

### III. What are reasonable safeguards that covered health care providers and their business associates should consider implementing?

OCR encourages covered health care providers and their business associates using WBSAs in good faith for the scheduling of individual appointments for COVID-19 vaccination to implement reasonable safeguards to protect the privacy and security of individuals' PHI. OCR recommends that covered health care providers and their business associates consider the following recommended reasonable safeguards:

- Using and disclosing only the minimum PHI necessary for the purpose (e.g., an individual's name and phone number may be the minimum necessary PHI for scheduling the appointment).
- Using encryption technology to protect PHI.
- Enabling all available privacy settings (e.g., adjusting WSBA calendar display settings, as needed, to hide names or show only individuals' initials instead of full names on calendar screens).
- Ensuring that storage of any PHI (including metadata that constitutes PHI) by the vendor is only temporary (e.g., the PHI is returned to the covered health care provider or destroyed as soon as practicable, but no later than 30 days after the appointment).<sup>10</sup>
- Ensuring the WBSA vendor does not use or disclose ePHI in a manner that is inconsistent with the HIPAA Rules (e.g., does not engage in the sale of ePHI<sup>11</sup> collected from individuals using the WBSA to schedule a COVID-19 vaccination).

Although covered health care providers and business associates are encouraged to implement these reasonable safeguards when using a WBSA to schedule individuals for appointments for COVID-19 vaccination, OCR will exercise its enforcement discretion and not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers or their business associates in connection with the good faith provision of COVID-19 vaccination during the COVID-19 nationwide public health emergency. Failure to implement the recommended reasonable safeguards above will not, in itself, cause OCR to determine that a covered health care provider or its

business associate failed to act in good faith for purposes of this Notification.

Covered health care providers and their business associates that seek additional privacy protections for ePHI collected while using WBSAs are encouraged to use application vendors that represent that their WBSAs support compliance with the HIPAA Rules and that the vendors will enter into BAAs in connection with the use of their WBSAs.

**Note:** OCR does not endorse, certify, or recommend specific technology, software, applications, or products.

### IV. Who/what is not covered under this Notification?

This Notification does not apply to activities of a covered health care provider and its business associates other than the scheduling of COVID-19 vaccinations. Other activities, such as the handling of PHI unrelated to the scheduling of COVID-19 vaccinations, are not included within the scope of this exercise of enforcement discretion. Potential HIPAA penalties still apply to all other HIPAA-covered operations of the covered health care provider and its business associates, unless otherwise stated by OCR.<sup>12</sup>

Additionally, this Notification does not apply to a covered health care provider or business associate when it fails to act in good faith. For example, OCR will not consider a covered health care provider or business associate to be acting in good faith with respect to the use of a WBSA for the scheduling of individual appointments for COVID-19 vaccination where the covered health care provider or business associate uses a WBSA:

- Whose terms of service prohibit the use of the WBSA for scheduling health care services or state that the WBSA may sell personal information that it collects.
- To conduct services other than scheduling appointments for COVID-19 vaccination (e.g., to determine individuals' eligibility for COVID-19 vaccination).
- Without reasonable security safeguards (e.g., access controls) to prevent the PHI from being readily accessed or viewed by unauthorized persons.
- To screen individuals for COVID-19 prior to individuals' in-person health care visits.

### V. Collection of Information Requirements

This Notification of Enforcement Discretion creates no legal obligations and no legal rights. Because this notice imposes no information collection requirements, it need not be reviewed by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: February 12, 2021.

#### Robinsue Frohboese

Acting Director and Principal Deputy Director, Office for Civil Rights, U.S. Department of Health and Human Services.

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## CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

### 45 CFR Parts 2522 and 2540

RIN 3045-AA69

#### National Service Criminal History Check

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

**ACTION:** Final rule.

**SUMMARY:** The Corporation for National and Community Service (CNCS) revised existing National Service Criminal History Check (NSCHC) regulations under the National and Community Service Act of 1990, as amended. These revisions will clarify and simplify the NSCHC requirements.

**DATES:** This rule is effective May 1, 2021.

**FOR FURTHER INFORMATION CONTACT:** Amy Borgstrom at the Corporation for National and Community Service, 250 E Street SW, Washington, DC 20525, [aborgstrom@cns.gov](mailto:aborgstrom@cns.gov), phone 202-422-2781.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

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

Grant recipient and subrecipient compliance with the NSCHC requirements has been an ongoing

<sup>10</sup> Once the WBSA vendor securely returns or destroys the ePHI (as determined by its arrangements with the covered health care provider), the WBSA vendor is no longer a business associate to that covered health care provider.

