



U.S. Department of Justice

Federal Bureau of Investigation

Clarksburg, WV 26306

August 26, 2011

TO: ALL CJIS SYSTEMS OFFICERS AND STATE IDENTIFICATION BUREAU REPRESENTATIVES

RE: NATIONAL BACKGROUND CHECK PROGRAM PURSUANT TO THE AFFORDABLE CARE ACT, SECTION 6201

The Affordable Care Act¹ (ACA) Subtitle C, Section 6201, requires the Secretary of the U.S. Department of Health and Human Services (DHHS) to establish a nationwide program to identify efficient, effective, and economical procedures for long-term care facilities and providers to conduct nationwide background checks on prospective direct patient access employees². States and U.S. territories that meet the requirements as described in Section 6201 of the ACA, whose application for program participation has been approved, are to receive federal matching funds for program implementation. Long-term care facilities/providers in participating states must obtain state and national background checks on prospective employees, including a check of state abuse and neglect registries, state criminal history records, and national fingerprint-based criminal history record checks. Section 6201 of the ACA is enclosed for reference (Attachment One). This letter provides guidance on the implementation of the National Background Check Program (NBCP) established by the Secretary of the U.S. DHHS pursuant to Section 6201 of the ACA.

NBCP Participation

The DHHS Centers for Medicare & Medicaid Services (CMS) is actively seeking the participation of all States and U.S. territories in the NBCP. To date, the CMS has released four solicitations to States and U.S. territories, inviting them to submit proposals for consideration for inclusion in the NBCP. Program participants are selected by the CMS based on non-competitive grant applications and are awarded federal funding (three-to-one federal-to-state fund match) to implement the provisions of Section 6201 of the ACA. Under Subtitle C, Section 6201 (a)(1)(A) and (B), the U.S. DHHS Secretary shall enter into agreements with States that agree to conduct background checks under the nationwide program on a Statewide basis when they submit timely applications to the Secretary containing such information as the Secretary may specify. Except for modifications provided by the ACA, Section 6201, the Secretary is

¹ The Patient Protection and Affordable Care Act (Pub. L. 111-148, enacted March 23, 2010) and the Health Care Education Reconciliation Act of 2010 (Pub. L. 111-152, enacted March 30, 2010), together are known as the ACA.

² The term "direct patient access employee" means any individual who has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider and has duties that involve (or may involve) one-on-one contact with a patient or resident of the facility or provider, as determined by the State for purposes of the nationwide program.

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establishing the NBCP under similar terms and conditions as implemented during the pilot program that was authorized by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108-173).

Legislative Provisions/Program Requirements

Section 6201(a)(3)(A) requires that long-term care facilities and providers obtain state and national criminal history background checks on prospective employees that utilize: a search of state-based abuse and neglect registries, state criminal history records, and national fingerprint-based criminal history record checks. Section 6201(a)(3)(B) requires that participating states describe and test methods that reduce duplicative fingerprinting, including providing for the development of rap back capability by the State. Section 6201(a)(3)(C) requires that the background checks conducted under the nationwide program remain valid for a period of time as specified by the Secretary (not yet determined).

Under Section 6201(a)(4)(A) and (B), participating states must also monitor compliance with the requirements of the nationwide program and have procedures in place to:

- Conduct screening and criminal history background checks;
- Monitor compliance by facilities and providers;
- Provide for up to 60 days of provisional employment by the long-term care facility/provider for a direct patient access employee, pending completion of the required criminal history background check or appeals process;
- Provide an independent appeals process for provisionally or permanently hired employees to appeal or dispute the accuracy of the background check information, including criteria for appeals by direct patient access employees with disqualifying information;
- Provide for the designation of a single State agency (referred to as the grantee state agency [GSA]), that is responsible for:
 - Overseeing the coordination of State and national criminal history background checks;
 - Overseeing the design of appropriate privacy and security safeguards for criminal history background check results;
 - Reporting criminal history background check results to the facility or provider; and
 - In the case of an employee with a conviction for a relevant crime that is subject to reporting under Section 1128E of the Social Security Act (42 United States Code [U.S.C.] 1320a-7e), reporting the existence of such conviction to the database established under that section;
- Determine which individuals are direct patient access employees;
- Specify disqualifying offenses, including convictions for violent crimes; and
- Describe and test methods that reduce duplicative fingerprinting, including providing for the development of rap back capability³.

³ The legislation describes “rap back” as subsequent notification when a direct patient access employee of a facility or provider is convicted of a crime following the initial criminal history background check, and the employee’s fingerprints match the prints on file with the State law enforcement department.

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Fingerprint Processing Requirements

Section 6201 of the ACA requires that a single state agency (the GSA) be responsible for the coordination of state and national criminal history background checks. The GSA must coordinate with the CJIS Systems Agency (CSA)/State Identification Bureau (SIB) prior to establishing procedures for performing state and national criminal history record checks, and participating states may request unique Integrated Automated Fingerprint Identification System (IAFIS) originating agency identifiers (ORI) or designate existing ORIs for exclusive use under Section 6201 of the ACA. The CSA/SIB must coordinate requests for ORI issuance or use of a designated ORI with the FBI CJIS Division for programming. All fingerprints submitted to the FBI CJIS Division under this new authority must employ the program-designated ORI and be populated with "CMS NBCP 6201" as the reason fingerprinted. The originating agency case number (OCA) field may be used to identify the long-term care facility or provider, or to indicate the provider type. If using the OCA field to identify the provider or long-term care facility type, please refer to the code chart (Attachment Two) for suggested language. Please refer to the Electronic Biometric Transmission Specification, version 9.2 or later, available at <www.fbibiospecs.org>, for field specifications. The FBI CJIS Division will provide responses to criminal history record requests to contributing CSAs/SIBs for dissemination to the GSAs.

