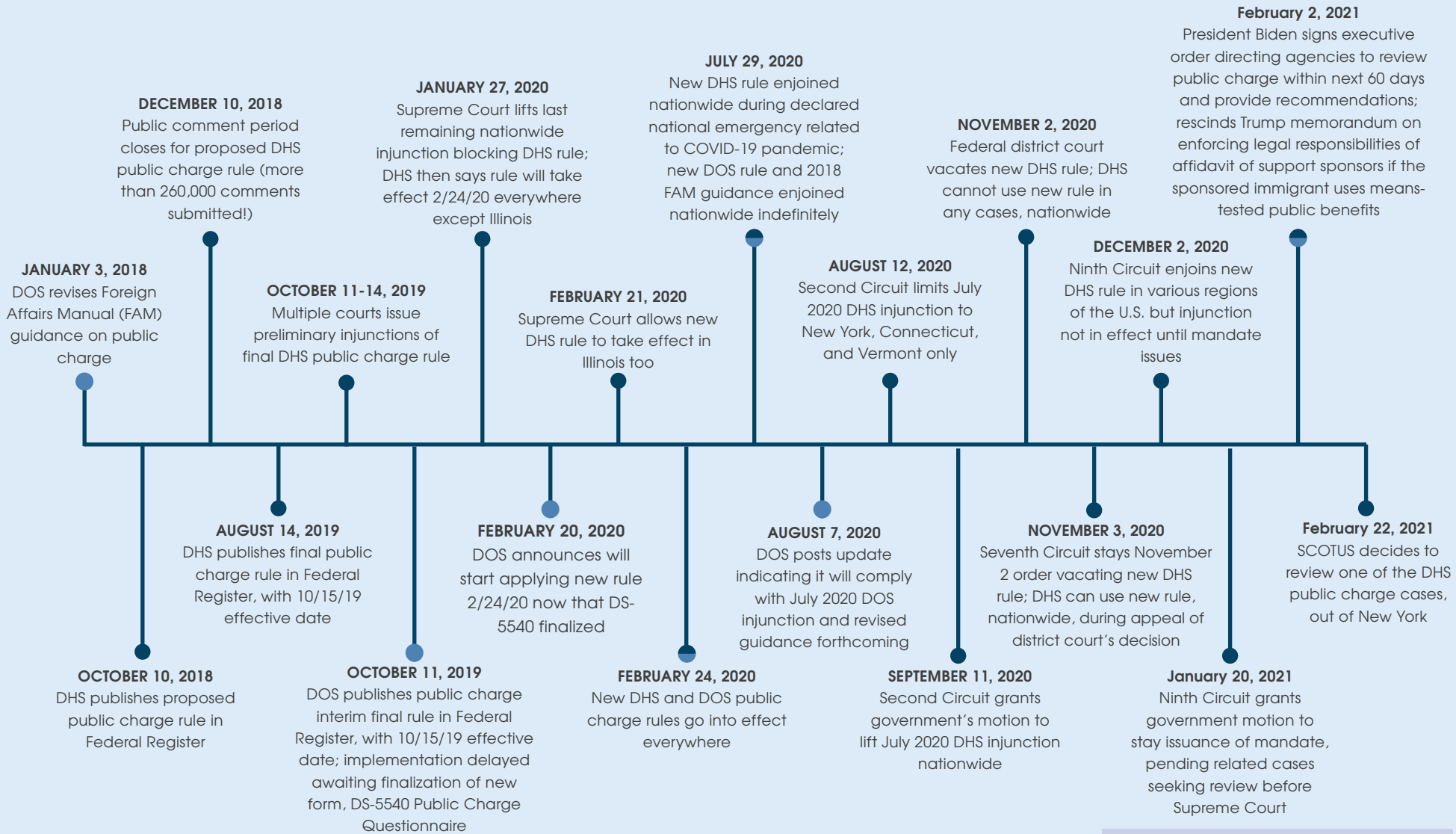
PUBLIC CHARGE TIMELINE



SO WHERE ARE WE NOW?