<sup>11</sup> See 45 CFR 164.502(a)(5)(B)(2).

<sup>12</sup> OCR's Notifications of Enforcement Discretion and other materials relating to the COVID-19 public health emergency are available at <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html>.

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

Improving the agency's core functions—including eliminating barriers to compliance—is a primary goal of the agency's Transformation and Sustainability Plan. In pursuit of that goal, the agency approved vendors that grant recipients may use to obtain the required NSCHC components. Since November 2018, grant recipients and subrecipients have been able to establish accounts and obtain the required National Sex Offender Public website (NSOPW.gov), state, and FBI components of the NSCHC through the approved vendors. Additionally, to help ensure grantee compliance with NSCHC requirements, the agency made grant funds available so that grant recipients could recheck persons who needed to have an NSCHC conducted. And for those grant recipients who took the opportunity to ensure compliance by rechecking persons in covered positions, the agency announced that it would not, except in limited circumstances, take enforcement action for past noncompliance. As of July 2020, grant recipients have conducted over 233,000 check components through the agency-approved vendors.

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

NSCHC, individuals in covered positions are: The staff working under these grants, AmeriCorps State and National members, AmeriCorps Seniors volunteers in the Foster Grandparent and Senior Companion programs who receive a stipend.

## II. Discussion of the Final Rule

The agency published a notice of proposed Federal rulemaking in the **Federal Register** on January 8, 2020, 85 FR 859. The final rule reflects the agency's consideration of the comments received and clarifies several requirements. In addition, the rule reflects technical corrections to the proposed language.

Agency-approved vendors provide grant recipients a path to obtaining the required NSCHC components. As stated in the Notice of Proposed Rulemaking, preliminary analysis of the agency's FY 2019 Improper Payments Elimination and Recovery Act (IPERA) test transactions demonstrated that use of the CNCS-approved NSCHC vendors by grantees resolved the NSCHC component of the improper payment transactions in 88% of the transactions for which the NSCHC component rendered the payment improper. The intent of the final rule is to emphasize the impact and availability of agency-approved vendors and to clarify and simplify the NSCHC requirements.

The final rule does not require grant recipients to establish accounts and conduct checks through the agency-approved vendors. However, the vendors remain a proven pathway for timely NSCHC compliance. Many commenters stated that they had access to affordable NSCHC component checks, other than those provided by the agency-approved vendors. The agency strongly encourages the use of the agency-approved vendors because use of the vendors allows grant recipients to reliably demonstrate compliance and eligibility. In addition, the final rule clarifies that individuals who turn 18 while working or serving in a covered position must get an NSCHC if they serve a consecutive term.

The final rule retains many of the other proposed changes. As proposed, the final rule establishes a single set of NSCHC check components, regardless of whether an individual has recurring access to vulnerable populations. The final rule also establishes that the NSCHC must be completed before an individual works or serves in a covered position. Further, it establishes a requirement that, by November 1, 2021, staff, members, or volunteers who remain on or after November 1, 2021 in a position for which an NSCHC is

required under the final rule complete an NSCHC that complies with the final rule.

## III. Comments and Responses

The agency published the proposed rule on January 8, 2020 (84 FR 859), in the **Federal Register** with a 60-day comment period and received over 280 comments. More than 75 percent of the commenters indicated they were current AmeriCorps State and National or AmeriCorps Seniors grant recipients subject to the rule.

Generally, the commenters opposed the proposed mandatory use of the agency-approved vendors to obtain the NSCHC component checks—the nationwide NSOPW check of all jurisdictions, including Tribes, states, and territories; state criminal history repository checks; and fingerprint-based FBI checks. While timely use of the vendor would ensure grant recipients' statutory compliance and, accordingly, reduce the agency's improper payment rate, commenters articulated how mandatory use of the vendors complicated their processes, and, in response to those comments, the agency has decided not to make agency-approved vendors the sole option for grant recipients and subrecipients to obtain NSCHC components.

Some commenters suggested that the agency decouple NSCHC from its Improper Payments Elimination and Recovery Act (IPERA) testing. The agency has never linked or targeted NSCHC compliance as a specific line of inquiry in its Improper Payments Elimination and Recovery Act (IPERA) testing. The guidance for executing IPERA is established by the Office of Management and Budget. Under that guidance and the IPERA statutes, payments to covered individuals who have incomplete or missing NSCHC checks when they received a payment that is included within an IPERA sample qualify as improper payments, as eligibility cannot be established at the time of payment (even if the individuals involved are later cleared in compliant checks). The frequency of NSCHC-based IPERA findings arises from the fact that a large portion of the agency's grant funds are used to make compensation and other payments to covered individuals. Nothing that the agency could write in its NSCHC regulations would alter the frequency that use of grant funds trigger NSCHC requirements, or that incomplete, incorrect or undocumented NSCHC checks will be considered improper payments under IPERA.

