

## COVERED CALIFORNIA BACKGROUND CHECK POLICY

### SUMMARY

Recently-released federal privacy and security guidelines require state Health Benefit Exchanges to perform criminal background checks on any personnel or potential personnel whose duties include, or would include, having access to personal health or financial information for Exchange applicants and enrollees. The guidelines also require a process for periodic rescreening of personnel with access to this information. These guidelines are laid out in the Minimum Acceptable Risk Standards for Exchanges (MARS-E), which is one of three federal guidances on Exchange privacy and security standards. Covered California staff have determined that these requirements apply broadly to employees, prospective employees, contractors, subcontractors, volunteers and vendors.

This Board Recommendation Brief discusses implementation issues such as defining the affected positions and types of offenses that may disqualify individuals from accessing personal information for Covered California applicants and enrollees. It also lays out next steps including providing technical assistance for required state legislation and developing emergency regulations to implement a screening process.

***Staff recommendation:*** require fingerprint-based criminal background checks (“background checks”) for any employees, prospective employees, contractor, subcontractor, volunteer or vendor who will have access to personal information for Covered California applicants and enrollees. For employees or prospective employees and for individuals who have successfully completed the training and certification process to be an Assister, staff recommend that Covered California pay the cost for the background checks for year one. The policy to pay for background checks for certified Assistors will be specified in forthcoming Assister program recommendations.

### ISSUE

Many Covered California employees, prospective employees, contractors, subcontractors, volunteers and vendors will have access to applicant or enrollee Personal Identifying Information, Personal Health Information and/or Federal Tax Information as defined in the Health Insurance Portability and Accountability Act (HIPAA), the California Information Practices Act, and Internal Revenue Service (IRS) regulations. Federal guidance requires that Covered California protect and safeguard customers from unauthorized and illegal access to or disclosure of this information. To comply with federal guidance, Covered California must implement background checks to identify, and exclude from accessing personal information, applicants with a demonstrated history of abuse of personal information or other offenses that may indicate potential propensity to abuse such information.

Background checks and security screening are required by the Centers for Medicare and Medicaid Services (CMS) and the IRS for any employee who is authorized to have access to

Personal Identifying Information or Federal Tax Information, respectively. Many state agencies in health, education and financial areas, including the Department of Managed Health Care and the California Department of Insurance, also require background checks. See Appendix 1 for selected state agency screening requirements.

## **FEDERAL BACKGROUND CHECK REQUIREMENTS**

Per the requirements of the MARS-E (see Appendix 2 – Federal Requirements), all individuals associated with Covered California who would have access to sensitive information such as Personal Identifying Information, Personal Health Information and Federal Tax Information are required to be screened before they may be authorized to obtain access to the information system and devices containing such information. To meet these requirements, Covered California must:

1. Perform a background check for all persons prior to authorizing access; and
2. Require appropriate personnel to obtain and hold a moderate-risk security clearance as defined in the DHHS Personnel Security/Suitability Handbook.

The MARS-E also requires periodic rescreening of individuals, consistent with the criticality/sensitivity rating of the position. Furthermore, IRS Publication 1075, Tax Information Security Guidelines requires screening and consideration of an individual's background and security clearance when designating personnel who are authorized to access Federal Tax Information.

## **IMPLEMENTATION CONSIDERATIONS**

### ***Who will be required to undergo a background check?***

Based on the federal guidance outlined above, Covered California has determined that background checks are required for all employees, prospective employees, contractors, subcontractors, volunteers and vendors who access or will access personal financial and identifying information. Depending on the payment arrangement, Assistors could be considered contractors or volunteers. Insurance agents who will sell Covered California Plans undergo fingerprint-based background checks as part of the licensure process run by the California Department of Insurance (CDI).

