

Questions and Answers

about the

National Background Check Program for Long Term Care
Facilities and Providers

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CONTENTS

Section	Topic	Page
A	General	3
B	Grants	4
C	Eligibility	5
D	Matching Funds	7
E	Technical Support and Resources	12
F	Federal Bureau of Investigation (FBI)	12
Z	Additional Questions	13

All States, the District of Columbia, and U.S. Territories will be referred to as “States” in this document.

Category A – General

A1: What is the “National Background Check Program”?

The National Background Check Program is a legislatively mandated Federal program, a part of the Patient Protection and Affordable Care Act (P.L. 111-148, enacted on March 23, 2010) and the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152, enacted on March 30, 2010) together called the Affordable Care Act (ACA). The national background check program will be conducted by CMS.

A2: What is the purpose of the National Background Check Program?

The purpose of the program is to identify efficient, effective and economical procedures for long term care facilities and providers to conduct background checks on prospective direct patient/resident access employees.

A3: Who is a “Direct Patient Access Employee”?

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.

A4: When is the deadline to apply for the grant?

On November 30, 2010, a second announcement of the solicitation was posted on the Grants.gov website (Funding Opportunity Number: CMS-1E0-11-001). Applications for this solicitation will be accepted on a flow basis. We encourage States to send applications as soon as they are ready and CMS will review each application soon after it is received in order to not delay awards.

A5: Will States be required to participate in and/or meet the National Program requirements at a later date?

At the present time, participation in the Background Check Program is voluntary on the part of States. We cannot offer a prediction as the likelihood that Congress, in the future, might enact requirements that States have a background check program in place in order to receive federal funding for health care programs. The best that we can offer are certain observations that a prudent State might wish to consider. The first is the trendline: legislation enacted in 2003 (section 307 of the MMA) provided for an earlier demonstration program, and Congress has now passed a much larger program described in the Affordable Care Act as a national program. Both actions point in the direction of potential national applicability. The second observation is that available evidence from the evaluation of the earlier demonstration program (and from other

sources) indicates the advisability of background checks in protecting vulnerable populations. Third, in recognition of such advisability, CMS initiated a requirement for background checks in the new Hospice Conditions of Participation (CoPs), and is evaluating such a requirement in relation to other providers as the agency updates its various CoPs. However, at the present time, participation in this National Background Check Program is voluntary on the part of States.

A6: Will CMS accept a partially complete application if a State is unable to provide all the data needed to complete the application by the due date?

All applicants should do their best to obtain the requested data; however, CMS encourages applicants to submit their application even if not fully complete. Please observe that, while we will not be able to approve applications right away if CMS determines that additional information is required, CMS will afford such applicants with a subsequent opportunity to submit material that addresses CMS questions.

A7: Have Tribal authorities been given an opportunity to submit an application to participate in the National Background Check Program (NBCP)? Some nursing homes are located on Indian reservations and recertification surveys and abbreviated surveys are conducted by the CMS regional offices, and not the state survey agency. In these instances, what assistance can be provided to the CMS regional offices and or Tribal Authorities to ensure that nursing homes on Indian reservations have a single source of contact/registry for the receipt and review of finger print checks, and also for the rap back process that is being developed?

Section 6201(a)(1) of the Affordable Care Act provides that, as long as certain conditions are satisfied, “[t]he Secretary [of HHS (the Secretary)] shall enter into agreements with each State” eligible to participate in the NBCP. For purposes of HHS, 45 C.F.R. § 74.2 provides that “State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments.” Under this definition, a Tribal Authority is not a “State.” Accordingly, it is not eligible to submit an application to participate in the NBCP because only a “State” that meets certain requirements set forth in section 6201 of the Affordable Care Act can enter into an agreement with the Secretary.

The NBCP is a federally funded grant program administered under federal law and the laws of each participating state. A nursing home located on an Indian reservation does not fall under the contractual purview of the state survey agency for purposes of certification surveys for participation in federal Medicare and Medicaid programs. Such facilities would not automatically be subject to the requirements of the state program funded by the NBCP. Neither would enforcement of the background check process be imposed by the CMS Regional Office surveyors.

CMS encourages each participating grantee State to make nursing facilities located on Indian reservations within the State's borders aware of the State's participation in the NBCP and to offer them the opportunity to participate in the program. Such facilities may be given this opportunity as long as they agree to comply with the same procedures established by the relevant State in accordance with section 6201 of the Affordable Care Act that apply to long-term care facilities and providers that operate within the particular state.