Commenters generally reflected an appreciation for the value of a criminal

history background check as part of a comprehensive screening process. And many commenters articulated how they are subject to several background check requirements from various sources and have tailored their screening and vetting procedures to conform with those required by state law or best practices or site requirements. The commenters asserted that the agency's requirements are yet another burden and suggested that the agency remove the requirement or broaden exemptions. The agency's legislation is prescriptive and creates an obligation to ensure that grant recipients comply with the law. The agency wants to ensure that grant recipients meet the basic requirements of the rule and can easily document compliance with the requirements. Commenters expressed a desire for ease of administration and minimal duplication of process. However, the IPERA data reflects that many grant recipients could not demonstrate that they conducted the required components on time, and the agency does not find a sufficient basis to embrace the relaxed approach suggested by some commenters.

Commenters supported elimination of the requirement for staff to obtain criminal history checks under planning grants, non-profit capacity building grants, and on fixed-award grants, again, with some commenters expressing support for expansion of categories of exemptions. In addition, commenters expressed support for the elimination of the requirement to conduct criminal history checks of individuals under the age of 18 at the time they start service or employment. And, commenters also expressed support for extending the time period for which a grant recipient must re-check a person after a break in service or employment with the same organization from 120 days to 180 days.

The final rule has been modified in response to the comments provided. The comments and CNCS's responses are set forth below:

*Comment:* CNCS received positive comments on eliminating the requirement for grant recipients to conduct criminal history checks on employees of organizations with planning grants and staff on fixed-amount grants. Some commenters requested that exemptions from NSCHCs extend to additional CNCS grants such as the Volunteer Generation Fund, and the Martin Luther King and 9/11 Day of Service grants.

*Response:* The agency balanced the statutory requirements articulated in 42 U.S.C. 12645g to protect vulnerable populations being served by programs, the needs of the agency to efficiently monitor programs, and the

administration of the requirements by grant recipients. Fixed-amount grant recipients receive a fixed amount per member service year and do not identify specific staff positions on a grant budget. Relying on information provided in the narrative text of fixed-amount grant applications to identify persons for whom the NSCHC was required, led, at times, to requiring checks for persons who would never be included if the program were funded under a cost reimbursement grant. It also led to uncertainty in determining whether a position was covered or not. Fixed-amount grants are intended to optimize efficiency in grantmaking. Fixed-amount grant recipients are provided a sum of money that is significantly less than what is needed to implement the program. The additional resources required to implement the program are the responsibility of the recipient. Fixed-amount grant recipients are not required to track spending or a specified percentage of matching funds, and federal agencies focus on grant recipient performance rather than grant recipient accounting. To require fixed-amount grantees to track funds in the same manner that cost reimbursement grant recipients do, for the purpose of determining whether or not a person is covered by the rule, would disrupt the statutory scheme of fixed-amount grants. In order to eliminate ambiguity and create a rule that can be easily applied with parity, the agency determined that the staff who implement fixed-amount grants should be exempt from the criminal history check requirement, under its authority to exempt individuals from the requirements for good cause under section 189D. While the agency encourages organizations to implement criminal history checks as part of a comprehensive screening procedure to reduce risk to vulnerable populations, which could include staff who implement fixed-amount grant activities, the agency finds that clarifying the applicability of the rule resolves the current ambiguous state.

The agency considered the comments regarding eliminating the applicability of the NSCHC to other grants, such as the Martin Luther King, Jr. and September 11th Day of Service grants and Volunteer Generation Fund grants. The agency declines to exempt these grants from the NSCHC requirements, as the grants issued are used to pay the salaries of persons reflected on a grant award who are implementing a day of service grant or otherwise covered grant program and the agency did not find a

sufficient basis to exclude them from the statutory requirements.

*Comment:* The agency received positive comments about not requiring an NSCHC for individuals under the age of 18 at the start of their service. Some commenters expressed a desire for the agency to expand exemptions to participants and employees who may already receive criminal history checks because of their profession.

