



**America's Service Commissions  
National Service Criminal History Check  
Public Comment**

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**Overview and Background**

Thank you for the opportunity to provide comments on the proposed rule implementing changes to the Corporation for National and Community Service's ("CNCS") National Service Criminal History Check ("NSCHC") requirements.

This comment is submitted by the Association of State Service Commissions (aka America's Service Commissions), an association of the 52 state service commissions which currently administer more than 80% of all AmeriCorps State and National funding. State service commissions are governor-led organizations in 49 states, the District of Columbia, Guam and Puerto Rico, statutory partners of CNCS, and integral stakeholder in the successful delivery of national service resources.

State service commissions have a direct interest in the smooth administration of NSCHC requirements both as grantees and as pass-through entities. CNCS has taken extreme measures over the past ten years, above and beyond its authority, to enforce NSCHC compliance, resulting in significant fines levied against grantees and subgrantees.<sup>1</sup>

In imposing NSCHC obligations far in excess of those set forth in the National and Community Service Act of 1990 as amended by the Serve America Act of 2009, CNCS has created a perception of widespread noncompliance. It has then continuously issued guidance to correct this false problem, creating new unworkable administrative obligations that are not based on the underlying statutory requirements. These new requirements in turn lead to more findings, and so on we go.

In actuality, there are very few instances of noncompliance with statutory NSCHC requirements among the approximately 80,000 AmeriCorps participants each year or the staff

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<sup>1</sup> Hereinafter, grantees and subgrantees, also termed "recipients" and "subrecipients" are generally referred to collectively as "grantees."



on the grants. Our comments object to promulgation of yet further unworkable administrative requirements and propose productive NSCHC solutions that will further statutory public service goals without unduly burdening the AmeriCorps community.

America's Service Commissions has significant concerns with the proposed rule. Most notably, it:

- Prioritizes ease of CNCS program administration over the safety of vulnerable populations;
- Fails to address the underlying issues that lead to CNCS's perception of NSCHC noncompliance in the AmeriCorps system;
- Creates undue burden for AmeriCorps grantees and subgrantees; and
- Deviates from the NSCHC framework established by Congress.

Our comments address substantive ongoing concerns with CNCS's administration of the NSCHC regime, concerns with the 2020 NSCHC proposed rule, positive elements of the 2020 NSCHC proposed rule, proposed systemic improvements, and procedural rulemaking concerns regarding the 2020 NSCHC proposed rule. Finally, a table presenting our comments in the form of brief section-by-section statements is attached as Appendix A.

### **Substantive Ongoing Concerns with CNCS's Administration of the NSCHC Regime**

The current proposed rule is issued against the backdrop of a decade of unworkable CNCS administrative requirements and aggressive enforcement, rooted at best only loosely in the underlying statutory requirements of 42 U.S.C. § 12645g. This section of our comments reiterates key aspects of that background and relevant longstanding concerns.

We believe it is important to first define the difference between statutory "eligibility" and CNCS's construct of "compliance," as it is not unusual for CNCS and the CNCS Office of Inspector General ("OIG"), to conflate the two as the same. The National and Community Service Act of 1990, as amended by the Serve America Act of 2009, establishes the NSCHC standards and requirements. The law unambiguously states what types of individuals are ineligible to work or serve in CNCS programs, excluding individuals under only very limited circumstances:



an individual shall be ineligible to serve in a position described under subsection (a) if such individual— (1) refuses to consent to the criminal history check described in subsection (b); (2) makes a false statement in connection with such criminal history check; (3) is registered, or is required to be registered, on a State sex offender registry or the National Sex Offender Registry established under the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901 et seq.); or (4) has been convicted of murder, as described in section 1111 of title 18, United States Code.<sup>2</sup>

To confirm eligibility, the statute provides specific requirements for the types of checks that are required, explicitly setting forth different requirements for individuals who will have access to vulnerable populations and those who will not. Specifically, the statute instructs that for all covered individuals, the following must be accomplished:

(1) a name-based search of the National Sex Offender Registry established under the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901 et seq.); and (2)(A) a search of the State criminal registry or repository in the State in which the program is operating and the State in which the individual resides at the time of application; **or** (B) submitting fingerprints to the Federal Bureau of Investigation for a national criminal history background check.<sup>3</sup>

The statute then sets forth a “special rule for individuals working with vulnerable populations,” requiring all three types of checks be accomplished:

(A) a name-based search of the National Sex Offender Registry established under the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901 et seq.); (B) a search of the State criminal registry or repository in the State in which the program is operating and the State in which the individual resides at the time of application; **and** (C) submitting fingerprints to the Federal Bureau of Investigation for a national criminal history background check.<sup>4</sup>

It is not difficult to determine *eligibility* as defined by Congress under the statute. However, CNCS has made it extremely challenging to meet its *compliance* standards set within a combination of current rules, policy, guidance, and FAQs. To understand what constitutes a

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<sup>2</sup> 42 U.S.C. § 12645g(c).

<sup>3</sup> 42 U.S.C. § 12645g(b) (emphasis added).

<sup>4</sup> 42 U.S.C. § 12645g(d) (emphasis added).



