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Submitted via the Federal eRulemaking Portal at <http://www.regulations.gov>

Samantha Deshombres  
Chief, Regulatory Coordination Division  
Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security  
20 Massachusetts Avenue NW  
Washington, DC 20529–2140

**Re: *Inadmissibility on Public Charge Grounds* Draft Regulation (CIS No. 2499–10; DHS Docket No. USCIS–2010–0012)**

Dear Ms. Deshombres:

The staff of Connect for Health Colorado, the state-based health insurance marketplace (SBM) for Colorado, greatly appreciates the opportunity to comment on the *Inadmissibility on Public Charge Grounds* proposed rule published in the *Federal Register* on October 10, 2018. In light of the substantial health, financial, and social impacts of this proposal, we request that the Department not move forward with any aspect of the proposed changes.

We write with concerns about the proposed rule on *Inadmissibility on Public Charge Grounds*. The proposed rule would supersede the 1999 guidance under which lawfully present immigrants are evaluated for a green card (legal permanent residency, or LPR), change in type of visa, or extension of current visa.<sup>1</sup> Under the proposal, several categories of non-monetizable services would be added to consideration for whether someone may be considered a public charge in the future. We believe the proposed rule will encourage lawfully present immigrants to forgo benefits they are eligible for out of fear or confusion that their visa status or the status of their household members could be impacted, even if they are not directly impacted by the rule.

#### **Public Health and Access to Care for Marginalized Communities**

In addition to the concerns noted below on the ways that this proposed regulation specifically impacts health insurance Exchanges, we would also like to comment on the impact that this proposed regulation may have on the larger community in Colorado and across the U.S.

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<sup>1</sup> *Field Guidance on Deportability and Inadmissibility on Public Charge Grounds*, 64 Fed. Reg. 28689 (March 26, 1999).

Non-citizens who are most likely to utilize the programs in question are already facing economic uncertainty and rely on these programs to empower them to focus on education and employment. By removing access to these stabilizing forces, this proposal further marginalizes communities that already face substantial barriers to success. We encourage the Department to consider the long-term impact of this proposal on success in migrant communities, and the ideals of fairness and inclusivity that many migrants seek in entering the United States.

We also request that the Department consider the economic impact of removing access to Medicaid and CHIP for families who are otherwise eligible. Without access to these important programs, families will be forced to forgo care until an emergency situation arises, at much higher cost to the federal government, care providers, and families. By shifting care from traditional Medicaid programs into emergency ones, not only will costs be significantly higher, but long-term health outcomes will also suffer.

Should the Department move forward with some elements of the existing proposal, we then request that the Department take into account the Exchange-specific comments noted below.

#### **Defining Applications for Public Benefits**

Under the proposed rule, “public charge” means an immigrant who receives one or more “public benefits.”<sup>2</sup> Public benefits would be defined to include most forms of Medicaid.<sup>3</sup> Advance payments of the premium tax credit (APTCs) and cost-sharing reductions (CSRs) are not included in the definition of “public benefits.”

A determination of an immigrant’s likelihood of becoming a public charge would be based on the “totality of the alien’s circumstances by weighing all factors that make the alien more or less likely at any time in the future to become a public charge.”<sup>4</sup> The factors weighed under the totality of circumstances test include: age; health; family status; assets, resources, and financial status; and education and skills.<sup>5</sup>

As a consideration under the “assets, resources, and financial status” factor, the Department of Homeland Security (DHS) proposes to review whether the immigrant has any financial liabilities or past reliance on public benefits that make the immigrant more or less likely to become a

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<sup>2</sup> Proposed 8 C.F.R. § 212.12(a).

<sup>3</sup> Proposed 8 C.F.R. § 212.21(b)(2)(i).

<sup>4</sup> Proposed 8 C.F.R. § 212.22.

<sup>5</sup> See proposed 8 C.F.R. § 212.22.

public charge.<sup>6</sup> As part of this consideration, DHS plans to review “[e]vidence that the alien has *applied for* or received any public benefit.”<sup>7</sup>

“Current or past *applications* for or receipt of public benefits ... suggests that the alien’s overall financial status is so weak that he or she is or was unable to fully support him or herself without government assistance, *i.e.*, that the alien will receive such benefits in the future.”<sup>8</sup>

Such applications would be a negative factor in the totality of the circumstances, “because it is indicative of a weak financial status and increases the likelihood that the alien will become a public charge in the future.”<sup>9</sup>

Consequently, under this proposed framework, because Medicaid is being defined as a public benefit, an application for Medicaid would be considered as a negative finding under the “assets, resources, and financial status.” The application would thus weigh against admissibility on public charge grounds under the totality of circumstances test.

