

(i) Make reasonable attempts to notify the patient, or to notify the attending physician or the physician who ordered the blood or blood component and ask the physician to notify the patient, or other individual as permitted under paragraph (b)(10) of this section, that potentially HIV or HCV infectious blood or blood components were transfused to the patient and that there may be a need for HIV or HCV testing and counseling.

(ii) If the physician is unavailable or declines to make the notification, make reasonable attempts to give this notification to the patient, legal guardian, or relative.

(iii) Document in the patient's medical record the notification or attempts to give the required notification.

(7) *Timeframe for notification*—(i) *For donors tested on or after February 20, 2008.* For notifications resulting from donors tested on or after February 20, 2008 as set forth at 21 CFR 610.46 and 21 CFR 610.47 the notification effort begins when the blood collecting establishment notifies the hospital that it received potentially HIV or HCV infectious blood and blood components. The hospital must make reasonable attempts to give notification over a period of 12 weeks unless—

(A) The patient is located and notified; or

(B) The hospital is unable to locate the patient and documents in the patient's medical record the extenuating circumstances beyond the hospital's control that caused the notification timeframe to exceed 12 weeks.

(ii) For donors tested before February 20, 2008. For notifications resulting from donors tested before February 20, 2008 as set forth at 21 CFR 610.48(b) and (c), the notification effort begins when the blood collecting establishment notifies the hospital that it received potentially HCV infectious blood and blood components. The hospital must make reasonable attempts to give notification and must complete the actions within 1 year of the date on which the hospital received notification from the outside blood collecting establishment.

(8) *Content of notification.* The notification must include the following information:

(i) A basic explanation of the need for HIV or HCV testing and counseling;

(ii) Enough oral or written information so that an informed decision can be made about whether to obtain HIV or HCV testing and counseling; and

(iii) A list of programs or places where the person can obtain HIV or HCV testing and counseling, including any

requirements or restrictions the program may impose.

(9) *Policies and procedures.* The hospital must establish policies and procedures for notification and documentation that conform to Federal, State, and local laws, including requirements for the confidentiality of medical records and other patient information.

(10) *Notification to legal representative or relative.* If the patient has been adjudged incompetent by a State court, the physician or hospital must notify a legal representative designated in accordance with State law. If the patient is competent, but State law permits a legal representative or relative to receive the information on the patient's behalf, the physician or hospital must notify the patient or his or her legal representative or relative. For possible HIV infectious transfusion recipients that are deceased, the physician or hospital must inform the deceased patient's legal representative or relative. If the patient is a minor, the parents or legal guardian must be notified.

(11) *Applicability.* HCV notification requirements resulting from donors tested before February 20, 2008 as set forth at 21 CFR 610.48 will expire on August 24, 2015.

(c) *General blood safety issues.* For lookback activities only related to new blood safety issues that are identified after August 24, 2007, hospitals must comply with FDA regulations as they pertain to blood safety issues in the following areas:

(1) Appropriate testing and quarantining of infectious blood and blood components.

(2) Notification and counseling of recipients that may have received infectious blood and blood components.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: July 22, 2005.

**Mark B. McClellan,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: December 18, 2006.

**Michael O. Leavitt,**

*Secretary.*

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## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

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

**RIN 3045-AA44**

### National Service Criminal History Checks

**AGENCY:** Corporation for National and Community Service.

**ACTION:** Final rule.

**SUMMARY:** The Corporation for National and Community Service (Corporation) is issuing a regulation requiring grantees to conduct and document National Service Criminal History Checks on Senior Companions and Foster Grandparents, as well as on AmeriCorps State and National (including Education Award Program) participants and grant-funded staff in those programs who, on a recurring basis, have access to children, persons age 60 and older, or individuals with disabilities. A National Service Criminal History Check consists of a State criminal registry check; and a National Sex Offender Public Registry (NSOPR) check.

**DATES:** This final rule is effective November 23, 2007.

**FOR FURTHER INFORMATION CONTACT:**

Amy Borgstrom at (202) 606-6930 ([aborgstrom@cns.gov](mailto:aborgstrom@cns.gov)). The TDD/TTY number is (202) 606-3472. You may request this rule in an alternative format for the visually impaired.

### I. Background—The October 26, 2006, Proposed Rule

On October 26, 2006, the Corporation published a proposed rule (71 FR 62573) to require its grantees to conduct and document criminal history checks on Senior Companions and Foster Grandparents, as well as on AmeriCorps State and National (including Education Awards Program) participants and grant-funded staff in those programs who, on a recurring basis, have access to children, persons age 60 and older, or individuals with disabilities. The objective of this rule is to help protect vulnerable individuals who are beneficiaries of programs that are funded by the Corporation. This update to the Corporation's criminal history check policies was prompted by a recommendation by the Corporation's Acting Inspector General in an advisory letter to the Corporation's Chief Executive Officer in January 2005.

#### *Emphasis on Protecting Vulnerable Populations*

Many national and community service programs are dedicated to

helping children learn to read, giving children better opportunities to thrive, helping older persons maintain their independence, and otherwise serving vulnerable individuals while striving to recruit diverse participants. With this commitment comes the responsibility to safeguard the well-being of program beneficiaries, including the effective screening of staff, participants, and volunteers. This responsibility is principally determined by State law, and the standard of care required may vary from one State to another. Organizations carrying out national and community service programs should establish and regularly review their screening and supervision practices as measured against the applicable standard of care under State law.

#### *The Corporation's Authority*

Sections 192A, 193, and 193A of the National and Community Service Act of 1990, 42 U.S.C. 12651b-d, give the Corporation broad authority to establish rules to protect program beneficiaries. This authority is reinforced by Executive Order 13331, National and Community Service Programs (Feb. 27, 2004), 60 FR. 9911 (Mar. 3, 2004), which directs the Corporation to "strengthen its oversight of national and community service programs through performance and compliance standards and other management tools."

#### *FBI Fingerprint Checks*

Rapid advances in technology are increasing the availability and accessibility of information about individuals in our society. However, we have not yet identified any established criminal history check process at the national level that we can mandate for all grantees. The FBI maintains the most complete criminal database in the United States, with records that are fingerprint-based. A fingerprint check of this database is generally considered the most reliable, in part because it screens a physical characteristic rather than a name provided by an applicant. However, FBI-maintained records can sometimes be less complete and less up-to-date than State records, and are available only to organizations specifically authorized by a Federal or State law. Many organizations operating national and community service programs do not currently have access to FBI fingerprint checks.

#### *The Attorney General's Report on Criminal History Background Checks*

In 2006, the U.S. Attorney General issued a report with recommendations for broader access to FBI criminal history records for non-criminal

purposes, including screening volunteers for entities providing services to children, the elderly, and individuals with disabilities. *The Attorney General's Report on Criminal History Background Checks (June 2006)* is available on-line at [http://www.usdoj.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.usdoj.gov/olp/ag_bgchecks_report.pdf) (hereinafter *The Attorney General's Report*). As such recommendations are implemented in Federal and State law, grantees operating national and community service programs may have better access to FBI fingerprint checks. In time, they may also have access to State and national criminal history databases that make use of driver's licenses incorporating fingerprint or other biometric data as a result of the Real ID Act of 2005 (Pub. L. 109-13) and new biometric techniques such as DNA identification.