“compliant” NSCHC, a grantee of CNCS funds must read more than 98 pages of requirements found within 11 separate documents across multiple different webpages on the CNCS website.<sup>5</sup>

CNCS’s strict enforcement regime has evolved over time since promulgation of its original NSCHC regulations in 2012,<sup>6</sup> with almost all of the elements of the compliance and enforcement regime being imposed through guidance documents outside the notice and comment rulemaking process. Not only has this practice failed to comply with the well-established standards of the Administrative Procedure Act,<sup>7</sup> it contravenes a direct mandate by Congress to CNCS, appearing annually in CNCS’s appropriation, to “make any significant changes to program requirements, service delivery or policy only through public notice and comment rulemaking.”<sup>8</sup>

Through June 2019, CNCS imposed an enforcement regime that essentially levied fines on grantees<sup>9</sup> for instances of perceived noncompliance. This enforcement regime has resulted in hundreds of thousands of dollars being sent to CNCS, even when the vast majority of individuals with respect to which NSCHC compliance failure fines were levied were *eligible* to serve under the standards set by Congress.

In 2019, CNCS issued a new “Enforcement Guide” (the “Guide”) and supplemental “Procedural Guidance for Enforcement” changing the monetary consequences for NSCHC noncompliance.<sup>10</sup> CNCS moved from its fine-based process (something it had no authority to

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<sup>5</sup> See Corporation for National and Community Service (“CNCS”), Criminal History Check Resources, *available at*: <https://www.nationalservice.gov/resources/criminal-history-check>.

<sup>6</sup> 77 Fed. Reg. 60922 (Oct. 5, 2012).

<sup>7</sup> 5 U.S.C. § 553.

<sup>8</sup> See, e.g., Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. 115-245, Div. B., Tit. IV, § 401 (Sep. 28, 2018). Such practice is now further in contravention of Executive Orders 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (Oct. 9, 2019) and 13892, Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication (Oct. 9, 2019) (directed at eliminating and clearly labelling non-binding guidance that might otherwise be used to levy “noncompliance” fines such as those historically imposed by CNCS under its NSCHC guidance).

<sup>9</sup> CNCS, NATIONAL SERVICE CRIMINAL HISTORY CHECK ENFORCEMENT GUIDE (Apr. 1, 2017) *available at*: [https://www.nationalservice.gov/sites/default/files/documents/Enforcement%20Guide%20for%20Staff%20and%20Grantees%203.0\\_508\\_1.pdf](https://www.nationalservice.gov/sites/default/files/documents/Enforcement%20Guide%20for%20Staff%20and%20Grantees%203.0_508_1.pdf).

<sup>10</sup> CNCS, NATIONAL SERVICE CRIMINAL HISTORY CHECK GUIDANCE TO ENFORCEMENT ACTION (Jul. 1, 2019) and NSCHC Enforcement Procedural Guidance (Jul. 1, 2019), *available at*: <https://www.nationalservice.gov/CHCEnforcement>.



impose) to a cost-based disallowance process. The Guide has substantial problems – which would have been identified had the Guide been issued through rulemaking – including, but not limited, to (i) the imposition of cost disallowances for alleged minor administrative failures, and (ii) the imposition of cost disallowances for noncompliance on fixed amount grants. Exacerbating the complications caused by the Guide, CNCS mandates that state service commissions and other pass-through entities apply it to their subrecipients and participate in imposing the questionable disallowances. It is one problem that CNCS exceeds its statutory authority to impose penalties upon AmeriCorps programs that are compliant with their statutory obligations – it is quite another that CNCS commandeers state service commissions to do the same.

Based upon our direct experience and feedback from state service commissions throughout the country, we can share that grantees and subgrantees of CNCS have no problem meeting the eligibility standards and NSCHC requirements set forth by Congress at 42 U.S.C. § 12645g.

While CNCS has not shared the data,<sup>11</sup> in soliciting regular feedback from our membership, we can anecdotally confirm that we are aware of only a handful of instances of NSCHC member ineligibility that has ever occurred among the more than 80,000 AmeriCorps applicants each year. State service commissions do extensive NSCHC monitoring of their subrecipients and there is simply no “ineligible member” problem to solve. Rather, CNCS appears to have created a perception, internally and perhaps externally, of widespread noncompliance by: (i) establishing unworkable administrative obligations well beyond the requirements of the statute, (ii) imposing them through a confusing labyrinth of unauthorized guidance, then (iii) aggressively asserting compliance findings for failure to comply with the unnecessary and unworkable “rules.”

Demonstrating the challenges state service commissions and AmeriCorps programs have faced over the past ten years under CNCS’s strict enforcement regime is the fact that the vast majority of asserted instances of noncompliance relate to grantees conducting “late” checks – often on the same day an individual commences service or soon after, with the individual having no access to vulnerable populations. In most cases, AmeriCorps members spend the first several days of service in training and orientation. Yet, under current standards, permitting an individual to commence service in a training status, then receiving the completed check for that individual a day later (while this individual remains in a training status), would be considered noncompliant. As a result, CNCS would impose (or expect a

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<sup>11</sup> We encourage CNCS to share actual noncompliance and eligibility-based data in this rulemaking process to facilitate an informed discussion of this important proposed rule. In this regard, we note that OIRA review of “significant regulatory actions” and RFA review provide a means for such exchange of information and ideas.



state service commission or other pass-through entity to impose) a disallowance even where the completed check shows the individual fully eligible to serve with no criminal history whatsoever.