*Response:* The agency finds that good cause exists to exempt those under the age of 18 from the NSCHC requirements and establishes the person's start date as the operative date for determining the person's age. Congress specified that a check for those serving with vulnerable populations applied only for those who were 18 or older, but did not specify the age requirement for being subject to the NSCHC for persons who serve with nonvulnerable populations, leaving it subject to the regulations and requirements established by the agency. Because Congress provided language in the statute that stated additional NSCHC components were required only for those 18 or older, the agency finds the age specified in the legislation to be a reasonable basis to establish parity in the age at which a baseline NSCHC is required. The agency encourages grant recipients to ask all applicants about any disqualifying criminal history and conduct an NSOPW search, but in the interest of clarity and consistency in application of the final rule, finds that an NSCHC for those under 18 years of age is not required by the regulation.

The agency has considered exemptions for certain professions in the past, and understands that there may be a reasonable basis to exempt certain professions from the NSCHC requirement. However, due to the variability of states' standards for rendering clearance decisions, and in pursuit of clarity in application and ease of monitoring, the agency has decided against including profession-based exceptions in the final rule. For situations where grant recipients demonstrate that an administrative modification to the rule is necessary, the final rule includes a waiver provision. Rather than codifying exemptions, the agency may evaluate facts and circumstances, in a particular case or in a class of cases, that necessitate administrative modifications to the process through the waiver provision.

*Comment:* Some commenters expressed support for requiring programs to obtain criminal history check results through designated vendors because it simplified the process and provided a consistent, timely and reliable method. However,

many commenters expressed objections to the requirement for mandatory use of designated vendors based on administrative burden, geographical and technical challenges, asserted inadequacy of the information provided, challenges with the service, added costs to programs and challenges in establishing accounts with vendors. For commenters who acknowledged the benefit of the vendor, some indicated that while use of agency-approved vendors may satisfy the statutory requirements, grant recipients also use the criminal history check results to make determination of suitability in addition to eligibility. Agency-approved vendor criminal history check results—which, in the case of the FBI check provides a “cleared” or “not cleared” recommendation based on whether or not the individual has been convicted of murder or an offense requiring registration as a sex offender, rather than providing a list of arrests and convictions—do not help a grant recipient determine suitability based on other criteria (e.g., a program that involves driving wanting to know if a person had recent DUI convictions). As a result, grant recipients must conduct duplicate or supplemental criminal history checks at additional expense, which is an allowable cost under grants, in order to meet local requirements. Commenters also noted that no criminal history check vendor has complete coverage or access to all state criminal history record repositories, creating coverage gaps for locations excluded from vendor access. In these circumstances, the vendor check may not satisfy local clearance requirements. In other instances, commenters noted that, for them, getting results through a state repository may be more economical and convenient than working through agency-approved vendors. Commenters also articulated that using agency-approved vendors required a level of technological savviness or accessibility that some grantee organizations or some people working or serving under the grants might not have. Commenters also noted that in some areas, vendor fingerprint collection locations may be prohibitively inconvenient for persons who do not have transportation or who need a location that is accessible to those with disabilities. Several commenters suggested that having both agency-approved vendors and state repositories as options for obtaining NSCHC components was satisfactory.

*Response:* The agency strongly encourages use of the approved vendors, though use of the approved vendors is

not the sole method through which a grant recipient or subrecipient may obtain NSCHC components. The grant recipient community dramatically improved NSCHC compliance through use of the vendors, as reflected in the agency’s IPERA analysis. Use of the vendors allows for timely compliance monitoring, which reduces the risk of adverse enforcement action. However, after careful consideration of the comments and the expression by commenters that they are able to obtain NSCHC checks that more closely meet their specific needs using methods other than the agency-approved vendors, the agency decided not to include the requirement to use the agency-approved vendors in the final rule. The agency will continue to implement effective enforcement to ensure grant recipients demonstrate timely compliance with the requirements of the final rule.

*Comment:* The agency received comments on the requirement to conduct, review, and adjudicate a person’s criminal history check results before the person may start service or work under a grant. Some commenters expressed that it was inconvenient to complete the background checking process before the start of service or employment because, at times, there may be delays or lack of responsiveness on the part of criminal history repositories, vendors, or because of other aspects of their onboarding process. Commenters stated they believe the new requirement would result in delayed startup and was unnecessary, as most programs conduct training and orientation in the first few days of service, which limits access to vulnerable populations. Further, some commenters stated that the agency’s timing of grant awards makes compliance unduly burdensome, as they are unable to take steps to enroll members, including the NSCHC, under the grant until it is awarded.

