

FREQUENTLY ASKED QUESTIONS

FINAL RULE ON NATIONAL SERVICE CRIMINAL HISTORY CHECKS

Please note: The Edward M. Kennedy Serve America Act passed on April 21, 2009, extends the requirements for criminal history checks to many additional national service program participants and employees, not just those serving vulnerable populations. The Act expands coverage to all individuals receiving a “living allowance, stipend, national service education award, or salary through a program receiving assistance under the national service laws.” The Act also adds a conviction for “murder”, as defined by federal law, as an offense that automatically disqualifies an individual from serving with, or working as a grant-funded employee for, a Corporation grantee. These new requirements apply as of October 1, 2009. The Corporation issued interim regulations that cover this requirement on September 10, 2009 (see 45 CFR §2522.205-207 and §2540.200-207). These FAQs will be updated to reflect these extended requirements as we develop policies. In the interim, please be aware that if your program provides a living allowance, stipend, national service education award, or salary to an individual with funds provided in your CNCS grant, you should be following this guidance. This includes AmeriCorps, Senior Corps and Learn and Serve grantees for positions as described above.

1.0 BACKGROUND

1.1 What is rulemaking?

Rulemaking is the process by which a Federal agency creates and updates the regulations that will govern the implementation of programs managed by that agency. Rulemaking is a way to address policy issues as well as to provide continuity for program operations. In general, the rulemaking process involves proposing rules, receiving public comment, and publishing final rules. In this rulemaking process, the Corporation took the extra step of inviting public input before drafting the proposed rule.

1.2 What were the steps in this rulemaking process?

There were several steps in the rulemaking process that provided the public with significant opportunities for input. Although not required by law, the Corporation sought preliminary informal public input in advance of issuing a Notice of Proposed Rulemaking (NPRM). The Corporation closely considered this input in drafting the proposed rule. The NPRM was published in the Federal Register, and the public had 60 days to provide comments. At the conclusion of the comment period, the Corporation considered the comments and published a final rule in the Federal Register, together with a summary of, and response to, the comments received during the comment period.

1.3 When does the final rule take effect?

The rule will take effect no sooner than November 23, 2007, which is 90 days after publication of the final rule in the Federal Register.

1.4 Will you have any additional training and technical assistance resources available to help grantees follow the new rule?

Yes. The Corporation intends to provide training and technical assistance to grantees to assist them. We will continue to consult with grantees to determine the most useful and appropriate training and technical assistance on this and other topics, including seeking additional input as we consider including other disqualifying factors in the future.

2.0 SCOPE OF FINAL RULE

2.1 To whom does this rule apply?

This final rule applies to all programs that provide a living allowance, stipend, national service education award, or salary to one or more individuals funded by a CNCS grant.

2.2 I read in the *definitions* section of the final rule that *recurring access* means on more than one occasion. Does this mean access to the same individual on more than one occasion?

The recurring access definition no longer has any significance with respect to the identification of covered individuals. See 2.1 above.

3.0 CONTENT OF FINAL RULE

3.1 What is a National Service Criminal History Check?

A National Service Criminal History Check consists of (1) a State criminal registry search, which involves a search of State law enforcement and court records (by name and/or fingerprint) to determine whether an applicant has a criminal history, and (2) a National Sex Offender Public Registry (NSOPR) check, which consists of individuals that are required by their States to register as sex offenders.

3.2 Why is the Corporation requiring the covered programs to conduct State criminal registry and NSOPR checks?

By establishing baseline requirements to document State criminal registry and NSOPR checks for grant funded positions, our goal is to make national and community service programs safer for all involved.

3.3 How does the proposed rule define “children”?

Children are individuals who are 17 years of age or younger.

3.4 What is a National Sex Offender Public Registry check?

This is a check of the National Sex Offender Registry (NSOPR), a no-cost Internet site operated by the U.S. Department of Justice, which is a compilation of the sex offender registries of all 50 States, as well as Guam, Puerto Rico, and the District of Columbia.

