Introduction

This memorandum analyzes the rule recently proposed by the Department of Homeland Security (DHS) entitled “Inadmissibility on Public Charge Grounds.”¹ This analysis focuses on the millions of immigrants legally working and residing in the United States, as well as U.S. citizens, who will be directly harmed by the rule. It also addresses the damage which the rule is likely to inflict on society as a whole.

The proposed rule will make it impossible for many legal immigrants to remain in the U.S. as a result of their past usage – and/or likely future usage – of a wide variety of public benefits programs. It will also adversely affect naturalized citizens and U.S.-born citizens. Additionally, as DHS itself acknowledges, it will harm public health and the national economy.

The proposed rule will change the way the federal government determines whether a person is inadmissible, and therefore deportable,² on “public charge” grounds. The benefits which will render a noncitizen deportable under the proposed rule include healthcare, food, and housing assistance. In other words, any noncitizen who is “unable to meet their basic needs without government help” could be considered a public charge.³ The proposed rule applies to those applying for:

- admission to the U.S;
- permanent residence (i.e., a Green Card);
- a temporary visa;
- extension of stay or change of status.⁴

The proposed rule will disproportionately affect vulnerable populations, including children, pregnant women, and disabled individuals. It will also create dire choices for families and a quandary for the social workers, medical care providers, and other professionals who advise immigrants. Each of these issues is discussed in more detail below.

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² Immigration and Nationality Act § 237(a)(1)(A), 8 U.S.C. § 1227 (a)(1)(A) (2018) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”).
1. The proposed rule will radically broaden the scope of the “public charge” grounds for inadmissibility and deportation.

   a. Under current policy, only noncitizens primarily dependent on cash assistance can be considered public charges.

   The proposed rule will significantly expand current law by including, for the first time, non-cash benefits in determining who is a “public charge.”\(^5\) While only about 3% of noncitizens receive cash assistance, nearly 50% receive some form of non-cash benefits.\(^6\)

   Congress first introduced the public charge grounds for inadmissibility in 1882 when it prohibited entry into the United States by “any person unable to take care of himself or herself without becoming a public charge.”\(^7\) In 1999 the former Immigration and Naturalization Service (INS) outlined the current policy for public charge determinations made by immigration officers.\(^8\) Those officers consider the following five factors in making such a determination, which is known as a “totality of the circumstances test”: (1) age; (2) health; (3) family status; (4) assets, resources, and financial status; and (5) education and skills.\(^9\) Under the totality of the circumstances test, immigration officers weigh certain “positive factors” comprised of characteristics showing self-sufficiency against “negative factors” demonstrating an inability to be self-sufficient.\(^10\) Under the assets factor, INS limited the inquiry to “cash benefits from the government for income

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\(^7\) Melissa Boteach, et al., *Trump’s Immigration Plan Imposes Radical New Income and Health Tests Center for American Progress* (July 19, 2018); In 1917, being a public charge of the government became grounds for deportation as well as inadmissibility. Act of Feb. 5, 1917, Pub. L. No. 64-301, ch. 29, § 19, 39 Stat. 874, 889. Prior to the 1870s, states regulated immigration and several states had laws limiting entry of poor immigrants. The states feared European countries were sending poor people to the United States as part of an official policy and requested the federal government take action. As a result, one of the earliest forms of federal immigration legislation banned entry by those likely to become a public charge. Neuman, Gerald L., *The Lost Century of American Immigration Law* (1776-1875), 93 COLUM. L. REV. 1833, 1859 (1993).


\(^9\) Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 FR 28689 (May 26, 1999).

Accordingly, current policy permits immigration officers to consider only cash benefits, including Temporary Assistance for Needy Families (TANF), General Assistance (GA), and Supplemental Security Income (SSI), under the fourth factor for purposes of public charge determinations. However, current policy explicitly prohibits officers from considering non-cash assistance, including housing assistance, food support, and Medicaid, in making public charge determinations.

b. The proposed rule will radically expand the circumstances defined as negative factors in the totality of the circumstances test.