Finally, CNCS has asserted (again via a guidance document)<sup>12</sup> that instances of perceived NSCHC “noncompliance” will be considered the basis of an “improper payment” under the Improper Payments Elimination and Recovery Act (“IPERA”).<sup>13</sup> Improper payments under IPERA are limited to payments made in an incorrect amount, payments that should not have been made at all, or payments made to an ineligible recipient or for an ineligible purpose.<sup>14</sup> As stated above, our experience, and feedback from state service commissions throughout the country, is that the majority of instances of NSCHC noncompliance asserted by CNCS in the context of IPERA are for payments related to individuals who are fundamentally eligible to serve, *i.e.* fundamentally eligible/allowable costs, but for whom a grantee failed to meet the administrative requirements of CNCS’s complex, guidance-driven implementation regime – most commonly, alleged timing or documentation failures.

### **Concerns with the 2020 Proposed NSCHC Rule**

America’s Service Commissions has carefully reviewed the proposed rule in coordination with its membership and has a number of concerns. The current proposed rule is, in many ways, a continuation of CNCS’s tendency to make NSCHC requirements ever more challenging and burdensome for grantees, going beyond statutory requirements from an enforcement perspective, yet failing to effectively address (and, in fact, in some ways impeding) the underlying public safety goals. Our specific concerns are:

- The propose rule calls for a three-part check for all covered individuals at § 2540.204(a). CNCS does not have the authority to impose the fingerprint-based FBI check for all covered individuals. The statute only requires a three-part check for individuals working

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<sup>12</sup> CNCS, NATIONAL SERVICE CRIMINAL HISTORY CHECK ENFORCEMENT GUIDE at Appendix C (Apr. 1, 2017) available at:

[https://www.nationalservice.gov/sites/default/files/documents/Enforcement%20Guide%20for%20Staff%20and%20Grantees%203.0\\_508\\_1.pdf](https://www.nationalservice.gov/sites/default/files/documents/Enforcement%20Guide%20for%20Staff%20and%20Grantees%203.0_508_1.pdf).

<sup>13</sup> IPERA, also referred to as IPERIA for a subsequent statute that amended IPERA, refers in a more general sense to a series of statutes implemented in coordination fashion at 31 U.S.C. § 3321 note: the Improper Payments Elimination and Recovery Act of 2002, Improper Payments Elimination and Recovery Act of 2010, and Improper Payments Elimination and Recovery Improvement Act of 2012.

<sup>14</sup> Improper Payments Elimination and Recovery Act of 2002, Pub. L. 107-300, § 2(g) (Nov. 26, 2002).



or serving with vulnerable populations. In mandating more than the unambiguous language of statute – in fact, reading the two-part check out of the statute – CNCS has exceeded its authority. It is well established that where Congress has unambiguously spoken, a federal agency cannot deviate by regulation from the statutory scheme that Congress has set forth.<sup>15</sup> Stated another way, CNCS cannot add regulatory requirements that Congress expressly declined to apply, namely requiring three-step checks for individuals for whom Congress expressly stated two-step checks may be accomplished.<sup>16</sup>

- The proposed rule mandates, at § 2540.204(a), use of CNCS’s two preferred vendors, currently Fieldprint and Truescreen (owned by the same parent company Vertical Screen), by all grantees. This creates numerous concerns:
  - It is inconsistent with requirements set forth in the Office of Management and Budget (“OMB”)-mandated Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (“Uniform Guidance”) for grantees to competitively award contracts in excess of the micro-purchase threshold.<sup>17</sup> CNCS cannot “impose additional or inconsistent requirements”<sup>18</sup> except through an “exception” approved by OMB.<sup>19</sup>

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<sup>15</sup> *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290, 296 (2013) (“First, applying the ordinary tools of statutory construction, the court must determine ‘whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court *as well as the agency*, must give effect to the unambiguously expressed intent of Congress.’”) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)) (emphasis added)).

<sup>16</sup> *Cf. Ragsdale v. Wolverine World Wide, Inc.* 535 U.S. 81 (2002) (prohibiting the enforcement of certain employment regulations that were contrary to the statutory regime established by Congress); *Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134 (D.C. Cir. 2006) (prohibiting the regulation of gaming activities beyond the bounds of the authority set forth in the regulatory regime established by Congress); *Merck & Co., Inc. v. United States Department of Health and Human Services*, 385 F. Supp. 3d 81 (D.D.C. 2019) (prohibiting HHS from regulating disclosure of certain drug pricing information where the proposed regulations were beyond the authority granted by Congress on the specific subject matter).

<sup>17</sup> 2 C.F.R. §§ 200.318-200.320 (establishing mandatory competitive procedures for federally funded procurements).

<sup>18</sup> 2 C.F.R. §§ 200.100(a)(2) and 200.102.