#### *The PROTECT Act*

We are aware of Congressional interest in making accurate information about individuals' criminal history available while appropriately limiting the sharing of such information. For example, the PROTECT Act (Pub. L. 108-21) authorizes the Boys & Girls Club of America, the National Council of Youth Sports, the National Mentoring Partnership, and nonprofit organizations that provide care, treatment, education, training, instruction, supervision, or recreation to children to participate in a pilot program with the National Center for Missing and Exploited Children to obtain FBI fingerprint criminal history checks on volunteer applicants for a fixed fee of \$18.00 per individual. Corporation grantees that provide the above types of services to children may consider contacting the National Center for Missing and Exploited Children (<http://www.missingkids.com>) to determine if they are eligible to participate in the pilot program. Alternatively, mentoring organizations, such as Foster Grandparent programs and many AmeriCorps programs, may request to participate through the National Mentoring Partnership (<http://www.mentoring.org>), a current participant in the pilot program. The lessons learned from the ongoing PROTECT Act's pilot program are likely to inform and spur greater and more effective coordination across State lines. For example, in January, 2007, Senators McCain and Schumer introduced legislation (S.431, *Keeping the Internet Devoid of Sexual Predators Act of 2007, or KIDS Act*) to strengthen national reporting requirements (including the requirement to register online Internet identifiers) for sex offenders. Also, in

January, 2007, Congressman Pomeroy introduced legislation (H.R. 719) to establish a National Sex Offender Risk Classification Task Force to create guidelines for a risk-based sex offender classification system for use in sex offender registries. Amid this changing landscape, the Corporation seeks at this time to achieve a consistent baseline practice among Senior Companion and Foster Grandparent programs, and among AmeriCorps State and National programs serving children, persons age 60 and older, or individuals with disabilities.

#### *The Requirement for Grantees To Establish a Baseline Screening Process*

This rule establishes a baseline screening process at the national level. This screening requirement will be a Federal grant condition separate and apart from any State requirement.

#### *The Need for a Comprehensive Screening Process*

This baseline screening requirement does not, however, preclude grantees from conducting a more thorough evaluation of supervising staff and participants if they choose to do so. Criminal history checks are one part of an effective risk management approach to protecting program participants from harm as well as protecting the sponsoring organization from liability. Organizations serving children and other vulnerable populations need to be mindful that no screening process is foolproof.

Sponsoring organizations should also note that the design and operation of programs can provide additional safeguards. Examples include programs designed to minimize opportunities for potential abuse; regular child or elder abuse prevention training; restricted one-on-one and other unsupervised contact with vulnerable clients; controlled access to areas where vulnerable clients are present; unannounced observation visits; and the posting and reinforcement of protocols on how to respond to suspected or reported abuse. To assist our grantees, the Corporation has distributed and also made available on our Web site the *Staff Screening Tool Kit, 3rd Edition*, a publication prepared by the Nonprofit Risk Management Center that contains helpful information designed to strengthen an organization's staff and volunteer screening and supervision processes. You can access this resource at <http://www.nationalservice.gov/screeningtoolkit>.

### *Fairness and Confidentiality*

The National Service Criminal History Check also seeks to ensure fairness and confidentiality in handling criminal history information. Such fairness and confidentiality considerations are congruent with the Attorney General's privacy recommendation and discussion of "fair information practices" as applied to criminal history records in *The Attorney General's Report*. As the Attorney General points out, we also have an interest, as a society, in rehabilitating individuals with a criminal history and in avoiding unlawful discrimination. In developing the rule, the Corporation reviewed comments and public statements submitted to DOJ by privacy, civil liberties, and ex-offender advocates concerning the impact of criminal background checks and sex offender registries on privacy, rehabilitation, and discrimination. Because criminal history searches and results often disclose other potentially sensitive identifying data, such as Social Security number, date of birth, driver's license number, and home address, grantees need to protect the individuals concerned from identity theft, physical threats, or other injury. Fairness and confidentiality procedures can also help ensure that qualified prospective program volunteers, participants, and employees are not discouraged from seeking to be involved in national and community service programs.

### *Laws That Prohibit Employment Discrimination*

Closely related to privacy requirements are Federal and State laws that prohibit discrimination in employment, such as Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*). This can be an issue, for example, if employment decisions are attributed to the results of criminal history checks, but the results are actually used as a pretext for excluding individuals based on their race, religion, gender, or age. The recently-revised Equal Employment Opportunity Commission (EEOC) Compliance Manual, Section 15: Race and Color Discrimination (April 19, 2006), refers to court rulings on the potential "disparate impact" of a hiring policy based on arrests or convictions. The EEOC suggests that prospective employers should weigh the following factors in each case to ensure their decisions to disqualify applicants based on criminal history results are grounded on defensible "business needs," despite any differential impact:

- 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 job held or sought.

These considerations apply directly to preventing unlawful discrimination in the employment of persons for covered grant-funded staff positions, and may be relevant to a national and community service program's evaluation of applicants to a position as a staff member or participant. The EEOC Compliance Manual is available online at: <http://www.eeoc.gov/policy/docs/race-color.html>.

### *Preliminary Public Input*

On October 17, 2005, the Corporation published a notice in the **Federal Register** inviting informal preliminary public input in advance of rulemaking (70 FR 60257). The Corporation also held two conference calls following the notice. The Corporation considered the input received in drafting its proposed rule.

### *60-Day Comment Period*

In the **Federal Register** of October 26, 2006 (71 FR 62573), the Corporation published the proposed rule, with a 60-day comment period. In addition to accepting comments in writing, the Corporation held two conference calls in November, 2006. The Corporation received over 70 comments concerning the proposed rule, including those in writing and those received through the conference calls. Comments are discussed in detail in Part III.

In general, almost all of the comments supported the requirement that criminal history background and NSOPR checks be conducted on individuals working with vulnerable populations in the positions designated in the proposed rule.

## **II. Discussion of the Final Rule**

### *Covered Positions*

This final rule covers Senior Companions and Foster Grandparents, and participant positions in AmeriCorps State and National and other programs that provide a Corporation-funded living allowance, stipend, education award, or other remuneration to individuals who have recurring access to children, persons age 60 and older, or individuals with disabilities. We define "children" as individuals 17 years of age and younger, consistent with the PROTECT Act. Sixty years of age—the lowest age commonly used by Congress to define elderly persons—is the

threshold age for protecting elderly persons. "Individuals with disabilities" has the same meaning given the term in the Rehabilitation Act in 29 U.S.C. 705(20)(B), and includes any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. The final rule also covers grant-funded staff with access to the identified vulnerable populations in these programs. Grantees, therefore, must establish the age and disability status of program participants, including beneficiaries.

The rule covers the Senior Companion and Foster Grandparent programs because their focus on serving vulnerable populations warrants baseline screening provisions that meet a national standard. The requirement includes specific search elements, as well as fairness considerations. It gives more specific direction to Senior Companion and Foster Grandparent sponsoring organizations in carrying out an important part of their responsibility to establish risk management policies and procedures, and disqualifies registered sex offenders from serving as Senior Companions or Foster Grandparents.

