



[BILLING CODE 6050-28-P]

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

45 CFR Parts 2522 and 2540

National Service Criminal History Check

RIN 3045-AA69.

AGENCY: Corporation for National and Community Service.

ACTION: Proposed rule with request for comments.

SUMMARY: The Corporation for National and Community Service (CNCS) proposes changes to existing National Service Criminal History Check (NSCHC) regulations under the National and Community Service Act of 1990, as amended. These amendments will simplify the NSCHC requirements.

DATES: Comments must reach CNCS on or before **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

- (1) Electronically through www.regulations.gov
- (2) By mail sent to: Corporation for National and Community Service; Attention Amy Borgstrom; 250 E Street S.W., Washington, DC, 20525.
- (3) By hand delivery or by courier to the CNCS mailroom at the address above between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except federal holidays.

Comments submitted in response to this Notice will be made available to the public through www.regulations.gov. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or

proprietary information. If you send an e-mail comment, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom at the Corporation for National and Community Service, 250 E Street SW, Washington, D.C. 20525, aborgstrom@cns.gov, phone 202-422-2781.

SUPPLEMENTARY INFORMATION

I. Background

CNCS proposes updating its current National Service Criminal History Check (NSCHC) regulations. CNCS first established its NSCHC regulation in 2007. In 2009, Congress codified NSCHC requirements in Section 189D of the National and Community Service Act of 1990 (NCSA), as amended by the Serve America Act. CNCS issued regulations in 2009 and 2012 implementing the Serve America Act NSCHC provisions.

Grant recipient and subrecipient compliance with the NSCHC requirements has been an ongoing challenge. Successful implementation of the NSCHC process by grant recipients has been frustrated, in part, by access to state sources of criminal history record information, requirements of state law, and restrictions on sharing information. As such, Congressional hearings and CNCS Office of the Inspector General (OIG) reports have highlighted grantee noncompliance with this important statutory requirement.

Improving CNCS core functions – including eliminating barriers to compliance – is a primary goal of the CNCS Transformation and Sustainability Plan. In pursuit of that goal, CNCS has approved vendors for grant recipients to use to obtain the required NSCHC components. Since November 2018, CNCS grant recipients and subrecipients have had the ability to establish accounts and obtain the required National Sex Offender Public Website (NSOPW), state, and FBI components of the NSCHC, through the approved vendors. Additionally, to help ensure grantee compliance with NSCHC requirements, CNCS made grant funds available for the purpose of rechecking individuals who needed to have an NSCHC conducted. And for those grant recipients who took the opportunity to ensure compliance by rechecking individuals in covered positions, CNCS announced that it would not, except in limited circumstances, take enforcement action for past noncompliance. As of September 25, 2019, 1,942 accounts were established with the new vendor resulting in 93,993 checks.

CNCS grant recipients must ensure that they identify individuals who need an NSCHC and ensure that it is done on time. The NSCHC must be conducted as a matter of law, and as a condition of receiving grant funds for individuals in covered positions working or serving under: Operational grants provided by AmeriCorps State and National, Foster Grandparent Program Grants, Retired Senior Volunteer Program Grants, Senior Companion Program Grants, Senior Corps Demonstration Program Grants that receive funding from CNCS, Martin Luther King, Jr. Day of Service Grants, September 11th Day of Service Grants, Social Innovation Fund Grants, Volunteer Generation Fund Grants, AmeriCorps VISTA Program Grants, or AmeriCorps VISTA Support Grants. Section 189D of the NCSA and these regulations do not apply to AmeriCorps NCCC and

or AmeriCorps VISTA members, who serve in Federally-operated programs that have separate criminal history check requirements. For the purpose of NSCHC, individuals in covered positions are: the staff working under these grants, AmeriCorps State and National members, Foster Grandparents, and Senior Companion Volunteers.

II. Scope of proposed rule

In addition to the steps already taken to ensure that grantees have a clear path to obtaining the required NSCHC components, CNCS proposes this revision to its regulations. The intent of this revision is to recognize the impact of the availability of vendors and to reduce the complexity of the requirements. The proposed rule requires that grant recipients establish accounts, and conduct checks, through the CNCS-approved vendors. By establishing one path for obtaining compliant checks, CNCS will simplify the process and make use of technological innovations that will help CNCS and its grantees monitor and improve NSCHC compliance. A preliminary analysis of the agency's FY 2019 IPERIA test transactions shows that use of the vendor by CNCS grantees resolved the NSCHC component of the improper payment transactions in 88% of the transactions for which the NSCHC component rendered the payment improper.