*Response:* The agency considered the challenges posed by potential delayed return of criminal history results and determined that establishing a clear requirement would eliminate longstanding confusion about when the NSCHC needs to be performed, how accompaniment of individuals with pending checks should be documented, and whether an individual has been determined to be eligible prior to a grant recipient incurring costs. Further, determining by the day before a person begins work or service on the grant that they do not have a disqualifying conviction protects program beneficiaries and the community from potential harm. The desire to resolve any uncertainty related to NSCHCs

outweighs the impact on programs that desire to start employees or participants before they are cleared. Some of the commenters also suggested that because the statute does not require the check to be completed prior to service, the agency should not specify a time by which NSCHCs should be completed. The agency declines to adopt the proposed change because the value of the NSCHC is in knowing in advance whether a person has been convicted of murder or a sex offense requiring registration. Some commenters stated that there is not an ineligibility problem in the agency’s programs—meaning that the rate at which ineligible individuals are discovered through the NSCHC process is so low as to make the process unnecessary. Commenters implied that not having a significant number of ineligible individuals in covered positions should be a basis to have a rule flexible enough for individuals in covered positions to fulfill the NSCHC requirements on the last day of service or even after service ends. However, the agency views the fact that most persons who apply to serve through the agency’s programs are eligible as a reason to continue to ensure that minimal screening takes place prior to service, to ensure that ineligible individuals do not serve. The agency encourages grant recipients who have onboarding challenges related to the timing of a grant being awarded to contact the agency. The agency will work with the grantee to ensure that timing of the grant award does not unreasonably prevent a grant recipient from taking timely action to comply with the rule.

*Comment:* Commenters objected to the requirement to check, within 180 days, any covered individuals not previously cleared through the designated vendors. Many commenters expressed this was burdensome and unnecessary. Some commenters asserted that to require individuals cleared under a prior rule was contrary to law, as the agency had limited authority to change a condition of the grant after it was awarded.

*Response:* After considering the comments, the agency decided to retain the requirement that within 180 days of the effective date of the rule, any individual who continues in a covered position must have an NSCHC that complies with the final rule, in order to establish clarity and consistency in the NSCHC requirements. That is, each person in a covered position who continues to work or serve on or after November 1, 2021 must have a check that complies with this regulation. They must be able to show that all three required components—the NSOPW, the

state check(s), and the FBI check—were conducted and reviewed before November 1, 2021. While the November 1, 2021 date is slightly more than 180 days from the effective date, the agency believes that the additional three calendar days and first of the month start date will allow for easier administration. By providing this extended compliance window, it is expected that most individuals in covered positions who remain in work or service in a covered position who did not have a three-part check will be able to obtain the missing state(s) or FBI check, as applicable, by the deadline. This requirement is prospective in applicability, not retroactive. That is, no action is required by individuals who do not continue to work or serve in a covered position. The rule establishes the future condition for continued service and establishes a uniform set of requirements that must be met by a future date certain. A defined date supports clarity of applicability and uniformity in monitoring. For entities that participated in the exemption period and conducted all three component checks, additional action may not be required for most individuals.

*Comment:* Many commenters objected to the requirement to conduct three-part checks for all covered individuals, regardless of their access to vulnerable populations. A number of commenters asserted that the agency had exceeded its legal authority in imposing this requirement and that two-part checks were satisfactory for covered persons who do not have access to vulnerable populations. Other commenters said it was excessively burdensome for covered persons and grantees to obtain an extra level of clearance when it is not required by the statute, especially since it had to be completed prior to service starting.

*Response:* The agency declines to modify the rule to have a distinction between checks for those serving vulnerable populations and those without recurring access to vulnerable populations. The need to establish consistency across grant programs and to simplify the requirements, as well as concerns for the safety of vulnerable populations, outweighed concerns about grant recipient preference. Commenters asserted that the statutory language is plain and does not give the agency discretion regarding the NSCHC component checks for those not working with vulnerable populations; the statute, they argue, gives the choice of NSCHC components to the grant recipient. The agency does not take this view.

Section 189D(a) of the NCSA states that entities “shall, *subject to the regulations and requirements established by the Corporation*, conduct criminal history background checks” on specified individuals. (Emphasis added). Section 189D(b) states that the criminal history background check under section (a) “shall, except in cases approved for good cause by the Corporation, include” a name-based sex offender check, and state checks for the state of service and state of residence at time of application, or a fingerprint-based FBI check.

Section 189D(b) establishes the minimum requirements that the agency must consider in exercising its authority under 189D(a) and understands the “or” in 189D (b)(2) to be read as permitting the agency to establish an NSCHC that permits a state component, an FBI component, or both.