<sup>19</sup> Though not a direct concern of the grantees, we note that CNCS’s mandate to use exclusively these two vendors appears problematic from the perspective of federal competitive procurement laws directly applicable to CNCS. Specifically, it appears from the solicitation CNCS used in 2017 through 2018 to engage Truescreen (entitled “State Criminal Checks & Nationwide Sex Offender Registry Checks” and available in FedBizOpps under CNCS entry No. CNSHQ18R0001 (Nov. 16, 2017)), that offerors were specifically informed that there was no guarantee that all grantees would be required to use the service. With this new regulatory mandate, the scope of that contract has been expanded enormously, leading to a windfall to Truescreen and circumstances that seem to necessitate a renewed competition under the Competition in Contracting Act. Certainly, grantees that will be forced to pay the prices



- It is likely to place many public entities in a position of having to sign Truescreen and Fieldprint contracts that contain indemnification<sup>20</sup> and choice of law<sup>21</sup> provisions that are legally problematic under the local jurisdiction's applicable laws. This mandate creates significant and unnecessary legal conflicts that further implicate federalism concerns. Certainly, Congress did not authorize CNCS to require, as a condition of their receipt of AmeriCorps funding, that state and local government grantees waive legal prohibitions against entering into contracts with such terms.
- In many cases, by using Truescreen, the mandated vendor for state checks, grantees and subgrantees based in state government would be paying to access their own information. This requirement is illogical and wasteful, as well as seemingly inconsistent with the principle that federal grant funds should only be expended on "reasonable" costs.<sup>22</sup>
- As a practical matter, Truescreen does not have all states reporting to its system, meaning that in certain cases grantees are only receiving the National Sex Offender Public Website ("NSOPW") from Truescreen. Mandating use of Truescreen will therefore force current grantees to use a process that is less comprehensive than processes they are currently using to conduct their checks, and, in many cases, will require that they pay more money for this less effective process.<sup>23</sup>
- AmeriCorps programs are authorized to implement more robust suitability criteria than the baseline eligibility requirements for AmeriCorps participation set forth under the statute. When working with vulnerable populations, such additional criteria are particularly commonplace and sometimes required under local laws. When grantees elect to do so, they often incorporate the additional criteria into the

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negotiated by CNCS would want to benefit from the fact that unit prices would now almost certainly be lower if CNCS were to obtain proper competition for a service for which CNCS is guaranteeing an enormous customer base.

<sup>20</sup> For example, we are aware that Truescreen contracts contain a broad indemnification clause.

<sup>21</sup> For example, we are aware that Truescreen contracts contain choice of law provisions requiring application of Pennsylvania law.

<sup>22</sup> 2 C.F.R. §§ 200.403 and 200.404.

<sup>23</sup> CNCS has the ability to waive accomplishment of criminal history checks in specific states, but long declined to do so until engaging its preferred vendors. As a result, programs were forced to go through challenging steps to secure checks under threat of CNCS fine. Ironically, in engaging its own vendors and encouraging (now attempting to mandate) their use, CNCS has waiving those state checks to facilitate the use of those vendors. This inconsistency is frustrating to grantees and subgrantees that have long been subjected to aggressive enforcement measures.



criminal history check process they use for basic NSCHC compliance. In mandating two specific vendors, CNCS will force those entities to either (i) negotiate special terms with the specified vendors in a noncompetitive pricing environment (*i.e.*, with no bargaining power – assuming the vendors would even be willing to apply the additional criteria the grantee desires) or (ii) engage the prescribed vendors for one set of checks *and* incur duplicative costs in using an alternate vendor or process for the additional suitability requirements. In this regard, we note that, while criminal history checks are an allowable cost, substantial cost increases will still be borne by the grantees as most AmeriCorps awards are subject to “member service year” (“MSY”) cost caps and strict cost sharing requirements.

- Exacerbating the problem stated immediately above and creating others, CNCS has not released the list of offenses that Fieldprint is using to screen applicants to determine “cleared” and “not cleared” status. This puts state service commissions and AmeriCorps programs in a precarious situation<sup>24</sup> in the event they decline a member based on a “not cleared” result. While CNCS and its vendors have a process for applicants to appeal a “not cleared” result, it can take many months and grantees may be exposed to allegations of failure to comply with employment and nondiscrimination laws.
- Truescreen and Fieldprint services are not readily accessible in all communities throughout the United States. Implementing these rule changes would make service opportunities less accessible to all Americans, as many individuals would be kept from service due to lack of reasonable accessibility to the processing vendors.
- If a “not cleared” result is returned by Fieldprint and the individual undergoing the check contests the result, the grantee is required to pay Fieldprint an additional fee to run another check to determine eligibility. Moreover, the additional processing can lead to significant delay in the individual commencing work or service in the program.

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<sup>24</sup> In the event of a lawsuit, it is reasonable to expect that CNCS would seek to limit its exposure, leaving the grantee at risk. *See, e.g., Harnishfeger v. United States*, 943 F.3d 1105 (7th Cir. 2019) (holding the Indiana National Guard liable for employment-related actions *via-a-vis* a member but absolving CNCS of direct liability). A proposed rule that limits the grantee’s ability to make informed decision by mandating a preferred CNCS contractor has far reaching implications.