Further, the proposed rule eliminates a distinction between the checks required for those serving vulnerable populations and those not serving vulnerable populations. All individuals in covered positions will require an NSCHC comprised of NSOPW, state, and FBI criminal history components available through the CNCS-approved vendors. In addition, the proposed rule requires that the NSCHC be completed before an individual works or serves in a covered position – including any grant-funded training time. This eliminates the need for individuals to be accompanied while checks are pending. The

proposed rule further clarifies which CNCS grant programs are required to comply with the NSCHC regulation and which individuals associated with a grant must have an NSCHC.

CNCS welcomes public comment on the proposed regulations, particularly on the scope of the proposed rule and its applicability to staff, volunteers, and members.

CNCS's intent is to establish systems and requirements that allow grant recipients to effectively demonstrate compliance.

III. Effective Date

CNCS expects to make the final rule effective no earlier than 30 days after publication of the final rule.

IV. Regulatory Procedures

Executive Order 12866

CNCS has determined that the rule is not an “economically significant” rule within the meaning of E.O. 12866 because it is not likely to result in: (1) an annual effect on the economy of \$100 million or more, or an adverse and material effect on a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal government or communities; (2) the creation of a serious inconsistency or interference with an action taken or planned by another agency; (3) a material alteration in the budgetary impacts of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) the raising of novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

Regulatory Flexibility Act

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605 (b)), CNCS 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 U.S.C. 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

The rule specifies that specific pieces of information must be obtained and maintained in order to demonstrate compliance with the regulatory procedures.

This requirement constitutes one set of information under the Paperwork Reduction Act (PRA), 44 U.S.C. 507 et seq. OMB, in accordance with the Paperwork Reduction Act, has previously approved information collections for the NSCHC requirement. The OMB

Control Number is 3045-0145.

Under the PRA, an agency may not conduct or sponsor a collection of information unless the collections of information display valid control numbers. This rule's collections of information are contained in 45 CFR 2540.204 and .206.

This information is necessary to ensure that only eligible individuals serve in covered positions under CNCS grants.

The likely respondents to these collections of information are entities interested in or seeking to serve in covered positions and grant recipients.

Executive Order 13132, Federalism

Executive Order 13132, Federalism, prohibits an agency from publishing any rule that has Federalism implications if the rule 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. This rule does not have any Federalism implications, as described above.

List of Subjects

45 CFR 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

For the reasons discussed in the preamble, under the authority of 42 USC 12651c(c), the Corporation for National and Community Service proposes to amend chapter XXV, title 45 of the Code of Federal Regulations as follows:

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. Revise § 2522.205 to read as follows:

§ 2522.205 To whom must I apply eligibility criteria relating to criminal history?

You must apply eligibility criteria relating to criminal history to individuals specified in 45 CFR 2540.201.

PART 2540 – GENERAL ADMINISTRATIVE PROVISIONS

Subpart B —REQUIREMENTS DIRECTLY AFFECTING THE SELECTION AND TREATMENT OF PARTICPANTS

3. 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.

4. Revise §2540.200 to read as follows:

§2540.200 Which entities are required to comply with the National Service Criminal History Check requirements in this part?

The National Service Criminal History Check is a requirement for entities that are

recipients or subrecipients of the following grants:

- (a) Operational grants provided by AmeriCorps State and National;
- (b) Foster Grandparent Program Grants
- (c) Retired Senior Volunteer Program Grants
- (d) Senior Companion Program Grants
- (e) Senior Corps Demonstration Program Grants that receive funding from CNCS
- (f) Martin Luther King, Jr. Day of Service Grants
- (g) September 11th Day of Service Grants
- (h) Social Innovation Fund Grants
- (i) Volunteer Generation Fund Grants
- (j) AmeriCorps VISTA Program Grants
- (k) AmeriCorps VISTA Support Grants

5. Revise §2540.201 to read as follows:

§2540.201 Which individuals require a National Service Criminal History Check?

(a) A National Service Criminal History Check must be conducted for individuals in covered positions. Individuals in covered positions are individuals selected, under a CNCS grant specified in 2540.200, by the recipient, subrecipient, or service site to work or serve in a position under a CNCS grant specified in §2540.200:

- (1) As an AmeriCorps State and National member, as described in 42 USC 12511 (30)(A)(i);
- (2) As a Foster Grandparent who receives a stipend;
- (3) As a Senior Companion who receives a stipend; or
- (4) In a position in which they will receive a salary, and will be listed on the grant

budget, under a cost reimbursement grant.

(b) A National Service Criminal History Check is not required for those individuals in (a) who are under the age of 18 on the first day of work or service in a covered position.

(c) A National Service Criminal History Check is not required for individuals whose activity is entirely included in the grant recipient's indirect cost rate.

