grounds; Notice of Proposed Rulemaking," 83 Federal Register 196 (10 October 2018), pp. 51188.
6. For more information about school-based Medicaid services, see: "Medicaid in Schools," MACPAC (2018), <https://www.macpac.gov/wp-content/uploads/2018/04/Medicaid-in-Schools.pdf>. Accessed: October 15, 2018.
7. "Inadmissibility on Public Charge Grounds; Notice of Proposed Rulemaking," 83 Federal Register 196 (10 October 2018), pp. 51170.
8. Also known as Qualified Medicare Beneficiary (QMB), Specified Low-Income Beneficiary (SLMB), and Qualifying Individual (QI) programs.
9. Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Public Law 111-3. Accessible at: <https://www.gpo.gov/fdsys/pkg/PLAW-111publ3/pdf/PLAW-111publ3.pdf>. Centers for Medicare & Medicaid Services. State Health Official Letter, SHO #10-006: *Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women*. Washington, DC: U.S. Department of Health and Human Services; 2018. <https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf>. Accessed: October 15, 2018.
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11. "Inadmissibility on Public Charge Grounds; Notice of Proposed Rulemaking," 83 Federal Register 196 (10 October 2018), pp. 51238-40.
12. Manatt Health. *Public Charge Proposed Rule: Potentially Chilled Population Data Dashboard*. New York, NY; 2018. <https://www.manatt.com/Insights/Articles/2018/Public-Charge-Rule-Potentially-Chilled-Population>. Accessed: October 15, 2018.
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14. Artiga S, Garfield R, Damico A. *Estimated Impacts of the Proposed Public Charge Rule on Immigrants and Medicaid*. Washington, DC: Kaiser Family Foundation; 2018. <https://www.kff.org/disparities-policy/issue-brief/estimated-impacts-of-the-proposed-public-charge-rule-on-immigrants-and-medicaid/>. Accessed: October 15, 2018. See Appendix C: Summary of DHS's Medicaid Estimates.
15. Fiscal Policy Institute. *"Only Wealthy Immigrants Need Apply": How a Trump Rule's Chilling Effect Will Harm the U.S.* New York, NY: Fiscal Policy Institute; 2018. <http://fiscalpolicy.org/public-charge>. Accessed: October 23, 2018.
16. Batalova J, Fix M, Greenberg M. *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*. Washington, DC: Migration Policy Institute; 2018. <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families>. Accessed: October 15, 2018.
17. Genser, J. *Who is Leaving the Food Stamp Program: An Analysis of Caseload Changes from 1994 to 1997*. Washington, DC: U.S. Department of Agriculture, Food and Nutrition Service, Office of Analysis, Nutrition, and Evaluation; 1999. <https://fns-prod.azureedge.net/sites/default/files/cdr.pdf>. Accessed: October 15, 2018.
18. Fix M, Passel J. *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform*. Urban Institute; 1999. <https://www.urban.org/research/publication/trends-noncitizens-and-citizens-use-public-benefits-following-welfare-reform>. Accessed: October 15, 2018.