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CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 2510, 2522, 2540, 2551, and 2552

RIN 3045-AA56

Criminal History Check Requirements for AmeriCorps State/National, Senior Companions, Foster Grandparents, the Retired and Senior Volunteer Program, and Other National Service Programs; Final Rule

AGENCY: Corporation for National and Community Service

ACTION: Final rule.

SUMMARY: To implement the Serve America Act, the Corporation for National and Community Service (CNCS) proposed amendments to its National Service Criminal History Check regulation on July 6, 2011. This final rule adopts the proposed amendments, clarifies several requirements, and makes minor technical corrections. The amendments require CNCS grantees to conduct and document a National Service Criminal History Check that includes a fingerprint-based FBI criminal history check on individuals in covered positions who begin work, or who start service, on or after April 21, 2011, and who have recurring access to children 17 years of age or younger, to persons age 60 and older, or to individuals with disabilities. Individuals in covered positions include Senior Companions (SCP), Foster Grandparents (FGP), AmeriCorps State and National participants, and other participants, volunteers, or staff funded under a CNCS grant.

DATES: This final rule is effective January 1, 2013.

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SUPPLEMENTARY INFORMATION:

I. Background

a. National Service Criminal History Check Requirements Prior to the Serve America Act

In 2007, the Corporation issued rules requiring grantees to conduct criminal history checks on the members, volunteers, and grant-funded staff who had recurring access to children, persons age 60 or older, or individuals with disabilities. Recurring access meant having contact with individuals from one or more of the above groups on more than one occasion. These 2007 rules only applied to the AmeriCorps State and National, FGP and SCP programs. The rules did not apply to the Retired and Senior Volunteer Program (RSVP), Learn and Serve America (LSA), or other CNCS-funded programs. Affected grantees could apply to CNCS for approval of an alternative search procedure (ASP) if state law precluded them from complying with the national service criminal history check requirements or if they could obtain substantially the same information using a different process. The regulation also permitted grantees to conduct a fingerprint-based FBI criminal history check in lieu of the required state criminal history registry check(s).

b. The Serve America Act's National Service Criminal History Check Requirements

In 2009, Congress amended the National and Community Service Act of 1990 (42 U.S.C. 12501 *et seq.*) (NCSA) with the Serve America Act (Pub. L. 111–13) (SAA). The SAA codified CNCS's regulatory National Service Criminal History Check requirements and expanded the categories of positions covered by the criminal history check requirements.

Under the SAA, on or after October 1, 2009, any entity that selects an individual to serve in a position in which the individual receives a living allowance, stipend, national service educational award, or salary through a program receiving assistance under the national service laws must conduct a criminal history check on that individual. Individuals in covered positions now include grant-funded staff serving in any CNCS-funded national service program, including RSVP, LSA, Non-profit Capacity Building, and the Social Innovation Fund (SIF) grant programs.

Notably, the SAA expanded the categories of covered positions subject to the National Service Criminal History Check requirements without regard to the individual's access to vulnerable populations. It also prohibited individuals convicted of murder from serving in covered positions. The SAA also required that after April 21, 2011, individuals in covered positions with recurring access to vulnerable populations must have a fingerprint-based FBI criminal history check conducted as part of the National Service Criminal History Check. As directed by the SAA, CNCS issued new regulations in 2009, expanding coverage to any national service participant, volunteer or grant-funded employee who received one of the above-described payments for his or her service or employment. (74 FR 46495, September 10, 2009). Pursuant to these regulations, each individual in a covered position who does not have recurring access to vulnerable populations who began work or started service with a grantee on or after October 1, 2009, is required to undergo a National Service Criminal History Check that includes: (1) a nationwide check of the National Sex Offender Public Website (NSOPW); and (2) a search of either (a) the state criminal registry(ies) in the state in which the grantee is operating and the state in which the individual resides at the time

of application, or (b) a Federal Bureau of Investigation (FBI) fingerprint-based criminal history check.

c. Special Rule for Individuals With Recurring Access to Vulnerable Populations

The SAA specified separate National Service Criminal History Check requirements for individuals in covered positions with recurring access to vulnerable populations. Beginning April 21, 2011, entities that select individuals to serve in covered positions who are 18 or older and who will have recurring access to children age 17 or younger, individuals age 60 or older, or individuals with disabilities must conduct for each individual: (1) a nationwide check of the NSOPW; (2) a search of the state criminal registr(ies) in the state in which the individual in a covered position will be primarily serving or working and the state in which the individual resides at the time of application; and (3) an FBI fingerprint-based criminal history check. The SAA created limited exceptions to this special rule.

II. Discussion of the final rule

To implement National Service Criminal History Check provisions of the SAA, CNCS published a notice of a proposed rulemaking in the Federal Register on July 6, 2011. (76 FR 39361). This final rule implements the SAA with regard to individuals in covered positions with recurring access to vulnerable populations. In addition, the final rule clarifies several requirements in the existing rule and makes minor technical corrections for clarity.

a. Definitions and Applicability

1. Definition of “program” (§ 2510.20)

The SAA amended the NCSA’s definition of program to include newly-authorized programs including Campuses of Service, Serve America Fellows, Encore Fellows, Silver Scholars, the Social Innovation Fund, and activities funded under programs such as the

Volunteer Generation Fund. The final rule aligns the definition of program in the regulation with the statutory definition, corrects a typographical error, and corrects the statutory citation.

2. Definition of “you” (§ 2540.200)

Because this rule sets forth the National Service Criminal History Check provisions in one location in the Code of Federal Regulations, and because the rule applies to recipients of CNCS federal financial assistance who have individuals in covered positions, this final rule is written using program-neutral terminology. Accordingly, “you” in this final rule means a Corporation grantee or other entity subject to Corporation grant provisions. Unless the context otherwise requires, this includes, but is not limited to, recipients of federal financial assistance under grant programs defined in § 2510.20 of this final rule, as well as SCP, FGP, and RSVP projects.

