



Center for Medicaid, CHIP, and Survey & Certification/Survey & Certification Group

Ref: S&C-10-21-NH

DATE: May 28, 2010

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Advance Notice - Upcoming Solicitation - National Background Check Program for Direct Patient Access Employees in Several Long Term Care Providers Including Nursing Homes, Home Health Agencies, Hospices, Adult Day Care, and Others

Memorandum Summary

- **Upcoming Solicitation for Background Check Program Participation:** As part of the new 2010 Affordable Care Act, the Centers for Medicare & Medicaid Services (CMS) will soon release to all States and U.S. Territories a solicitation to apply for Federal funds for a multi-year national background check program for several long term care facilities and providers.
- **Funds:** A total of \$3 million for FY 2010-2012 will be available for most States. A 25% non-federal match is required, and the match may be rendered through methods typically applied under Medicaid, including donations.
- **Terms:** Further information about this new initiative, as well as a prior background check pilot program and evaluation may be accessed at:
http://www.cms.gov/SurveyCertificationGenInfo/04_BackgroundCheck.asp.

Background

We are providing advance notice that the Centers for Medicare & Medicaid Services (CMS) will issue a solicitation for Federal matching grants to all States and the U.S. Territories for a multi-year *National Background Check Program for Patient Protection* for direct patient access employees of several long term care facilities and providers. As specified in the law and listed below, these providers include nursing homes and other providers that provide services through a variety of authorities including Medicaid State Plan services and Medicaid waiver authorities such as 1915(c) home and community-based services. We expect the solicitation to be available in early summer on <http://grants.gov>, with State replies due in August. The program will be open to all States and U.S. Territories.

The new national background check program is 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. Section 6201 of the Act is attached for your review.

Further information about this new initiative, as well as a prior background check pilot program and evaluation may be accessed at:

http://www.cms.gov/SurveyCertificationGenInfo/04_BackgroundCheck.asp.

The purpose of the program is to assist States and Territories that desire to institute or upgrade their systems of employee background checks to include checks of all pertinent registry sources in all States in which a potential employee has lived, to check State and Federal criminal records, and to use the FBI fingerprinting system in order to ensure that employees hired to serve the vulnerable long term care populations do not have criminal or registry past histories that make them unfit to be hired. The goal of the program is to prohibit the hiring of employees who have histories of abuse or relevant criminal violations to serve the vulnerable long term care population.

Program Components

The Law specifies the following types of facilities and providers that must be a part of the Program, similar to the previous demonstration program in which States phased in the following:

- Skilled nursing facilities;
- Nursing facilities;
- Home health agencies;
- Providers of hospice care;
- Long term care hospitals;
- Providers of personal care services;
- Providers of adult day care;
- Residential care providers that arrange for or provide long term care services including assisted living facilities;
- Intermediate care facilities for the mentally retarded; and
- Others determined by the State/Territory.

Funding

The new Program makes a distinction between States that are newly participating and those that participated in a statewide basis in the previous Background Check Pilot. For new States and the Territories, the maximum three-to-one Federal match is limited to \$3,000,000, while for previous statewide pilot States, the maximum match is limited to \$1,500,000. States/Territories may provide their matching funds either directly or through donations.

For more information about acceptable sources of donations for the State match, please refer to 42 CFR 433 Subpart B. States and providers have found background checks to be important to their efforts to assure quality and protect residents and we strongly encourage such efforts. This new initiative will assist States in initiating or expanding background check programs with favorable

federal funding. States can also receive federal Medicaid funding to supplement these efforts, but will be reimbursed at the regular federal matching rate.