3.5 Who is subject to an NSOPR check?

Because an individual who is registered, or required to be registered, on a sex offender registry is automatically disqualified from serving, NSOPR checks must be conducted on all participants and grant-funded employees who occupy covered positions.

4.0 REQUIRED CHECKS

4.1 What checks does the final rule require for covered positions?

Unless approved otherwise, either you or your designee must conduct (1) a criminal history records search (by name or fingerprint) of the State criminal registry for the State in which your program operates and the State in which the applicant is residing at the time of application; and (2) a National Sex Offender Public Registry search.

4.2 How do I check a state’s criminal registry?

All states, including the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have state criminal registries that you can contact. The addresses and phone numbers for these state registries can be found on pages 108-112 in the *Staff Screening Tool Kit*, which is located on-line at www.nationalservice.gov/screeningtoolkit.

4.3 Does an FBI check satisfy the State criminal registry check requirement?

An organization that conducts either an FBI fingerprint check or a comprehensive 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 where the applicant physically resides, will be deemed to have satisfied the rule's state criminal registry record check requirement, but must still conduct a search of the NSOPR.

4.4 What if my State has a separate criminal history requirement that is similar to the Corporation's requirements?

The Corporation is prepared to approve requests for alternative search procedures where a duly-authorized State or local body has established substantially equivalent requirements. For example, 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 most likely satisfy the criteria for an approved alternative search protocol.

4.5 Why doesn't the final rule require an FBI Check?

At this time, not every grantee has access to the FBI check, so we could not require it of every grantee.

4.6 How do I determine if an applicant is registered on a state sex offender registry?

All 50 states, Guam, and Puerto Rico participate in the National Sex Offender Public Registry. It can be accessed at no cost at www.nsopr.gov.

4.7 Is a check of just my State's sex offender registry sufficient to satisfy the NSOPR search requirement?

No. You must check the NSOPR, which is a national search. The goal is to check as many States as possible and the NSOPR is the most effective method of achieving this goal.

4.8 Isn't the sex offender registry requirement duplicative of state criminal registry requirement?

Not necessarily. A person subject to a sex offender registration requirement in State A could move to State B and register in State B's sex offender registry, but not be listed in State B's criminal history registry.

4.9 If the FBI check captures crimes that are also identified on the sex offender registry, why is the Corporation requiring separate checks of these data bases?

The National Sex Offender Public Registry produces immediate results while it may take several weeks or more to receive the FBI results. In addition, it is also possible that an individual could be registered as a sex offender on the NSOPR, but is not in the FBI's fingerprint database.

4.10 What do I do if I find an individual listed on the NSOPR who has the same name as a program applicant?

In these situations, it is necessary that you make a more in-depth inquiry into the facts to determine whether the individual who appears on the NSOPR is your applicant or is someone with the same name.

4.11 How do I document an NSOPR check?

You must either print the page on the screen that indicates the results of the NSOPR search, or prepare a written memorandum for the file detailing the steps that you took to conduct the search and the results of the search.

4.12 What steps should I take if I discover that several States’ sex offender registry sites are inoperative when I am conducting the NSOPR check on an applicant?

You must document in writing that you conducted the search and further indicate the States whose sites were inoperative. If any of these States is either the State in which your program is operating or one where the applicant resides, you must continue the search in order to ensure that the applicant is not listed on those States’ registries. If the inoperative sites include other States, merely document the names of these States for the file, as this would satisfy the rule’s requirement. However, as a best practice, it would be prudent to re-check the NSOPR at a later date in order to rule out the possibility that the applicant may be registered in that State.

4.13 What if a program neglects to follow the required procedures?

In addition to incurring potential liability, Corporation grantees who do not comply with the criminal registry check and NSOPR requirements risk loss of Corporation funding. Further, if a grantee enrolls or hires an individual who is disqualified as a sex offender, the Corporation may disallow costs attributable to the ineligible individual.

5.0 PROTECT ACT PILOT PROGRAM

5.1 I have heard that some non-profit organizations that work with children might be eligible to obtain FBI fingerprint checks for \$18. Is that true?