The agency’s regulatory requirement aligns with the statute. A check of all three components meets the statutory requirement that the agency not require less than a sex offender check and either the state or FBI checks. The operative phrase in 189D(b) is “shall . . . include.” It is permissive and, read in the context of 189D(a), vests implementation to the discretion of the agency.

The scope of agency discretion would be different had the language said “shall consist of” or “shall be limited to” or “shall not exceed,” or other such discretion-limiting language. Section 189D(b) requires the agency to include the specified components, but does not require the agency to limit itself to those components.

Congress similarly specified the requirements for those serving vulnerable populations. At minimum, all three components must be present in the agency’s requirements for those who work with vulnerable populations. The agency retains discretion—that is, what is required for the NSCHC is still “subject to the requirements and regulations established by the Corporation”—and could require additional components, although the agency has opted to establish a check that mirrors the statutory language for those who work or serve with vulnerable populations.

*Comment:* Several commenters felt that replacing the current Alternative Search Procedure process with a new waiver process lacked clarity. They expressed concern because there has been a widespread history of needing Alternative Search Procedures to resolve situations where programs lacked access, or timely access, to criminal history check results and they were

unsure how the proposed waiver process was intended to work.

*Response:* The agency believes that with agency-approved vendors available, there should be less need for alternative procedures or to waive elements of the requirements for criminal history checks. However, the agency recognizes that circumstances change, and new factual situations may emerge, and expects to use the waiver process to address those situations. Those who would like a waiver may request it through the specified email address and the agency will provide a written response.

*Comment:* The agency noted that the proposed rule may have created confusion about the role of the budget in determining applicability of the NSCHC in section 201(a)(4). That section specified that an individual had to be paid a salary and on the budget.

*Response:* The statutory requirement to conduct an NSCHC applies to persons who serve under a grant award—whether they are paid directly from federal funds or if their time and effort are reflected on the grant as match under a cost reimbursement award. The budget document, historically, has been a strong indicator of persons who would be subject to the rule, but the budget document at the time of application, alone, does not determine who is in a position that requires an NSCHC. Persons whose activities are attributed to funding on a CNCS grant or subgrant are always covered.

*Comment:* Several commenters expressed a desire for more frequent and impactful training for grant recipients to help them be more compliant. Many commenters provided suggestions for ways to improve training and training materials.

*Response:* The agency welcomes the suggestions for improving training and will consider them when it develops training programs or supporting materials.

*Comment:* The agency received several comments regarding its approach to enforcement. Commenters expressed disapproval of an enforcement scheme that required grant recipients to return grant funds to the agency when the grant recipients did not comply with the regulatory requirements.

*Response:* The agency did not propose making its enforcement guidance part of this rulemaking, as enforcement for noncompliance with grants is addressed under 2 CFR 200.338. With the agency-approved vendors, all grant recipients have an established pathway to compliance and the costs of the NSCHC and any other checks required for

persons in covered positions remain allowable under grants. With the added clarity provided by the final rule, the expectation remains that grant recipients will obtain the required checks in a complete and timely manner. Accordingly, the agency appreciates the feedback regarding its approach to enforcement, and declines to respond to specific comments, as they are beyond the scope of the rulemaking.

#### IV. Effective Date

The final rule is effective on May 1, 2021.

#### IV. Regulatory Procedures

##### *Executive Order 12866*

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.

##### *Regulatory Flexibility Act*

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

##### *Unfunded Mandates*

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

##### *Paperwork Reduction Act*

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

This requirement constitutes one set of information under the Paperwork Reduction Act (PRA), 44 U.S.C. 507 *et seq.* OMB, in accordance with the Paperwork Reduction Act, has previously approved information collections for the NSCHC requirement. The OMB Control Number is 3045–0145.

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

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

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

##### *Executive Order 13132, Federalism*

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

#### List of Subjects

##### *45 CFR 2522*

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

##### *45 CFR Part 2540*

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

For the reasons discussed in the preamble, under the authority of 42 U.S.C. 12651c(c), the Corporation for National and Community Service amends chapter XXV, title 45 of the Code of Federal Regulations, as follows:

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

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

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

##### **Subpart B—Participant Eligibility, Requirements, and Benefits**

■ 2. Revise § 2522.205 to read as follows:

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

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

#### **PART 2540—GENERAL ADMINISTRATIVE PROVISIONS**

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

**Authority:** E.O. 13331, 69 FR 9911; 18 U.S.C. 506, 701, 1017; 42 U.S.C. 12653, 12631–12637, 12645g; 42 U.S.C. 5065.

##### **Subpart B—Requirements Directly Affecting the Selection and Treatment of Participants**

■ 4. Revise § 2540.200 to read as follows:

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

The National Service Criminal History Check is a requirement for entities that are recipients or subrecipients of the following grants:

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

(k) AmeriCorps VISTA Support Grants.