3. Individuals in Covered Positions (§ 2540.201)

The final rule clarifies that the National Service Criminal History Check eligibility criteria apply to individuals in covered positions and aligns the definition of the term “covered position” with the language of the SAA. The reference in the proposed rule to the definition of program in § 2510.20 was removed from the final rule for clarity. The SAA extended application of the National Service Criminal History Check requirements to entities receiving CNCS grants under the national service laws, which include the NCSA and the Domestic Volunteer Service Act of 1973 (DVSA), as amended. While the National Service Criminal History Check requirements apply to programs defined in § 2510.20, the applicability is not limited to those programs. The requirements also apply to individuals in covered positions in the SCP, FGP, and RSVP programs. It should be clear that a National

Service Criminal History Check is not required for individuals whose connection to the grantee is tangential, or who are considered beneficiaries. For example, a National Service Criminal History Check would not be required for an individual contracted to provide occasional training to participants and volunteers, but is not otherwise integral to the operation of the program, nor would it be required for a child who receives a cash prize from a program for completing a service-learning project.

b. Eligibility Criteria – AmeriCorps State and National Positions (§ 2522.200)

The SAA amended the NCSA to prohibit an individual convicted of murder, as defined under 18 U.S.C. 1111, from serving in a covered position. In 2009, CNCS amended the National Service Criminal History Check regulations to reflect this statutory change concerning eligibility. As the regulatory sections updated in 2009 indicated, the change applied to AmeriCorps State and National. However, CNCS inadvertently failed to update the provision in the regulation that specifically addresses eligibility to serve in an AmeriCorps State and National position. This final rule corrects this oversight to reflect in this section that eligibility for service in an AmeriCorps State and National position includes satisfaction of the National Service Criminal History Check eligibility criteria.

The 2009 amendments to the National Service Criminal History Check regulations created some confusion regarding the eligibility of individuals convicted of murder, as defined under 18 U.S.C. 1111, from serving in a covered position. Congress declared that, as of October 1, 2009, individuals convicted of murder may not work or serve in covered positions. This Congressional mandate gave no discretion to CNCS to waive or modify this eligibility requirement.

Consequently, grantees with individuals convicted of murder who are currently serving or working in a covered position, including staff, must remove those individuals from the covered positions. For those individuals for whom a state registry or FBI criminal history check was not required prior to this final rule (e.g., those individuals who began work or service before October 1, 2009, without a subsequent break in service), grantees will be permitted to rely on the individuals' self-certification that they have never been convicted of murder as defined by 18 U.S.C. 1111, in lieu of conducting a criminal history check. The definition in 18 U.S.C. 1111 is as follows: "Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree."

Individuals who have been convicted of murder have been ineligible to serve as of October 1, 2009, and therefore, all costs associated with these individuals are potentially disallowable since that date.

c. National Service Criminal History Checks Generally (§ 2540.203)

The National Service Criminal History Check for individuals in covered positions must include (1) a nationwide check of the Department of Justice's National Sex Offender Public Website (NSOPW) and (2) either (a) a name- or fingerprint-based search of the

official state criminal history registry in the state in which the grantee is operating and of the official state criminal history registry in the state in which the individual resides at the time of application, or (b) submission of fingerprints through a state central record repository to the Federal Bureau of Investigation for a national criminal history background check.

Because of the importance of proper screening and because the NSOPW is a widely-available and free public resource, the NSOPW search must be nationwide (i.e., all states and territories) in order to meet the National Service Criminal History Check requirement. If any of the databases comprising the NSOPW are down, offline, or otherwise unavailable, the NSOPW check is incomplete until all databases are checked. The rule has been revised to clarify this requirement. Additionally, because of the availability of this free public resource, grantees must conduct an NSOPW check for any individual currently serving or working in a covered position defined under this rule, regardless of when the individual was hired or started service, and regardless of their access to vulnerable populations. Finally, as a prudential action, all CNCS grantees, when conducting a search of the name-based NSOPW, should include not only the applicant's current legal name, but also any previous names or aliases by which the applicant may have been known.

Since 2007, CNCS has required grantees operating in more than one state that conduct state criminal registry checks to conduct the checks in the state where the individual in a covered position will be primarily serving or working and in the state in which the individual resides at the time of application. The final rule codifies this requirement.

Comments received by CNCS indicated that the formatting of the proposed rule made it difficult to determine which components of the National Service Criminal History Check

are required. The rule has been reformatted to make the requirements clear. Additionally, the heading of this section was edited to be consistent with the other section headings.

CNCS also received comments requesting resolution of the ambiguity in the proposed rule regarding the time at which an individual is considered of age for the special rule for individuals with recurring access to vulnerable populations to apply. The final rule establishes that the rule applies to an individual who will be 18 years old or older at any time while serving in a covered position. The final rule also replaces the broad term “vulnerable population” with the specific groups statutorily defined as “vulnerable populations,” where necessary, to resolve any ambiguity.

This section of the final rule is the first section in which the words “enrolled” and “hired” are replaced with “starts service” and “begins work,” respectively. These words are updated throughout the final rule because comments suggested that the use of “enrolled” and “hired” created some confusion. For some grantees, “enrolled” has a specific operational meaning that does not reflect the intended timing in the context of the rule. Therefore, the word, “enrolled,” has been replaced with the words, “starts service,” to more clearly convey the intended timing requirements of the final rule. For the purposes of this rule, an individual “starts service” when the individual’s time begins to be credited toward their service commitment; an individual “begins work” when the individual engages in activities chargeable to the grant."

The proposed rule reflected CNCS’s intent to eliminate unnecessary replication of the National Service Criminal History Check provisions in the Code of Federal Regulations, and anchors the substantive provisions in one location. Because grantees subject to the National Service Criminal History Check provisions use different terminology, and comments

indicated that the terminology may have caused confusion, the final rule includes a definitional section to eliminate confusion concerning the applicability of the provisions. Sections have been renumbered and citations throughout the rule have been updated accordingly to accommodate its inclusion.

d. Special Rule for Individuals with Recurring Access to Vulnerable Populations (§ 2540.203).

This final rule implements the National Service Criminal History Check requirements for individuals in covered positions with recurring access to vulnerable populations who began work or who started service on or after April 21, 2011. The NCSA, as amended by the SAA, defines vulnerable populations as children age 17 or younger, individuals age 60 or older, or individuals with disabilities. The final rule now more clearly defines “vulnerable population.” Unless CNCS approves an alternative search procedure or an exception under § 2540.207, for individuals in covered positions who will be 18 or older and who also have recurring access to vulnerable populations, grantees must conduct (1) a nationwide check of the NSOPW (<http://www.nsopw.gov>), (2) a name- or fingerprint-based search of the official state criminal registry in the state in which the grantee is operating and of the official state criminal registry in the state in which the individual resides at the time of application, and (3) submission of fingerprints through a state central record repository to the Federal Bureau of Investigation for a national criminal history background check.

CNCS continues to define “recurring access” as “the ability on more than one occasion to approach, observe, or communicate with an individual through physical proximity or other means, including but not limited to, electronic or telephonic communication.” (45 CFR 2510.20).

In anticipation of the final rule, current grantees have inquired as to whether CNCS would develop a centralized mechanism for conducting FBI fingerprint checks for national service participants. CNCS is committed to identifying ways to decrease the burden on grantees; however, no such centralized mechanism is available at this time.

e. Timing of National Service Criminal History Check and Consecutive Terms (§ 2540.204)

Grantees must conduct and document the results of the nationwide NSOPW check before an individual begins work or starts service. The NSOPW is a free public resource available at <http://www.nsopw.gov/>.