#### Single Streamlined Application and Insurance Affordability Programs

Section 1413(b)(1)(A) of the Affordable Care Act and its implementing regulations require Exchanges to use a single, streamlined application (SSApp) to determine eligibility for enrollment in Qualified Health Plans (QHPs) through the Exchange, as well as insurance affordability programs (IAP).<sup>10</sup> Insurance affordability programs includes advance payments of the premium tax credit (APTCs), cost-sharing reductions (CSRs), Medicaid, and CHIP.<sup>11</sup>

The Exchange must permit an applicant to request only an eligibility determination for enrollment in a QHP.<sup>12</sup> This is the non-financially assisted (NFA) application route where only eligibility for enrollment in a QHP is determined.

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<sup>6</sup> Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51188 (Oct. 10, 2018) (emphasis added). Similarly, “[r]eview of past *applications* for or receipt of public benefits would include a review of both cash and non-cash public benefits...” *Id.* (emphasis added).

<sup>7</sup> *Id.* (emphasis added). See also proposed 8 C.F.R. § 212.22(b)(4)(ii)(F)(i).

<sup>8</sup> 83 Fed. Reg. at 51188 (emphasis added).

<sup>9</sup> *Id.* See also 83 Fed. Reg. at 51211-51215 (Table 33. Totality of Circumstances Framework for Public Charge Determinations).

<sup>10</sup> See 42 C.F.R. §§ 435.907, 435.911, 435.945-435.956 and 435.1200, 457.330-457.380, and 45 C.F.R. §§ 155.300-155.320 and 155.405.

<sup>11</sup> 42 C.F.R. § 435.4.

<sup>12</sup> 45 C.F.R. § 155.310(b).

However, the Exchange may not permit an applicant to request an eligibility determination for less than all IAPs.<sup>13</sup> This is the financially assisted (FA) application route, where eligibility for enrollment in a QHP, as well as eligibility for Medicaid, CHIP, APTC, and CSRs is determined or assessed.<sup>14</sup>

An applicant may not choose between IAPs since section 36B(c)(2)(B) of the Internal Revenue Code specifies that a tax filer is ineligible for APTC for any applicant who is eligible for other Minimum Essential Coverage (MEC).<sup>15</sup> MEC includes government-sponsored coverage, including most forms of Medicaid and CHIP coverage.<sup>16</sup>

Thus, a FA application is essentially an application for Medicaid, because the determination or assessment that the individual is ineligible for Medicaid or CHIP is a necessary condition of qualifying for APTC/CSR. Because the FA application submitted to the Exchange is an application for Medicaid, it would be considered an “application for public benefits” under the proposed rule, and therefore become a negative factor in the public charge inadmissibility determination.

Given the potentially unintentional impact to Exchange enrollees, we seek clarification in the final rule that an application to the Exchange would not be considered an application for public benefits.

#### **Children’s Health Insurance Program (CHIP)**

We are deeply concerned that children enrolled in CHIP would be included in this rule and strongly encourage DHS to exclude CHIP enrollees from the final rule. Children enrolled in CHIP frequently have family members enrolled in Exchange plans. Inclusion of CHIP in the final rule would impact families with Exchange enrollee members in the household as it is likely that Exchange enrollees would drop their coverage or that a single-session application for both programs would need to be differentiated in the application process to adequately notify the family that the use of the CHIP program may subject them to the public charge rule. Many consumers may find out too late that they are impacted by the final rule and may not be able to disenroll in time to not be impacted.

#### **Timing & Effective Date**

We are concerned that the timing of the issuance of the final regulation and effective date of any changes may not give organizations time to conduct appropriate outreach to impacted households.

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<sup>13</sup> 45 C.F.R. § 155.310(b).

<sup>14</sup> 45 C.F.R. § 155.302.

<sup>15</sup> *See also* 26 C.F.R. § 1.36B-2.

<sup>16</sup> 26 C.F.R. § 1.36B-2.

We therefore urge the Department to delay the effective date of any final regulation until at least January 1, 2020, or one year after the publication of the final rule. This would minimize disruption to the markets, consumer confusion of mid-year changes, and allow SBMs to adjust their outreach, messaging, and technology to accommodate the changes.

**Conclusion**

Given the scope of the changes proposed, we request that the Department hold a public hearing on this proposed rule.

Thank you for considering our comments on issues that will directly impact Colorado consumers and our individual health insurance market.

Sincerely,

Connect for Health Colorado Staff