



## **PUBLIC CHARGE AND IMMIGRANT PARTICIPATION IN WIC: FREQUENTLY ASKED QUESTIONS**

OCTOBER 1, 2018

### **1. Is WIC a public charge?**

**NO.** WIC participation has not been considered in immigration determinations, including public charge review. After many rumors over the past year, current proposals by the Trump Administration no longer seek to include WIC in public charge.

However, DHS is actively soliciting comment on whether any additional programs should be included in the public charge rule. Even though WIC is no longer in the proposed rule, it is important for the WIC community to speak out during the public comment period to ensure that WIC is not included in a final rule on public charge.

### **BACKGROUND ON PUBLIC CHARGE**

#### **1. What is public charge?**

Public charge is an element of immigration law that allows federal authorities to deny legal status to individuals who are determined to be primarily dependent on the government for subsistence. Recent efforts by the Trump Administration seek to redefine public charge in a way that would allow immigration officials to deny legal status for the use of one or more public benefits.

Public charge determinations are conducted according to a forward-looking “totality of the circumstances” test. This means that immigration officials will consider a variety of factors – including an immigrant’s age, health, family status, assets, resources, financial status, education, skills, and use of certain public benefits – and how all of those factors would affect the immigrant’s likelihood to support themselves and their family without government assistance.

The federal government has long held a narrow view of what public benefits can be considered in a public charge determination, limited only to cash assistance for income maintenance (specifically SSI or TANF) or institutionalization for long-term care at government expense (such as certain long-term programs through Medicaid). Use of government programs like WIC has never before been considered in a public charge determination.



## **2. When do immigration officials conduct a public charge determination?**

Public charge determinations occur when an immigrant is petitioning the government for a change to their legal status. This includes applications for a visa to enter the country and petitions for a green card and legal permanent residency. Public charge determinations do NOT occur during naturalization proceedings, which is when an immigrant petitions for citizenship status. Nonetheless, gaining legal status or legal permanent residency is a critical step on the path to citizenship and public charge determinations can delay or deprive immigrants of the opportunity to eventually become citizens.

## **3. Can public charge determinations result in deportation?**

**YES**, but it is unlikely. Legal authority to deport an immigrant for becoming a public charge is narrow. Immigrants may only be deported under public charge within five years after their first entry into the United States, and the government must further prove that the immigrant became a public charge for reasons that predate entry into the United States. Deportation on this ground is a very rare occurrence.

## **PROPOSED CHANGES TO PUBLIC CHARGE**

### **1. What has been reported so far this year regarding potential changes to the public charge rule?**

This spring, news organizations reported that the Department of Homeland Security (DHS) had drafted a proposed rule that would expand the public benefits considered in public charge determinations. In a series of two leaked drafts, WIC was initially considered by DHS for inclusion in the public charge rule.

WIC clinics across the country spoke up to highlight the negative public health impacts of this proposal. A [Politico article](#) highlighting the impact of including WIC put pressure on the Department of Agriculture, and Secretary Perdue publicly expressed concern.

On September 22, 2018, DHS released a new draft that expanded the definition of public charge. WIC was not included in this draft. However, under the proposal, an immigrant's use of SNAP, Medicaid, or housing assistance would count as a negative factor in immigration proceedings. These changes have still not been formally proposed – a process that would be open for public comment – but DHS signaled that this draft will be moving forward shortly.



## 2. What would the proposed rule change?

The proposed rule would expand the public benefits that could be considered under the totality of the circumstances test to include a wide range of public assistance programs. The September 2018 draft specifically permits consideration of SNAP, Medicaid, and housing assistance programs in public charge review. The September 2018 draft *does not include* WIC.

Use of any specified program would be considered a “heavily weighted negative factor” which could be used to deny an immigrant legal status. It does not automatically disqualify an immigrant from attaining legal status. Nonetheless, the inclusion of vital programs like SNAP and Medicaid in the definition of public charge would be an alarming step.

## 3. Has the law changed?

**NO.** DHS has released the text of a proposed rule, but a proposed rule must go through a comment process before it can be finalized. Federal rulemaking takes several months to complete, and a federal rule does not have legal weight until the entire process is finished.

## 4. What are the next actions to be taken?

DHS will soon publish the proposed rule in the Federal Register, initiating a comment period so that interested parties can express their concerns with any changes to public charge. The comment period is expected to last for sixty days, and the National WIC Association will be providing templates so that interested members of the WIC community can submit their own, personalized comments. Once the comment period concludes, DHS must review all of the comments and make appropriate revisions.

The proposed rule does not take legal effect until after DHS makes post-comment revisions and issues a *final rule*. This process will take multiple months to complete.

## 5. Would the proposed rule apply to all immigrants?

**NO.** The proposed rule would not affect naturalization proceedings, which is when an immigrant petitions for citizenship status. It would also not apply to certain humanitarian immigrant groups, including refugees, asylees, and Violence Against Women Act self-petitioners.

## 6. Are there exemptions for Native Americans?

It depends. The leaked drafts exempt American Indians born in Canada from public charge determinations. There may also be other protections available



for American Indians born outside of the United States. It remains unclear how the rule would be applied to immigrant spouses of Native Americans, particularly those living in tribal territories.

**7. Would the proposed rule consider benefit use that predates the rule?**

The rule will not be retroactive. The September 2018 draft indicates that public charge determinations would not weigh benefit use that was previously exempt from consideration. Therefore, immigrants should not change their current practices until a final rule is issued.

**8. Would the proposed rule consider benefit use by US citizen family members, including US citizen children?**

**NO.** Prior drafts indicated that a dependent's use of benefit programs, including use by US citizen children, would be considered in public charge determinations. The September 2018 draft removes this provision.