Under § 2540.204(b) of this final rule, it is not necessary to perform an additional National Service Criminal History Check on an individual who serves consecutive terms of service with the same grantee when the break in service does not exceed 120 days, as long as the original check is a compliant check for the covered position in which the individual will be serving or working following the break in service. For example, if an individual serves an original term in a covered position with no recurring access to vulnerable populations, but will be serving the consecutive term in a covered position with recurring access to vulnerable populations, the grantee must ensure that any additional National Service Criminal History Check components required for the position are conducted (e.g. the fingerprint-based FBI check). This section allows, but does not require, a grantee to forego additional National Service Criminal History checks for individuals serving consecutive terms, based upon a presumption that the additional check would, in large part, replicate the original check and that the grantee's proximity to the individual would increase the likelihood that the grantee would have knowledge of the individual's activity.

Grantees must conduct a National Service Criminal History Check under this final rule on individuals in covered positions who, on or after April 21, 2011, begin work or start service (1) following a break in service exceeding 120 days or (2) with a new grantee.

(f) No Unaccompanied Access to Vulnerable Populations Pending National Service Criminal History Check Results (§ 2540.205)

This final rule codifies CNCS's understanding that it is common for vulnerable population beneficiaries to be accompanied by a parent, legal guardian, teacher, doctor, nurse, or other individual responsible for his or her care. CNCS does not believe it is necessary for an individual with pending National Service Criminal History Check results to be accompanied by an authorized grantee representative who has received the appropriate criminal history check when the vulnerable population beneficiary is accompanied by an individual responsible for his or her care.

While results from the state or FBI criminal history check components of the National Service Criminal History Check are pending, grantees may allow individuals in covered positions with recurring access to vulnerable populations to begin work or start service, as long as the individual is not permitted access to vulnerable populations without being accompanied by (1) an authorized grantee representative who has previously been cleared for such access; (2) a family member or legal guardian of the vulnerable individual; or (3) an individual authorized by the nature of his or her profession to have recurring access to the vulnerable individual, such as an education or medical professional. Accompaniment is a higher standard than supervision in that it requires the individual with recurring access to vulnerable populations to be in the physical presence of the accompanying individual. For example, a covered individual whose criminal history check component results are pending

may give nature tours to schoolchildren as part of an environmental program as long as the covered individual is within the physical presence of teachers or parents.

The final rule has been changed based on comments CNCS received about the ambiguity in the term “accompaniment.” The final rule uses the phrase “physical presence” in place of “accompaniment” to convey the intended meaning and specific requirement.

g. Costs (§ 2540.205)

The rule requires grantees to obtain and document a baseline criminal history check for individuals in covered positions. CNCS considers the cost of this required National Service Criminal History Check a reasonable and necessary program grant expense, such costs being presumptively eligible for reimbursement. In any event, a grantee should include the costs associated with its screening process in the grant budget it submits to CNCS for approval.

This rule codifies CNCS’s guidance that a grantee may not charge an individual for the cost of a National Service Criminal History Check unless CNCS has given written permission to do so. In addition, because a National Service Criminal History Check is inherently attributable to operating a program, such costs may not be charged to a state commission administrative grant.

h. Documentation Requirements (§ 2540.206)

Grantees must retain the criminal history check results along with written documentation that they considered the results in selecting the individual. The grantee must review and determine that the information returned by the governmental body issuing criminal history registry results provides information that would allow the grantee to determine whether or not an individual was eligible to work or serve in a covered position

under the final rule. For example, if a grantee receives a document from the statewide criminal history registry that indicates that the individual is “cleared” for service based upon an agreement that describes CNCS’s standards for eligibility, that clearance document may be retained as the sufficient documentation of the criminal history check results, along with written documentation that the grantee considered the result in selecting the individual.

i. Alternative Search Procedures and Exceptions to the National Service Criminal History Check requirements for Individuals in Covered Positions With Recurring Access to Vulnerable Populations (§ 2540.207)

The headings and structure of this section have been modified from those in the proposed rule in order to clarify the substantive content, and to clearly distinguish alternative search procedures from the statutory exceptions to the fingerprint-based FBI criminal history check requirement for individuals in covered positions with recurring access to vulnerable populations. A grantee may request in writing that CNCS approve an alternative search procedure for the National Service Criminal History Check components described in § 2540.203(a) or § 2540.203(b)(2)(i)-(ii), if the grantee (1) is prohibited under state law from meeting the requirements of § 2540.203(a) or § 2540.203(b)(2)(i)-(ii) or (2) demonstrates that it can obtain substantially equivalent or better information through an alternative search procedure.

Grantees may also apply to CNCS for approval of an exception from the fingerprint-based FBI criminal history check component of the National Service Criminal History Check, described in § 2540.203(b)(2)(iii), for an individual in a covered position with recurring access to vulnerable populations. CNCS may approve such an exception if the entity demonstrates to CNCS’s satisfaction (1) that the cost to the grantee of complying with

45 CFR 2540.203(b)(2)(iii) is prohibitive; (2) that the entity is not authorized, or is otherwise unable, under State or Federal law, to access the national criminal history background check system of the FBI; or (3) that there is sufficient justification for CNCS to exempt the grantee from the requirement for good cause.

1. Episodic Access (§ 2540.207)

Congress granted those individuals in covered positions with recurring access to vulnerable populations an exception to the FBI fingerprint-based criminal history check requirement when their access to vulnerable populations is “episodic in nature or for a [one]-day period.” For the purpose of this final rule, the Corporation defines “episodic” as access that is not a regular, scheduled, and anticipated component of an individual’s service activities. If access to vulnerable populations is not a regular, scheduled, and anticipated component of an individual’s service activities, the grantee is not required to conduct a fingerprint-based FBI criminal history check. However, the grantee must conduct the other components of the National Service Criminal History Check, as described in § 2540.203(b)(2)(i)-(ii) or under an approved ASP.

For example, consider an individual who is applying for an AmeriCorps position with an environmental program that involves volunteer coordination. If the grantee anticipates that the position will involve coordinating high school student volunteers on a regular basis, then the grantee must conduct a fingerprint-based FBI criminal history check on that individual. However, if the grantee has no reason to expect that the position will involve coordinating 17-year-old and younger volunteers because the grantee has never operated in a youth environment, does not have any youth engagement goals, and does not recruit high school aged volunteers, then any contact with a child volunteer would be irregular, unscheduled,

unanticipated, and thus, episodic. Therefore, the grantee would not need to conduct a fingerprint-based FBI criminal history check. However, the grantee must conduct the other components of the National Service Criminal History Check, as described in § 2540.203(b)(2)(i)-(ii) or under an approved ASP.