- Though rap sheets theoretically can be obtained upon request, some grantees have reported difficulties in obtaining them from Truescreen. Mandating an exclusive vendor for state checks is likely to exacerbate these difficulties for grantees who have no choice but to use the mandated source.
- The current CNCS vendors have created processing barriers for individuals from tribal populations. We are aware of multiple instances in which a vendor rejected tribal IDs as a valid form of identification despite CNCS FAQs stating that such IDs must be accepted. In these instances, the participant has had to acquire a state ID, creating additional cost and burden on the prospective member or volunteer.
- Other technical and customer service dilemmas have been encountered with the current vendors, including difficulty obtaining access to information on pending checks, because the vendors have, at times, struggled to properly map checks to particular grantees in their electronic portals. This currently remains an outstanding issue in the field. Complications such as this have created uneasiness among state service commissions and AmeriCorps programs regarding the full capacity of the vendors.
- The proposed rule requires at § 2540.204(b) that, in the event of unavailability of the “approved vendors,” CNCS will notify grantees, who will then have to obtain checks through alternate means. Mandating essentially only one approved vendor for each type of check will erode grantee internal capacity for conducting checks through alternate means, leading to considerable problems across the AmeriCorps system if a mandated vendor becomes unavailable. The proposed rule suggests moving from a system with considerable redundancy to a single process for all checks with no redundant capacity except what appears to be a plan to “tell the grantees to figure it out.” The criminal history check process has never operated smoothly enough for this to seem like a realistic plan, and CNCS’s aggressive enforcement posture makes this aspect of the proposed rule particularly concerning.
- The proposed rule requires at § 2540.205(a) that checks be completed prior to an individual even entering a training status. This requirement is problematic for several reasons:
  - First, 42 U.S.C. 12645g requires only that checks “shall [be] conduct[ed].”<sup>25</sup> It does not require that checks be completed prior to services commencing in any

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<sup>25</sup> 42 U.S.C. § 12645g(a).



capacity. We recognize and support that public safety considerations require reasonable additional controls, in particular with respect to individuals who will have access to vulnerable populations. However, this requirement imposes substantial administrative burdens on grantees while also going far beyond what is necessary to achieve the public safety goals. For those who will have access to vulnerable populations, a much more reasonable and effective approach would be to require the check be submitted prior to commencement of service, but to permit accompaniment of the individual pending completion of the check. For individuals with no access to vulnerable populations, this requirement is largely simply wasteful and unduly burdensome – particularly in light of the fact that, as explained above, the AmeriCorps system has no real “ineligible individuals” problem.

- Second, any delay in service commencement can have a significant impact on an AmeriCorps member’s ability to successfully complete his or her required service. Full-time members serve in positions that require 1700 hours of service. Whenever there is a delay in results – whether weeks or months – a member’s ability to accomplish his or her hours within the originally planned service term is impacted. We are aware of instances in just this past year where members were indicated as “not cleared” in results from Fieldprint but had no criminal record. In one case, the AmeriCorps program proceeded to obtain the FBI check outside of Fieldprint, and the results showed no criminal record.
- Third, we note that this proposed requirement to complete all checks seems partially necessitated by CNCS’s improperly grouping individuals with access to vulnerable populations and those with no such access into a single large “three checks required” category. If CNCS were to abide by the plain language of the statute in this regard (as required), perceived timing issues would be less pronounced.
- The proposed rule purports at § 2540.205(c) to be effective and to require certain actions for current grant awards. Such an effective date is impermissible. Under longstanding legal precedent,<sup>26</sup> new funding conditions can only be applied to newly

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<sup>26</sup> *Bennett v. New Jersey*, 470 U.S. 632 (1985) (“practical considerations related to the administration of federal grant programs imply that obligations generally should be determined by reference to the law in effect when the grants were made.”); *See also* *Elder Care Services, Inc. v. Corporation for National and Community Service*, 2018 WL 4681002 (Sep. 28, 2018) (unreported) (questioning applicability of criminal history check regulations promulgated in 2012 to conduct of the grantee in a disallowance dispute because the regulations were issued only after the pertinent grants were awarded).



awarded funds – not existing awards. With the publication of the final rule an effective date should be clear that the rule will be implemented for awards issued after the date of publication.

### **Positive Aspects of the 2020 NSCHC Proposed Rule**

Though America's Service Commissions has substantial concerns with the proposed rule, there are a number of elements that we commend as improvements to the current system. Specifically:

- We believe that the approach of listing specifically covered award types at the proposed § 2540.200 is helpful in clarifying applicability for purposes of administration. Further, in the proposed list of awards, we noted that certain grants focused on capacity building and administrative matters are not included, in particular: Commission Support Grants, Commission Investment Fund grants, and planning grants. We concur in this limited application, as the activities funded under those awards are not service delivery activities in which an individual would have access to vulnerable populations. As noted in the “proposed systemic improvements” section of our comments below, for similar reasons, we also recommend (i) removal of a few grants that appear on the covered awards list in the proposed rule and (ii) clarifying that commission support staff time charged to covered awards would not trigger a background check obligation for the individuals whose time is so allocated.
- We believe that the language at § 2540.201 excluding the following individuals from coverage is a positive and helpful clarification measure: (i) individuals who are under 18 on the date they commence service, (ii) staff whose salary is paid under a fixed amount award, and (iii) staff whose salary is paid entirely via an entity's indirect cost rate agreement.