While Section 6201 of ACA does not prohibit the GSA from disseminating criminal history record information to long-term care facilities or providers, any business model which incorporates dissemination from the GSA to long-term care facilities or providers must first be proposed to the CSA/SIB. The CSA/SIB and the CMS will ensure audit and security concerns, as specified in the CJIS Security Policy, are adequately addressed. The CMS will forward the proposed business model to the FBI for review.

Fees

State and FBI fees may be charged for processing state and national criminal history record checks. Fingerprint submissions forwarded to the FBI CJIS Division under this authority should be submitted using the non-federal applicant user fee (NFUF) System Type of Transaction. In limited instances, volunteer fees may apply⁴. Additional fees may be charged for State and/or FBI CJIS Division rap back services, and for fingerprint processing by independent or contracted vendors. Please see 28 Code of Federal Regulations (CFR) Part 20 and the Federal Register, Notice of Proposed Rule Making, dated June 19, 2008, for the FBI CJIS Division's most current fee schedule.

Use and Challenge

Participating States must establish procedures, pursuant to Section 6201(a)(4)(B)(iii) and (iv), to provide for provisional periods of employment by facilities or providers of direct patient access employees as appropriate and not to exceed 60 days, pending completion of the background check process;

⁴ Pursuant to Section 6201(a)(6)(D), a volunteer may be considered as a direct patient access employee only if "the volunteer has duties that are equivalent to the duties of a direct patient access employee and those duties involve (or may involve) one-on-one contact with a patient or resident of the long-term care facility or provider."

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and, in the case where the employee has appealed the results of the background check, pending completion of the appeals process. During this time, provisional employees shall be subject to direct on-site supervision in accordance with procedures established by the State. The State must also provide an independent process by which an employee or provisional employee may appeal or dispute the accuracy of the information obtained in a background check. Appeals criteria for employees with disqualifying information are to include consideration of the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the disqualifying information with respect to the current employment of the individual. Title 28 CFR Section 50.12(b) provides applicants with notice of certain entitlements to include the procedures for changing, correcting, or updating an FBI Identification Record.

Fitness Determination

The CMS NBCP authorizes the GSA to make fitness determinations. The ACA defines the disqualification criteria in Section 6201(a)(6)(A-C) and describes "a conviction for a relevant crime" as any federal or State criminal conviction for (i) any offense described in Section 1128(a) of the Social Security Act (42 U.S.C. 1320a-7); or (ii) such other types of offenses as a participating State may specify for purposes of conducting the program in such State. The term "disqualifying information" means a conviction for a relevant crime or finding of patient or resident abuse. The term "finding of patient or resident abuse" means any substantiated finding by a State agency under Section 1819(g)(1)(C) or 1919(g)(1)(C) of the Social Security Act (42 U.S.C. 1395i-3(g)(1)(C), 1396r(g)(1)(C) or a federal agency that a direct patient access employee has committed (i) an act of patient or resident abuse or neglect or a misappropriation of patient or resident property; or (ii) such other types of acts as a participating State may specify for purposes of conducting the program in such state.

Evaluation and Report

Section 6201(a)(7)(A) and (B) require the Office of Inspector General (OIG) of the U.S. DHHS to conduct an evaluation of the nationwide program to include: (1) a review of the various procedures implemented by participating states and an identification of the most appropriate, efficient, and effective procedures; (2) an assessment of costs of conducting such checks; (3) a determination of the extent that conducting background checks leads to unintended consequences, such as a reduction in workforce; (4) an assessment of the impact of the nationwide program on reducing the number of incidents of neglect, abuse, and misappropriation of resident property; and (5) an evaluation of other aspects of the nationwide program, as determined appropriate by the Secretary. The Inspector General shall submit the report to Congress within 180 days of the program's conclusion. The CMS has advised that the OIG may contact appropriate CSA/SIB representatives and the FBI CJIS Division for information that is relevant to the report to Congress. The CMS will also request quarterly reports to gather programmatic information from participating states.

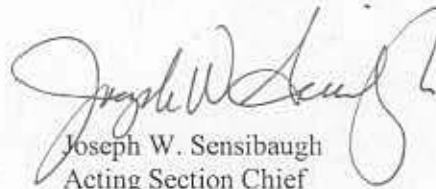
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Contact Information

Questions regarding the implementation of the CMS' NBCP should be forwarded to the CMS at <background_checks@cms.hhs.gov>. Questions regarding implementation of fingerprint processing pursuant to Section 6201 of the ACA may be directed to Mr. William Rex Durkin at telephone number (304) 625-2755 or by e-mail at <william.durkin@leo.gov> or Ms. Julia Mickey Wilson at telephone number (304) 625-5759 or by e-mail at <julia.wilson@leo.gov>.

Sincerely yours,



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Enclosure(s) 2

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