Episodic access is not determined by a specific number. In other words, if a grantee does not anticipate that a member will have access to vulnerable populations, the need to meet the National Service Criminal History Check requirements for individuals in covered positions with access to vulnerable populations would not materialize after a specific number of incidents of access occur, but would once the access becomes regular, scheduled and anticipated. If incidental access becomes unexpectedly regular or frequent, a grantee should re-evaluate its initial determination of episodic access and take appropriate action.

CNCS expects that in the majority of cases, it will be clear whether or not access to vulnerable populations is a regular, scheduled, and anticipated component of an individual's service activities. Nevertheless, CNCS recommends that grantees specifically address contact with vulnerable populations in each position description, service agreement, or similar document describing an individual's service activities.

2. Exemptions Approved for Good Cause

CNCS will publish on its website (<http://www.nationalservice.gov>) those scenarios for which CNCS has approved exemptions for "good cause" from the fingerprint-based FBI criminal history check requirement in § 2540.203(b)(2)(iii). The list of approved "good cause" exemptions may be expanded and codified in future rulemakings.

CNCS will monitor compliance with the rules and requirements associated with National Service Criminal History checks as a material condition of receiving a CNCS grant.

An entity’s failure to comply may adversely affect the entity’s access to grant funds or ability to obtain future funding from CNCS. In addition, an entity jeopardizes its eligibility for reimbursement of costs and hours related to an individual if it fails to perform or properly document the required National Service Criminal History Check.

III. Non-Regulatory Matters

Coverage Based on Start Date

The table below illustrates what National Service Criminal History Check components are required of individuals serving or working after **January 1, 2013**.

Recurring Access to vulnerable populations?		Individuals who, on or after the effective date of this rule, Began Work or Started Service											
		Before November 23, 2007			November 23, 2007 – September 30, 2009			October 1, 2009 – April 20, 2011			On or after April 21, 2011		
		N	S	F	N	S	F	N	S	F	N	S	F
AmeriCorps S & N	Yes	✓			✓	✓		✓	✓		✓	✓	✓
	No	✓			✓			✓	✓		✓	✓	
FGP	Yes	✓			✓	✓		✓	✓		✓	✓	✓
	No	✓			✓			✓	✓		✓	✓	
Senior Companion	Yes	✓			✓	✓		✓	✓		✓	✓	✓
	No	✓			✓			✓	✓		✓	✓	
RSVP staff	Yes	✓			✓			✓	✓		✓	✓	✓
	No	✓			✓			✓	✓		✓	✓	

VISTA grant-funded staff	Yes	✓			✓			✓	✓		✓	✓	✓
	No	✓			✓			✓	✓		✓	✓	
Learn & Serve	Yes	✓			✓			✓	✓		✓	✓	✓
	No	✓			✓			✓	✓		✓	✓	
Other Grant Programs	Yes	✓			✓			✓	✓		✓	✓	✓
	No	✓			✓			✓	✓		✓	✓	

N = NSOPW; S = State registry check; F = FBI fingerprint check

IV. Comments and Responses:

CNCS published the proposed rule with a 30-day comment period in the Federal Register of July 6, 2011 (76 FR 39361). We received over 150 comments on the proposed rule. Most of the commenters identified themselves as representatives of grantees required to comply with the rule. The most relevant comments and our responses are set forth below.

Comment: The majority of commenters expressed disapproval with the rule’s requirement that individuals working with vulnerable populations must submit their fingerprints to the FBI for a national criminal history background check. The commenters disapproved of the requirement because the process for complying with the requirement is time consuming, costly, and logistically challenging for grantees and participants. As a result, the commenters said that the increased administrative and financial burden the requirement imposes on grantees will significantly impact their ability to recruit participants and operate effectively. Additionally, the commenters considered the requirement unnecessarily redundant, as many of the grantees already require individuals to complete several criminal history background checks and that the additional requirement of a fingerprint-based FBI check provides very little new information.

Response: We acknowledge the concerns expressed about the FBI fingerprinting process and the administrative impact the requirement may have on some grantees. We, like all executive agencies, may exercise discretion in issuing rules, but only to the extent discretion is granted to us by law. The law requires individuals working with vulnerable populations to submit their fingerprints to the FBI for a national criminal history check; however, the law also created exceptions to the fingerprint-based FBI criminal history check. Grantees may use the “episodic access” exception without our written approval. The other available exceptions require that you contact our Office of Grants Management for written approval. The procedure for requesting an exception is in 45 CFR 2540.207.

Comment: Several of the comments we received indicated that the cost of the FBI criminal history background check could be a financial burden for the grantee and for the participants and volunteers.

Response: We acknowledge the administrative and financial impact that the fingerprint-based FBI criminal history check could have on grantees. The law created exceptions to the fingerprint-based FBI criminal history check requirement for individuals in covered positions with recurring access to vulnerable populations, one of which is when it is cost-prohibitive for the grantee to comply. Grantees may request written approval of an exception by contacting our Office of Grants Management.

We want to reiterate that unless we grant specific permission in writing, a grantee may not charge an individual for the cost of any component of a National Service Criminal History Check. In the absence of specific written permission, the grantee must not, even when the check returns unfavorable results, require the applicant or participant to ultimately bear the cost of the criminal history check.

Comment: The U.S. Department of Justice, FBI, Criminal Justice Information Systems (CJIS) commented that the final rule did not adequately address the role played by the state central record repositories and requested that CNCS revise the rule to specify that entities must submit fingerprints to the FBI through the state central record repository.

Response: We agree and have amended the rule to reflect the process established by FBI CJIS to process the fingerprint-based FBI criminal history checks required by the SAA. State central record repositories are critical to the infrastructure established by FBI CJIS for the processing of national criminal history background checks. In its October 31, 2011 memorandum to state central record repositories on the implementation of the SAA, FBI CJIS stated that those organizations subject to the SAA (and this final rule) “must contact the state repository in the state of operation to determine if the organization can access national criminal history record information.” In lieu of state statutory provisions, fingerprint-based state and national criminal history checks for CNCS grantees could be authorized by three federal legal authorities: the SAA, the National Child Protection Act, as amended by the Volunteers for Children Act, and Section 153 of the Adam Walsh Act. “Background checks conducted pursuant to the SAA must comply with certain criteria, to include fingerprints submitted via [a state central record repository], designation of a governmental agency to receive and screen the results of the record checks, and non-dissemination of the criminal history record information outside the receiving governmental department or related governmental agencies.”