The following are some the major requirements for States/Territories that participate in this Program:

- Long term care facilities and provider must obtain State and national criminal history background checks on prospective employees, and these checks must include:
 - A search of abuse and neglect registries of the current State and other States in which the prospective employee lived;
 - State criminal history records;
 - Records of State proceedings that may contain disqualifying information; and
 - Federal criminal history records, including a fingerprint check using the FBI Integrated Automated Fingerprint Identification System;
- States/Territories must describe and test methods to reduce duplicative fingerprinting including providing for the development of a “rap back” capability so that employees once hired, who subsequently are convicted of new crimes, are immediately made known to the employing facility/provider;
- States/Territories must have procedures to:
 - Conduct screening and criminal history background checks in accordance with the requirements of the Program;
 - Monitor facility/provider compliance;
 - Provide, as appropriate, for provisional employment period pending completion of the background check and/or completion of an employee appeal;
 - Provide an independent employee/prospective employee appeal process; and
 - Provide for the designation of a single State/Territorial agency responsible for the Program that is responsible to:
 - Oversee coordination between State and national criminal history background checks;
 - Oversee design of privacy and security safeguards;
 - Provide for immediate reporting of background check results to facilities/providers;
 - Determine and define which categories of employees are considered “direct patient access employees” according to the definitions provided in the Law;
 - Specify offenses; and
 - Develop the rap back system.

CMS plans to offer a national conference call once the solicitation is issued, as well as on-going technical assistance to all participating States to assist with implementation of their programs, as well as the development/collection of data that will be later used by the Office of the Inspector General when they conduct an evaluation of the Program. CMS matching funds will become available on

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award and throughout Federal Fiscal Year 2012, according to the three-to-one match amount awarded to each participant.

If you have any questions about this upcoming opportunity, you may contact the Background Check Program mailbox at background_checks@cms.hhs.gov. I hope you will consider becoming a part of this important new Federal/State partnership opportunity to enhance safety and quality of care for our nation's long term care population.

/s /

Thomas E. Hamilton

Attachment

cc: Survey and Certification Regional Office Management

ATTACHMENT

Subtitle C—Nationwide Program for National and State Background Checks on Direct Patient Access Employees of Long-term Care Facilities and Providers

SEC. 6201. NATIONWIDE PROGRAM FOR NATIONAL AND STATE BACKGROUND CHECKS ON DIRECT PATIENT ACCESS EMPLOYEES OF LONG-TERM CARE FACILITIES AND PROVIDERS.

(a) IN GENERAL.—The Secretary of Health and Human Services (in this section referred to as the “Secretary”), shall establish a program to identify efficient, effective, and economical procedures for long term care facilities or providers to conduct background checks on prospective direct patient access employees on a nationwide basis (in this subsection, such program shall be referred to as the “nationwide program”). Except for the following modifications, the Secretary shall carry out the nationwide program under similar terms and conditions as the pilot program under section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108–173; 117 Stat. 2257), including the prohibition on hiring abusive workers and the authorization of the imposition of penalties by a participating State under subsection (b)(3)(A) and (b)(6), respectively, of such section 307:

(1) AGREEMENTS.— H. R. 3590—604

(A) NEWLY PARTICIPATING STATES.—The Secretary shall enter into agreements with each State—

- (i) that the Secretary has not entered into an agreement with under subsection (c)(1) of such section 307;
- (ii) that agrees to conduct background checks under the nationwide program on a Statewide basis; and
- (iii) that submits an application to the Secretary containing such information and at such time as the Secretary may specify.

(B) CERTAIN PREVIOUSLY PARTICIPATING STATES.—The Secretary shall enter into agreements with each State—

- (i) that the Secretary has entered into an agreement with under such subsection (c)(1), but only in the case where such agreement did not require the State to conduct background checks under the program established under subsection (a) of such section 307 on a Statewide basis;
- (ii) that agrees to conduct background checks under the nationwide program on a Statewide basis; and
- (iii) that submits an application to the Secretary containing such information and at such time as the Secretary may specify.

(2) NONAPPLICATION OF SELECTION CRITERIA.—The selection criteria required under subsection (c)(3)(B) of such section 307 shall not apply.

(3) REQUIRED FINGERPRINT CHECK AS PART OF CRIMINAL HISTORY BACKGROUND CHECK.—The procedures established under subsection (b)(1) of such section 307 shall—

- (A) require that the long-term care facility or provider (or the designated agent of the long-term care facility or provider) obtain State and national criminal history background checks on the prospective employee through such means as the Secretary determines appropriate, efficient, and effective that utilize a search of State-based abuse and neglect registries and databases, including the abuse and neglect registries of another State in the case where a

prospective employee previously resided in that State, State criminal history records, the records of any proceedings in the State that may contain disqualifying information about prospective employees (such as proceedings conducted by State professional licensing and disciplinary boards and State Medicaid Fraud Control Units), and Federal criminal history records, including a fingerprint check using the Integrated Automated Fingerprint Identification System of the Federal Bureau of Investigation;