Currently, AmeriCorps State and National grant programs, including the Education Awards Program, have a criminal background check requirement in their grant provisions. In light of the Corporation's substantial support for AmeriCorps participants, all of whom are eligible to receive a Corporation-funded education award upon successful completion of service, we believe that baseline screening requirements are appropriate. This rule adds details to the required search elements, establishes procedures to assure fairness and confidentiality, and disqualifies registered sex offenders from AmeriCorps positions with recurring access to children, persons age 60 and older, or individuals with disabilities.

The rule also applies to other Corporation-supported grant programs in which service participants receive a Corporation-funded living allowance, stipend, or education award and, on a recurring basis, have access to children, persons age 60 and older, or individuals with disabilities. For example, the rule would also cover a non-AmeriCorps program that provides a stipend to participants who tutor children in an after-school program.

### *Programs Not Covered Under Final Rule*

The rule's requirements do not cover individuals in the RSVP or Learn and Serve America programs, or unaffiliated volunteers recruited by national and community service programs. Those individuals have an attenuated connection to the Corporation, and the Federal government does not directly facilitate unsupervised contact between vulnerable persons and individuals through those programs. The Corporation therefore defers to existing duties of care under State law. For example, participants in Learn and Serve K-12 programs seldom serve in unsupervised settings. In addition, participants in Learn and Serve Higher Education programs, who concentrate primarily on curriculum development, as well as participants in Community-Based programs who usually serve in supervised, group settings, generally do not have unsupervised access to vulnerable populations. The Corporation emphasizes, however, the importance of ascertaining and meeting the applicable standards of care under State law for all Corporation-supported programs and activities. The final rule also does not cover the AmeriCorps National Civilian Community Corps or the AmeriCorps VISTA programs, as the selection of participants in those programs is made by Federal personnel rather than by grantee organizations. While the Corporation has strengthened our internal screening practices in both of those federally-operated programs through an arrangement with the U.S. Office of Personnel Management, these programs are outside the scope of this rulemaking.

### *Specifics of the Final Rule*

The rule requires a criminal history review that reflects information that should be reasonably accessible to grantees. The following elements are required:

#### *Components of the National Service Criminal History Check*

Unless the Corporation approves an alternative screening protocol and unless prohibited or otherwise precluded by State law, a covered grantee must, in selecting an individual for participation, conduct and document two searches: (A) A search (by name or fingerprint) of the State criminal registry for the State in which the program operates and the State in which the applicant resides at the time of application; and (B) a search of the Department of Justice (DOJ) National Sex Offender Public Registry (NSOPR) at <http://www.nsopr.gov>. The term

"State," when used in this rule, also includes U.S. Territories, as defined in 45 CFR 2510.20; 2551.12 (u); and 2552.12 (x).

### *Required Procedures*

Procedures must include: (a) Verification of the applicant's identity by examining a government-issued photo identification card; (b) prior, written authorization by the applicant authorizing the program to conduct State criminal registry checks (not required for NSOPR checks), as well as authorization to share the results of that check within the program, as appropriate; (c) documentation of the applicant's understanding that selection into the program is contingent upon the organization's review of the applicant's criminal history, if any; (d) an opportunity for the applicant to review and challenge the factual accuracy of a result before action is taken to exclude the applicant from the position; (e) safeguards to ensure the confidentiality of any information relating to the criminal history check, consistent with the authorization provided by the applicant (grantees may find a useful model in considering confidentiality safeguards in the Federal Trade Commission's Standards for Safeguarding Customer Information, 16 CFR Part 314, posted at <http://www.ftc.gov/os/2002/05/67fr36585.pdf>); and (f) ensuring that an individual, for whom the results of a required State criminal registry check are pending, is not permitted to have access to vulnerable beneficiaries without being accompanied by an authorized program representative who has previously been cleared for such access.

An individual who refuses to authorize a program to conduct a criminal history State registry check, or who makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history, may not serve in a covered position.

### *Required Documentation*

A grantee must document in writing that it (or its designee) verified the identity of the individual by examining the individual's government-issued photo identification card, conducted the required checks, maintained the results of the National Service Criminal History Check (unless precluded by State law), and considered the results in selecting or retaining an individual for a covered position.

### *NSOPR Checks Required on All Covered Positions, Including Those Currently Serving*

The NSOPR is a DOJ-sponsored Internet-based, searchable Web site that provides one-stop access to registries from all 50 States, Guam, Puerto Rico, and the District of Columbia. To assist the public, the FBI also has a link on its Web site to each State's sexual offender registry. The FBI Web site can be accessed at <http://www.fbi.gov/hq/cid/cac/States.htm>. The NSOPR check must be conducted on any applicant for a covered position, as well as on any individual currently serving in a covered position at the time this rule becomes effective. Grantees should know that the NSOPR compiles, but does not independently verify or analyze, data that is provided by each State, and even if current legislative proposals to establish national reporting standards are adopted, there may continue to be differences in the content and currency of data held respectively in the NSOPR and State sex offender registries.

### *Effective Dates for Conducting State Criminal Registry and NSOPR Checks*

A Senior Companion or Foster Grandparent sponsoring organization must demonstrate that any required State criminal registry check is conducted at least once for any Senior Companion or Foster Grandparent who begins serving with the program on or after the effective date of this rule. An AmeriCorps grantee must document that the required State criminal registry check is conducted the first time an individual applies for a covered position in its program on or after the rule's effective date. NSOPR checks must, however, be conducted for all Senior Companion, Foster Grandparent, and AmeriCorps covered positions, including those currently serving at the time this final rule becomes effective. Programs must complete the NSOPR check on their current participants and grant-funded employees in covered positions within 90 days from the publication date of the final rule.

### *Alternative Search Procedures*

If a grantee demonstrates that, for good cause, including a conflict with State law, it is unable to conduct the required searches or that it can obtain substantially equivalent or better information through an alternative process, the Corporation will consider approving an alternative search protocol proposed in writing by the grantee. This includes, but is not limited to, situations where a State or local government body

has established screening and documentation requirements designed to protect one or more vulnerable populations covered by the final rule. A school board, for example, acting pursuant to State legislation, may have set requirements for screening staff and volunteers that provide substantially equivalent protections to the vulnerable populations identified in this rule. Consequently, a teacher corps, whose members are all school district employees screened pursuant to a requirement imposed by a school board or other governing body, would satisfy the criteria for an approved alternative search procedure. In determining whether an alternative process results in substantially equivalent or better information, the Corporation will review the nature of the sources included in the alternative process, as well as the reliability of the information obtained. A current grantee can submit a written request within 90 days after the publication of this rule to the Corporation for approval of an alternative search protocol. A grantee qualifying for an exception must still conduct NSOPR checks on its participants and grant-funded employees, if not already required under State or local authority.

Grantees must submit any applicable alternative protocol requests for approval in writing to the Corporation's Office of Grants Management. The Office of Grants Management will review the alternative protocol and will consider factors including, but not limited to: (1) That it sufficiently verifies the identity of the applicant; and (2) that it includes a search of an alternative criminal database that is sufficient to identify the existence, or absence of, a criminal offense.

In addition, a grantee that conducts and documents a criminal history check through the FBI or through a national name-based check that, at a minimum, includes a search of the State criminal registry in the State in which the program is operating, as well as in the State in which the applicant resides, will be deemed to have satisfied the required State criminal registry check and does not need separate approval by the Corporation.