The FBI CJIS guidance to state repositories stated that “each national service organization must coordinate with the [state central records repository] in the states of

program operation/residence to establish procedures for performing state and national criminal history record checks.” The guidance specified further that

”[e]ach [. . . repository] must request a unique Integrated Automated Fingerprint Identification System (IAFIS) originating agency identifier (ORI) or designate an existing ORI for exclusive use under the SAA. The repository must coordinate requests for ORI issuance, or use of a designated ORI, with FBI CJIS Division for programming. All fingerprints submitted to the FBI CJIS Division under this authority must include the program-designated ORI and be populated with “Serve America Act” or “Serve America Act-Volunteer” as the reason fingerprinted (RFP).”

The full text of the memorandum is available at

<http://www.nationalservicerresources.org/files/fbi-memo-to-state-repositories-on-serve-america-act-oct-31-11.pdf>.

We believe that our State Commission partners, as well as state Departments on Aging, Child Welfare Agencies, and Education Agencies can be instrumental in engaging the state central record repositories to streamline the National Service Criminal History Check process for national service grantees operating in their states and ensure proper screening of individuals in covered positions and the full implementation of the SAA.

Comment: We received comments regarding the potential discriminatory effects that the use of criminal history checks by grantee organizations may have on individuals’ ability to participate in National Service.

Response: The commenters identify an important issue. The use of criminal history records to exclude members and staff from Corporation-funded programs and activities may,

in some circumstances, run afoul of federal civil rights laws. Grantees should recognize that they have a dual status under the Civil Rights Act of 1964, depending on the nature of their relationship with an individual. Grantees, as recipients of federal financial assistance, must comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and its implementing regulations, 45 CFR 1203.1 et seq., which prohibit discrimination in Corporation-funded programs and activities, including the selection and placement of volunteers and members, on the basis of race, color, and national origin. Grantees, as employers, must also comply with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which prohibits discrimination in employment decisions. The Equal Employment Opportunity Commission (EEOC) has issued guidance explaining when consideration of arrest and conviction records violates Title VII. See http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. As explained in the EEOC guidance, grantees should be mindful that arrests alone are mere allegations, and that actual criminal convictions (where there has been a formal adjudication by a finder of fact), or actual evidence of conduct underlying an arrest, are the relevant indicators of an individual's fitness, or in some cases, eligibility (i.e., murder), to serve with, or work for, a Corporation grantee. Grantees should ensure that their screening practices are narrowly tailored in a manner that complies with these federal nondiscrimination requirements, in addition to applicable state laws governing the consideration of criminal history records.

Grantees also should be mindful that applicants have the right to review and challenge the results of the National Service Criminal History Check. Grantees are required by our regulations to safeguard an individual's personal information and give the individual

the opportunity to challenge any adverse findings that result from the National Service Criminal History Check.

Comment: We received comments requesting clarification of when the results of a National Service Criminal History Check make an individual ineligible to serve in a covered position.

Response: The law prohibits an individual from serving in a national service program in four situations: 1) the individual refuses to consent to the criminal history check; 2) the individual makes a false statement in connection with the criminal history check; 3) the individual is registered or required to be registered as a sex offender; or 4) the individual has been convicted of murder as defined by federal law. If the National Service Criminal History Check returns results that implicate criteria other than those above, the grantee has the discretion, subject to any federal civil rights law and state law requirements, to decide whether or not the results of a criminal history background check disqualify an individual from service with the grantee. Grantees should consider the factors set forth in the EEOC's guidance under Title VII (http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm), including the nature and gravity of the offense, the time that has passed since the conviction or completion of the sentence, and the nature of the position. Grantees should have written policies on their disqualification criteria and be consistent in how those criteria are applied to all individuals.

In addition, grantees should be aware of federal reentry policy, which seeks to minimize unjustified collateral consequences on formerly incarcerated persons. Participation in national service programs funded by the Corporation could aid the successful reentry of formerly incarcerated persons into society. Therefore, barriers to participation in national

service programs for those formerly incarcerated persons who are not statutorily ineligible to serve should be minimized as much as possible without putting program beneficiaries at genuine risk.

Comment: We received comments expressing concern about many grantees' overall level of understanding or ability to interpret the results of a National Service Criminal History Check.

Response: Grantees should be aware that, due to pending cases, state law restrictions, and resource issues, the information contained in databases and reports for criminal histories may be missing certain arrest and disposition information. Accordingly, grantees should obtain training, and implement best practices, in the interpretation and use of criminal records for screening participants and staff. We have required grantees to conduct National Service Criminal History Checks since 2007, and have always required that they treat applicants fairly. We reiterate that the grantee is responsible for obtaining the level of expertise necessary to understand the information received in response to the National Service Criminal History Check and use it in a fair manner that is consistent with our regulations and grant conditions. Information obtained from a National Service Criminal History Check is only one of many sources of information that is available about an individual.

Comment: We received numerous comments on the proposed rule's requirement that National Service Criminal History Checks be repeated on individuals who serve consecutive terms of service with the same grantee when the break in service exceeds 30 days. The comments suggested that in view of the time it takes to complete the newly-required fingerprint-based FBI criminal background check, a 30-day break in service requirement

imposes an additional administrative burden on seasonal or academic-year programs or projects.

Response: We agree with the commenters. The FBI fingerprint check takes longer than the process established under our 2007 rule and the SAA expands the number of individuals in covered positions. Balancing the administrative burden on grantees with the importance of proper screening, we determined that a longer break in service period is not unreasonable. Accordingly, the final rule reflects our decision to require that the National Service Criminal History Check be repeated if an individual's break in service exceeds 120 days, and also allows grantees to request approval for a longer break in service than 120 days, as long as the break does not exceed 180 days. The request must describe the program's design, explain why the longer period is required, and demonstrate the establishment of adequate risk management controls for the extended break in service. We want to clarify that consecutive terms of service requires that the individual serves another term with the same grantee. Checks performed by one grantee on an individual may not be transferred to another grantee. When an individual begins service with a new grantee, that grantee is responsible for conducting a new National Service Criminal History Check. Because the NSOPW is a free and widely-available resource, we encourage grantees with program designs where breaks in service are anticipated to conduct a new nationwide NSOPW check after a break in service of any duration.

Comment: We received comments seeking clarification about the status of individuals in covered positions who conducted the appropriate National Service Criminal History Check components when they began work or started service prior to April 21, 2011.

Response: The National Service Criminal History Check components of this rule apply to individuals in covered positions who begin work, or who start service, on or after, April 21, 2011. Grantees are responsible for ensuring that those individuals who began work, or who started service, prior to, April 21, 2011, conducted the appropriate National Service Criminal History Check components required by the regulation that was in effect prior to that date. If individuals in covered positions who began work, or who started service prior to, April 21, 2011, subsequently have a break in service that exceeds 120 days, or begins work or service with a different grantee, they must have a Check required by this final rule. If an individual serves consecutive terms of service in a covered position and does not have a break in service that exceeds 120 days, then no additional National Service Criminal History Check is required as long as the original check is a compliant check for the covered position in which the individual will be serving or working following the break in service.