If a State has within its borders a nursing facility located on an Indian reservation and it is considering applying to the NBCP solicitation, we encourage the State to confer with the Tribal Authorities in advance of submitting an application.

Category B - Grants

B1: From where is the Federal money coming to fund the program?

Section 6201 of the Affordable Care Act specifies the appropriated, Federal funds that CMS will provide to each State that enters into an agreement to participate in the National Background Check Program.

B2: How should a prospective applicant download the grant application packet for completion and submission?

Applicants can download the application packet via the www.grants.gov website by entering the funding opportunity number listed in the solicitation. Applicants may also download the solicitation and other useful information (such as the evaluation of CMS' earlier pilot program) from our website at: www.cms.gov/SurveyCertificationGenInfo/04_BackgroundCheck.asp

B3: If I did not submit a letter of intent can I still submit a grant application?

Yes, the notice of intent to apply is voluntary. We encourage all States to apply.

Category C - Eligibility

C1: Who is eligible to participate in the program?

All States¹ may apply for funding under this grant opportunity.

¹ By "State" we refer to the definition provided under 45 CFR 74.2 as "any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments." By "territory or possession" we mean Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. A State's Office of the Governor, State Medicaid Agency, or State Survey Agency (SA) may apply for funding under this grant opportunity.

C2: What provider types are included in this program?

Provider types are defined in the grant solicitation. Certain provider types are required, though the participation of different provider types may be phased in. Permitted provider types include:

1. Nursing homes (SNF and NF)
2. Home health agencies,
3. Hospice care providers,
4. Long term care hospitals,
5. Long term care residential care providers,
6. Personal care services providers,
7. Adult day care services providers,
8. Intermediate care facilities for the mentally retarded,
9. Assisted living facilities, and
10. All other long term care providers (including providers receiving home and community based waiver programs).

C3: What are the requirements to participate in the National Background Check Program?

Participating States must:

1. Guarantee non-Federal funds to cover a portion of the cost to conduct the program in their State (three-to-one match);
2. Require FBI fingerprint checks as part of the criminal background check for all direct patient access employees; and
3. Have a plan to implement the program (a) Statewide and (b) in all long term care entities specified in Section 6201 of the ACA, although the State may phase-in the program over a multi-year period, and the phase-in may be accomplished by geographical location, provider type, or other factors determined by the State.
4. Each participating State is required to develop and test a rap-back system by which State law enforcement departments immediately inform the State of any criminal convictions against the employee that occur following the pre-employment background check.
5. Include all provider types “as mandated in the statute.”

Note – Additional requirements apply. We state the requirements in detail on page – 3 of the solicitation.

C4: Will States with existing background check programs be eligible to apply?

Any State is eligible to apply. States that have existing background check programs are eligible to apply, as well as those States that participated in the pilot.

States that received funding under the First Solicitation (announced in June 2010) are ineligible to apply for funding under the Second Solicitation. States that were denied funding under the First Solicitation may apply for funding under the Second Solicitation.

Category D – Matching Funds

D1: How does the Federal match funding work?

CMS will provide Federal grant funds to each participating State that enters into this agreement. The Federal fund will be at a rate that will be three times the amount that the State guarantees, not to exceed \$1.5 million for a State that implemented CMS' earlier pilot program (2004-2007), and up to \$3 million in Federal grant funds for the FY 2010-2012 time period for all other States. Although federal grant funds must be obligated by 9/2012, each State will have 36 months from the date of their award to implement their program.

Examples:

If a newly participating State has \$1 million of non Federal money to fund the development or expansion of a Statewide background check program, CMS would match their money with \$3 million for the program over the three year period if the State has an approved \$4 million budget.

If the State has \$700,000 of non Federal money to fund the program development or expansion, CMS will match their money with \$2.1 million for the program over the three year period if the State has an approved background check budget of \$2.8 million.

D2: Will there be any difference in funding if a State participated in the Pilot Background Check Program under section 307 of the MMA?

Previous pilot States are eligible for a maximum federal match of \$1.5 million.

D3: What are “State guarantee requirements”?

In order to participate in this nationwide program, a State must guarantee that it will make available non-Federal funds to cover a portion of the cost to be incurred by the State to carry out the program in their State. The participating State must make available non-Federal contributions as a condition of receiving the Federal match under this agreement.

D4: What type of funds can a State use to meet the non-Federal match?

The funds used to meet the non-Federal match may either be provided directly through State funds (including provider taxes or certification fees) or through donations.

Note - Appendix 9 of the solicitation discusses acceptable resources related to non Federal share funding. These include State general revenues, donations, provider taxes, application fees or certification fees, etc.