#### *Additional Safeguards*

Establishing a baseline process as a grant condition is in no way intended to discourage grantees from undertaking additional measures to screen applicants. For example, grantees should be aware that individuals might provide a false name during the application process. Consequently, while a grantee must verify an

applicant's identity with a government-issued photo identification card, such as a driver's license, the Corporation also strongly encourages grantees to take other precautionary steps such as consistently checking references or past employment. Additional screening practices include conducting a personal interview or, for an individual whose program assignment will include driving a vehicle, examining driving records. In addition, some programs have access to State-based child abuse or elder abuse registries. A grantee's decision to take any of these additional steps reflects the organization's own judgment about appropriate screening and is not considered a requirement under the Corporation grant.

#### *Terminations and the Corporation's Refill Policy*

The Corporation's refill policy may enable AmeriCorps program grantees that have fully enrolled their awarded slots to replace a participant who terminates service before completing a required minimum (currently 30 percent) of his or her term and without having receiving a pro-rated education award. If the background screening results in the participant being ineligible to serve and the participant has already served more than the term of service specified under the refill policy, a grantee may seek an exception to the refill policy by submitting a written request for an exception to the Corporation's Office of Grants Management. The Office of Grants Management will review the request based on factors including, but not limited to, whether the delay in obtaining the criminal history check for the participant was a result of the grantee's lack of due diligence, or was for a reason that was beyond the grantee's control, and will reply within 30 days of receipt of such requests.

#### *Disqualification of Registered Sex Offenders*

States have developed sexual offender registries to inform the public concerning the presence and location of individuals who have been convicted of certain sex-related offenses, either committed within that State, or in another State. Depending on the severity of the convicted offense, individuals are required to register as sex offenders either for a specified number of years (e.g., 10 years) or for life.

An individual who is subject to a State sex offender registration requirement is deemed unsuitable for, and may not serve in, a covered position. The disqualification includes individuals who are applicants for

covered positions, as well as individuals who are currently serving with the organization in a covered position.

#### *Grantees not Precluded From Adopting Other Disqualifying Offenses*

In developing the proposed rule, the Corporation considered other disqualifying factors and offenses, such as convictions for serious and violent felonies, but ultimately determined that the selection criteria for covered positions—beyond any statutory eligibility criteria and the disqualification of registered sex offenders—should continue to be the responsibility of each grantee organization. Therefore, this rule does not preclude a grantee from adopting additional grounds for disqualification if it decides that it is appropriate or necessary for a particular program. Grantees should, however, be aware that State law may specifically prohibit the consideration of conviction or arrest records under certain circumstances. Finally, grantees should look at criminal history checks as but one of many sources of information to assess whether an individual is suitable for a program.

#### *Selection of Applicants Pending Criminal History Results*

A grantee may not select an individual for a position that has recurring access to children, persons age 60 and older, or individuals with disabilities prior to determining whether the individual is subject to a State sex offender registration requirement, which is readily ascertainable through an on-line search. Because the additionally-required search of State criminal registries, or an approved alternative search, may take more time, a grantee is not precluded under this rule from selecting or placing an individual contingent upon obtaining these additional results subsequently. However, until all required State criminal registry check results are received and reviewed by the grantee, an applicant may not have access to a vulnerable beneficiary without being accompanied by an authorized program representative who has previously been cleared to have such access. A grantee should take other reasonable precautions to ensure that safeguards are in place while the results are pending, including additional monitoring, and other risk mitigation steps, as determined by the grantee. The Corporation again emphasizes that the NSOPR check must be conducted before the individual begins to serve, as it is a no-cost, almost instantaneous search that can be conducted by accessing the DOJ Web site.

### Use of Intermediary Permitted

A grantee may ascertain and assess an individual's criminal history or sex offender status directly from the applicable government agency, or indirectly through a duly authorized intermediary selected by the grantee such as a commercial entity or nonprofit organization. However, as a prudential matter, grantees should routinely review the intermediary's criminal history check procedures and practices to ensure that they are in compliance with the Corporation's requirements. In addition, because the amount of time from application until actual enrollment can be substantial, grantees should ensure that the criminal history result that it reviews before selecting the applicant is as current as possible.

### Costs

The final rule requires grantees (or their designees) to obtain and document a National Service Criminal History Check for covered individuals. The Corporation considers the cost of this required criminal history check a reasonable and necessary program grant expense, such costs being presumptively eligible for reimbursement. A grantee should include the costs associated with its screening process in the grant budget it submits for approval to the Corporation.

Unless specifically approved by the Corporation, a grantee may not charge an individual for the cost of a criminal history check required under this rule. The Corporation will consider approving, for example, a long-standing school district policy of charging staff, volunteers, and others who work or serve in schools for the cost of criminal history checks, provided the income is treated in accordance with applicable grant conditions. In addition, because criminal history checks are inherently attributable to operating a program, such costs may not be charged to a State commission administrative grant.

We will monitor the screening and documentation requirement as a material condition of receiving a Corporation grant. A grantee's material failure to comply with this requirement (including the NSOPR check) will result in the Corporation taking appropriate action, up to and including denial of the grantee's claim for reimbursements, suspending the grantee's access to grant funds, or restricting (or denying) the grantee's eligibility to obtain future grants from the Corporation. And specifically, a grantee jeopardizes eligibility for reimbursement of costs related to a disqualified individual if it

fails to perform or document the required check.

### III. Comments and Response

Of the more than 70 comments received, the vast majority of the comments supported the requirement that national service programs conduct and document criminal history checks on individuals in covered positions. The comments and our responses are set forth below.

*Comment:* Several commenters inquired as to why the Corporation was not including the RSVP or Learn and Serve programs under this rule.

*Response:* The Corporation's connections with individual participants in the RSVP and Learn and Serve programs are sufficiently attenuated to rely on existing duties of care under State law. At the same time, the Corporation recognizes the importance of protecting all Corporation-supported program beneficiaries; therefore, we wish to emphasize the importance and need for all programs to ascertain and meet the applicable duties of care under State law.

*Comment:* Several commenters asked for clarification concerning the term "recurring access," expressing concern that it may be too broad in its scope.

*Response:* The term is defined in the final rule at § 2510.20 Definitions. The Corporation believes that the definition of recurring access in the proposed rule is appropriate, and that it is prudent to include more applicants under this requirement than to exclude them by limiting the definition to a narrower category of individuals. A definition other than "more than once" would be likely to result in additional documentation requirements and collateral disputes about the adequacy of such documentation. Note that the definition does not apply to Senior Companions and Foster Grandparents, all of whom are covered by the requirements.

*Comment:* Some commenters expressed concern that including persons age 60 and older as vulnerable individuals may offend individuals in this age category.

*Response:* While we acknowledge that many individuals, age 60 and older, would not consider themselves vulnerable, we thought it would be prudent, from a policy and safety perspective, to be more inclusive than exclusive on this point. In addition, we have determined that sixty years of age appears to be the lowest age commonly used by Congress to define elderly persons in legislation that establishes a threshold age for elderly persons (e.g.,

Older Americans Act; Food Stamp Act) (§§ 2522.205; 2540.200; 2551.26; 2552.26)).

*Comment:* One commenter asked us to clarify which State criminal registry checks are required for a program that operates in more than one State.