Comment: We received numerous comments on the requirement that individuals working with vulnerable populations be accompanied while the components of their National Service Criminal History Check have been submitted, but not yet returned. Commenters suggested that we clarify what we mean by “accompaniment” and how to document it.

Response: The purpose of the National Service Criminal History Check is to screen out those individuals who may pose a risk to the population being served. Accompaniment requires that an individual for whom the National Service Criminal History Check components are pending be, at all times, in the physical presence of 1) an authorized grantee representative who has been previously cleared for such access; 2) a family member or legal guardian of the vulnerable individual; or 3) an individual authorized by the nature of his or her profession to have recurring access to the vulnerable individual, such as an education or medical professional. Accompaniment provides grantees with the opportunity to place

participants in service positions before the criminal history background check is complete. Supervision is insufficient because it doesn't provide the immediate oversight that would mitigate risk of a participant's improper conduct sought to be avoided by the National Service Criminal History Check. We have updated the rule to reflect more accurately our intent that accompaniment means that the individual must be in the physical presence of the accompanying individual.

The Office of Grants Management will issue guidance to grantees prior to the effective date of this final rule on how to document compliance with the accompaniment requirements.

Comment: We also received comments requesting clarification on how to apply the rule to individuals who reach the age of 18 during their service term.

Response: A National Service Criminal History Check is required for individuals who are, or who will reach the age of, 18 or older at any time during their service term. The Check must be conducted in accordance with 2450.204, even if the individual is not yet 18 at the time service or work begins. The final rule reflects this clarification.

Comment: Some comments identified areas in the proposed rule where the distinction between exceptions and alternative search procedures was unclear. Other commenters articulated specific challenges they faced in obtaining the required checks.

Response: Since implementation of the original National Service Criminal History Check rule in 2007, we have evaluated and approved alternative search procedures when grantees submitted a written request for evaluation of a proposed alternative search procedure. This practice will continue under the new rule. The law also gives us the authority to exempt grantees from conducting the fingerprint-based FBI criminal history check

required under the new rule for individuals in covered positions with recurring access to vulnerable populations. We acknowledge the confusion in the wording of the proposed rule. We have revised the final rule so that the requirements and procedures are clear.

With respect to the comments we received regarding particular challenges grantees face under the new rule, we cannot address those here. Grantees with individual challenges that they believe will justify an exception from § 2540.203(b)(2)(iii) should contact our Office of Grants Management or their Program Officer.

Comment: We received comments requesting clarification of the “episodic access” exception from the fingerprint-based FBI criminal history background check requirement for individuals with recurring access to vulnerable populations.

Response: A grantee does not need our approval to use the “episodic access” exception to the fingerprint-based FBI criminal history check requirement described in § 2540.203(b)(2)(iii). This is a self-determination grantees will make using the guidance in this notice. We will continue to monitor grantees for compliance with the criminal history background check requirement, including reliance on the episodic access exception.

Comment: CNCS received comments indicating that the proposed rule was unclear as to when approval from CNCS is required for individuals in covered positions with recurring access to vulnerable populations to be excepted from the fingerprint-based FBI criminal history check.

Response: The final rule has been restructured with new headings to indicate clearly when CNCS approval is required. In the case of episodic access, grantees are responsible for using their best judgment to determine whether or not an individual’s access to vulnerable populations is episodic. Approval from the CNCS Office of Grants Management is not

required. However, reliance on the self-determined exception for “episodic access” will be monitored by CNCS as a material grant condition.

Comment: We received numerous comments expressing concern about our ability to process requests for alternative search procedure approval and fingerprint-based FBI criminal history check exceptions in a timely manner and what grantees should do while their requests are pending.

Response: The Office of Grants Management is prepared to process requests from grantees in a prompt manner. This function may not be delegated to a grantee, such as a State Commission. However, a State Commission may request approval for an alternative search procedure applicable to individual sub-grantees, or to all of their sub-grantees, if applicable. While results of the National Service Criminal History Check are pending, individuals in covered positions with recurring access to vulnerable populations must be accompanied. The final rule and preamble have been updated to clarify this requirement.

V. Effective Dates and Implementation

This final rule becomes effective January 1, 2013. However, the special rule for individuals in covered positions with recurring access to vulnerable populations will only apply to the selection of individuals in covered positions who began work or who started service with a grantee on, or after, April 21, 2011. Notwithstanding this date, grantees will have until January 1, 2013 to initiate the fingerprint-based FBI criminal history check or the state registr(ies) check(s), whichever has not already been initiated, for individuals in covered positions with recurring access to vulnerable populations. A grantee must be certain that it has already satisfied the requirement to conduct an NSOPW check on all individuals who are currently serving or working in covered positions.

Because of the significant period of time between April 21, 2011, and the effective date of the regulation, CNCS has determined that, as a blanket good cause exception implemented by section 2540.207(b)(2) of this final rule, an individual in a covered position with recurring access to vulnerable populations who began work or who started service with a grantee on or after April 21, 2011, and then departed the program or project before January 1, 2013, must have complied with the rule effective on October 1, 2009 (i.e. had a Check that included the NSOPW component and either the State Criminal History registr(ies) component OR the fingerprint-based FBI national criminal history background check component, but not BOTH the State Criminal History registr(ies) component AND the fingerprint-based FBI national criminal history background check component).

VI. Regulatory Procedures

Executive Orders 12866 and Executive Order 13563

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605 (b)), the Corporation certifies that this rule, if adopted, will not have a significant economic impact on a substantial number of small entities. This regulatory action will not result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, CNCS has not performed the initial regulatory flexibility analysis that is required under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) for major rules that are expected to have such results.

Unfunded Mandates

For purposes of Title II of the Unfunded Mandates Reform Act of 1995, 2 USC 1531–1538, as well as Executive Order 12875, this regulatory action does not contain any Federal mandate that may result in increased expenditures in either federal, state, local, or tribal governments in the aggregate, or impose an annual burden exceeding \$100 million on the private sector.

Paperwork Reduction Act

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the recordkeeping requirements included in this final rule have been submitted for emergency approval to the Office of Management and Budget (OMB). Due to an oversight, the Paperwork Reduction Act information was not included in the proposed rule and CNCS is requesting a short-term emergency clearance (OMB Control Number 3045-0145). In order to fairly evaluate whether a recordkeeping requirement should be approved

by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the recordkeeping requirement and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Under a separate notice, we will solicit public comment on each of these issues for the following sections of this document that contain recordkeeping requirements: 2540.205, .206.

Executive Order 13132, Federalism

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has Federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. The proposed rule does not have any Federalism implications, as described above.

List of Subjects

45 CFR Part 2510

Grant programs-social programs, Volunteers.