Through a Congressionally authorized pilot program with the National Center for Missing and Exploited Children (NCMEC), non-profit organizations that work with children may be eligible to obtain FBI fingerprint checks for their volunteers at a cost of \$18. NCMEC can answer specific questions concerning this program. The website address is www.missingkids.com. You should be aware that NCMEC is not currently accepting any new organizations, but you may consult with them by contacting Dawn Nelson at 1-877- 446-2632, ext. 6440.

5.2 Why doesn’t the Corporation procure a national criminal check company to provide a standardized service to all grantees?

The variation in criminal codes and criminal history procedures among States means that, for now, a uniform national approach does not appear feasible. However, we are monitoring the results of the PROTECT Act’s (Public Law 108-21) pilot program to see if Congress will act to make a national search of FBI information even more accessible nationwide.

6.0 COVERED POSITIONS

6.1 How do we know if program staff members are subject to the criminal registry check and NSOPR requirement?

The requirement covers program staff whose salaries are supported by the grant either as Federal or grantee share. You should review your program’s budget to determine whether salaries to any such staff are supported under the grant.

6.2 Do we have to conduct a criminal registry check and NSOPR check every year for each Senior Companion or Foster Grandparent?

State criminal registry checks are required only once for any individual who begins serving as a Senior Companion or Foster Grandparent after the rule’s effective date. As discussed below, NSOPR checks are, however, required on all Senior Companions, Foster Grandparents, and applicable staff who are currently serving, as well on all future Senior Companions, Foster Grandparents, and affected grant-funded staff. Programs will have 90 days to conduct NSOPR checks on current volunteers. Programs may choose to perform additional checks, but this is not a requirement under the final rule.

6.3 So the final rule doesn't require us to conduct a criminal registry check for a Senior Companion or Foster Grandparent who is already serving in the program?

That's correct. The requirement in the final rule is only for an individual who applies to begin serving in your SCP or FGP program after the proposed rule's effective date. However, your program may choose to conduct criminal history checks on other non-covered individuals as an effective risk management tool, and may include this as a program operating cost (volunteer support expense) in your grant budget proposal. In addition, if a Foster Grandparent or Senior Companion who is serving at the time the rule becomes effective leaves a program and begins service with another program, the new program must conduct both a state criminal registry and SOPR check on the individual. Finally, while you are not required to conduct a criminal registry check for those already serving, you are required to conduct an NSOPR check on all Senior Companions, Foster Grandparents, and applicable grant-funded employees, including those who are currently serving.

6.4 When does a program have to do a second check on a second-term AmeriCorps member?

A program must conduct a criminal registry check and NSOPR check the first time an individual applies to a covered position in an AmeriCorps State and National program, but a second check is not required for an individual who is serving a consecutive term of service within the same program. 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. However, if an individual applies for a second (or later) term of service with a different program, a new check is required. In addition, while a state criminal registry check is not required for an AmeriCorps participant who is serving at the time the rule becomes effective, a state criminal registry check will be required if the participant desires to serve a second term with a different, or the same, program.

6.5 So the 30-day break in service requirement doesn't apply to FGP and SCP volunteers?

That's correct. It only applies to AmeriCorps participants who are serving in covered positions. However, a FGP and SCP volunteer who is serving at the time of the rule's effective date (11/23/07), while not subject to a State criminal history check as long as the volunteer is serving with his or her current program, would be subject to this check if the volunteer leaves that program and enrolls in another, notwithstanding the length of the time in-between the two periods of service.

6.6 Does administrative leave, sick leave, or not actively working with a client constitute a break in service for Senior Corps volunteers?

No; a break in service means that a volunteer is no longer enrolled in a program. If the volunteer subsequently re-enrolls in that same program, or enrolls in a different program, all applicable criminal history checks must be conducted.

