**Key Provisions of Final Public Charge Rule vs October 2019 NPRM**

The Trump Administration published a final rule regarding the definition, determination and application of “public charge,” on Wednesday, August 14. This q & a document summarizes key provisions in the rule and compares the changes to current law and the draft rule released in October 2018.

***What is the current “public charge” rule?***

The current definition of “public charge” is a person who has become or is likely to become primarily

dependent on the government for subsistence. Under the current policy, which dates back to 1999, the only benefits considered in the public charge test are:

* Cash *assistance* such as Supplemental Security Income (SSI), Temporary Assistance for Needy

Families (TANF) and comparable state or local programs.

* Government-funded long-term institutional care.

***Which programs are affected by the final rule?***

Under the October 10, 2018 NPRM, the following programs were proposed to be added to the list that could be considered for public charge determination:

* SNAP
* Most forms of Medicaid
* Premium and Cost-Sharing Subsidies for Medicare Part D
* Section 8 Housing under the HUD HCV program
* Section 8 project-based rental assistance
* Certain other forms of subsidized housing

The August 14, 2019 Final Rule:

* Retains SNAP, most forms of Medicaid, and the listed housing subsidies on the expanded list
* Note that CHIP coverage is NOT affected by this rule and therefore is not included on the list of programs that will be reviewed during a public charge determination
* Deletes Part D subsidies as an affected benefit

***Is there a threshold for duration or amount of benefits that a person may not exceed?***

The final rule sets a threshold, defining “public charge” as “an alien who receives one or more public benefit for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two public benefits in one month counts as two months).”

* The proposed rule would have set *three different thresholds* depending on whether the person received only monetizable benefits, only non-monetizable benefits, or some combination of the two. If a person received some benefits but those benefits remained below the threshold, their receipt of benefits would not have been taken into consideration *at all* in the public charge determination.
* The final rule sets one threshold for all types of benefit receipt. However, the final rule also allows officers to, at their discretion, consider receipt of benefits in a duration shorter than the 12-month threshold, to the extent that such receipt is “relevant in the totality of the circumstances.”

***What groups are exempted from the public charge consideration?***

Certain immigrants—such as refugees, asylees, survivors of domestic violence, and other protected groups—are not subject to “public charge” determinations and would not be affected by this proposed rule if they seek a visa, seek to extend a visa, or seek a green card through these pathways. Public charge is also not a consideration when lawful permanent residents (green card holders) apply to become U.S. citizens.

The final rule further exempts public assistance received by the following:

* Active duty or Ready Reserve members of the armed forces and their spouses and children
* An individual while in a status that is exempt from the public charge ground of inadmissibility
* Children of U.S. citizens whose lawful admission for permanent residency and subsequent residence in the custody of U.S. citizen parents will result in the child’s acquisition of citizenship
* Children entering the U.S. for the prime purpose of attending a citizenship interview under the Child Citizenship Act of 2000
* Holders of T (severe form of trafficking in persons) and U (victim of criminal activity) visas. Both had been proposed to be subject to the determination of public charge but would have been able to seek waivers; the final rule exempts them altogether from the determination.

***What are the Medicaid-related exemptions?***

The proposed rule would have exempted the following individuals/types of Medicaid-funded services from consideration towards the public charge determination:

* Emergency Medicaid
* Medicaid received for services under the Individuals with Disabilities Education Act (IDEA)
* School-based benefits provided to individuals who are at or below the maximum eligible age for secondary education, as determined under state law.
* Medicaid received by children of U.S. citizens whose lawful admission for permanent residency and subsequent residence in the custody of U.S. citizen parents will result in the child’s acquisition of citizenship.
* Medicaid received by children entering the U.S. for the prime purpose of attending a citizenship interview under the Child Citizenship Act of 2000.

The final rule makes the following revisions to those exemptions and adds two additional exemptions:

* Adds Medicaid received by children under the age of 21
* Adds Medicaid received by pregnant women up to 60 days post-partum
* Expands the Medicaid related exemption for children eligible for acquisition of citizenship to apply to *any* public benefit received by such a child

***If someone applies for assistance, but does not actually receive such assistance, will that count?***

The final rule clarifies that:

* The act of applying for a benefit does not constitute receipt, but “it may serve as evidence of the alien’s likelihood of receiving public benefits in the future.”
* A person who applies on behalf of another (i.e., a parent applying for a child but not seeking benefits for themselves) is not considered to have received the benefit themselves.

***What is the “totality of the circumstances” test?***

The public charge statute — which cannot be changed by regulations — requires immigration officials to look at all factors that relate to noncitizens’ ability to support themselves, including their age, health, income, assets, resources, education/skills, family members they support, and family who will support them. They may also consider whether a sponsor has signed an affidavit of support (a contract) promising to support the noncitizen.

Since the test looks at the person’s overall circumstances prospectively, no one factor is definitive. Any negative factor, such as not having a job, can be overcome by positive factors, such as having completed training for a new profession or having college-educated children who will help support the family.

This rule defines certain “positive” and “negative” factors, and further defines some of those factors as “heavily positive” or “heavily negative” when considered by a government officer. The final rule clarifies a number of the factors that will be taken into account in determining whether someone is, or is likely to become, a public charge. Notably:

* The receipt of benefits for a total of 12 months in a 36-month period is defined as a “heavily negative” factor in the rule.
* The rule adds positive consideration for an individual who is an unpaid caregiver for another person in their home, such as a child or elderly relative. Previously the factors considered paid employment but not unpaid activities such as caregiving that provide a benefit to the government.
* A new heavily positive factor will be the receipt of private health insurance. This is in addition to the positive factor that would apply in circumstances where an individual has sufficient household assets and resources to cover reasonably foreseeable medical expenses.
* Under the October 2018 NPRM, an individual who had applied for a fee waiver for charges to apply to enter the country or adjust status would have that weigh negatively against them; the final rule deletes that provision.

Also note that for an individual who holds a non-immigrant visa and is seeking to extend that visa, the only test that would be applied is whether the person received 12 months of benefits in the aggregate in the prior 36-month period – not the entire totality of the circumstances test as had originally been proposed in the October 2018 NPRM. Because non-immigrant visa holders are generally ineligible for the types of benefits the public charge rule encompasses, this test will likely have no practical impact on these visa holders.

***Will the rule be applied retroactively?***

Generally, no, with the following comments:

* An individual who received assistance that counted toward the public charge determination under the 1999 guidance that has been in effect for the past two decades could have that assistance used in the determination, but not under the “heavily weighted” factor definition created by the new rule.
* Prior to the October 15, 2019 effective date, receipt of benefits that would be added under the new rule such as SNAP and HUD subsidies will not be taken into consideration. The continued receipt of these benefits following the bill going into effect would, however, be considered under the new totality of the circumstances test and durational definitions.