If you have questions about the acceptability of a revenue source, we suggest you send us an email providing the information about the source and amount of the non-Federal funds and we will attempt to help clarify the possibilities. Send the information to:

Background_Checks@cms.hhs.gov.

D5: Can States use other State funds/revenues that would have been used as the non-Federal share for Medicaid expenditures?

Yes, the State has the discretion to choose how it wants to best utilize its general fund revenues. However, a State cannot use the same general fund dollar twice as matching for Federal funds. For example, a State legislature may have appropriated general revenue funds for Medicaid match that it later determines will not be needed for the Medicaid program and could determine to use the general revenue funds for the background check program.

However, a State may not use the same funds to match two different Federal programs, nor may it use Federal funds provided in one program to match Federal funds in the background check program.

D6: What happens if a State has difficulty funding the required non-Federal match amount necessary to fund a successful program?

Interested States should complete an application, even if they cannot assure by the application deadline that funds will be available. The State should explain this, as well as their plans to acquire necessary State funds in their application. CMS will review the application and may consult further with the State if necessary. CMS may decide to award the grant but not provide any funding until such time as the State can guarantee their funds. Federal funding can be incremental, if portions of State funds are acquired incrementally.

D7: Will States be allowed to use Civil Money Penalty (CMP) funds to meet all or a portion of the non-federal matching funds?

CMS may approve limited use of certain CMP funds as a source of the non-federal funds for a portion of the background check program if the State provides an attestation that the CMP funds:

(a) Derive entirely from that portion of CMP revenue collected by CMS and returned to the State, as the State share of total CMP revenue, prior to CMS' approval for the States National Background Check application.

(b) Apply only to the first full year of a State's implementation of the program;

(c) Apply only to the share of total background check costs that are directly attributed to background checks of prospective employees of nursing homes, that the State will maintain cost-accounting systems sufficient to document the proportionate share of total costs that are attributable to the protection and benefit of nursing home residents, and that the State will report such cost-accounting documentation to CMS upon request;

(d) Are approved for such use by the single State Medicaid Agency;

(e) Are separately identified from other sources of the State's non-federal matching funds reported to CMS.

Note: the limitations listed above on the use of CMP funds as match funds do not apply to any CMPs levied entirely under State Licensure authority.

We emphasize that such CMP use may only apply to that portion of the program that directly benefits nursing home residents and that, consistent with “c” above, the State must have an acceptable accounting methodology to identify that portion of total costs attributable to the nursing home background checks. For example, a State may determine that 30% of all background checks are applicable to job candidates seeking nursing home employment, and thereby calculate that 30% of the non-federal share is attributable to the protection and benefit of nursing home residents.

D8: Could the general revenue that supports the current State background check be used as the State match? Also, there is a State provider assessment on nursing homes of 5.5% in our State. Could a portion of this revenue be considered for the State match and would it have to be directly dedicated for this purpose?

Yes. State general revenue funds that support an existing State background check program may be used for this national program. As explained in the solicitation, however, we would expect to see an expansion or improvement in the program commensurate with the increase in federal funds that the State obtains. For example, the new federal funds might support conversion from fingerprint cards to electronic fingerprint capture, or support the addition of FBI checks to a State-only program, or support an expansion of the types of providers and number of background checks that are conducted. In contrast, simply using federal funds to replace State funds would not meet the terms of the solicitation.

With regard to the 5.5% provider assessment on nursing homes - yes, the general revenue received by the State from such assessments could be used as non-federal matching funds for the Background Check Program but only so long as (a) the assessment meets the same conditions required for the use such funds as non-federal match for Medicaid (e.g., it is a broad-based and uniform assessment that does not hold taxpayers harmless, or (b) the State requests and CMS approves a waiver from the broad-based and uniformity requirements, and (c) the State is not already using 100% of the revenue from such a provider assessment to provide non-federal match to any other federal program. For example, if the State has such a 5.5% assessment on nursing facility services that generates \$5.0 million per year, and the State uses only \$4.0 million as non-federal matching funds for Medicaid, then the remaining \$1.0 million that is not being used to match any type of federal program might be used as non-federal match for the Background Check Program.

D9: May in-kind contributions be used for the non-federal share?

If considering such a possibility, we advise you to send us an email prior to submission of your grant application specifying the (a) specific type of funds, (b) source of funds, (c) amount and duration (beginning and ending) of the funds, (d) how value is determined, (e) how costs will be accounted, and (f) any other pertinent information.