### **Proposed Systemic Improvements**

America's Service Commissions recommends the following changes to the NSCHC framework, all of which can be accomplished in the current rulemaking process. These changes would both increase administrative compliance and enhance real public safety:



- The statute specifically provides that the FBI fingerprint-based check requirements “shall not apply” where (i) an individual’s access to vulnerable populations “is episodic in nature or for a 1-day period” or (ii) “where the cost to the entity of complying with this subsection is prohibitive.”<sup>27</sup> In combination, these exceptions warrant categorical exception of application of the FBI fingerprint-based checks in certain small grants focused on infrastructure building, capacity development, and administrative activities, specifically: Volunteer Generation Fund grants, AmeriCorps VISTA Support grants, September 11<sup>th</sup> Day of Service grants, and Martin Luther King Jr. Day of Service Grants. We recommend that these be removed from the list of covered grants at the proposed § 2540.200.
- For reasons similar to those articulated immediately above and for general consistency with the proposed rule’s exclusion of individuals whose activity is charged exclusively through an indirect cost rate from coverage, the rule should clarify that state service commission staff time on a covered CNCS award would not trigger an obligation to obtain a criminal history check for that individual. We recommend such clarification be added to the proposed § 2540.201.
- Though particular vendors should not be mandated, we do appreciate that CNCS has arranged for vendors that can provide state and FBI checks for those recipients that have challenges with accessing those checks through other means. We propose that CNCS further clarify that checks accomplished by such vendors will be deemed compliant for purposes of CNCS oversight. We recommend adding this language to the proposed § 2540.204.
- Clarify that accompaniment is permitted for accommodating access to vulnerable populations pending completion of submitted criminal history check. This clarification could be accomplished by clarifying the meaning of “access” and/or by clarifying “when” checks must be accomplished in the proposed § 2540.205.
- As reflected in the proposed § 2540.207, CNCS has the authority to grant “waivers” or “exceptions.” We recommend that CNCS clarify the waiver/exception process in general, including when and under what circumstance waivers will be granted. Further, we recommend the following clarifications or additions within the proposed § 2540.207:

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<sup>27</sup> 42 U.S.C. § 12645g(d)(3).



- Amend the proposed rule to acknowledge that waivers/exceptions are available with respect to checks in particular states that are extremely burdensome, so long as the AmeriCorps program is able to employ alternative measures to meet the statutory requirements.
- To the extent that CNCS has permitted checks conducted by its approved vendors to exclude some state checks where not easily available, expand such determinations to cover entities not using the approved vendors. It would be equitable and logical to expand flexibilities and exceptions that CNCS is essentially granting itself to the broader regulated community. Such waivers could be publicly promulgated on the Criminal History Check section of CNCS's website.
- Expressly acknowledge in this proposed rule that for individuals in professions that mandate commensurate criminal history checks, such as teachers, no CNCS-specific check need be accomplished. We are aware of at least one state that has requested such a waiver/exemption and understand that the request was denied.
- We recommend that the proposed rule expressly state that CNCS will provide training and technical assistance for NSCHC in partnership with the state service commissions. As explained above, to understand how to complete a compliant NSCHC check, a grantee currently must read 11 different documents covering 98 pages. CNCS presently does not provide timely or sustainable training to support grantees in completing compliant NSCHC, while imposing harsh penalties for perceived instances of noncompliance. In this regard, we also encourage CNCS to share data on what its staff learns from monitoring activities so that state service commissions can build on existing training and technical assistance to subrecipients. We recommend adding a new § 2540.208 to provide a framework for such training and technical assistance.
- Expressly revoke the current "Enforcement Guide" for NSCHC noncompliance, clarify that a disallowance cannot be issued for a perceived instance of noncompliance on a fixed amount award, and clarify that NSCHC noncompliance is not considered an improper payment for the purposes of IPERA (thereby also superseding and revoking current erroneous guidance to the contrary). This will eliminate the majority of perceived IPERA findings. Only in the event that an ineligible person is found to be working or serving in a covered position under the very limited statutory standards,



should underlying expenditures against federal awards even potentially be considered improper payments.

### **Procedural Rulemaking Concerns Regarding the 2020 NSCHC Proposed Rule**

In addition to the substantive problems, we are concerned regarding legally required procedural steps CNCS has skipped in issuing this proposed rule. These process failures are, in fact, illustrative of how we have reached the current point of an unworkable and inflexible administrative compliance regime that has, in turn, been used regularly to exact fines and impose disallowances on grantees while doing little to further the actual requirements of 42 U.S.C. § 12645g.

First, this proposed rule is a “significant regulatory action,” as defined by Executive Order 12866, yet CNCS has certified that it is not and is thereby avoiding the more fulsome assessment of a proposed rule’s impact that significant rulemakings must undergo. In particular, the rule (i) “materially alter[s] . . . the rights and obligations of recipients [of AmeriCorps grants]”<sup>28</sup> and (ii) has the potential to “[c]reate a serious inconsistency or otherwise interfere with an action taken or planned by another agency.”<sup>29</sup>

As explained above, the proposed rule will impose substantial new requirements upon AmeriCorps grantees (both at the state service commission and AmeriCorps program level), creating substantially increased regulatory compliance risk and having a direct impact on their budgets. As explained above, at a minimum, the proposed rule would have every CNCS grantee use CNCS’s “approved vendors,” leading to significant new costs, administrative difficulties, and even legal barriers that implicate questions of federalism for state service commissions. With respect merely to cost, in some cases, the cost to determine eligibility and suitability of applicants would increase under the proposed rule by up to two or three times, depending on the geographic location of the program. These costs will be incurred in an environment where CNCS simultaneously caps costs per MSY and imposes strict cost share obligations.

