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MEMORANDUM

To: County of Alameda

From: Christopher J. Schulte
Emily Bacque Da Silva

Date: October 17, 2018

Re: Department of Homeland Security "Public Charge" Proposed Rule

The U.S. Department of Homeland Security ("DHS") has published a notice of proposed rulemaking ("NPRM") regarding how DHS determines whether an alien is inadmissible to the United States under section 212(a)(4) of the Immigration and Nationality Act ("INA") because he or she is likely, at any time, to become a "public charge," *i.e.*, are "self-sufficient" and "do not depend on public resources to meet their needs," relying on instead on their own capabilities or the resources of family members, sponsors, or private organizations. The NPRM would fundamentally change the framework under which the government considers public charge inadmissibility.

The comment period on the NPRM will run for 60 days until December 10, 2018. We are offering this memo as a brief overview of the context in which the NPRM has been introduced and some of the key provisions and concerns that it raises for the County and its residents.

I. Background

Immigration inadmissibility based on "public charge" status dates back to enactment of the INA in 1952, and earlier versions of this provision date back to the 1800s.[1] Aliens seeking adjustment of status, a nonimmigrant visa, or admission as an immigrant to the United States bear the burden of proving that they are <u>not</u> likely at any time to become a public charge, unless Congress has specifically exempted them from the requirement or permitted them to seek a waiver of inadmissibility. The NPRM specifically defines the forms

[1] The Page Act of 1875 excluded immigrants considered "undesirable" from admission to the U.S. (Sect. 141, 18 Stat. 477, 1873-March 1875); a precursor to the Chinese Exclusion Act of 1882 and the Immigration Act of 1882.

of public benefits that an alien might receive that would trigger a finding of "public charge" inadmissibility.

INA section 212(a)(4) does not define what constitutes a "public charge," nor what public benefits would make an alien recipient a public charge. Congress' last change to the law on this subject came in 1996, with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). One of the cornerstone elements of IIRIRA was restricting access to public benefits to legal aliens, along with restrictions on higher-education in-state tuition limits for students here without legal status. The predecessor agency to DHS on this issue, the Immigration and Naturalization Service ("INS") published the most recent public charge guidance on May 26, 1999.[2] The NPRM will withdraw the 1999 guidance on publication and proposes to replace it entirely.

In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), signed into law a month before IIRIRA, Congress announced the following principles regarding public benefits and immigration law:

> Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes. 8 U.S.C. § 1601(1).
>
> It continues to be the immigration policy of the United States that –
> (A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
> (B) the availability of public benefits not constitute an incentive for immigration to the United States. 8 U.S.C. § 1601(2).

The policy undergirding the NPRM, therefore, has a relatively long history in the U.S., but the NPRM ratchets up the interpretation and enforcement of these principles.

The NPRM would add additional categories of public benefits and explicitly "consider an alien's receipt of public benefits when such receipt is above the applicable threshold(s) proposed by DHS, either in terms of dollar value or duration or receipt." As part of the process, the NPRM also involves additional information collection by DHS' U.S. Citizenship and Immigration Services ("USCIS"), through new forms to be filed as part of an application for a visa, nonimmigrant extension or stay, or change of status.

The County of Alameda is the most diverse county in the most diverse state in the U.S. The County has been at the forefront of the response to the Trump Administration's immigration-related actions. The "public charge" NPRM is the newest front in that campaign.

[2] *Inadmissibility and Deportability on Public Charge Grounds*, 64 Fed. Reg. 28676 (May 26, 1999).

II. Overview of Proposed Changes in the NPRM

The final text of the NPRM has only one change from the copy released by DHS a few weeks ago, the Department replaced the phrase "excluded benefits" that would trigger a public charge determination with the phrase "unenumerated benefits" to clarify that they were not already listed, rather than "excluded" from consideration.