*Response:* The final rule requires a search of the criminal registry for the State in which a program operates and the State in which the applicant resides at the time of application. "State in which your program operates" refers to the actual geographic location where an individual will be serving on a permanent basis while participating in the program. For example, if the program's headquarters is in Florida, but the individual is applying to serve in an operating site in another State, the program must conduct a criminal history check in the State in which the operating site is located. If a program is unsure where an applicant is going to serve at the time that the applicant submits an application, the program must check each State in which the applicant could be assigned to serve on a permanent basis. (§§ 2540.202 (a); 2551.27 (a); 2552.27 (a)).

*Comment:* One commenter asked for clarification as to what has to be documented when conducting the NSOPR check.

*Response:* The program must document in writing that it conducted the NSOPR check on all covered positions, and considered the results in determining the individual's suitability. Any individual who is registered, or who is required to be registered, on a State sex offender registry is deemed unsuitable for, and may not serve in, a covered position (§§ 2540.202(b); 2551.27(b); 2552.27(b)); (§§ 2522.206; 2540.201; 2551.42; 2552.42).

*Comment:* Another commenter asked us to clarify the term "consecutive terms of service" as it relates to a grantee's requirement to conduct a separate criminal history check for a subsequent term of service. There is an exception to this requirement if an individual is serving "consecutive terms of service."

*Response:* A consecutive term of service means that there is no intervening break in service of more than 30 days during which the applicant did not serve in that specific program. Consequently, if there is no break in service, there is no requirement that a grantee conduct a new State criminal registry and NSOPR check (§ 2540.203). Notwithstanding this exception, any AmeriCorps participant who is serving in a covered position at the time this rule becomes effective will be required to submit to a criminal registry check if the participant decides to serve another

term, even if it is with the same program and there is no 30-day break in service.

*Comment:* We were asked to clarify when the requirement takes effect and to whom it applies.

*Response:* Both the State criminal registry check and NSOPR requirements take effect 90 days after publication of the Final Rule in the **Federal Register**. The State criminal registry check requirement applies only to those covered individuals who apply after the effective date of the final rule. The NSOPR check, however, applies to all covered individuals who apply to serve, or who are currently serving with, or working in, the affected programs (See paragraph V, Effective Dates).

*Comment:* One commenter asked if costs (such as a living allowance) attributable to an individual under a grant were allowable if the grantee subsequently determines that the individual must leave the program as a result of a criminal history check.

*Response:* The costs are allowable unless the delay in determining that an individual is ineligible to serve is caused by non-compliance or unreasonable delay by the grantee (e.g., failure to conduct the NSOPR check before enrolling or hiring the individual).

*Comment:* Some commenters asked whether staff members of a grantee whose salaries are paid with matching funds are included under this requirement.

*Response:* If the staff members are included in the grantee's proposed budget as grant-funded employees, whether supported by Corporation or matching funds, they are included under this requirement (§§ 2522.205; 2540.200; 2551.26; 2552.26).

*Comment:* A commenter asked for clarification as to which States' criminal registry must be checked for a college student who is attending college in a State that is not his or her home of record.

*Response:* For the purpose of this rule, a student who is attending college in a State that is not the student's "home of record" (i.e., where the student's parent(s) reside) is deemed to be residing in the State in which the college is located. The final rule requires programs to conduct a criminal registry check in the State in which the program is operating, as well as in the State in which the applicant is residing at the time the application is submitted. There is nothing, however, to preclude a program from including additional States (i.e., the applicant's home of record or other States in which the student has lived) in its criminal

registry check (§§ 2540.202(a); 2551.27(a); 2552.27(a)).

*Comment:* One commenter expressed concern that the prospective nature of the rule would leave unchecked potentially unsuitable participants who are currently in the programs.

*Response:* In establishing this new requirement as a grant condition, we were mindful of the costs associated with retrospective application. Because the criminal history State registry check requirement is prospective, grantees should design their programs' applications in a manner that appropriately reflects their screening practices. Programs with relatively less stringent screening practices are well advised to build in compensating controls to minimize the risks to their program beneficiaries. In addition, because an NSOPR check is cost-free and relatively easy to conduct, we are requiring all programs subject to this rule to conduct NSOPR checks on all applicants for covered positions, as well as on all individuals who are currently serving in covered positions (See paragraph V, Effective Dates).

*Comment:* One individual submitted a written comment asking why the final rule disqualifies registered sex offenders, but not those individuals convicted of other offenses.

*Response:* Disqualifying registered sex offenders from positions with recurring access to children, older persons, or individuals with disabilities takes advantage of the newly established national registry of sex offenders, accessible online across the country, and is consistent with our objective of establishing by rule an achievable baseline set of screening practices. Advances in information sharing at the national level may make it possible to strengthen this baseline in the future. To this end, the Corporation intends, at a later date, to consider adding other disqualifying factors, including specific offenses. Accordingly, we invite grantees and other interested parties to provide input on additional disqualifying factors. Input should be submitted to the individual listed at, **FOR FURTHER INFORMATION CONTACT** (§§ 2522.206; 2540.201; 2551.42; 2552.42).

*Comment:* One commenter asked for clarification concerning the eligibility of an individual who refuses to consent to a State criminal registry check.

*Response:* We have added language in the final rule clarifying that an individual who refuses to consent to a State criminal registry check, or who makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history, is not

eligible to serve in a covered position (§§ 2540.207; 2551.32; 2552.32).

*Comment:* One commenter asked for clarification concerning an individual's right to review and challenge the factual accuracy of a criminal history check before any action is taken to exclude the individual from serving in, or working with, the program.

*Response:* We believe that the ability of an applicant to review and challenge the results of State criminal registry and NSOPR checks is a basic right that all programs must give to each individual. With the potential for false positives, it is essential that all Corporation programs safeguard an individual's personal information and give the individual the opportunity to challenge any adverse findings that may surface (§§ 2540.204 (d); 2551.29 (d); 2552.29 (d)).

*Comment:* Several commenters expressed concern that their individual States may not permit them to conduct criminal history checks without specific statutory authority to conduct the search.

*Response:* We are prepared to approve an alternative search protocol if a program is prohibited or otherwise precluded from complying with the Corporation's criminal history check requirement (§§ 2540.206(c); 2551.31(c); 2552.31(c)).

*Comment:* Several commenters expressed that the Corporation's criminal history requirement could be redundant if a program is already required to comply with a State or local government-mandated criminal history check that is equivalent to the Corporation's requirement.

*Response:* Based upon these comments, we have included preamble language making clear that a program that is required to comply with a State or local government-mandated criminal history check that parallels the Corporation's requirement may request that the Corporation approve this alternative search protocol. A program qualifying for this exception must, however, in addition to satisfying State criminal history check requirements, conduct NSOPR checks on its participants and grant-funded employees, if not already required (§§ 2540.206(c); 2551.31(c); 2552.31(c)).

*Comment:* Several commenters thought the criminal history requirement was necessary and prudent but were concerned about the cost of conducting the criminal history checks. They asked whether the Corporation would provide more funding to pay for the checks.

*Response:* Although there are no additional funds designated for these

checks, these costs are allowable. In addition, the NSOPR check is a no-cost Internet search. While the Corporation will provide guidance to assist grantees on effective and economic ways to reduce costs in this area, we remind our grantees that it is their responsibility when operating programs that serve vulnerable populations to ensure that they establish appropriate safeguards to meet their respective States' existing duties of care. It should also be noted that many programs are already managing within their budgets to secure the types of criminal history checks that we are requiring. For example, many local law enforcement agencies offer in-kind support to non-profit organizations that require this type of assistance.

