



Understanding the Final Criminal History Check Requirements for the Corporation for National Community Service Programs

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The Corporation for National and Community Service (CNCS) recently issued a final rule on criminal history check requirements for staff and participants in its programs, which include AmeriCorps, Foster Grandparents, Retired and Senior Volunteer Program (RSVP), and others.¹ The rule, which becomes effective on January 1, 2013, implements the 2009 Serve America Act's provisions concerning background checks and clarifies and makes technical corrections to the existing rule.

Fingerprint-based FBI Check Requirement

The new rule most notably requires that CNCS grantees conduct a rigorous criminal history check, including fingerprinting, of grantee staff and program participants with recurring access to vulnerable populations (in addition to the general background checks required for all employees).² Recurring access is defined 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."³ In order to be considered part of a "vulnerable population," a person must be either:

1. A child aged 17 or younger,
2. An elder aged 60 or older, or
3. A person with a disability.⁴

Before an individual with recurring access to these populations begins work or starts service in the CNCS program, the grantee must conduct the following checks: (1) a nationwide name-based check of the National Sex Offender Public Website; (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) a national criminal history background check by submitting fingerprints to the FBI through a state central record repository.⁵ These requirements apply to staff or program participants who started service on or after April 21, 2011.⁶ For those who began their employment or service at an earlier date, grantees are only required to ensure that screening of those participants met the prior rule's requirements. However, if they have a break in their service or employment for over 120 days or begin work or service with a new grantee, the new rule's requirements apply.⁷ CNCS has stated that the January 1, 2013 effective date means that grantees must *initiate* by January 1, 2013 the fingerprint-based FBI check or the state registries check, whichever has not already been initiated.⁸ See a [table](#) regarding timing of the law's implementation.

The law has created three exemptions to the FBI fingerprint requirement for individuals with access to vulnerable populations:

1. Episodic Access. No prior CNCS approval is necessary, but the grantee must meet and document the following eligibility criteria: an individual's access to vulnerable population is either: (1) not a regular, scheduled, and anticipated component of the individual's position description or (2) for a 1-day period. However, if the individual's access to the vulnerable population becomes recurring, the rigorous criminal history checks described above must be completed immediately.⁹
2. Alternative Search Method. With prior written CNCS approval, grantees may use an alternative to the fingerprint-based FBI search where it can prove that either: (1) the requirements of the law are prohibited under state law; or (2) the grantee can obtain substantially equivalent or better information through an alternative search procedure.¹⁰ In determining whether an alternative search procedure provides substantially equivalent information, the CNCS will look to ensure that the procedure verifies the identity of the individual and includes a search of an alternative criminal database that is sufficient to identify the existence or absence of criminal offenses. For more information, see the [webpage](#) about the application process on the CNCS website.
3. Good Cause Exception. To take advantage of this exception, the grantee must obtain prior written approval from CNCS and show one of the following: (1) the cost to the grantee of complying is prohibitive; (2) the grantee 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) there is sufficient justification for CNCS to exempt the grantee from the requirement for good cause.¹¹

For further guidance on how to apply for an alternative search procedure or good cause exemption, please see this [webpage](#) on the CNCS website. While awaiting approval of an exemption, programs should abide by the accompaniment rules described below.

Given the length of the new fingerprint screening process, individuals with recurring access to vulnerable populations may begin work with those populations while their screen is pending, but only so long as they are physically accompanied by an appropriate individual, who is defined as either: (1) an authorized grantee representative who has previously been cleared for such access by a family member or legal guardian of the vulnerable individual or (2) a professional authorized by the nature of his or her profession to have recurring access to the vulnerable individual (such as an education or medical professional).¹² The rule requires that a specific statewide criminal history repository be used for each State and Territory.¹³ For a full list of repositories by state, see this [webpage](#) of the CNCS website.

These state repositories are responsible for aiding grantees in conducting both the statewide criminal history as well as the FBI fingerprint check required for individuals with recurring access to vulnerable populations. For the latter, the state repositories act as "Authorized Recipients" of the FBI fingerprint check results. As an "Authorized Recipient," the state repositories are not authorized to provide the source records to the grantee.¹⁴ Therefore, the grantee must determine and communicate to the state depository the relevant criteria to ensure that convictions for offenses that would make an individual ineligible for the program are identified as "not cleared" or equivalent.¹⁵ This information will then be forwarded to the grantee.

For some states, CNCS has authorized two different repositories (at this time, those states are Connecticut, Kentucky, Michigan, Missouri, New Mexico, New York, and North Carolina). Other alternative sources must be approved by the CNCS through the alternative search method process.