■ 5. Revise § 2540.201 to read as follows:

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

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

(1) As an AmeriCorps State and National member, as described in 42 U.S.C. 12511(30)(A)(i);

(2) As a Foster Grandparent who receives a stipend;

(3) As a Senior Companion who receives a stipend; or

(4) In a position in which they will receive a salary, directly or reflected as match, under a cost reimbursement grant.

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

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

■ 6. Revise § 2540.202 to read as follows:

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

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

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

(b) Makes a false statement in connection with a criminal history check described in § 2540.204;

(c) Is registered, or is required to be registered, on a state sex offender registry or the National Sex Offender Registry; or

(d) Has been convicted of murder, as defined in 18 U.S.C. 1111.

■ 7. Revise § 2540.203 to read as follows:

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

Grant recipients and subrecipients, or service sites, may establish suitability criteria, consistent with state and

Federal Civil Rights and nondiscrimination laws, for individuals working or serving in a position specified in § 2540.201(a). While members may be eligible to work or serve in a position specified in § 2540.201(a) based on the eligibility requirements of § 2540.202, a grant recipient, subrecipient, or service site may determine that an individual is not suitable to work or serve in such a position based on criteria that the grant recipient or subrecipient or service site establishes.

■ 8. Revise § 2540.204 to read as follows:

**§ 2540.204 What are the components of a National Service Criminal History Check?**

(a) Unless CNCS approves a waiver under § 2540.207, for each individual in a position specified in § 2540.201, grantees or subgrantees must, obtain:

(1) A nationwide check of the National Sex Offender Public website through *NSOPW.gov*;

(2) A check of the State criminal history record repository or agency-designated alternative for the individual's State of residence and State of service; and

(3) A fingerprint-based check of the FBI criminal history record database through the State criminal history record repository or agency-approved vendor.

(b) One way for grant recipients or subrecipients to obtain and document the required components of the National Service History Check is through the use of agency-approved vendors.

■ 9. Revise § 2540.205 to read as follows:

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

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

(b) If a person serves consecutive terms of service or employment with the same organization in a position specified in § 2540.201(a) and does not have a break in service or employment longer than 180 days, then no additional National Service Criminal History Check is required, as long as the original check complied with the requirements of § 2540.204. If a National Service Criminal History Check was not conducted on a person because they were under the age of 18 at the time

they began their prior term(s) of service or employment in a covered position, pursuant to § 2540.201(b), a National Service Criminal History check must be conducted prior to the individual beginning a subsequent term of work or service for which the person is 18 years of age or older at the start of work or service.

(c) Persons working or serving in positions specified in § 2540.201(a) prior to May 1, 2021, who continue working or serving in a position specified in § 2540.201(a) on or after November 1, 2021, must have a National Service Criminal History Check conducted, reviewed, and an eligibility determination made by the grant recipient or subrecipient based on the results of the National Service Criminal History Check completed in accordance with this part. For these people, the National Service Criminal History Check must be completed no later than November 1, 2021.

■ 10. Revise § 2540.206 to read as follows:

**§ 2540.206 What procedural steps are required, in addition to conducting the National Service Criminal History Check described in this subpart?**

(a) In addition to conducting the National Service Criminal History Check described in § 2540.204, grant recipients or subrecipients must:

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

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

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

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

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

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

(b) CNCS-approved vendors may facilitate obtaining and documenting the

requirements in paragraphs (a)(1) through (5) of this section.

■ 11. Revise § 2540.207 to read as follows:

**§ 2540.207 Waiver.**

CNCS may waive provisions of §§ 2540.200 through 2540.206 for good cause, or for any other lawful basis. To request a waiver, submit a written request to NSCHC Waiver Requests, 250 E Street SW, Washington DC 20525, or send your request to [NSCHCwaiverRequest@cns.gov](mailto:NSCHCwaiverRequest@cns.gov).

Dated: February 12, 2021.

**Lisa Guccione,**

*Deputy Chief of Staff.*

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**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 1**

[MD Docket No. 20-64; FCC 20-172; FRS 17357]

**Closure of FCC Lockbox 979089 Used To File Fees for Services Provided by the Media Bureau**

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (FCC or Commission) adopts an Order that closes Lockbox 979089 and modifies the relevant rule provisions to require electronic filing and fee payments.