### ***How will be background checks be performed?***

In analyzing options for conducting background checks, Covered California considered two standard types of clearances: 1) non-fingerprint-based background check, and 2) fingerprint-based background check (see Appendix 3 – Background Check Options). A non-fingerprint-based background check is conducted using the applicant's identifying information, such as social security number, to check county data sources. The fingerprinting-based background check allows for a broader search including state and federal crime databases maintained by DOJ and FBI, respectively, and allows for subsequent arrest notifications. Covered California

staff have determined that fingerprint-based background checks are necessary to comply with federal requirements for initial security clearance and ongoing monitoring. We note that fingerprint-based background checks will identify convictions and any arrests for which charges are still pending and will not identify any arrests that did not result in conviction.

Covered California explored the possibility of using existing fingerprint checks previously undergone by prospective Covered California personnel to satisfy Covered California's background check requirement. This approach was determined not to meet federal requirements because it will not provide a positive identification of the individual being screened and will not allow Covered California to receive required subsequent arrest notifications.

### *When will background checks be performed?*

- **Prospective Covered California employees:** As a condition of employment, Covered California will require background checks of all prospective employees whose duties include access to Personal Identifying Information, Personal Health Information or Federal Tax Information. Hiring offers will be made contingent on an acceptable background criminal record check, and prospective employees will not begin employment until the criminal record check is completed and approved.
- **Prospective Covered California contractors, subcontractors, volunteers and vendors:** Covered California will require background checks of all prospective contractors, subcontractors, volunteers and vendors whose duties include access to Personal Identifying Information, Personal Health Information or Federal Tax Information. Assisters would be considered volunteers or vendors depending on their compensation terms. For Assisters, acceptance to training will be contingent on an acceptable background criminal record check, and prospective Assisters will not begin training until the criminal record check is completed and approved.
- **Current Covered California employees and contractors, subcontractors, volunteers and vendors:** CMS requires all Covered California employees, contractors, subcontractors, volunteers and vendors to have a criminal record check before hire. Because some individuals in these positions have already been hired and more will be hired before legislation can be obtained to authorize access to criminal records, the treatment of existing personnel will need to be discussed with federal oversight agencies.
- **Periodic rescreening of employees, contractors, subcontractors, volunteers and vendors:** Once an employee, contractor, subcontractor, volunteer or vendor has been fingerprinted and approved for access to personal information, Covered California will receive any subsequent arrest and conviction information from DOJ for California offenses. There is no additional charge for this information, and no further action will be required of the employee, contractor, subcontractor, volunteer or vendor.

### *What could be considered a disqualifying offense?*

Covered California will use the judicially created standard of crimes of moral turpitude to guide potentially disqualifying offenses which could include theft, dishonesty or fraud, as well as the manufacture or distribution of drugs and certain violent or property offenses, such as assault with a deadly weapon, murder and arson, which are performed with an evil intent. This standard is used by many other state departments and is a simple shorthand as compared to enumerating each disqualifying crime. Other crimes that are not likely to impact an individual's fitness for employment, such as driving under the influence, drug possession, and petty vandalism, will not be considered disqualifying.

Covered California's implementing regulations will also specify mitigating factors that could be considered in determining whether the offense disqualifies an individual for the position. Factors could include: age of individual when the offense was committed; length of time since the offense was committed; whether there have been any intervening convictions and if the applicant remains on probation or parole; and whether the applicant has established a stable job history since the conviction and end of any sentence imposed. In addition, Covered California will work to develop a process for Assister applicants to appeal disqualification decisions. The process will be specified in forthcoming Assister program recommendations.

### *Who will pay for background checks?*

The estimated cost for an individual criminal background check is approximately \$65 which includes the cost of fingerprinting and fees charged by DOJ and the FBI. For employees or prospective employees and individuals who have successfully completed the training and certification process to be an Assister, staff recommend that Covered California pay the cost for the background checks for year one. The policy to pay for background checks for certified Assistors will be specified in forthcoming Assister program recommendations. Covered California's other contactors, subcontractors, volunteers and vendors that are not Assister Enrollment Entities would pay for the cost of background checks for employees and prospective employees who would be required to undergo a background check. For Covered California, with an estimated hiring program of approximately 900 employees who would be subject to background checks in 2013, the estimated cost to Covered California in 2013 would be approximately \$60,000, with ongoing annual costs of approximately \$38,000. The estimated one-year cost for Assister background checks is \$1,155,000. Covered California will engage in negotiations to receive a state-wide discount rate through a company such as LiveScan and offer the services to contractors, subcontractors, volunteers and vendors to reduce costs.