For now, the DHS new public charge rule is still in effect—USCIS will apply the rule to cases subject to public charge postmarked on or after February 24, 2020. A Ninth Circuit case that would enjoin DHS from implementing the new public charge rule in 18 states and Washington, D.C. has not gone into effect. On January 20, 2021, the Ninth Circuit granted the government's request to stay issuance of the mandate while it seeks review of related public charge cases by the Supreme Court. (Staying the mandate means the decision of the court is not final and cannot be implemented.) In addition, while President Biden has directed review of public charge, asking agencies to report back in April 2021, he has not yet taken any other immediate action that would alter implementation of the new public charge rule by DHS.

DOS is currently enjoined from implementing its new public charge rule at embassies and consulates.

The DHS new public charge rule has stopped and started various times now, from a delayed start date in February 2020, to a brief halt in response to COVID-19 in late July 2020, to court decisions in August and September 2020 that chipped away at the pandemic-related injunction, ultimately permitting USCIS to resume implementation everywhere in September. Then the November 2020 district court decision vacating the new public charge rule nationwide only lasted one day, before the Seventh Circuit permitted USCIS to continue applying the new rule, including requiring submission of Form I-944. More recently, the Ninth Circuit upheld geographically limited injunctions of the new rule, enjoining DHS from implementing the new rule in California, Colorado, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Virginia, Washington D.C., and Washington State. This decision was set to become final in late January when the court would have "issued the mandate." (The court issues the final decision after waiting a specific period for parties to request further action on the case.) However, the government did seek to stop the mandate from issuing by filing a motion. On January 20, 2021 the Ninth Circuit granted the government's December 2020 motion to stay issuance of the mandate while petitions for certiorari to the Supreme Court in related public charge cases remain pending. On February 22, 2021, the Supreme Court decided to review one of the public charge cases, DHS, et al. v. New York, et al. In the meantime, DHS may continue applying the new rule nationwide including requiring submission of Form I-944.

On February 2, 2021, President Biden signed an executive order directing agencies to conduct a 60-day review of public charge policies and impact; this does not alter DHS's immediate ability to continue implementing the new public charge rule. He also immediately rescinded a Trump memorandum on enforcing legal responsibilities of affidavit of support sponsors if the sponsored immigrant uses means-tested public benefits.

The DOS new public charge rule remains enjoined, in accordance with the July 29, 2020 order. This order also blocks use of the 2018 Foreign Affairs Manual (FAM) guidance related to public charge. On August 7, 2020, DOS posted an update conveying its intent to comply with the July 2020 DOS injunction. Visa applicants are not required to complete the DS-5540 Public Charge Questionnaire or present it during visa interviews. DOS has also indicated that it is updating its guidance to consular officers on how to proceed under the preliminary injunction. DOS has provided a limited update to its FAM guidance on public charge, directing consular officers to refuse visa applicants under INA § 221(g) (i.e., a visa refusal because of a "documentary problem"), not INA § 212(a)(4) (i.e., a visa refusal because of a "substantive problem"—in this context, public charge), if they believe an applicant may be ineligible for a visa under INA § 212(a)(4) or want to ensure they are not relying on enjoined FAM guidance on public charge. Officers who refuse

visa applicants under INA § 221(g) must request an advisory opinion explaining the basis for their belief that the applicant may be ineligible under INA § 212(a)(4). The current FAM guidance on public charge prohibits consular officers from finding any visa applicants ineligible for admission under INA § 212(a)(4) until they have received a response from the Office of Legal Adviser for Consular Affairs.

Note that litigation challenging the DHS and DOS public charge rules, 2018 FAM revisions, and related issues is ongoing; the state of the law and implementation of these rules could very well change again.

Check our Public Charge Page for further updates.