Here are some of the most significant changes proposed by DHS in the NPRM:

- Revisions to the surety bond process (sometimes referred to as "public charge bonds") under 8 CFR 103.6;

- The "excluded benefits" include the following, specifically where the cumulative value of the listed benefits exceeds 15% of the Federal Poverty Guidelines[3] within any 12-month period:

    - Cash assistance for income maintenance
        - Supplemental Security Income (SSI)
        - Temporary Assistance for Needy Families ("TANF")
        - Other "General Assistance" cash benefits

    - Supplemental Nutrition Assistance Program (SNAP/"food stamps")[4]
    - Housing assistance (Section 8 vouchers or rental assistance, etc.)
    - Medicaid, <u>except:</u>
        - Benefits for an emergency medical condition
        - IDEA benefits funded by Medicaid
        - School-based benefits
        - Benefits received by children of U.S. citizens
    - Institutionalization for long-term care at government expense
    - Prescription drug subsidies ("Medicaid Part D")
    - Subsidized housing under the Housing Act of 1937

Notably absent from the list are: (1) the Women, Infants and Children or "WIC" program, formerly known as the Special Supplemental Nutrition Program for Women, Infants, and Children; and (2) the Children's Health Insurance Program ("CHIP"). The NPRM specifically solicits comments on whether CHIP should be added to the list of "excluded benefits." ACA marketplace subsidies are also not on the NPRM list.

[3] For 2018, that would be $1,821 for an individual or $3,765 for a family of 4, with specific dollar figures for every family size.

[4] Under the 1999 INS guidance, the non-cash benefits (Medicaid, SNAP, etc.) were considered but not included for public charge purposes. 64 Fed. Reg. 28676, 28689-93.

Immigration officers would consider the "totality of the circumstances" for the individual applicant, including health conditions that might impede their ability to work, existing financial liabilities, credit score, household size, English-language proficiency (or additional languages "with appropriate consideration given to market demand"), and other criteria.

A key factor to demonstrate that one will not become a "public charge," is household assets, support, or income amounts greater than 250% of the nationwide federal poverty guidelines levels: *i.e.*, $30,350 for an individual, or $62,750 for a family of four. The median household income in the United States is only $60,000, according to the American Community Survey from the Census Bureau, although that figure includes households of single persons, as well.

On the USCIS website for the NPRM, the agency insists that:

> This rule would not impact groups of aliens that Congress specifically exempted from the public charge ground of inadmissibility, such as refugees, asylees, Afghans and Iraqis with special immigrant visas, nonimmigrant trafficking and crime victims, individuals applying under the Violence Against Women Act, and special immigrant juveniles. Additionally, the rule excludes consideration of benefits received by U.S. citizen children of aliens who will acquire citizenship under either section 320 or 322 of the INA, and by alien service members of the U.S. Armed Forces.

https://www.uscis.gov/legal-resources/proposed-change-public-charge-ground-inadmissibility [5]

For purposes of tracking receipt of "excluded benefits," the rule defines the "alien's household" depending on the age of the specific alien in question:

- Alien is 21 or older or under 21 and married:
  - Alien
  - Alien's spouse – if physically residing with the alien
  - Alien's children physically residing with the alien
  - Alien's children not physically residing with the alien if the alien provides at least 50% of their financial support
  - Any other individuals (including a spouse not physically residing with the alien) to whom the alien provides (or is required to provide) at least 50% of their financial support
  - Any individual who provides the alien with 50% of their financial support or who lists the alien as a dependent on their federal income tax return

[5] Section 212.23 of the proposed rule details the exempt categories of aliens.

- Alien who is a child (under Section 101(b)(1) of the INA)
  - Alien
  - Alien's children physically residing with the alien
  - Alien's children not physically residing with the alien if the alien provides at least 50% of their financial support
  - Alien's parents, guardians, or others providing at least 50% of support
  - Alien's parent physically residing with the alien
  - Alien's parents'/guardians' other children not physically residing with the alien for whom the parent/guardian provides at least 50% support
  - Any other individuals to whom the alien's parents/guardians provide at least 50% support or who are listed on the parents' federal income tax return

For benefits that assist more than one person – SNAP, Section 8 housing, etc. – the NPRM has a method for attributing shares of the assistance to individual members of the household, if necessary.

III. Comments Outline

The NPRM clearly proposes a sea-change in public benefit usage, particularly among the County's immigrant community. Whether intentional or unanticipated, the change in the "public charge" definition and the public interpretation of that change will have a significant chilling effect on the usage of public safety-net benefits. The NPRM does not provide reassurance that federal resources will be allocated toward education and outreach to address and allay community fears about adverse immigration action based on the lawful and appropriate use of public benefits, nor the value of seeking preventative care early rather than waiting for more serious (and costly) care later.