**9. Will an immigrant still be subject to public charge review if they obtain an affidavit of support?**

**YES.** An affidavit of support is a declaration, usually by a family member, that suggests an immigrant will have the resources or community support needed to live without government assistance. Historically, the affidavit of support was a strong indicator that an immigrant would not become a public charge. The September 2018 draft indicates that an affidavit of support will now be a lesser factor in the totality of the circumstances test, weighed against an immigrant's benefit use.

In January 2018, the State Department revised the Foreign Affairs Manual (FAM) – guidance for embassies and consulates on when to issue visas. The FAM now permits consular officers to review **any** past or current benefit use by the immigrant, the immigrant's family, the sponsor, or the sponsor's family. It is not clear whether this guidance will be revised after the completion of the DHS public charge rule.

**10. Will the proposed rule make it easier to deport immigrants on the basis of public charge?**

**NO.** Legal authority to deport an immigrant on the basis of public charge is narrow, and those limitations are put in place by federal law. If the Administration seeks to make it easier to deport individuals on the basis of public charge, they will have to pass legislation in Congress.



## PUBLIC CHARGE'S IMPACT ON WIC PARTICIPATION

### 1. Do the Trump Administration's actions mean that participating in WIC could hurt my immigration status?

**NO.** If you were on WIC before, you should continue to be on WIC. The September 2018 draft indicates that WIC will not be included in the Administration's efforts to expand public charge, even though other vital programs like SNAP and Medicaid may be affected.

However, DHS is actively soliciting comment on whether any additional programs should be included in the public charge rule. Even though WIC is no longer in the proposed rule, it is important for the WIC community to speak out during the public comment period to ensure that WIC is not included in a final rule on public charge.

There is one caveat: the State Department's guidance for consular officials (the Foreign Affairs Manual) permits officials that are issuing visas to enter the country to consider **any** benefit obtained by an applicant, an applicant's family, a sponsor, or a sponsor's family. As of today, WIC participation has never been used to deny a visa to someone seeking entry into the country. It is possible that this guidance will be revised after completion of the DHS public charge rule. Until further revisions are approved, the National WIC Association will continue to monitor this provision and its application.

### 2. Does WIC keep records of my personal information, including my address?

WIC maintains personal information in your participant file, including your address and contact information. With limited exceptions, this information is used only for the purposes of administering the WIC program. WIC agencies and clinics are bound by federal regulations to maintain the confidentiality of participant data and personal information.

### 3. Does WIC collect information about my immigration or citizenship status?

**NO.** WIC clinics and agencies do not inquire or collect information about a participant's immigration or citizenship status. The only exception is the state of Indiana.

### 4. Does WIC share my information with immigration authorities?

**NO.** Federal regulations restrict the sharing of information collected by WIC to ensure participant privacy, and this information is generally only shared with other parties when necessary for the administration of the WIC program. WIC clinics and agencies do not share personal participant information with



immigration authorities, including Immigration and Customs Enforcement (ICE) or United States Citizenship and Immigration Services (USCIS).

**5. Do I have to respond when WIC asks whether I am registered to vote?**

**NO.** WIC staff will often ask new participants whether they are registered to vote as part of a broader effort to encourage civic participation. This question is not intended to detect citizenship or immigration status. Since only US citizens over the age of 18 are permitted to vote, immigrant participants may be concerned about answering this question. No one is legally required to answer this question as a condition of WIC eligibility.

**6. Does my participation in WIC affect the ability of my family members to change their immigration status?**

**NO.** WIC participation is not included in the latest proposals for public charge. The September 2018 draft limits public charge review of participation in certain public assistance programs (i.e., SNAP, Medicaid, housing assistance) to only the applicant's benefits. Your participation in these programs should not impact another individual's immigration case.

**7. My lawyer is telling me that I should no longer participate in WIC. What should I do?**

Lawyers will often exercise caution, especially in a time of uncertainty. Lawyers may be unfamiliar with the fact that WIC is not included in the public charge proposal, and that the proposal does not apply retroactively. Lawyers may also be unfamiliar with the fact that WIC is legally available to all eligible women and children – regardless of immigration status (8 U.S.C. § 1615(b)). Other nutrition programs (like SNAP) have eligibility restrictions on certain immigrants, and attorneys may confuse and conflate the different programs. It is worth having a more detailed discussion with your lawyer and consulting your WIC staff before denying yourself access to WIC benefits.

**8. What happens if my lawyer asks for documentation of my WIC participation?**

When applying for a green card, the current Form I-485 inquires into whether an applicant has received public assistance from any source. The current forms do not ask whether family members (including children) have received public assistance. You should be truthful in disclosing your participation in WIC, although current rules prevent immigration officials from weighing that participation in a public charge determination. If you are uncertain, you should ask your immigration attorney why documentation of your WIC participation is needed and how it will be used in the application process.



**9. If I choose to terminate my participation in WIC, should I return unused food checks, breast pumps, or other benefits I received from WIC?**

**NO.** Past use of WIC benefits should not be considered in any public charge determination. You should be able to use any benefits that were issued to you before a formal change to the rule without any consequence to your immigration status.

**10. If I choose to terminate my participation in WIC, can WIC delete records of my prior use of the program?**

**NO.** WIC clinics or agencies generally cannot delete WIC records, including those of past participation and receipt of benefits. However, WIC records are bound by privacy rules that are not shared with other agencies for purposes outside of the administration of the WIC program. Even though WIC cannot delete your participant file, it should not be shared with ICE, USCIS, or other immigration officials.