6.7 Why doesn't the final rule cover volunteers who are recruited by the Corporation's programs?

The rule is intended to establish a baseline screening process for individuals who have a substantial and individually identifiable connection to the Corporation. While Senior Companions, Foster Companions, and AmeriCorps State/National members meet this criterion, unaffiliated volunteers do not. Grantees remain subject to State law duties of care in supervising unaffiliated volunteers, but there is no separate Corporation grant requirement detailing any particular protocol.

6.8 Why doesn't the final rule cover VISTA and the NCCC?

VISTA and the NCCC are both Federally-operated programs, where the selection of participants is made by Federal personnel and the internal screening procedures are conducted through an arrangement with the U.S. Office of Personnel Management.

6.9 Do programs have to conduct criminal history checks on individuals who are living outside of the United States at the time they apply for a covered position?

The requirement covers only State of origin and State where the program operates. As a risk management matter, a program should exercise due care in selecting an individual for a covered position. While not required by the final rule, a program should consider using commercial vendors that have the capability of obtaining a criminal history check in an applicant’s country of origin. In addition, programs must also conduct an NSOPR check on these individuals.

7.0 DETERMINING AN INDIVIDUAL’S IDENTITY AND SUITABILITY

7.1 How do I verify the identity of an applicant?

You must require the applicant to produce a government-issued photo identification card.

7.2 What types of documents are considered to be government-issued photo identification cards?

Examples of government-issued photo identification cards include, but are not limited to, state drivers’ licenses, non-driver photo IDs issued by states’ Department of Motor Vehicles, and federally-issued photo IDs, including official passports.

7.3 What if a criminal registry check discloses a prior conviction?

The program should give the applicant an opportunity to correct any inaccurate information, and then make a judgment about whether to accept the individual.

7.4 Are the criminal registry and NSOPR checks the only applicant screening mechanisms that my program should use to determine an applicant’s suitability?

These checks are only part of the overall applicant screening process, which should also include a comprehensive interview and personal reference checks. The final rule, however, does not cover these additional measures.

7.5 Why is the Corporation disqualifying sex offenders but not those convicted of other crimes?

Disqualifying registered sex offenders takes advantage of the newly-established national registry of sex offenders, accessible on-line 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. While the Corporation will consider adding specific disqualifying offenses in the future, for now, programs may exercise their own judgment in deciding whether, and to what extent, to disqualify applicants on the basis of additional offenses.

7.6 What is to prevent someone convicted of a serious crime from serving in a program?

The selection of individuals to serve is the responsibility of each grantee. Establishing a baseline criminal history check will help to ensure that each grantee has sufficient information in making selection decisions. Program officials may establish their own selection criteria in determining an applicant’s eligibility, and in those situations where an ex-offender applies, officials may take into consideration the type of service that is to be conducted, the specific crime committed by an applicant, and the various supervisory levels that exist to manage risks associated with an ex-offender’s participation in the program.

7.7 Does the rule punish those on the basis of an arrest?

Only those convicted of certain sex offenses are subject to registration as sex offenders, so the rule does not disqualify anyone on the basis of an arrest. The preamble also notes that in certain states there are legal constraints on how an arrest record may be considered.

7.8 Why doesn't the rule bar someone from serving until the criminal registry results are received?

The rule does bar selection until an individual has been checked against a sex offender registry. An individual listed on a sex offender registry is not eligible to serve in a covered position. Because state criminal registry checks results can sometimes take weeks or more to complete, the rule does not prohibit an individual from serving while that check is pending. However, the individual may not have unsupervised access to children, persons age 60 and older, or individuals with disabilities while waiting for the results of the state criminal registry check. Further, the individual (including grant-funded staff) must also be physically accompanied at all times by either a participant or staff member who has been cleared for such access.

7.9 What if an applicant refuses to consent to a state criminal registry check?

The applicant will not be eligible to serve in a Corporation-funded position that requires a criminal history check unless he or she consents. No consent is needed to search the NSOPR because this is a public site.