The cost of FBI checks may be included in the grant budget. CNCS considers the cost of this required National Service Criminal History Check a reasonable and necessary program grant expense and therefore the costs are eligible for reimbursement.¹⁶ A grantee may not charge an individual for any component of the cost of a National Service Criminal History Check unless it has received specific approval from CNCS to do so.¹⁷

Other Clarifications

The rule clarifies certain aspects of the prior rule's background check requirements. First, the rule makes clear that grantees for all CNCS programs are covered, including: Senior Companion Programs, Foster Grandparents Program and Retired and Senior Volunteer Programs, and, AmeriCorps National or State participants.

Second, the rule clarifies the differences in screening requirements between employees with access to vulnerable populations and all other covered individuals. The former's screening requirements are more stringent than the latter. For the latter, programs must conduct the following screens: (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) a national criminal history background check by submitting fingerprints to the FBI through a state central record repository.¹⁸ In other words, for grantee employees or staff generally, only two official checks are required (NSOPW and either (a) or (b)). They are not required to have a fingerprint-based FBI records check. This is a less stringent check system than those required for those who have recurrent access to vulnerable populations, as described above.

The law also clarifies which situations would bar an individual from working for or participating in a CNCS program. In addition to any criteria a grantee itself establishes, a grantee must deny a person employment or participation when any of the following are true: the individual refused to consent to criminal history check; the individual made false statement in connection with the criminal history check; the individual is or should be registered as a sex offender; or the individual has been convicted of murder.¹⁹

For further information, please see the ["FAQ" document](#) on the CNCS website.

What You Should Do Now

All grantees that will be covered by this law should begin preparing now. Some steps to take include:

- 1) *Determine which employees are subject to the new requirements.* The law's new screening procedures (i.e. required FBI fingerprint check) apply only to those employees who began work on or after April 21, 2011. Therefore, begin figuring out who will need to be screened under the new procedures, including existing employees, and who will be exempt. Ensure that you initiate required FBI fingerprint checks by January 1, 2013.
- 2) *Make sure you know the designated repository for your state.* The law requires that each grantee use a specified state repository when processing state criminal checks and FBI fingerprint checks. Begin developing a relationship with your repository now so that you understand how it operates.

- 3) *Begin drafting exclusionary criteria to communicate to your state repository.* State repositories act as “Authorized Recipients” of FBI information as part of the FBI fingerprint check process. Therefore, each grantee will need to provide its state repository with the relevant criteria to check. The law requires that an employee or participant be rejected if the FBI fingerprint screening process should reveal that that person was convicted of murder or is a registered sex offender. These criteria must be communicated to the state repository, as well as any other criminal history restrictions that the grantee wishes to impose on potential staff or participants. Any additional criteria should be tailored narrowly to the duties the person will undertake in the program and the access they will have to vulnerable populations in order to avoid claims of unlawful discrimination under Title VII of the Civil Rights Act and EEOC guidance.

- 4) *Determine how you will obtain fingerprints.* Since each grantee must send fingerprints to its designated state repository, you must determine how to collect these fingerprints. Start researching your options now.

¹ “Criminal History Check Requirements for AmeriCorps State/National, Senior Companions, Foster Grandparents, the Retired and Senior Volunteer Program, and Other National Service Programs,” 77 Federal Register 194 (5 October 2012), pp. 60922-60934; 45 CFR § 2510, 2522, 2540, 2551, 2552 (2012).

² 45 CFR § 2540.203.

³ 45 CFR 2510.20.

⁴ 45 CFR § 2540.203.

⁵ 45 CFR § 2540.203(b)(2)(iii).

⁶ 45 CFR § 2540.203(b)(1)(i).

⁷ 45 CFR § 2540.204(b).

⁸ 77 Fed. Reg. No. 194, Page 60930, Section V.

⁹ 45 CFR § 2540.207(b)(1).

¹⁰ 45 CFR § 2540.207(a).

¹¹ 45 CFR § 2540.207(b)(2).

¹² 45 CFR § 2540.205(g).

¹³ 45 CFR § 2540.203.

¹⁴ [“National Service Criminal History Check: Frequently Asked Questions,”](#) 24 May, 2012. Pg. 10.

¹⁵ *Id.*

¹⁶ 77 Fed. Reg. No. 194, Page 60925, section g.

¹⁷ 45 CFR § 2540.205.

¹⁸ 45 CFR § 2540.203.

¹⁹ 45 CFR § 2540.202.