With this proposed rule, DHS seeks to dramatically expand the number of noncitizens who will be inadmissible, and therefore deportable, on public charge grounds. Specifically, in making the public charge determination, immigration officers will be permitted to consider various forms of health insurance coverage, and food and housing assistance, including Medicaid, prescription drug costs under Medicare Part D, SNAP (previously referred to as the Food Stamps program), and the Section 8 Choice Voucher Program and Project-Based Rental Assistance Program, as well as other subsidized housing programs. Even pre-approval for public benefits could serve as evidence that a noncitizen is likely to become a public charge.12

DHS makes no secret of the scope and breadth of its proposal. It has acknowledged that the benefits it proposes to include in determining a public charge “represent the largest Federal programs for low-income people by total expenditure that address basic living needs such as income, housing, food, and medical care.”13 Indeed, four million noncitizens receive Medicaid, 9.6 million have at least one family member receiving Medicaid or CHIP,14 and 4.5 million belong to a family in which at least one member receives food support.15

The proposed rule sets forth a series of threshold levels for the public charge determination, depending on the type of benefit being considered:

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11 Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 FR 28689 (May 26, 1999) (emphasis added).
14 Jeanne Batalova, et al., Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use, MIGRATION POLICY INSTITUTE, 4 (June 2018), https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families. Although the proposed rule does not include CHIP (Children’s Health Insurance Program), an earlier draft of the proposed rule did so, and DHS is specifically seeking input as to whether to include it (see page 11 of this memo). CHIP “provides health coverage to eligible children, through both Medicaid and separate CHIP programs. CHIP is administered by states, according to federal requirements. The program is funded jointly by states and the federal government.” Children’s Health Insurance (CHIP), Medicaid.gov, https://www.medicaid.gov/chip/index.html.
A noncitizen who only receives benefits in the form of cash assistance, SNAP, Section 8 Choice Voucher Program, or Section 8 Project-Based Rental Assistance, will be considered a public charge if the total value of all combined assistance is greater than $1,821 (15% of the Federal Poverty Guidelines (FPG) for a household of one) within a one-year period. To put this in perspective, an individual who receives just over $150 in such benefits per month would exceed this threshold. A noncitizen could also be deemed a public charge if she receives Medicaid, Medicare Part D, or non-Section 8 subsidized housing for more than twelve months in a three-year period. A noncitizen receiving subsidies for prescription medication through Medicare Part D for more than twelve months within this period would exceed this threshold. The proposed rule does not require the twelve months to be consecutive.

A noncitizen who receives a combination of cash assistance, SNAP, and Section 8 assistance in an amount below the 15% threshold but also receives Medicaid, Medicare Part D, or non-Section 8 subsidized housing for nine months within a three-year period would also fall under the definition of public charge. Again, these months need not be consecutive.

In addition to the broadened scope of public benefits considered, the rule will also introduce an income guideline for the public charge determination. Specifically, an individual will be deemed a public charge if her household income is less than 125% of the Federal Poverty Guidelines. This will require a family of four to have a yearly income of over $30,000. This implicitly makes a large family size a negative factor, as a larger household is subject to a higher dollar amount in order to attain the 125% threshold. Another negative factor is age: any noncitizen under eighteen and over sixty-one will be considered to have limited employability and thus more likely to be deemed a public charge. A health condition “requir[ing] extensive medical treatment” (a term not defined in the proposed rule) or which would make it difficult for the noncitizen to obtain employment or education, will also be a negative factor in making a public charge.

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17 Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51158 (Oct. 10, 2018); The second threshold also includes long-term institutionalization at the government’s expense for more than twelve months in a three-year period.
20 Id. at 51180.
determination. Other negative factors include a lack of education and skills, including English language proficiency.