(B) require States to describe and test methods that reduce duplicative fingerprinting, including providing for the development of “rap back” capability by the State such that, if a direct patient access employee of a long-term care facility or provider is convicted of a crime following the initial criminal history background check conducted H. R. 3590—605 with respect to such employee, and the employee’s fingerprints match the prints on file with the State law enforcement department, the department will immediately inform the State and the State will immediately inform the long term care facility or provider which employs the direct patient access employee of such conviction; and

(C) require that criminal history background checks conducted under the nationwide program remain valid for a period of time specified by the Secretary.

(4) STATE REQUIREMENTS.—An agreement entered into under paragraph (1) shall require that a participating State—

(A) be responsible for monitoring compliance with the requirements of the nationwide program;

(B) have procedures in place to—

(i) conduct screening and criminal history background checks under the nationwide program in accordance with the requirements of this section;

(ii) monitor compliance by long-term care facilities and providers with the procedures and requirements of the nationwide program;

(iii) as appropriate, provide for a provisional period of employment by a long-term care facility or provider of a direct patient access employee, not to exceed 60 days, pending completion of the required criminal history background check and, in the case where the employee has appealed the results of such background check, pending completion of the appeals process, during which the employee shall be subject to direct on-site supervision (in accordance with procedures established by the State to ensure that a long-term care facility or provider furnishes such direct on-site supervision);

(iv) provide an independent process by which a provisional employee or an employee may appeal or dispute the accuracy of the information obtained in a background check performed under the nationwide program, including the specification of criteria for appeals for direct patient access employees found to have disqualifying information which shall include consideration of the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual;

(v) provide for the designation of a single State agency as responsible for—

(I) overseeing the coordination of any State and national criminal history background checks requested by a long-term care facility or provider (or the designated agent of the long-term care facility or provider) utilizing a search of State and Federal criminal history records, including a fingerprint check of such records;

(II) overseeing the design of appropriate privacy and security safeguards for use in the review of the results of any State or national criminal history background checks conducted regarding a H. R. 3590—606 prospective direct patient access employee to determine whether the employee has any conviction for a relevant crime;

(III) immediately reporting to the long-term care facility or provider that requested the criminal history background check the results of such review; and

(IV) 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 U.S.C. 1320a–7e), reporting the existence of such conviction to the database established under that section;

(vi) determine which individuals are direct patient access employees (as defined in paragraph (6)(B)) for purposes of the nationwide program;

(vii) as appropriate, specify offenses, including convictions for violent crimes, for purposes of the nationwide program; and

(viii) describe and test methods that reduce duplicative fingerprinting, including providing for the development of “rap back” capability such that, if a direct patient access employee of a long-term care facility or provider is convicted of a crime following the initial criminal history background check conducted with respect to such employee, and the employee’s fingerprints match the prints on file with the State law enforcement department—

(I) the department will immediately inform the State agency designated under clause (v) and such agency will immediately inform the facility or provider which employs the direct patient access employee of such conviction; and

(II) the State will provide, or will require the facility to provide, to the employee a copy of the results of the criminal history background check conducted with respect to the employee at no charge in the case where the individual requests such a copy.

(5) PAYMENTS.—

(A) NEWLY PARTICIPATING STATES.—

(i) **IN GENERAL.**—As part of the application submitted by a State under paragraph (1)(A)(iii), the State shall guarantee, with respect to the costs to be incurred by the State in carrying out the nationwide program, that the State will make available (directly or through donations from public or private entities) a particular amount of non-Federal contributions, as a condition of receiving the Federal match under clause (ii).

(ii) **FEDERAL MATCH.**—The payment amount to each State that the Secretary enters into an agreement with under paragraph (1)(A) shall be 3 times the amount that the State guarantees to make available under clause (i), except that in no case may the payment amount exceed \$3,000,000.