45 CFR Part 2522

Grant programs-social programs, Reporting and recordkeeping requirements,
Volunteers.

45 CFR Part 2540

Administrative practice and procedure, Grant programs-social programs, Reporting
and recordkeeping requirements, Volunteers.

45 CFR Part 2551

Aged, Grant programs-social programs, Volunteers.

45 CFR Part 2552

Aged, Grant programs-social programs, Volunteers.

For the reasons stated in the preamble, the Corporation for National and Community Service
proposes to amend chapter XXV, title 45 of the Code of Federal Regulations as follows:

PART 2510 – OVERALL PURPOSES AND DEFINITIONS

1. The authority citation for Part 2510 continues to read as follows:

Authority: 42 U.S.C. 12511

2. Amend § 2510.20 by revising the definition of “program” to read as follows:

§ 2510.20 Definitions.

* * * * *

Program. The term program, unless the context otherwise requires, and except when used as
part of the term academic program, means a program described in the National and
Community Service Act of 1990, as amended (42 U.S.C. 12501 et seq.), in section 112(a)
(other than a program referred to in paragraph (3)(B) of that section), 118A, or 118(b)(1), or
subsection (a), (b), or (c) of section 122, or in paragraph (1) or (2) of section 152(b), section

198B, 198C, 198H, or 198K, or an activity that could be funded under section 179A, 198, 198O, 198P, or 199N.

* * * * *

PART 2522 – AMERICORPS PARTICIPANTS, PROGRAMS, AND APPLICANTS

1. The authority citation for Part 2522 continues to read as follows:

Authority: 42 U.S.C. 12571-12595; 12651b-12651d; E.O. 13331, 69 FR 9911

2. Amend § 2522.200 by removing the period at the end of paragraph (a)(3) and adding a semicolon in its place and adding paragraph (a) (4) to read as follows:

§ 2522.200 What are the eligibility requirements for an AmeriCorps participant?

(a) * * *

(4) Satisfy the National Service Criminal History Check eligibility criteria pursuant to 45 CFR 2540.202.

* * * * *

3. Revise § 2522.205 to read as follows:

§ 2522.205 To whom must I apply the National Service Criminal History Check eligibility criteria?

You must apply the National Service Criminal History Check eligibility criteria to individuals serving in covered positions. A covered position is a position in which the individual receives an education award or a Corporation grant-funded living allowance, stipend, or salary.

§ 2522.206 [Removed and Reserved]

4. Remove and reserve § 2522.206.

5. Revise § 2522.207 to read as follows:

§ 2522.207 How do I determine an individual’s eligibility to serve in a covered position?

To determine an individual’s eligibility to serve in a covered position, you must follow the procedures in part 2540 of this chapter.

PART 2540 – GENERAL ADMINISTRATIVE PROVISIONS

6. The authority citation for part 2540 continues to read as follows:

Authority: E.O. 13331, 69 FR 9911; 18 U.S.C. 506, 701, 1017; 42 U.S.C. 12653, 12631-12637; 42 U.S.C. 5065

7. Revise § 2540.200 to read as follows:

§ 2540.200 What does “you” mean in this section?

As used in this section, “you” means a Corporation grantee or other entity subject to Corporation grant provisions. Unless the context otherwise requires, this includes, but is not limited to, recipients of federal financial assistance under grant programs defined in § 2510.20 of this chapter as well as projects under the Senior Companion Program, the Foster Grandparent Program, and RSVP.

8. Revise § 2540.201 to read as follows:

§ 2540.201 To whom must I apply the National Service Criminal History Check eligibility criteria?

You must apply the National Service Criminal History Check eligibility criteria to individuals serving in covered positions. A covered position is a position in which the individual receives an education award or a Corporation grant-funded living allowance, stipend, or salary.

9. Revise § 2540.202 to read as follows:

§ 2540.202 What eligibility criteria must I apply to a covered position in connection with the National Service Criminal History Check?

In addition to the eligibility criteria you establish, an individual shall be ineligible to serve in a covered position if the individual –

- (a) Refuses to consent to a criminal history check described in § 2540.203 of this chapter;
- (b) Makes a false statement in connection with a criminal history check described in § 2540.203 of this chapter;
- (c) Is registered, or is required to be registered, on a state sex offender registry or the National Sex Offender Registry; or
- (d) Has been convicted of murder, as defined in 18 USC 1111.

10. Revise § 2540.203 to read as follows:

§ 2540.203 What search components of the National Service Criminal History Check must I satisfy to determine an individual's eligibility to serve in a covered position?

(a) Search procedure for individuals in covered positions who do not have recurring access to vulnerable populations. Unless the Corporation approves an alternative search procedure under § 2540.207 of this chapter, to determine an individual's eligibility to serve in a covered position, you must conduct and document a National Service Criminal History Check that consists of the following components:

- (1) A nationwide name-based search of the Department of Justice (DOJ) National Sex Offender Public Website (NSOPW), and
- (2) Either:

- (i) A name- or fingerprint-based search of the official state criminal history registry for the state in which the individual in a covered position will be primarily serving or working and for the state in which the individual resides at the time of application; or
- (ii) Submission of fingerprints through a state central record repository for a fingerprint-based Federal Bureau of Investigation (FBI) national criminal history background check.

(b) Search procedure for individuals in covered positions who have recurring access to vulnerable populations. (1) This rule applies to individuals who:

- (i) Begin working for, or who start service with, you on or after April 21, 2011;
- (ii) Will be 18 years old or older at any time during their term of service; and
- (iii) Serve in a covered position that will involve recurring access to children age 17 years or younger, to individuals age 60 years or older, or to individuals with disabilities.

(2) Unless the Corporation approves an alternative search procedure or an exception under § 2540.207 of this chapter, to determine the eligibility of an individual described in paragraph (b)(1) of this section you must conduct and document a National Service Criminal History Check that consists of the following components:

- (i) A nationwide name-based search of the Department of Justice (DOJ) National Sex Offender Public Website (NSOPW);
- (ii) A name- or fingerprint-based search of the official state criminal history registry for the state in which the individual in a covered position will be primarily serving or working and for the state in which the individual resides at the time of application; and
- (iii) Submission of fingerprints through a state central record repository for a fingerprint-based FBI national criminal history background check.

11. Revise § 2540.204 to read as follows:

§ 2540.204 When must I conduct a National Service Criminal History Check on an individual in a covered position?

(a) Timing of the National Service Criminal History Check Components. (1) You must conduct and review the results of the nationwide NSOPW check required under § 2540.203 before an individual in a covered position begins work or starts service.