#### IV. Relationship to State Laws

To the extent that any element of the final rule is prohibited, or is otherwise precluded under State law, the Corporation's Office of Grants Management is prepared to approve an alternative that is consistent with State law, within 30 days of receiving such notice.

#### V. Effective Dates

The final rule takes effect November 23, 2007. The State criminal registry search requirement applies prospectively to the selection of any individual who applies on or after the effective date. However, an AmeriCorps participant who is serving in a covered position at the time this rule becomes effective will be required to submit to a criminal registry check if the participant desires to serve another term, even if it is with the same program. The NSOPR requirement applies: (1) To any applicant for a covered position beginning on or after the effective date, as well as (2) to an individual who is serving as a participant or grant-funded employee in a covered position on the effective date.

#### VI. Regulatory Procedures

##### *Executive Order 12866*

The Corporation has determined that this 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. It is, however, a significant rule and has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

##### *Regulatory Flexibility Act*

As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Corporation certifies that this rule 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, the Corporation 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*

This rule contains no information collection requirements and is therefore not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

##### *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

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 amends 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. 12501 *et seq.*

■ 2. Amend § 2510.20 by adding the definitions of "children," and "recurring access" in alphabetical order to read as follows:

##### **§ 2510.20 Definitions.**

\* \* \* \* \*

*Children.* The term *children* means individuals 17 years of age and younger.

\* \* \* \* \*

*Recurring access.* The term *recurring access* means 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.

\* \* \* \* \*

#### **PART 2522—AMERICORPS PARTICIPANTS, PROGRAMS, AND APPLICANTS**

■ 1. The authority citation for part 2522 is revised to read as follows:

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

■ 2. Add the following new sections: § 2522.205, § 2522.206, and § 2522.207 to read as follows:

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

You must apply suitability criteria relating to criminal history to a participant or staff position for which an individual receives a Corporation grant-funded living allowance, stipend, education award, salary, or other remuneration, and which involves recurring access to children, persons age 60 and older, or individuals with disabilities.

**§ 2522.206 What suitability criteria must I apply to a covered position?**

Any individual who is registered, or required to be registered, on a State sex offender registry is deemed unsuitable for, and may not serve in, a covered position.

**§ 2522.207 What are the procedures I must follow to determine an individual's suitability to serve in a covered position?**

In determining an individual's suitability to serve in a covered position, you must follow the procedures in part 2540 of this title.

**PART 2540—GENERAL ADMINISTRATIVE PROVISIONS**

■ 1. The authority citation for part 2540 is revised to read as follows:

**Authority:** 42 U.S.C. 12651b–12651d; E.O. 13331, 69 FR 9911.

**§ 2540.200 [Redesignated as § 2540.208]**

■ 2. Redesignate § 2540.200 as § 2540.208.

■ 3. Add the following sections: §§ 2540.200, 2540.201, 2540.202, 2540.203, 2540.204, 2540.205, 2540.206, and 2540.207.

**§ 2540.200 To whom must I apply suitability criteria relating to criminal history?**

You must apply suitability criteria relating to criminal history to an individual applying for, or serving in, a position for which an individual receives a Corporation grant-funded living allowance, stipend, education award, salary, or other remuneration, and which involves recurring access to children, persons age 60 and older, or individuals with disabilities.

**§ 2540.201 What suitability criteria must I apply to a covered position?**

Any individual who is registered, or required to be registered, on a State sex offender registry is deemed unsuitable

for, and may not serve in, a position covered by suitability criteria.

**§ 2540.202 What two search components of the National Service Criminal History Check must I satisfy to determine an individual's suitability to serve in a covered position?**

Unless the Corporation approves an alternative screening protocol, in determining an individual's suitability to serve in a covered position, you are responsible for conducting and documenting a National Service Criminal History Check, which consists of the following two search components:

(a) *State criminal registry search.* A search (by name or fingerprint) of the State criminal registry for the State in which your program operates and the State in which the individual resides at the time of application; and

(b) *National Sex Offender Public Registry.* A name-based search of the Department of Justice (DOJ) National Sex Offender Public Registry (NSOPR).

**§ 2540.203 When must I conduct a State criminal registry check and a NSOPR check on an individual in a covered position?**

(a) The State criminal registry check must be conducted on an individual who enrolls in, or is hired by, your program after November 23, 2007.

(b) The NSOPR check must be conducted on an individual who is serving, or applies to serve, in a covered position on or after November 23, 2007.

(c) For an individual who serves consecutive terms of service in your program with a break in service of no more than 30 days, no additional check is required after the first term.

**§ 2540.204 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 for the State criminal registry check and the appropriate sharing of the results of that check within the program from the individual (but not for the NSOPR check);

(c) Document the individual's understanding that selection into the program is contingent upon the organization's review of the individual's criminal history, if any;

(d) 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;

(e) Provide safeguards to ensure the confidentiality of any information

relating to the criminal history check, consistent with authorization provided by the applicant; and

(f) Ensure that an individual, for whom the results of a required State criminal registry check are pending, is not permitted to have access to children, persons age 60 and older, or individuals with disabilities without being accompanied by an authorized program representative who has previously been cleared for such access.

**§ 2540.205 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 of the National Service Criminal History check (unless precluded by State law) and document in writing that you considered the results in selecting the individual.

**§ 2540.206 Under what circumstances may I follow alternative procedures in conducting a State criminal registry check for a covered position?**

(a) *FBI fingerprint-based check.* If you conduct and document a fingerprint-based criminal history check through the Federal Bureau of Investigation, you will be deemed to have satisfied the State criminal registry check requirement and do not need separate approval by the Corporation.

(b) *Name-based search.* If you conduct and document a name-based criminal history check through a source other than the FBI that includes a check of the criminal records repository in the State in which your program is operating, as well as in the State in which the applicant lives, you will be deemed to have satisfied the State criminal registry check requirement and do not need separate approval by the Corporation.

(c) *Alternative search approval.* If you demonstrate that you are prohibited or otherwise precluded under State law from complying with a Corporation requirement relating to criminal history checks or that you can obtain substantially equivalent or better information through an alternative process, the Corporation will consider approving an alternative search protocol that you submit in writing to the Corporation's Office of Grants Management. The Office of Grants

Management will review the alternative protocol to ensure that it:

- (1) Verifies the identity of the individual; and
- (2) Includes a search of an alternative criminal database that is sufficient to identify the existence, or absence of, criminal offenses.

**§ 2540.207 Is an individual who refuses to consent to a State criminal registry check, or who makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history, eligible to serve in a covered position?**

An individual who refuses to consent to a State criminal registry check, or who makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history, is not eligible to serve in a covered position.

**PART 2551—SENIOR COMPANION PROGRAM**

- 1. The authority citation for part 2551 is revised to read as follows:

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

**Subpart C of Part 2551—[Amended]**

**§ 2551.31 [Redesignated as § 2551.34]**

- 2. Amend subpart C by redesignating § 2551.31 as § 2551.34.

**Subpart B of Part 2551—[Amended]**

**§ 2551.26 [Redesignated as § 2551.33]**

- 3. Amend subpart B of part 2551 by redesignating § 2551.26 as § 2551.33.
- 4. Add the following sections to subpart B: §§ 2551.26, 2551.27, 2551.28, 2551.29, 2551.30, 2551.31, and 2551.32.