The proposed rule also provides significant discretion to immigration officers in weighing other factors against noncitizens. Specifically, the proposed rule states “[o]ther negative and positive factors, including factors not enumerated elsewhere in this rule, may also be weighed heavily in individual determinations, as circumstances warrant.” This gives immigration officials extraordinary discretion to make a public charge determination, even where the noncitizen applicant fulfills the enumerated guidelines.

2. The proposed rule will affect millions of noncitizens, as well as naturalized and U.S.-born citizens.

a. The proposed rule will directly harm noncitizens.

More than 10 million noncitizens (or about half of all noncitizens in the U.S.) reside in benefit-receiving families. These individuals will be vulnerable to deportation under the proposed rule. This includes visa-holders and lawful permanent residents (LPRs). Of the LPRs affected by the proposed rule, those who have come to the U.S. for family-related reasons will be the most at risk because they typically have less education and proficiency in English, both of which are considered negative factors under the proposed rule.

b. The proposed rule will also impact naturalized citizens.

Although naturalized citizens will not be directly affected by the proposed rule, they will nevertheless feel its effects. Many naturalized citizens live in mixed-status families in which one or more family members are noncitizens. Those naturalized citizens will likely refrain from

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21 Id. at 51182.
22 Id. at 51189-51190.
23 Id. at 51198.
25 Under the Immigration and Nationality Act (INA), LPRs can be deported if they become a public charge within five years of entering the United States, unless it was caused by circumstances occurring after they entered the country. Em Puhl, et al., An Overview of Public Charge, Immigrant Legal Resource Center, 5 (August 2018), https://www.ilrc.org/sites/default/files/resources/overview_of_public_charge-20180808.pdf. LPRs may be considered applicants for admission, and therefore subject to deportation under the proposed rule, if they attempt to adjust their status to a citizen, have abandoned or relinquished their status, been outside the U.S. for more than 180 days, engaged in illegal activity after departing the U.S. while in removal or extradition proceedings, committed a “crime of moral turpitude” or a crime related to controlled substances, or attempted to enter at a time or place other than as designated by immigration officers. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51135 n.176 (Oct. 10, 2018).
utilizing benefits for fear that doing so will risk deportation for noncitizen family members. For example, noncitizen parents of U.S.-born children with other noncitizen family members in the U.S. have been frightened into withdrawing their children from benefits that are necessary for their health and wellness.\(^{28}\) Also, many naturalized citizens are the dependents of prospective permanent residence applicants. These applicants will be affected by their dependents’ receipt of benefits.

c. **U.S. citizen children will lose access to healthy food and healthcare.**

Like naturalized citizens, U.S.-born citizens will be indirectly impacted by the proposed rule. Over 9 million U.S.-born citizen children have at least one immigrant parent and live in a family that uses public benefits.\(^{29}\) The immigrants in these families will risk being deemed public charges if they receive benefits. As such, they will be faced with the gut-wrenching choice of accessing food and healthcare for their children or keeping their family together. As a result, more children will go hungry and lose healthcare. Indeed, parents have already begun disenrolling or deciding not to enroll in programs such as Women, Infants and Children (WIC), and SNAP.\(^{30}\) A lack of access to healthy food and medical care will have negative long-term effects on these children, including their academic performance and future earning potential.\(^{31}\)

3. **The proposed rule will have a disproportionate effect on other vulnerable groups, including pregnant women, individuals with disabilities, and people of color.**

a. **Pregnant women will face a choice between a lack of prenatal care and deportation.**

The proposed rule will have particularly harsh effects on pregnant women and their U.S.-born children. Many pregnant women who qualify for Medicaid will forego prenatal and/or labor

\(^{27}\) Even though refugees and asylees are exempt from this rule, they might be impacted as part of mixed-status families. They will be deterred from using public benefits due to confusion over the proposed rule. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51156 (Oct. 10, 2018).


care (and somehow find other ways to finance such care\textsuperscript{32}) rather than risk being deemed a public charge.\textsuperscript{33} Women will also likely withdraw from or decline to enroll themselves or their children in programs like SNAP or WIC. Immigrants are already withdrawing from these programs out of fear of this rule going into effect.\textsuperscript{34} Such mass disenrollment will have highly negative long-term effects on the health and well-being of these women and children. The Department of Homeland Security (DHS) explicitly acknowledges this, stating that the rule could lead to “[w]orse health outcomes, including increased prevalence of obesity and malnutrition, especially for pregnant or breastfeeding women, infants, or children.”\textsuperscript{35}

b. The proposed rule discriminates against people with disabilities against federal regulations.

