

DEPARTMENT OF HOMELAND SECURITY FINALIZES PUBLIC CHARGE RULE ON INADMISSIBILITY; EFFECTIVE OCT. 15

Today, the Department of Homeland Security issued a [final rule](#) ([press release](#)) on determining inadmissibility on public charge grounds.

- **What it is:** Public charge is the determination that evaluates whether an immigrant is likely to become reliant on public benefits, and consequently whether he or she is allowed to enter the country or to alter his or her immigration status.
- **Why it is important for you:** While historically the agency has considered only cash and government-funded long term care benefits, the rule finalizes an expansion of public charge determinations to consider health, housing, and nutrition benefits. Unlike the proposed rule, the final rule would not consider Medicare Part D low-income subsidy and Medicaid for those under age 21 and pregnant women in the first 60 days after birth.
- **Potential next steps:** The final rule takes effect at midnight on Oct. 15, 2019. DHS notes that it will apply the final rule to applications and petitions postmarked (or, if applicable, submitted electronically) on or after the effective date. The final rule will not be applied retroactively. A legal challenge to the final rule is likely.

Highlights from the final rule, on which DHS received 266,000 comments that largely opposed the provisions, follow:

- **Public Benefits Considered** – Currently, only cash benefits and government-funded long-term institutional care are considered in public charge determination, including the use of Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), and federal, state, local, or tribal cash assistance for income maintenance. As proposed, the final rule expands the definition of “public benefits” that will be considered in public charge determinations to include non-cash benefits including “the **Supplemental Nutrition Assistance Program (SNAP), most forms of Medicaid, Section 8 Housing Assistance under the Housing Choice Voucher (HCV) Program, Section 8 Project-Based Rental Assistance, and certain other forms of subsidized housing.**” See p. 14.
- **Public Benefits Excluded** – The final rule excludes certain public benefits from consideration for public charge inadmissibility. Under the final rule, public charge Medicaid benefits for emergency medical services; Medicaid for pregnant women (including 60 days post-partum) and immigrants under age 21; Medicaid for school-based services and services provided under the Individuals with

Disabilities Education Act; the Women, Infants, and Children (WIC) program; and public benefits received by certain international adoptees and other children acquiring US citizenship; and public benefits received by individuals that are either actively serving in the military or are in the Ready Reserve, as well as their spouses and children. Where DHS has previously proposed to include receipt of the Medicare Part D Low-Income Subsidy (LIS), the final rule excludes the use of this program entirely from public charge determinations. See p. 24

- **Clarification on the Receipt of Public Benefits** – On p. 23, DHS clarifies that an application or certification for benefits will not constitute “receipt” of such benefits, “although it may serve as evidence of the alien’s likelihood of receiving public benefits in the future.” Additionally, DHS clarifies that they will only consider public benefits received directly by an immigrant for the immigrant’s own benefit. If one or more members of the immigrant’s household such as a child or family member receives benefits, it will not count against the immigrant unless he or she is listed as a beneficiary.
- **Thresholds for Public Charge Determinations** – DHS has created a duration-based standard for determining whether an alien is likely to become a public charge. Specifically, DHS defines the term “public charge” to mean an individual who receives one or more designated public benefits for more than 12 months, in the aggregate, within any 36-month period. As DHS clarifies, this means that receipt of two benefits in one month, for example, counts as two months. See p. 242 for more details. It is important to note that the rule will not be applied retroactively. Thus, the full 36 month period will not be examined until 36 months after the rule takes effect.
- **Totality of Circumstances** – Of note, the final rule will now allow DHS to consider the extent to which an alien has received public benefits below the defined threshold in determining whether the alien is likely to become a public charge in the future. In addition to this change, DHS made the following adjustments for what it will consider in the totality of circumstances determination for whether an alien is or will become a public charge (p. 29-32):
 - Whether the alien is a primary caregiver for an individual in his or her household;
 - Whether the alien receives public benefits above the threshold for more than 12 months within any 36-month period;
 - Whether the alien has private health insurance;
 - The alien’s health status, which DHS will generally determine through an “immigration medical examination;”
 - The alien’s household assets;
 - The alien’s income relative to whether he or she is in the armed forces;
 - The alien’s income minus the value of any received public benefits and illegal activities;
 - The alien’s income according to his or her most recent federal tax-year transcripts;
 - DHS will *not* consider a fee waiver request in determining public charge inadmissibility; and,
 - Federal tax-return transcripts that demonstrate steady employment history.

- **Public Charge Bond** – The final rule authorizes DHS to use its discretion to offer public charge bonds to certain applicants for adjustment of status, “who are inadmissible only due to the likelihood of becoming a public charge.” USCIS is developing training and policy guidance to ensure discretionary decisions to offer a public charge bond are fair and consistent. In the final rule, DHS reduced the minimum bond amount from \$10,000 to \$8,100, adjusted annually for inflation based on the Consumer Price Index for All Urban Consumers (CPI-U). See discussion beginning p. 609.

For the purposes of bond breach determination, as mentioned above, DHS modified the threshold to a single duration-based threshold set “for more than 12 months in the aggregate within any 36-month period (such that, for instance, receipt of two benefits in one month counts as two months).” Only public charge bonds of unlimited duration will be offered, noting the administrative burden on the “bonded alien” and DHS in the period renewal and review of bonds.

- **Projected Impact** – DHS states the final rule will result in a reduction of approximately \$2.47 billion in transfer payments from the federal government to individuals who might choose to disenroll from or forego future enrollment in public benefits. Specifically, “DHS estimates that the 10-year discounted federal and state transfer payments reduction of this final rule will be approximately \$21.0 billion at a 3 percent discount rate and about \$17.3 billion at a 7 percent discount rate.” DHS also notes they are unable to quantify additional reductions to transfer payments. See pp. 38-39.