(B) PREVIOUSLY PARTICIPATING STATES.— H. R. 3590—607

(i) **IN GENERAL.**—As part of the application submitted by a State under paragraph (1)(B)(iii), the State shall guarantee, with respect to the costs to be incurred by the State in carrying out the nationwide program, that the State will make available (directly or through donations from public or private entities) a particular amount of non-Federal contributions, as a condition of receiving the Federal match under clause (ii).

(ii) FEDERAL MATCH.—The payment amount to each State that the Secretary enters into an agreement with under paragraph (1)(B) shall be 3 times the amount that the State guarantees to make available under clause (i), except that in no case may the payment amount exceed \$1,500,000.

(6) DEFINITIONS.—Under the nationwide program:

(A) CONVICTION FOR A RELEVANT CRIME.—The term “conviction for a relevant crime” means 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.

(B) DISQUALIFYING INFORMATION.—The term “disqualifying information” means a conviction for a relevant crime or a finding of patient or resident abuse.

(C) 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.

(D) DIRECT PATIENT ACCESS EMPLOYEE.—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. Such term does not include a volunteer unless 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.

(E) LONG-TERM CARE FACILITY OR PROVIDER.—The term “long-term care facility or provider” means the following facilities or providers which receive payment for services under title XVIII or XIX of the Social Security Act: H. R. 3590—608

(i) A skilled nursing facility (as defined in section 1819(a) of the Social Security Act (42 U.S.C. 1395i-3(a))).

(ii) A nursing facility (as defined in section 1919(a) of such Act (42 U.S.C. 396r(a))).

(iii) A home health agency.

(iv) A provider of hospice care (as defined in section 1861(dd)(1) of such Act (42 U.S.C. 1395x(dd)(1))).

(v) A long-term care hospital (as described in section 1886(d)(1)(B)(iv) of such Act (42 U.S.C. 1395ww(d)(1)(B)(iv))).

(vi) A provider of personal care services.

(vii) A provider of adult day care.

(viii) A residential care provider that arranges for, or directly provides, long-term care services, including an assisted living facility that provides a level of care established by the Secretary.

(ix) An intermediate care facility for the mentally retarded (as defined in section 1905(d) of such Act (42 U.S.C. 1396d(d))).

(x) Any other facility or provider of long-term care services under such titles as the participating State determines appropriate.

(7) EVALUATION AND REPORT.—

(A) EVALUATION.—

(i) **IN GENERAL.**—The Inspector General of the Department of Health and Human Services shall conduct an evaluation of the nationwide program.

(ii) **INCLUSION OF SPECIFIC TOPICS.**—The evaluation conducted under clause (i) shall include the following:

(I) A review of the various procedures implemented by participating States for long-term care facilities or providers, including staffing agencies, to conduct background checks of direct patient access employees under the nationwide program and identification of the most appropriate, efficient, and effective procedures for conducting such background checks.

(II) An assessment of the costs of conducting such background checks (including start up and administrative costs).

(III) A determination of the extent to which conducting such background checks leads to any unintended consequences, including a reduction in the available workforce for long-term care facilities or providers.

(IV) An assessment of the impact of the nationwide program on reducing the number of incidents of neglect, abuse, and misappropriation of resident property to the extent practicable.

(V) An evaluation of other aspects of the nationwide program, as determined appropriate by the Secretary.

(B) REPORT.—Not later than 180 days after the completion of the nationwide program, the Inspector General of the Department of Health and Human Services shall H. R. 3590—609 submit a report to Congress containing the results of the evaluation conducted under subparagraph (A).

(b) FUNDING.—

(1) NOTIFICATION.—The Secretary of Health and Human Services shall notify the Secretary of the Treasury of the amount necessary to carry out the nationwide program under this section for the period of fiscal years 2010 through 2012, except that in no case shall such amount exceed \$160,000,000.

(2) TRANSFER OF FUNDS.—

(A) IN GENERAL.—Out of any funds in the Treasury not otherwise appropriated, the Secretary of the Treasury shall provide for the transfer to the Secretary of Health and Human Services of the amount specified as necessary to carry out the nationwide program under paragraph (1). Such amount shall remain available until expended.

(B) RESERVATION OF FUNDS FOR CONDUCT OF EVALUATION.—

The Secretary may reserve not more than \$3,000,000 of the amount transferred under subparagraph (A) to provide for the conduct of the evaluation under subsection (a)(7)(A).