6. Revise §2540.202 to read as follows:

§2540.202 What eligibility criteria apply to an individual for whom a National Service Criminal History Check is required?

An individual shall be ineligible to work or serve in a position specified in §2540.201(a) if the individual—

(a) Refuses to consent to a criminal history check described in §2540.204;

(b) Makes a false statement in connection with a criminal history check described in §2540.204 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 U.S.C. 1111.

7. Revise §2540.203 to read as follows:

§ 2540.203 May a grant recipient or subrecipient or service site establish and apply suitability criteria for individuals to work or serve in a position specified in §2540.201(a)?

Grant recipients and subrecipients, or service sites, may establish suitability criteria, consistent with state and federal Civil Rights and nondiscrimination laws, for individuals working or serving in a position specified in §2540.201(a). While

members may be eligible to work or serve in a position specified in §2540.201(a) based on the eligibility requirements of §2540.202, a grant recipient, subrecipient, or service site may determine that an individual is not suitable to work or serve in such a position based on criteria that the grant recipient or subrecipient or service site establishes.

8. Revise §2540.204 to read as follows:

§2540.204 How is a National Service Criminal History Check obtained?

(a) Unless CNCS approves a waiver under §2540.207, grant recipients or subrecipients must conduct and document a National Service Criminal History Check through CNCS-approved vendors. For each individual in a position specified in §2540.201, grantees or subgrantees must, through the CNCS-approved vendors, obtain a nationwide check of the National Sex Offender Public Website, a check of the state criminal history record repository or designated alternative for the individual's state of residence and state of service, and a fingerprint-based check of the FBI criminal history record database.

(b) In the case that a CNCS-approved vendor is not available to provide one or more of the National Service Criminal History Check components or if CNCS discontinues use of an approved vendor, CNCS will provide notice of such unavailability or discontinuation, and grant recipients or subrecipients must obtain, as appropriate, a nationwide check of the National Sex Offender Public Website through NSOPW.gov, a check of the state criminal history record repository or designated alternative for the individual's state of residence and state of service, and a fingerprint-based check of the FBI criminal history record

database through the state criminal history record repository.

9. Revise §2540.205 to read as follows:

§2540.205 By when must the National Service Criminal History Check be completed?

(a) The National Service Criminal History Check must be conducted, reviewed, and an eligibility determination made by the grant recipient or subrecipient based on the results of the National Service Criminal History Check *before* a person begins to work or serve in a position specified in §2540.201(a).

(b) If a person serves consecutive terms of service with the same organization in a position specified in §2540.201(a) and does not have a break in service longer than 180 days, then no additional National Service Criminal History Check is required, as long as the original check complied with the requirements of §2540.204.

(c) Persons working or serving in positions specified in §2540.201(a) who continue working or serving in a position specified in §2540.201(a) more than 180 days after the effective date of this rule must have a National Service Criminal History Check conducted, reviewed, and an eligibility determination made by the grant recipient or subrecipient based on the results of the National Service Criminal History Check completed in accordance with this part. For these people, the National Service Criminal History Check must be completed no later than 180 days following the effective date of this rule.

10. Revise §2540.206 to read as follows:

§2540.206 What procedural steps are required, in addition to conducting the

National Service Criminal History Check described in 2540.204?

(a) Grant recipients or subrecipients must:

(1) Obtain a person's consent before conducting the state and FBI components of the National Service Criminal History Check;

(2) Provide notice that selection for work or service specified in §2540.201(a) is contingent upon the organization's review of the National Service Criminal History Check component results;

(3) Provide a reasonable opportunity for the person to review and challenge the factual accuracy of a result before action is taken to exclude the person from the position;

(4) Take reasonable steps to protect the confidentiality of any information relating to the criminal history check, consistent with authorization provided by the applicant;

(5) Maintain the results of the National Service Criminal History Check components as grant records; and

(6) Pay for the cost of the NSCHC. Unless specifically approved by CNCS under 2540.207, the person who is serving in the covered position may not be charged for the cost of any component of a National Service Criminal History Check.

(b) CNCS-approved vendors may facilitate obtaining and documenting the requirements of paragraphs (a)(1) through (5) of this section.

11. Revise §2540.207 to read as follows:

§2540.207 Waiver

CNCS may waive provisions of sections 2540.200 -.206 for good cause, or for

any other lawful basis. To request a waiver, submit a written request to NSCHC Waiver Requests, 250 E Street SW, Washington DC 20525, or send your request to NSCHCWaiverRequest@cns.gov.

Dated: December 31, 2019.

Timothy Noelker,
General Counsel.

[FR Doc. 2019-28489 Filed: 1/7/2020 8:45 am; Publication Date: 1/8/2020]