Further, the proposed rule will trigger substantially more requests generated by private parties (primarily subgrantees) to the FBI’s national criminal history database system, and a corresponding increase in disclosure of individual’s information from that system – none of

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<sup>28</sup> EXECUTIVE ORDER 12866, § 3(f)(2); *see also* OFFICE OF MANAGEMENT AND BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, FAQs *available at*: <https://www.reginfo.gov/public/jsp/Utilities/faq.myjsp>.

<sup>29</sup> *Id.*, § 3(f)(3).



which is actually necessitated by statute. It is our understanding that a rule having such impact is exactly what is contemplated as a “significant regulatory action” that must be coordinated with the FBI.

As a separate but similar procedural failure, CNCS’s Regulatory Flexibility Act (“RFA”) certification is implausible and appears to have been given little, if any, actual consideration. As explained by the Small Business Administration’s (“SBA”) Office of Advocacy, the SBA division responsible for RFA matters, a “no significant impact” certification is to reflect facts appropriate to the circumstances of the regulation and the community regulated.<sup>30</sup> CNCS’s certification offers no more than a cursory statement that, if anything, tends to indicate (especially in light of the substantive concerns we explained above) that CNCS did not afford this proposed rule the consideration mandated by the RFA.

CNCS’s failure to comply with the RFA creates additional risk to the regulated community in two ways. First, it leads to a failure to consider better potential solutions to the problem asserted. Second, given the judicial review provisions established under the RFA, it leads to an uncertain and unsustainable legal framework – CNCS will be issuing a rule of questionable legality that it is likely to then attempt to enforce against small entities through monetary penalties, and in the process arming these small entities with an ability to seek rescission of the rule for mere failure of CNCS to follow the Congressionally mandated requirements of the RFA in promulgating it. Issuing unlawful rules by failing to follow commonsense procedural requirements creates instability in the AmeriCorps system that all stakeholders have an interest in avoiding.

Under the circumstances, it seems the OMB Office of Information and Regulatory Affairs (“OIRA”) would expect CNCS to conduct a more careful review of this proposed regulation, including soliciting input from the Department of Justice and FBI, and ensuring compliance with the important steps mandated by the RFA for protection of small entities. We encourage CNCS to follow legally required procedures in proposing this regulation and request that OIRA ensure that CNCS follows such procedures.

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<sup>30</sup> SMALL BUSINESS ADMINISTRATION, A GUIDE FOR GOVERNMENT AGENCIES: HOW TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT at 13, available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2019/06/21110349/How-to-Comply-with-the-RFA.pdf> (last visited Feb. 21, 2020) (“certifications that simply state that the agency has found that the proposed or final rule will not have a significant economic impact on a substantial number of small entities are not sufficient under section 605(b)”; *see also* 5 U.S.C. § 605(b) (“If the head of [an] agency makes a certification [“of no significant impact”] the agency shall publish such certification in the Federal Register at the time of publication of the general notice of proposed rulemaking for the rule or at the time of publication of the final rule, *along with a statement providing the factual basis for such certification.*”) (emphasis added).



## **Conclusion**

We appreciate the opportunity to provide input into the future of NSCHC for CNCS grantees. As statutory partners of CNCS, state service commissions take compliance and safety of the populations we serve seriously. We welcome the opportunity to work in partnership with CNCS to improve the NSCHC system.

We have serious concerns about the direction in which CNCS continues to go with NSCHC matters. We strongly encourage CNCS to focus its effort on ensuring grantees meet the statutory eligibility and NSCHC requirements and focus less on overzealous enforcement of minor timing and documentation issues. While administrative requirements are important, CNCS's approach to implementation of those requirements is driving both unwarranted enforcement actions and misperceptions about substantive compliance.

If you have any questions regarding this comment please contact Rachel Bruns, Deputy Director of America's Service Commissions at [rbruns@statecommissions.org](mailto:rbruns@statecommissions.org) or (515) 720-5892.

**Appendix A**  
**Section-by-Section Comments**

Section	Topic	Comment/Concern
§ 2540.200	Specifically lists covered award type.	<p>Certain grants for infrastructure building, capacity development, and similar activities warrant categorical exclusion under statutory authorities. As such we propose they be removed from this list of covered award types:</p> <ul style="list-style-type: none"> <li>• Volunteer Generation Fund grants,</li> <li>• AmeriCorps VISTA Support grants,</li> <li>• September 11<sup>th</sup> Day of Service grants, and</li> <li>• Martin Luther King Jr. Day of Service Grants.</li> </ul>
§ 2540.201	Describes covered individuals.	<p>We generally concur with this language as it clarifies important limitations on inapplicability to individuals who work as staff on fixed amount awards, as well as those whose cost is charged exclusively through an entity’s indirect cost rate.</p> <p>We also concur with the clarification that no check is required for an individual who is under 18 on the date he or she commences service.</p> <p>We recommend that CNCS expressly acknowledge that waivers may be offered for individuals who are, by the nature of their profession, already required to undergo a criminal history check that is commensurate in scope with the check that would be required under 42 U.S.C. § 12645g.</p>
§ 2540.202	Restates statutory eligibility standards.	No comment.
§ 2540.203	Expressly authorizes establishment of additional suitability	We concur with this flexibility. We note, however, that CNCS mandating specific vendors – a matter with which we strongly disagree – undermines this flexibility. It is not certain that Fieldprint or Truescreen can or would implement such additional criteria. Even if