(2) You must initiate state registry or FBI criminal history checks required under § 2540.203 before an individual in a covered position begins work or starts service. You may permit an individual in a covered position to begin work or start service pending the receipt of results from state registry or FBI criminal history checks as long as the individual is not permitted access to children age 17 years or younger, to individuals age 60 years or older, or to individuals with disabilities, without being in the physical presence of an appropriate individual, as described in § 2540.205(g) of this chapter.

(b) Consecutive terms. If an individual serves consecutive terms of service in a covered position and does not have a break in service that exceeds 120 days, then no additional National Service Criminal History Check is required, as long as the original check is a compliant check for the covered position in which the individual will be serving or working following the break in service. If your program or project is designed with breaks in service over 120 days, but less than 180 days between consecutive terms, you may request approval for a break in service of up to 180 days before a new National Service Criminal History Check is required. Your request must describe the overall program design, explain why the longer period is reasonable, and demonstrate that you have established adequate risk management controls for the extended break in service.

12. Revise § 2540.205 to read as follows:

§ 2540.205 What procedures must I follow in conducting a National Service Criminal History Check for a covered position?

You are responsible for following these procedures:

- (a) Verify the individual's identity by examining the individual's government-issued photo identification card, such as a driver's license;
- (b) Obtain prior, written authorization from the individual for the State registry check, for the FBI criminal history check, and for the appropriate sharing of the results of the checks within the program. Prior written authorization from the individual is not required to conduct the nationwide NSOPW check;
- (c) Document the individual's understanding that selection into the program is contingent upon the organization's review of the individual's National Service Criminal History Check component results, if any;
- (d) Ensure that screening practices comply with federal civil rights laws, including Titles VI and VII of the Civil Rights Act of 1964 (and the Corporation's implementing regulations under Title VI);
- (e) Provide a reasonable opportunity for the individual to review and challenge the factual accuracy of a result before action is taken to exclude the individual from the position;
- (f) Provide safeguards to ensure the confidentiality of any information relating to the criminal history check, consistent with authorization provided by the applicant; and
- (g) Ensure that an individual, for whom the results of a required state or FBI criminal history registry check are pending, is not permitted to have access to children age 17 years or

younger, to individuals age 60 years or older, or to individuals with disabilities without being in the physical presence of:

- (1) Your authorized representative who has previously been cleared for such access;
- (2) A family member or legal guardian of the vulnerable individual; or
- (3) An individual authorized, because of his or her profession, to have recurring access to the vulnerable individual, such as an education or medical professional.

(h) Unless specifically approved by the Corporation, you may not charge an individual for the cost of any component of a National Service Criminal History Check.

13. Revise § 2540.206 to read as follows:

§ 2540.206 What documentation must I maintain regarding a National Service Criminal History Check for a covered position?

You must:

- (a) Document in writing that you verified the identity of the individual in a covered position by examining the individual's government-issued photo identification card, and that you conducted the required checks for the covered position; and
- (b) Maintain the results, or a results summary issued by a State or Federal government body, of the NSOPW check and the other components of each National Service Criminal History Check, unless precluded from doing so by State or Federal law or regulation. You must also document in writing that an authorized grantee representative considered the results of the National Service Criminal History Check in selecting the individual.

14. Revise § 2540.207 to read as follows:

§ 2540.207 When may I follow an alternative search procedure or be excepted from a requirement in conducting a National Service Criminal History Check for a covered position?

(a) Alternative search procedure. (1) If you submit a written request to the Corporation's Office of Grants Management, the Corporation will consider approving an alternative search procedure:

(i) If you demonstrate that you are prohibited or otherwise precluded under state law from complying with a Corporation requirement relating to the National Service Criminal History Check, or

(ii) If you can obtain substantially equivalent or better information through an alternative search procedure.

(2) The Office of Grants Management will review the alternative search procedure to ensure that it:

(i) Verifies the identity of the individual; and

(ii) Includes a search of an alternative criminal database that is sufficient to identify the existence or absence of criminal offenses.

(b) Exceptions to Criminal History Check requirements for individuals with recurring access to vulnerable populations. (1) Exception that does not require prior Corporation approval - Episodic Access. (i) For the purposes of this section, an individual's access to a vulnerable population is considered to be episodic in nature if the service is not a regular, scheduled, and anticipated component of the individual's position description.

(ii) You are not required to conduct the fingerprint-based FBI criminal history check on individuals in covered positions with recurring access to vulnerable populations, as

described in § 2540.203 of this chapter, when the individual's access to a vulnerable population is episodic in nature or for a 1-day period.

(iii) No prior approval is required from the Corporation for you to apply this exception. You must make and document a determination that the individual's access to vulnerable populations is episodic, as defined by paragraphs (b)(1)(i) and (ii) of this section.

(2) Exceptions that require prior approval of the Corporation. You are not required to conduct the fingerprint-based FBI criminal history check on individuals in covered positions with recurring access to vulnerable populations, as described in § 2540.203 of this chapter, if you demonstrate and the Corporation determines in writing that:

- (i) Complying with § 2540.203(b)(2)(iii) of this chapter is cost-prohibitive;
- (ii) You are not authorized, or are otherwise unable, under state or federal law, to access the national criminal history background check system of the FBI; or
- (iii) That you are exempt from the requirement in § 2540.203(b)(2)(iii) of this chapter for good cause.

PART 2551 – SENIOR COMPANION PROGRAM

15. The authority citation for part 2551 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.*; 42 U.S.C. 12651b-12651d; E.O. 13331, 69 FR 9911.

16. Amend § 2551.23 by adding paragraph (l) to read as follows:

§ 2551.23 What are the sponsor's program responsibilities?

* * * * *

(l) Conduct criminal history checks on all Senior Companions and Senior Companion grant-funded employees who start service, or begin work, in your program after November 23, 2007, in accordance with the National Service Criminal History Check requirements in 45 CFR 2540.200 through 2540.207.

§§ 2551.26 through 2551.32 [Removed and Reserved].

17. Remove and reserve §§ 2551.26 through 2551.32.

PART 2552 – FOSTER GRANDPARENT PROGRAM

18. The authority citation for Part 2552 continues to read as follows:

Authority: 42 U.S.C. 4950 *et seq.*, 42 U.S.C. 12651b-12651d; E.O. 13331, 69 FR 9911

19. Amend § 2552.23 by adding paragraph (l) to read as follows:

§ 2552.23 What are a sponsor's program responsibilities?

* * * * *

(l) Conduct criminal history checks on all Foster Grandparents and Foster Grandparent grant-funded employees who start service, or begin work, in your program after November 23, 2007, in accordance with the National Service Criminal History Check requirements in 45 CFR 2540.200 through 2540.207.

§§ 2552.26 through 2552.32 [Removed and Reserved]

20. Remove and reserve §§ 2552.26 through 2552.32.

Valerie Green
General Counsel

September 28, 2012

Date

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