The proposed rule will disproportionately affect individuals with disabilities. DHS is prohibited from discriminating against individuals with disabilities or “impair[ing] accomplishment of the objectives of a program or activity with respect to individuals with a disability.”\textsuperscript{36} But this proposed rule will do just that. As part of its “totality of the circumstances test”, DHS will consider whether an individual’s “medical conditions may impose costs that a person is unable to afford, and may also reduce that person’s ability to attend school, work, or financially support him or herself.”\textsuperscript{37} Such a medical condition or disability is a negative factor toward inadmissibility. In other words, an individual’s disability can be counted against them. According to the 2013 United States Census Bureau, 30% of adults receiving government assistance have a disability.\textsuperscript{38} Therefore, while DHS asserts that it will not discriminate against individuals with disabilities, in reality the proposed rule will fall particularly hard on such individuals.\textsuperscript{39}

\textsuperscript{32} The average hospital bill for an uncomplicated birth in the U.S. is about $10,000. Hillary Hoffower, \textit{How much it costs to have a baby in every state, whether you have health insurance or don’t}, BUSINESS INSIDER (Jul, 9 2018), https://www.businessinsider.com/how-much-does-it-cost-to-have-a-baby-2018-4.


\textsuperscript{36} 6 C.F.R. § 15.30 (2018).


\textsuperscript{39} Rebecca Cokley & Hannah Leibson, \textit{Trump’s Public-Charge Rule Would Threaten Disabled Immigrants’ Health and Safety}, CENTER FOR AMERICAN PROGRESS (Aug. 8, 2018), https://www.americanprogress.org/issues/disability/news/2018/08/08/454537/trumps-public-charge-rule-threaten-disabled-immigrants-health-safety/; DHS claims that they are not discriminating against individuals with disabilities because “an applicant’s disability could not be the sole basis for a public charge inadmissibility finding.” Rather, they are considering in the totality of the circumstances whether the individual has a medical condition which affects their ability to “work, attend school, or otherwise care for him or herself.” Meaning, simply having a disability will not affect the public charge determination. But having a disability that affects an individual’s life will. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51184 (Oct. 10, 2018).
c. The proposed rule will disproportionately harm people of color.

An income over 250% of the federal poverty line is a heavily weighed “positive factor” under the proposed rule. This consideration will have a racial impact because members of immigrant communities of color have disproportionately lower incomes than the white immigrant population. The majority of recently arrived and legally present immigrants from Mexico, Central America, Africa, and the Caribbean have incomes under the 250% threshold, while only 36% of immigrants from Europe, Canada, and other majority-white countries fall into that category. People of color also face greater obstacles in finding employment, which is a heavily weighed negative factor under the proposed rule.

4. The proposed rule will have broader negative implications for society.

a. The proposed rule will negatively impact public health.

As noted above, and as DHS openly acknowledges, the proposed rule will cause widespread disenrollment from public health programs such as food assistance and subsidized health insurance. DHS concedes that the rule will create “[i]ncreased prevalence of communicable diseases, including among members of the U.S. citizen population who are not vaccinated.” Indeed, the rule will create public health problems far beyond immigrants and their families. For example, the proposed rule will result in approximately one million people uninsured, as individuals decline to access Medicaid out of fear that doing so will negatively impact their immigration status. This will lead to people leaving illnesses untreated and forgoing preventative visits. When people do not seek regular help for their medical issues, these issues can become more serious and create long-term health problems for the general public. Communicable diseases will spread to other members of the community. The public health of the entire nation will suffer.