**§ 2551.26 To whom does this part apply?**

This part applies to Senior Companion Sponsors when determining the suitability of Senior Companions, as well as to Senior Companion grant-funded employees who, on a recurring basis, have access to children, persons age 60 and older, or individuals with disabilities.

**§ 2551.27 What two search components of the National Service Criminal History Check must I satisfy to determine an individual's suitability to serve in a covered position?**

Unless the Corporation approves an alternative screening protocol, in determining the suitability of an individual to serve as a Senior Companion or as a covered grant-funded employee, you are responsible for ensuring, unless prohibited by State law, that you conduct and document a National Service Criminal History

Check, which consists of the following two search components:

(a) *State criminal registry search.* A search (by name or fingerprint) of the State criminal registry for the State in which the program operates and the State in which the individual resides at the time of application; and

(b) *National Sex Offender Public Registry.* A name-based search of the Department of Justice (DOJ) National Sex Offender Public Registry (NSOPR).

**§ 2551.28 When must I conduct a State criminal registry check and a NSOPR check on an individual in a covered position?**

(a) The State criminal registry check must be conducted on an individual who enrolls in, or is hired by, your program after the effective date of this regulation.

(b) The NSOPR check must be conducted on an individual who is serving, or applies to serve, in a covered position on or after the effective date of this regulation.

**§ 2551.29 What procedures must I follow in conducting a National Service Criminal History Check?**

You are responsible for ensuring that the following procedures are satisfied:

(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 for the State criminal registry check and the appropriate sharing of the results of that check within the program from the individual (but not for the NSOPR check);

(c) Document the individual's understanding that selection into the program is contingent upon the organization's review of the individual's criminal history, if any;

(d) 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;

(e) Provide safeguards to ensure the confidentiality of any information relating to the criminal history check, consistent with authorization provided by the individual; and

(f) Ensure that an individual, for whom the results of a required State criminal registry check are pending, is not permitted to have access to children, persons age 60 and older, or individuals with disabilities without being accompanied by an authorized program representative who has previously been cleared for such access.

**§ 2551.30 What documentation must I maintain regarding a National Service Criminal History Check?**

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 of the National Service Criminal History check (unless precluded by State law) and document in writing that you considered the results in selecting the individual.

**§ 2551.31 Under what circumstances may I follow alternative procedures in conducting a State criminal registry check?**

(a) *FBI fingerprint-based check.* If you or your designee conduct and document a fingerprint-based criminal history check through the Federal Bureau of Investigation, you will be deemed to have satisfied the State criminal registry check requirement and do not need separate approval by the Corporation.

(b) *Name-based search.* If you conduct and document a name-based criminal history check through a source other than the FBI that, includes a check of the criminal records repository, in the State in which your program is operating, as well as in the State in which the individual lives, you will be deemed to have satisfied the State criminal registry check requirement and do not need separate approval by the Corporation.

(c) *Alternative search approval.* If you demonstrate that you are prohibited or otherwise precluded under State law from complying with a Corporation requirement relating to criminal history checks or that you can obtain substantially equivalent or better information through an alternative process, the Corporation will consider approving an alternative search protocol that you submit in writing to the Office of Grants Management. The Office of Grants Management will review the alternative protocol to ensure that it:

- (1) Verifies the identity of the individual; and
- (2) Includes a search of an alternative criminal database that is sufficient to identify the existence, or absence of, criminal offenses.

**§ 2551.32 Is an individual who refuses to consent to a State criminal registry check, or who makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history, eligible to serve in a covered position?**

An individual who refuses to consent to a State criminal registry check, or

who makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history, is not eligible to serve in a covered position.

**§§ 2551.42, 2551.43, 2551.44, 2551.45, and 2551.46 [Redesignated as §§ 2551.43, 2551.44, 2551.45, 2551.46, and 2551.47]**

■ 5. Amend subpart D of part 2551 by redesignating §§ 2551.42, 2551.43, 2551.44, 2551.45, 2551.46 as §§ 2551.43, 2551.44, 2551.45, 2551.46, 2551.47, respectively.

■ 6. Add the following new section to subpart D: § 2551.42.

**§ 2551.42 May an individual who is subject to a State sex offender registration requirement serve as a Senior Companion or as a Senior Companion grant-funded employee?**

Any individual who is registered, or who is required to be registered, on a State sex offender registry is deemed unsuitable for, and may not serve in, a position as a Senior Companion or as a Senior Companion grant-funded employee.

**PART 2552—FOSTER GRANDPARENT PROGRAM**

■ 1. The authority citation for part 2552 is revised to read as follows:

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

**Subpart C of Part 2552—[Amended]**

**§ 2552.31 [Redesignated as § 2552.34]**

■ 2. Amend subpart C by redesignating § 2552.31 as § 2552.34.

**Subpart B of Part 2552—[Amended]**

**§ 2552.26 [Redesignated as § 2552.33]**

■ 3. Amend subpart B of part 2552 by redesignating § 2552.26 as § 2552.33.

■ 4. Add the following sections to subpart B: §§ 2552.26, 2552.27, 2552.28, 2552.29, 2552.30, 2552.31, and 2552.32.

**§ 2552.26 To whom does this part apply?**

This part applies to Foster Grandparent Sponsors in determining the suitability of Foster Grandparents, as well as to Foster Grandparent grant-funded employees who, on a recurring basis, have access to children, persons age 60 and older, or individuals with disabilities.

**§ 2552.27 What two search components of the National Service Criminal History Check must I satisfy to determine an individual's suitability to serve in a covered position?**

Unless the Corporation approves an alternative screening protocol, in selecting an individual as a Foster

Grandparent or as a covered grant-funded employee, you are responsible for ensuring, unless prohibited by State law, that you conduct and document a National Service Criminal History Check, which consists of the following two search components:

(a) *State criminal registry search.* A search (by name or fingerprint) of the State criminal registry for the State in which the program operates and the State in which the individual resides at the time of application; and

(b) *National Sex Offender Public Registry.* A name-based search of the Department of Justice (DOJ) National Sex Offender Public Registry (NSOPR).

**§ 2552.28 When must I conduct a State criminal registry check and a NSOPR check on an individual in a covered position?**

(a) The State criminal registry check must be conducted on an individual who enrolls in, or is hired by, your program after November 23, 2007.

(b) The NSOPR check must be conducted on an individual who is serving, or applies to serve, in a covered position on or after November 23, 2007.

**§ 2552.29 What procedures must I follow in conducting a National Service Criminal History Check?**

You are responsible for ensuring that the following procedures are satisfied:

(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 for the State criminal registry check and the appropriate sharing of the results of that check within the program from the individual (but not for the NSOPR check);

(c) Document the individual's understanding that selection into program is contingent upon the organization's review of the individual's criminal history, if any;

(d) Provide a reasonable opportunity for the individual to challenge the factual accuracy of a result before action is taken to exclude the individual from the position;

(e) Provide safeguards to ensure the confidentiality of any information relating to the criminal history check, consistent with authorization provided by the individual; and

(f) Ensure that an individual, for whom the results of a required State criminal registry check are pending, is not permitted to have access to children, persons age 60 and older, or individuals with disabilities without being accompanied by an authorized program representative who has previously been cleared for such access.