7.10 If we de-select an individual for an AmeriCorps position based on criminal history, can we refill that position?

By policy, eligible programs that have fully enrolled their awarded member slots are allowed to replace any member who terminates service before completing 30 percent of his or her term. A fully-enrolled grantee that seeks to re-fill a position after the 30 percent cut-off may seek an exception by writing to the Corporation's Office of Grants Management.

8.0 IMPLEMENTATION CHALLENGES

8.1 The cost of conducting background checks can be a financial burden for a program. Can the Corporation pay for these checks?

The Corporation has concluded that the cost of conducting the criminal registry check is a reasonable and necessary program operating cost (called a "volunteer support expense" in Senior Corps programs) under the terms of the grant.

8.2 Our Senior Corps sponsoring organization has only a few staff and relies totally on the volunteer stations to screen and select the senior volunteers. Why does the requirement fall on us rather than the volunteer station?

Our grant is to the sponsoring organization, and the sponsoring organization is responsible for compliance with the terms and conditions of the grants. You may, by agreement, assign the task of conducting and documenting the criminal registry and NSOPR checks to your volunteer stations, but doing so does not eliminate your responsibilities as a grantee.

8.3 Why is the Corporation requiring something that may make it harder to recruit senior volunteers?

Screening and supervision of volunteers, including senior volunteers, is an integral part of operating a service program. The baseline screening required in the rule does not involve any additional burden on the participants, other than giving their names and other personally-identifiable information and consenting to criminal registry checks.

8.4 My program works with a school that conducts criminal history checks on its employees and volunteers (including national service participants), but doesn't permit outside entities to review the actual results of the criminal history check. How can we satisfy the documentation requirements of the final rule if we are not permitted to review these results?

Programs may use third parties to conduct the required criminal history checks as long as the procedures satisfy the requirements of the rule. Consequently, programs should take necessary steps to ensure that the procedures used by the school comply with the Corporation's requirements. In addition, programs should obtain the applicant's written permission to review the criminal history results, as well as ensuring

(in the written agreement with the school) that the program (and CNCS oversight officials) have the authority to obtain access to these results, when appropriate.

8.5 Does the final rule require my program to keep the actual results of the criminal history check?

Yes; unless prohibited or limited by State law (see 8.6 below), you must maintain the results in a secure location.

8.6 Some organizations (e.g. NCMEC – see 5.1 above) only provide a general finding (green, yellow, or red) and not the actual results of the criminal history check. How do I properly document the “results” of the check if I only receive these general findings?

In the case of NCMEC, each color is based on a list of published criteria. Therefore, you should first ensure that the criteria meet the rule’s requirements. Specifically, you should ensure that an individual who is required to be registered on a State sex offender registry is automatically determined to be a “red”, and consequently, not eligible to serve. You may rely on the organization’s judgment in the other, non-disqualifying areas as it is a matter that is within your program’s discretion. Once you have established these criteria, you may consider the general finding as the “results” and maintain these in a secure location as you would the results themselves.

8.7 What if my State either doesn’t allow my program to maintain the results of the actual criminal registry or NSOPR check or limits the amount of time that the results can be maintained?

The final rule requires you to retain the criminal registry or NSOPR results, unless your state law prohibits or limits you in retaining this written documentation.

You should comply with State law and document in writing that you or your designee considered the results of the criminal registry and NSOPR check in selecting the applicant.

8.8 What are some of the practical implications of maintaining the results of the criminal registry check in the member’s file?

Some information that is kept in the member file is also accessible to individuals who don’t have an official need to view this personal type of information. The information, as permitted by state law, should be maintained in a secure location where it can be viewed only by individuals who have an official need to review the information (much in the same manner as personal medical information is protected).

8.9 The preamble states that programs may not charge an applicant for the cost of conducting the State criminal registry check. Does this mean that we can’t charge an applicant and later reimburse him or her for this cost?

Generally, except under very limited circumstances (for example, where programs have traditionally charged all volunteers for this cost) programs may not charge applicants for the cost of conducting criminal registry checks. However, programs are permitted to initially charge the applicant if the program eventually reimburses the applicant for the cost of conducting the check, thus resulting in no actual cost to the applicant.