45 Id.
b. The proposed rule will damage the national economy.

The proposed rule will negatively impact the economy in at least seven ways, many of which DHS openly acknowledges. For example, DHS concedes that the proposed rule could lead to “reduced productivity and educational attainment.”\(^{46}\) Second, as DHS also acknowledges, disenrollment from insurance programs could lead to an increase in uncompensated care.\(^{47}\) This burden will disproportionately fall on taxpayer-funded hospitals and providers.\(^{48}\) Third, DHS admits that the proposed rule might lead to “reduced revenues for healthcare providers participating in Medicaid, pharmacies that provide prescriptions to participants in the Medicare Part D Low Income Subsidy (LIS) program,” and “companies that manufacture medical supplies or pharmaceuticals[.]”\(^{49}\) Fourth, as noted above, the loss of nutrition, health, childcare, and other support will lead to poorer health, development, education, and psychological outcomes among immigrant children and their families. This will result in slower integration and lower levels of self-sufficiency.\(^{50}\) Fifth, local economies and small businesses like grocery retailers, agricultural producers, and landlords will suffer because of decreased enrollment in benefits such as SNAP and subsidized housing programs.\(^{51}\) Sixth, the proposed rule will severely curtail economic growth in industries like agriculture, service and textile manufacturing that rely heavily on immigrant workers. Finally, as DHS acknowledges, noncitizens disenrolling from public benefits could lead to “[i]ncreased rates of poverty and housing instability.”\(^{52}\)

c. The proposed rule will hurt families.

The proposed rule will make it more difficult for families to remain healthy and stay together. One in four children in the United States live with an immigrant parent and nearly nine in ten of these children are U.S. citizens.\(^{53}\) Confusion over the proposed rule has already resulted in disenrollment from programs providing critical assistance to families.\(^{54}\) There are countless example of this. For example, a mother disenrolled her U.S.-born citizen daughter from SNAP, which she had used for healthy lunches for her daughter; she was afraid it would affect her son’s

\(^{50}\) Chilling Effects: The Expected Public-Charge Rule and Its Impact on Immigrant Families, MIGRATION POLICY INSTITUTE (Aug. 6, 2018), https://www.youtube.com/watch?v=gO8QEHi8Io.
\(^{52}\) Id. at 51270.
Green Card application. Another woman who previously received health coverage for her U.S.-born citizen daughter through CHIP is afraid to use it again because she fears it will affect her ability to become a legal permanent resident. A mother with a Green Card disenrolled her children from SNAP and Medicaid; her daughter now needs dental care and glasses, but she worries what will happen to her children if she gets deported.

d. The proposed rule will undermine state policy.

By compelling many individuals to forego state-based benefit programs, the proposed rule will undermine the state public policy goals that underlie such programs. Various states have determined that the expansion of benefits within their states is critical to the health and well-being of their residents as well as the state economy. Additionally, the proposed rule will limit states’ ability to expand public benefits eligibility to noncitizens in the future as it could result in a public charge determination for individual noncitizens.

e. The proposed rule will punish immigrants for using benefits to which they are legally entitled.

Noncitizens are eligible to receive many forms of public benefits from the federal government. These benefits includes SNAP, Medicaid, and Section 8, all of which are explicitly considered under the public charge determination in the proposed rule. With the proposed rule, DHS has engaged in something of a bait and switch: many immigrants and their families have taken advantage of the much-needed security that such benefits provide; but now, the government is threatening to use the receipt of such benefits as a means to deport them. The proposed rule will also undermine decades of legislation crafted by Congress that allows for noncitizens to receive certain public benefits.

f. The proposed rule will sow uncertainty in the public benefits community.