By way of contrast, the County can speak to the level of funding (Federal and County) that went with the Affordable Care Act roll-out, and how expensive a public awareness campaign can be on health insurance issues – particularly one that must overcome such a high level of misinformation or misunderstanding already in the public discussion around the law.

Beyond the negative policy implications of the rule's substance, there are a number of procedural flaws in the NPRM that DHS must address in responding to public comments. In particular, the Administrative Procedures Act ("APA") and Regulatory Flexibility Act ("RFA" or "Reg-Flex") impose specific requirements on an agency promulgating a new rule. Specifically, the agency must calculate the impact in time and money on the affected community and offer a detailed explanation for why it chose this particular rule rather than a less-costly alternative. No analysis appears to have been done on the proportionality of the cost of this proposal to immigrant communities as compared with the asserted benefits from excluding additional prospective immigrants or visa recipients.

The NPRM does not calculate the social or aggregate individual costs of foregone medical or nutritional benefits. The National Bureau of Economic Research published a paper in April 2018 assessing the health and mental health effects of local immigration enforcement, generally, including decreased usage of public benefits by those in immigrant communities, even those with lawful status.[6] Thus, available data could have been used for such a calculation, but the decision was apparently made not to do so. The NBER study looked at data from the National Health Interview Study from 2000-2012, following the increased enforcement and public-benefit restrictions from IIRIRA, as discussed above, as well as the Secure Communities program. The authors found that the Latino communities studied saw increases in "mental health distress" scores of 15%, with statistically significant decreases in the proportions of those reporting "very good to excellent" health and increases in those reporting "fair or poor" health.

The nonpartisan Fiscal Policy Institute issued a report on the potential chilling effect of the proposed rule, specifically SNAP and Medicaid benefits.[7] If 15% of people currently enrolled in those programs disenroll because of the rule, FPI estimates the loss of 99,000 jobs in hospitals, medical offices, grocery stores, and related businesses. The 15% level of disenrollment is actually the lowest estimate in the FPI report, with figures for 25% and 35% disenrollment also considered. Overall, an estimated 24 million people could experience some chilling effect, including 9 million children under 18. FPI also found that while 5% of U.S.-born residents would not pass the current financial threshold (compared to only 3% of non-citizens); those numbers would jump up to 29% of U.S.-born residents and 28% of non-citizens under the proposed rule. Total "potential economic ripple effects" range from $14.5 billion at the 15% disenrollment level up to $33.8 billion at the 35% level.

The NPRM also does not include an estimate of how many people may be deemed inadmissible as a "public charge" each year if the proposed version of the rule were to take effect. There is no sense of the magnitude of the effect on actual applicants for immigration status or nonimmigrant visas, not even an estimate of how many temporary visa holders would be subjected to further review and/or required to complete the Form I-944 as to proof of self-sufficiency.[8] USCIS claims that it is unable to estimate with sufficient certainty the shrinking effect on the number of immigrants or visa holders once the rule is in place, but suggests that there could be a "replacement effect" in which "more favorable" applicants take the place of those who do not meet the financial standards implemented by the rule.

USCIS specifically notes in the NPRM that "[c]omments that will provide the most assistance to [USCIS] in implementing these changes will reference a specific portion of the

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[6] Julia Shu-Huah Wang & Neeraj Kaushal, *Health and Mental Health Effects of Local Immigration Enforcement*, Working Paper 24487 (April 2018), available at http://www.nber.org/papers/w24487.

[7] http://fiscalpolicy.org/wp-content/uploads/2018/10/US-Impact-of-Public-Charge.pdf

[8] Of less dire concern for current purposes, but also of issue for applicants and employers, there is likewise no estimate of delays in visa processing times under the NPRM.

proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change."

Most public benefit recipients are employed, but their wages may not be sufficient to meet their needs – particularly in relatively expensive metropolitan areas like Alameda County. The majority of SNAP recipients are employed, according to the Center on Budget and Policy Priorities, and the Kaiser Family Foundation reports that 60% of adult Medicaid recipients in 2016 (excluding the elderly or those on cash assistance) were employed full time or part time.