**§ 2552.30 What documentation must I maintain regarding a National Service Criminal History Check?**

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 of the National Service Criminal History check (unless precluded by State law) and document in writing that you considered the results in selecting the individual.

**§ 2552.31 Under what circumstances may I follow alternative procedures in conducting a State criminal registry check?**

(a) *FBI fingerprint-based check.* If you or your designee conduct and document a fingerprint-based criminal history check through the Federal Bureau of Investigation, you will be deemed to have satisfied the State criminal registry check requirement and do not need separate approval by the Corporation.

(b) *Name-based search.* If you conduct and document a name-based criminal history check through a source other than the FBI that, includes a check of the criminal records repository, in the State in which your program is operating, as well as in the State in which the individual lives, you will be deemed to have satisfied the State criminal registry check requirement and do not need separate approval by the Corporation.

(c) *Alternative search approval.* If you demonstrate that you are prohibited or otherwise precluded under State law from complying with a Corporation requirement relating to criminal history checks or that you can obtain substantially equivalent or better information through an alternative process, the Corporation will consider approving an alternative search protocol that you submit in writing to the Office of Grants Management. The Office of Grants Management will review the alternative protocol to ensure that it:

(1) Verifies the identity of the individual; and

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

**§ 2552.32 Is an individual who refuses to consent to a State criminal registry check, or who makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history, eligible to serve in a covered position?**

An individual who refuses to consent to a State criminal registry check, or

who makes a false statement in connection with a grantee's inquiry concerning the individual's criminal history, is not eligible to serve in a covered position.

**§§ 2552.42, 2552.43, 2552.44, 2552.45, and 2552.46** [Redesignated as §§ 2552.43, 2552.44, 2552.45, 2552.46, and 2552.47]

■ 5. Amend subpart D of part 2552 by redesignating §§ 2552.42, 2552.43, 2552.44, 2552.45, and 2552.46 as §§ 2552.43, 2552.44, 2552.45, 2552.46, and 2552.47, respectively.

■ 6. Add adding the following new section to subpart D: § 2552.42.

**§ 2552.42 May an individual who is subject to a State sex offender registration requirement serve as a Foster Grandparent or as a Foster Grandparent grant-funded employee?**

Any individual who is registered, or required to be registered, on a State sex offender registry is deemed unsuitable for, and may not serve in, a position as a Foster Grandparent or as a Foster Grandparent grant-funded employee.

Dated: August 16, 2007.

**Frank R. Trinity,**

*General Counsel.*

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**BILLING CODE 6050-28-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Part 367

[Docket No. FMCSA-2007-27871]

RIN 2126-AB09

#### Fees for Unified Carrier Registration Plan and Agreement

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This rule establishes initial fees for 2007 and a fee bracket structure for the Unified Carrier Registration Agreement. This action is required under the Uniform Carrier Registration Act of 2005, enacted as Subtitle C of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.

**EFFECTIVE DATE:** August 24, 2007.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Miller, Regulatory Development Division, (202) 366-5370, or by e-mail at: FMCSAregs@dot.gov.

#### Availability of Rulemaking Documents

For access to the docket to read background documents and comments

received, go to <http://dms.dot.gov> at any time or to U.S. Department of Transportation, Room W12-140, 1200 New Jersey Ave., SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### I. Legal Basis for the Rulemaking

This rule involves the fees to be set for the Unified Carrier Registration Agreement established by 49 U.S.C. 14504a, enacted by section 4305(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (119 Stat. 1144, 1764 (2005)). Section 14504a states that the "Unified Carrier Registration Plan \* \* \* mean[s] the organization \* \* \* responsible for developing, implementing, and administering the unified carrier registration agreement" (49 U.S.C. 14504a(a)(9)) (UCR Plan). The Unified Carrier Registration Agreement (UCR Agreement) developed by the UCR Plan is the "interstate agreement governing the collection and distribution of registration and financial responsibility information provided and fees paid by motor carriers, motor private carriers, brokers, freight forwarders and leasing companies \* \* \*" (49 U.S.C. 14504a(a)(8)).

Congress also repealed the statutory provisions of 49 U.S.C. 14504 governing the Single State Registration System (SSRS) (SAFETEA-LU section 4305(a)).<sup>1</sup> The legislative history indicates that the purpose of the UCR Plan and Agreement is both to "replace the existing outdated system [SSRS]" for registration of interstate motor carrier entities with the States and to "ensure that States don't lose current revenues derived from SSRS" (S. Rep. 109-120, at 2 (2005)).<sup>2</sup>

The statute provides for a 15-member Board of Directors for the UCR Plan and Agreement (Board) appointed by the Secretary of Transportation. The statute specified that the Board should consist of one individual (either the FMCSA Deputy Administrator or another Presidential appointee) from the Department of Transportation; four directors, including one from each of the four FMCSA service areas, selected from among the chief administrative officers of the State agencies responsible for administering the UCR Agreement; five directors from among the professional staffs of State agencies

responsible for administering the UCR Agreement, to be nominated by the National Conference of State Transportation Specialists (NCSTS); and five directors representing the motor carrier industry, of whom at least one must be from a national trade association representing the general motor carrier of property industry and one from a motor carrier that falls within the smallest fleet fee bracket. The establishment of the Board was announced in the **Federal Register** on May 12, 2006 (71 FR 27777).

Among its responsibilities, the Board was required to submit to the Secretary of Transportation<sup>3</sup> a recommendation for the initial annual fees to be assessed on motor carriers, motor private carriers, freight forwarders, brokers and leasing companies under the UCR Agreement (49 U.S.C. 14504a(d)(7)(A)). The FMCSA then was directed to set the fees within 90 days after receiving the Board's recommendation and after notice and opportunity for public comment (49 U.S.C. 14504a(d)(7)(B)).

##### II. Statutory Requirements for UCR Fees

The statute specifies several relevant factors that must be considered by the Board and FMCSA in setting the fees (see 49 U.S.C. 14504a(d)(7)(A), (f)(1) and (g)). It specifies that fees are to be determined by FMCSA based upon the recommendation of the Board. The FMCSA described the statutory requirements in detail in a Notice of Proposed Rulemaking (NPRM) published on May 29, 2007 (72 FR 29472).

Section 14504a(f)(1) also stipulates that for the purpose of charging fees the Board shall develop no less than 4 and no more than 6 brackets of carriers based on the size of the fleet, i.e. the number of commercial motor vehicles owned or operated. Finally, the fee scale is required to be progressive in the amount of the fee.

Overall, the fees assessed under the UCR Agreement must produce a level of revenues established by the statute. Section 14504a(g) establishes the revenue entitlements for States that choose to participate in the UCR Plan. That section provides that a participating State, which participated in the SSRS in the registration year prior to the enactment of the Unified Carrier Registration Act of 2005 (i.e., the 2004 registration year), is entitled to receive revenues under the UCR Agreement

<sup>1</sup> This repeal became effective on January 1, 2007, in accordance with section 4305(a).

<sup>2</sup> The Senate bill's provisions were enacted "with modifications." H. Conf. Rep. No. 109-203, at 1020 (2005).

<sup>3</sup> The Secretary's functions under section 14504a have been delegated to the Administrator of the Federal Motor Carrier Safety Administration. 49 CFR 1.73(a)(7), as amended, 71 FR 30833 (May 31, 2006).