The proposed rule will negatively impact those who advise noncitizens about available public benefits. For decades, social workers and other professionals have recommended these benefits to immigrants and their families in order to ease their transition to U.S. society. If the proposed rule becomes law, these professionals will be wary of continuing to make such recommendations, given uncertainty over whether their clients will be deemed public charges as a result. The proposed rule puts these professionals in the untenable position of providing legal advice to their clients regarding the immigration-related consequences of their receipt of various public benefits. Because they are not legal experts, this will put these professionals in a very difficult situation and might expose them to legal liability.

5. DHS seeks input on expanding the proposed rule even further

In addition to seeking comments on the proposed rule as it is currently drafted, DHS is soliciting public input on further changes in the public charge determination process, some of which would expand the scope – and harmful effects - of the rule even further.

a. Lowering the monetized benefit threshold

Under the proposed rule, the receipt of monetary benefits from the government will not be taken into account until those benefits amount to 15% of the federal poverty guidelines or if any benefits are received for more than 12 months over a 36 month period. However, the rule requests comments on the possibility of considering the receipt of benefits below the 15% threshold in making a public charge determination. 60 Lowering this threshold even further would allow the government to determine that nearly everyone who has received any monetary benefit is a public charge. For instance, the average monthly benefit for a household of one on SNAP is $134. 61 This is only barely below the approximately $150 per month in aid allowed under the current proposal, and above what the rule would allow if the threshold were changed to 10%. 62

b. Lowering the non-monetized benefit threshold

Under the proposed rule, one negative factor is receipt of non-monetized benefits (such as Medicaid), for more than 12 months during a 36 month period (this threshold would be lower if the noncitizen also receives monetized benefits below the 15% threshold mentioned above). However, the rule asks for comments on the possibility of changing the amount of time someone needs to be on public assistance before it affects a public charge determination, so the threshold could be even lower. 68.8% of those who use government assistance programs will be on those programs for over a year. 63 Reducing the amount of utilization time for purposes of the public

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charge determination would increase the number of people negatively affected under the proposed rule.

c. Expanding the range of benefits considered

DHS seeks comments on the potential inclusion of any public benefit it is not already included in making a public charge determination. DHS is open to considering any benefits, as long as the benefits’ recipients are generally aware they receive and must opt into receiving the benefits. The proposed rule specifically identifies CHIP as a program that DHS is considering adding to the list. DHS has already conceded that adding Medicaid to the public charge rule could result in deleterious health effects, including an increase in communicable diseases, within the U.S. population generally due to resulting disenrollment. Adding CHIP to the list would make matters worse. Given that a lack of healthcare leads to lower rates of preventive care, and greater probability of death, including CHIP in public charge determinations will result in an increase in child death in the United States.

d. Measurement of benefits

DHS has yet to adopt a specific formula for weighing how likely a child receiving benefits is to become a public charge, and is seeking comment on what data to use. The more benefit programs considered under the final DHS rule, the more basic necessities children will be denied because parents will likely disenroll their children from affected programs.

Conclusion

The proposed rule will harm millions of noncitizens and citizens alike by dramatically increasing the scope and type of benefits considered when making public charge determinations. It will fall particularly harshly on children, pregnant women, people with disabilities, and people of color. It will not only affect individuals and their families, but also small businesses and local economies. Even before going into effect, the proposed rule has compelled many noncitizens to disenroll from programs that provide food, healthcare, and shelter for their families, which often include citizens. If the proposed rule goes into effect it will dramatically escalate harm to noncitizens as well as the health and economy of the entire country.

Further, the proposed rule will upend a public benefits system Congress and the States have carefully crafted over several decades. Congress made the informed decision that certain programs would better accomplish their goals if at least some noncitizens were included. The proposed rule will effectively overturn decades of Congressional decision-making with one unilateral executive action. Additionally, even as a mere proposal, this rule has caused fear and confusion among noncitizens and the professionals who advise them on benefits. By punishing noncitizens for using

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programs that government officials long told them would not affect their immigration status, the proposed rule makes today’s noncitizens feel betrayed and tomorrow’s noncitizens leery of participating in any programs in the future.