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	criteria by grantees and subgrantees.	willing to, by mandating their use, CNCS is forcing grantees to negotiate for the additional service in essentially a “sole source” environment, hampering grantee ability to negotiate effective terms and pricing.
§ 2540.204	Mandates three-part check for all covered individuals, and mandates use of “CNCS-approved vendors.”	<p>For the reasons stated above, we strongly oppose these requirements and question their legality. In particular:</p> <p>The three-part check requirement:</p> <ul style="list-style-type: none"> <li>• exceeds CNCS’s statutory authority; and</li> <li>• will create unwarranted inefficiency and cost.</li> </ul> <p>The requirement that particular vendors be used:</p> <ul style="list-style-type: none"> <li>• will create significant administrative and legal challenges for state service commissions, particularly for public entities that are restricted by local law from agreeing to all of Fieldprint and Truescreen’s mandated contractual terms (such as indemnification and choice of law provisions);</li> <li>• is inconsistent with the Uniform Guidance’s federal procurement standards which are binding unless waived by OMB and which require competitive sourcing for service contracts valued in excess of \$10,000;</li> <li>• mandates grantees use a product that is often not suitable to their needs, producing insufficient information and results, in turn leading to (i) redundant costs of securing alternate vendors and (ii) difficult negotiations and additional costs in attempting to work with the approved vendors for a more customized criminal history check;</li> </ul>

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		<ul style="list-style-type: none"> <li>• will create challenges for grantees that have limited ability to access Fieldprint and Truescreen, in particular grantees in rural locations;</li> <li>• will create an unstable framework for grantees and subgrantees by (i) eroding existing internal capacity to accomplish checks and (ii) coopting grantees and subgrantees (including state agencies) into a system dependent upon federal contracts awarded by CNCS;</li> </ul> <p>While we strongly disagree with CNCS’s attempt to mandate particular vendors, we appreciate CNCS’s efforts to identify and secure vendors that grantees and subgrantees may use. We recommend that rather than mandate use of particular vendors, CNCS clarify that when CNCS-approved vendors are used, checks completed by those vendors will be deemed compliant.</p>
§ 2540.205	Requires checks be completed prior to commencement of service, sets forth effective dates, and sets forth requirements for re-processing after a break in service.	<p>The statute does not require that criminal history checks be completed <i>before</i> an individual commences service. In requiring that all checks be completed before an individual commences service in any capacity, the proposed rule is unreasonable, creating unnecessary cost and administrative burden without improving public safety. We recommend instead that CNCS require only that (i) criminal history checks be <i>commenced</i> prior to commencement of service and (ii) any individual who has not yet been completely cleared have no <i>unaccompanied</i> access to vulnerable populations pending completion of the check. Adopting such an approach (i) is consistent with statutory requirements, (ii) accomplishes public safety goals, and (iii) enables maximum efficiency to implementing grantees.</p> <p>To the extent the proposed rule implies effectiveness for current awards, it is unlawful. It is well established that new funding conditions (<i>i.e.</i>, obligations attached to grant funds) may only be imposed with the award of new grants after the rule has been promulgated. The earliest CNCS can implement revised NSCHC rules is with its first new awards after the effective date of this regulation.</p>

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§ 2540.206	States basic required procedural steps for a compliant NSCHC	The brevity of this section implies that CNCS will not view as binding its numerous prior NSCHC guidance documents on the subject, particularly in light of recent Executive Orders reiterating that such guidance cannot be treated as creating binding obligations (which notably merely reiterate well-established principles of federal administrative law). We recommend that, for clarity, CNCS expressly revoke such prior guidance.
§ 2540.207	States that CNCS may grant waivers and provides an address for submission	<p>Given CNCS’s historical refusal to grant any waivers except for waivers applicable to certain state checks its approved vendors have had difficulty obtaining, we encourage CNCS to provide explicit standards for waiver evaluation in this proposed rule. We are concerned that with no acknowledgement of the statutory availability of waivers or statement of standards, that CNCS will continue to simply deny all requests under all circumstances.</p> <p>We also encourage CNCS to promulgate by this rule a form of blanket waiver for state checks that it waives for its approved vendors, extending such waivers to checks accomplished by means other than its vendors. In this regard, we propose merely that any waiver made available to an approved vendor’s process be extended to all grantees in equal scope to promote fairness and uniformity.</p> <p>Finally, we encourage CNCS to consider implementing a specific waiver standard that entities (such as schools) with existing robust criminal history check processes already in place might use to avoid redundant obligations.</p>
Miscellaneous	Not currently addressed	<p>We encourage CNCS to:</p> <ul style="list-style-type: none"> <li>• expressly revoke its Enforcement Guide and other NSCHC enforcement guidance documents (which were improperly promulgated in the first instance), clarify that cost disallowances are not a permitted method of enforcement on a fixed amount award (which would merely be recognition of existing law), and clarify that IPERA findings are</li> </ul>

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		<p>not appropriate in instances in which the individual to whom the alleged IPERA event pertains met statutory eligibility requirements.</p> <ul style="list-style-type: none"><li>• add express provisions guaranteeing CNCS training and technical assistance on NSCHC compliance in coordination with state service commissions.</li></ul>
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