**DATES:** Effective March 26, 2021.

**FOR FURTHER INFORMATION CONTACT:**

Warren Firschein, Office of Managing Director at (202) 418-2653 or Roland Helvajian, Office of Managing Director at (202) 418-0444.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Order, FCC 20-172, MD Docket No. 20-64, adopted on December 7, 2020 and released on December 10, 2020, which is the subject of this rulemaking. The full text of this document is available for public inspection and copying by downloading the text from the Commission's website at <https://www.fcc.gov/document/closure-lockbox-used-collect-fee-payments-media-bureau>.

**I. Procedural Matters**

*A. Final Regulatory Flexibility Analysis*

1. Section 603 of the Regulatory Flexibility Act, as amended, requires a regulatory flexibility analysis in notice

and comment rulemaking proceedings. See 5 U.S.C. 603(a). As we are adopting these rules without notice and comment, no regulatory flexibility analysis is required.

*B. Final Paperwork Reduction Act of 1995 Analysis*

2. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

*C. Congressional Review Act*

3. The Commission will not send a copy of the Order pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A), because the adopted rules are rules of agency organization, procedure, or practice that do not "substantially affect the rights or obligations of non-agency parties. See 5 U.S.C. 804(3)(C).

**II. Introduction**

4. In the Order, we reduce expenditures by the Commission and modernize procedures by amending § 1.1104 of our rules, 47 CFR 1.1104, which sets forth the application fees for services administered by the FCC's Media Bureau (MB). The rule amendment reflects the closure of the lockbox (P.O. Box)<sup>1</sup> used for such manual payment of filing fees for nine types of IB services: (1) Commercial TV Services; (2) Commercial AM Radio Stations; (3) Commercial FM Radio Stations; (4) FM Translators; (5) TV Translators and LPTV Stations; (6) FM Booster Stations; (7) TV Booster Stations; (8) Class A TV Services; and (9) Cable Television Services. We discontinue the option of manual fee payments and instead require the use of an electronic payment for each service listed above.

5. Section 1.1104 of the Commission's rules, 47 CFR 1.1104, provides a schedule of application fees for proceedings handled by MB. The rule had also directed filers that do not utilize the Commission's on-line filing

<sup>1</sup> A P.O. Box used for the collection of fees is referred to as a "lockbox" in our rules and other Commission documents. The FCC collects application processing fees using a series of P.O. Boxes located at U.S. Bank in St. Louis, Missouri. See 47 CFR 1.1101-1.1109 (setting forth the fee schedule for each type of application remittable to the Commission along with the correct lockbox).

and fee payment systems to send manual payments to P.O. Box 979089 at U.S. Bank in St. Louis, Missouri. In recent years, there have been a decreasing number of lockbox filers, and it now is rare that the Commission receives a lockbox payment.

6. The Commission has begun to reduce its reliance on P.O. Boxes for the collection of fees, instead encouraging the use of electronic payment systems for all application and regulatory fees and closing certain lockboxes. We find that electronic payment of fees for the services processed by MB reduces the agency's expenditures (including eliminating the annual fee for the bank's services) and the cost of manually processing each transaction, with little or no inconvenience to the Commission's regulatees, applicants, and the public.

7. As part of this effort, we are now closing P.O. Box 979089 and modifying the relevant rule provision that requires payment of fees via the closed P.O. Box. The rules changes are contained in the Appendix of the Order and the Final Rules of this document. We make these changes without notice and comment because they are rules of agency organization, procedure, or practice exempt from the general notice-and-comment requirements of the Administrative Procedure Act, see 5 U.S.C. 553(b)(A).

8. *Implementation.* As a temporary transition measure, for 90 days after publication of this document in the **Federal Register**, U.S. Bank will continue to process payments to P.O. Box 979089. After that date, payments for these MB services must be made in accordance with the procedures set forth on the Commission's website, <https://www.fcc.gov/licensing-databases/fees/application-processing-fees> (Media Bureau Fee Filing Guide). For now, such payments will be made through the Fee Filer Online System (Fee Filer), accessible at <https://www.fcc.gov/licensing-databases/fees/fee-filer>. As we assess and implement U.S. Treasury initiatives toward an all-electronic payment system, we may transition to other secure payment systems with appropriate public notice and guidance.

**III. Ordering Clauses**

9. *Accordingly, it is ordered*, that pursuant to sections 4(i), 4(j), 158, 208, and 224 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 158, 208, and 224, the Order is hereby *adopted* and the rules set forth in the Appendix of the Order are hereby *amended* effective March 26, 2021.