IN-KIND CONTRIBUTIONS are "contributions other than cash." In-kind contributions typically do not require an actual cash outlay, but they must add real value to a project commensurate with the dollar value assigned to the contribution, be necessary for the successful conduct of the program, and offset expenses that the program would of necessity incur if the in-kind contribution were not provided. They may not represent costs for functions that the contributor must otherwise provide under State or local law in the absence of the background check program (e.g., State law enforcement costs). Some examples of in-kind contributions are equipment donations, third-party contributions, and donated labor, materials, and services. The background check legislation explicitly identifies donations as a source of permissible non-federal funds, and such donations may be in the form of cash or in-kind contributions. However, because there are many limitations on the use of in-kind contributions, we advise States to consult with us in advance. CMS also reserves the right to deny the acceptability of proposed in-kind match where the agency determines that the proposed use is not consistent with the intent of the background check program.

D10: May the salaries of current State staff used in our existing background check program be used as non-federal match?

We would treat such funds as a cash contribution (rather than an in-kind contribution), as there is an on-going cash outlay on the part of the State for the payment of such costs. So long as the staff are dedicated to the State's background check program whose terms are consistent with the ACA background check legislation, the applicable salaries may represent an acceptable source of non-federal funds.

As explained in the solicitation and in question D8 above, however, we would expect to see an expansion or improvement in the program commensurate with the increase in federal funds that the State obtains. Consider, for example, a State that has current salary expenses of \$500,000 for staff positions that will continue and will be included in the new background check program under this grant. In such a case, the \$500,000 might be used as non-federal funds, matching \$1,500,000 in federal funds. In this case we would expect to see a program budget of \$2,000,000 or greater, and an implementation plan that shows the full amount of federal funds being used to expand or improve the existing program. We would not approve an application that simply replaced State funds with federal.

D11: Currently, an individual pays the State Police \$69.00 to process a background check. There were approximately 4,500 checks paid by individuals in FY 10 that generated \$310,500 in payments. Of the \$69.00, the State Police pays \$22.00 to the FBI. Can we use the entire \$69.00 (\$310,500) as part our non-federal match? If not, what amount would be allowable?

Once the grant period starts, the full \$69 paid to the State police may count as the non-federal share so long as (a) the full amount (100%) that the State is designating as non-federal funds is used for the Background Check Program (i.e., in this case the \$69) and (b) the fee structure used must conform to federal requirements (see, e.g., Appendix 9 on the CMS grant solicitation).

With regard to fees already collected but not yet expended, the State may use accumulated funds (i.e., funds collected and not expended prior to the grant) as match once the grant period begins. However, any funds designated as match may only count as match if expended during the grant period and used 100% for the Background Check Program. Simply stated, the State cannot count as match for the Sept. 2010 – 2012 time period any money that it expended in a prior period (unless it was for equipment that is later donated, at its depreciated value, to its Background Check Program during the grant period as an in-kind contribution). Funds that a State already paid to the FBI in a prior period may not count as match during the upcoming grant period – but funds paid out of individual fee revenue that is used to pay the FBI during the grant period can count as match, as well as the remainder of the \$69 (\$69 minus \$22) if the State has not already spent those monies.

To count as match, the State must include in its application the details of how it charges fees to make sure that the fee structure is equitable and meets CMS standards, and CMS must approve the system. Appendix 9 – Resource Information Related to Non-Federal Share of the grant solicitation includes a discussion of these issues (e.g., the fee should apply to everyone similarly situated, some of the flexibilities that the State has in setting fees).

D12: May previously awarded States request an increase in funds if they did not receive the maximum allowed?

Any previously-awarded State that received less than the maximum permitted may at any time request an increase up to the maximum allowed by law provided that (a) the state submits a proposed modification to its plan that details and justifies the increase, (b) the State provides the requisite matching funds from acceptable sources, (c) CMS will evaluate the proposals on a flow basis, and (d) CMS reserves the right to fund less than requested.

D13: Our State has monies that it would like to obligate in 2011 to meet its NBCP State match requirement. Would CMS allow a State to obligate its entire State match in the first year—this would mean that the State would meet its financial contribution obligation in the first year?

Yes, CMS would allow a State to obligate its entire State match in the first year. However, CMS would not allow a State to withhold State match until the final year of grant award. Since the NBCP is a shared federal and State effort, we expect the State to contribute funding throughout the grant period unless it meets its obligation early on.

E1: What happens if necessary State legislation is not in place prior to the commencement of the grant period?