Although CHIP benefits were left off the list in the NPRM, USCIS specifically asked for comments on whether to include CHIP on the list. Given the importance of proper healthcare for children, the County would obviously want to weigh in to articulate the importance of CHIP for County residences and the need to keep CHIP off the list of excluded benefits. This discussion might include specific concerns about childhood health conditions and outcomes, such as asthma rates related to the Port of Oakland and other treatable childhood illnesses that could be adversely affected by disenrollment resulting from the rule.

Also, ACA marketplace subsidies are not included; comments in support of their exclusion would also be extremely relevant. Comments about increases in the uninsured population would be germane to the discussion, including the net increase in the cost of healthcare for those avoiding preventative care but, rather, facing acute or emergency care from failing to obtain early treatment of a medical condition – Diabetes, heart disease, etc. – resulting in uncompensated care from the County's medical safety net.

Even without expressly including those health benefits on the excluded benefits list, USCIS will need to take significant steps to ensure that current beneficiaries and families do not disenroll as part of the "chilling effect" described above – FPI estimates that 875,000 to 2,000,000 children with at least one noncitizen parent could drop Medicaid/CHIP coverage, leaving the children without access to necessary healthcare, despite being eligible to continue receiving those benefits.[9]

IV. Early Responses to NPRM

Rep. Judy Chu (D-CA-27) has introduced H.R. 7052, which would block federal funds from being used to carry out the proposed public charge rule. The bill has 50 co-sponsors, all Democrats. The County, including Supervisors Chan and Carson, SSA, and HCSA, have co-signed a request to support the bill.

[9] The Kaiser Family Foundation seconds FPI's concern in this report: https://www.kff.org/disparities-policy/fact-sheet/proposed-changes-to-public-charge-policies-for-immigrants-implications-for-health-coverage/#endnote_link_274689-7

As part of the roll-out of the NPRM, USCIS Director L. Francis Cissna spoke recently at a Migration Policy Institute event at Georgetown University Law Center. He asserted that non-citizens should not panic over the NPRM, and insisted that there should not be a "mad rash" for them to drop out of all public assistance programs. He stressed that some public benefits are not included in the proposed rule, and that "The population of people that we're talking about that are on benefits right now would be very small." Director Cissna estimated that 382,000 people seeking to adjust their immigration status would be subjected to public charge review each year, with an estimated 518,000 with temporary visas facing additional scrutiny.

Michael Bloomberg's New American Economy group, however, estimates that approximately 1.5 million who receive public benefits could be directly affected by the rule, across numerous industries: construction, natural resources, mining, hospitality, recreation, food services, and others. This includes both potential immigrants and highly-skilled and lower-skilled nonimmigrant visa recipients (H-1B, H-2A, H-2B, etc.). The disparity in estimates may be due to the calculation of those seeking immigration benefits vs. those "directly affected." Most non-citizens are ineligible to receive these government benefits, but there are many mixed-status families that could be affected by the rule. An estimated 18 million children (roughly one in every four) in the U.S. has at least one immigrant parent.

Local food banks and healthcare providers, including WIC programs and others serving children, are already reporting nervous phone calls and decreased usage of public benefits just from the announcements surrounding the rule, months before it will actually take effect (and despite the fact that WIC is not one of the "excluded benefits" in the NPRM).[10] At the other end of the political spectrum, the libertarian Cato Institute has expressed concern with the proposal, as well, at least adopting a wait-and-see approach on what the final rule might contain and how USCIS will enforce the final rule. Employer groups have spoken out on the possible effect of the rule on business-related non-immigrant visas.

As of the date of this memo, there have already been 15,482 comments submitted in response to the NPRM. Current comment numbers and copies of the actual comments submitted already are available here:
https://www.regulations.gov/document?D=USCIS-2010-0012-0001

We look forward to working with the PAL Committee and County Offices to assemble data and comments and to file them with USCIS in advance of the December 10, 2018 deadline.

[10] The most recent WIC data come from May 2018, when 6.8 million women and children were enrolled in the program.