CMS is aware some States may require changes to State law or administrative rules in order to participate fully in all or some aspects of the program. CMS will be providing the services of a technical assistance contractor to assist the State, if desired, identify resources that other States have found useful as they contemplated the type of laws or administrative rules that have been useful. CMS will work with the State to identify benchmarks and the amount of Federal funds that may be available during each benchmarked period. For example, a State may determine that it has authority to require certain providers to participate immediately, while the State may need additional legislated authority (or administrative rule-making) before other provider types might be required to participate. In such a case CMS may work with the State to identify a portion of the potential grant funds that would be available immediately, and additional funds that may be available at a later time when the additional authority is in place.

Similarly, a State may determine that it does not have authority to require any provider type to participate right now, but could start implementing the program on a voluntary basis with those providers willing to participate. In this case we may also work with the State to identify a portion of the potential grant funds that would be available immediately, and additional funds that may be available at a later time when the additional authority is in place.

In the application, we advise such States to be as specific as possible with regard to its plans to secure such legislation, including the timetable that the State expects for the legislation or administrative rules to be proposed, and to be acted upon.

E2: Will there be technical support for States to start the program?

Yes, CMS has awarded a technical assistance contract to CNA to assist the States that are selected to participate in the program. We will be hosting annual grantee conferences which grantee States will be required attend as a condition of grant award. We also expect to open these conferences to other interested States that are not participating in the program.

E3: Is technical assistance available to assist a State in applying to the announcement of November 2010?

A State that requires technical assistance (TA) to apply for a NBCP grant should contact CMS by sending its request for TA to CMS via the NBCP email address at Background_Checks@cms.hhs.gov. TA may be provided to assist the State in investigating and understanding its options and planning that is necessary to fully implement the NBCP. TA may be provided with the understanding that the State will submit a complete proposal unless the State concludes that it would face major, insurmountable implementation barriers.

Category F – Federal Bureau of Investigation (FBI)

F1: How will the FBI fingerprint process work for the national background check?

The Patient Protection and Affordable Care Act authorizes long-term care facilities and providers to obtain State and national fingerprint-based background checks on prospective employees. When fingerprints are obtained from these individuals, the facility/provider will forward the fingerprints to their respective State Criminal Justice Information Services (CJIS) Systems Agency/State Identification Bureau (CSA/SIB) for a state check. Subsequent to the State check, the CSA/SIB will forward the fingerprints to the FBI for the national background check.

F2: Are rolled fingerprints required for all national background checks?

Yes, rolled fingerprints are required because they give the needed ridge impression for accurate classification. Flat fingerprints do not provide all the needed ridge characteristics currently required by State criminal history record repositories and the FBI, for the most accurate classification.

F3: What is the role of CJIS Systems Agencies/State Identification Bureaus (CSAs/SIBs) in establishing and implementing the program authorized by the Patient Protection and Affordable Care Act (Public Law 111-148), the Nationwide Program for “National and State Background Checks for Long-Term Care Direct Patient Access Employees” (National Background Check Program)?

Under this program, long-term care facilities/providers must obtain State and national background checks on prospective employees, including a check of State abuse and neglect registries in all States in which an applicant resided, and a State and national fingerprint-based background check. The Affordable Care Act also requires that States describe and test methods for the development of “rap back” capability for long-term care employees.

Within each State/territory is a central repository that maintains criminal history records on all State/territory offenders, and is generally responsible for State-level identification services. Repositories are housed in agencies referred to as CSAs/SIBs which serve as the focal point for criminal and noncriminal justice information services within a State/territory. CSAs/SIBs will perform State record checks on fingerprint submissions they receive from prospective employees of long-term care facilities/providers, and then forward the submissions to the FBI for national record checks against the Integrated Automated Fingerprint Identification System. CSAs/SIBs may also be solicited by NBCP grantees for assistance in formulating grant solicitations and applications under the National Background Check Program grant process and developing procedures for conducting fingerprint-based background checks.

An essential ingredient to the successful implementation of the National Background Check Program is a coordinated effort between the HHS Centers for Medicare & Medicaid Services (CMS), FBI, and CSAs/SIBs. Grantees will work with the CSAs/SIBs to implement their

national and State background checks program. CMS and its technical contractor, CNA, will work with the FBI to respond to inquiries from the grantees.

Category Z – Additional Questions

Z1: WAIT!!! I have more questions. Who will answer them?

Please send your additional questions to our background check email address (Background_Checks@cms.hhs.gov). We will periodically review the additional questions we receive and post updated versions of this Q&A document on our website. Please check the website periodically for more information.