## **REQUIRED AUTHORITY**

Covered California must have explicit statutory authority in order to receive criminal record information from DOJ and the FBI, and subsequent criminal arrest and conviction information from DOJ. Covered California must receive statutory authority in the 2013 legislative session in

order to comply with federal requirements. Covered California will then promulgate emergency regulations to further specify background check requirements including disqualifying crimes and affected positions.

### **RECOMMENDATION**

Staff recommend requiring fingerprint-based criminal background checks (“background checks”) for any employees, prospective employees, contractor, subcontractor, volunteer or vendor who will have access to personal information for Covered California applicants and enrollees. For employees and prospective employees and individuals who have successfully completed the training and certification process to be an Assister, staff recommend that Covered California pay the cost for the background checks for year one. The policy to pay for background checks for certified Assistants will be specified in forthcoming Assister program recommendations.

APPENDIX 1: CALIFORNIA STATE AGENCY BACKGROUND CHECK REQUIREMENTS			
Agency	Authority	Background Check Method	Disqualifying Offenses
Department of Managed Health Care	Gov. Code 1041	Background Checks, Fingerprinting	(g) The Department of Managed Health Care may investigate the criminal history for crimes involving moral turpitude of persons applying for employment in order to make a final determination of that person's fitness to perform duties that would include any access to confidential information. <b>Gov. Code 1041(g).</b>
California Department of Insurance	Insurance Code 12921(a), 10 CCR 2183 et seq., 18 U.S.C. 1033	Background Checks, Fingerprinting	Reasons for denial of a license include, but are not limited to, the licensee or applicant lacking integrity, having a poor business reputation, or that permitting the licensee or applicant to hold an insurance license is against the public interest. The following is a partial list of crimes or acts that are substantially related to the qualifications, functions or duties of an insurance licensee: (a) Any felony conviction; (b) A misdemeanor conviction which evidences present or potential unfitness to perform the functions authorized by the license in the manner consistent with the public health, safety, and welfare, including but not limited to, soliciting, attempting, or committing crimes involving the following: (1) Dishonesty or fraud; (2) Any conviction arising out of acts performed in the business of insurance or any other licensed business or profession; (3) Theft; (4) Sexually related conduct affecting a person who is an observer or non-consenting participant in the conduct or convictions, or which requires registration pursuant to the provisions of Section 290 of the Penal Code; (5) Resisting, delaying, or obstructing a public officer in violation of Penal Code Section 148; (6) Any act or offense wherein the person willfully causes injury to the person or property of another; (7) Violation of a relation of trust or

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			confidence, or a breach of fiduciary duty; (8) Multiple convictions which demonstrate a pattern of repeated and willful disregard for the law. (c) Any act which demonstrates a willful attempt to derive a personal financial benefit through the nonpayment or underpayment of taxes, assessments, or levies duly imposed upon the licensee or applicant by federal, state or local government or a willful failure to comply with a court order. <b>10 CCR 2183.2.</b>
Department of Motor Vehicles	Gov. Code 1040	Background Checks, Fingerprinting	The Department of Motor Vehicles may investigate the criminal history of persons applying for employment in order to make a final determination of that person's fitness to perform duties that would include any of those specified in subdivision (a). <b>Gov. Code 1040(g).</b>
Department of Justice (Attorney General's Office – Electronic Recording Delivery System Roles)	Gov. Code 27395, 11 CCR 999.121	Background Checks, Fingerprinting	...if convicted of a felony, has been convicted of a misdemeanor related to theft, fraud, or a crime of moral turpitude, a plead of guilty or no contest, a verdict resulting in conviction, or the forfeiture of bail... <b>Gov. Code 27395(a).</b>
California Gambling Control Commission	Gov. Code 1042	Background Checks, Fingerprinting	(g) The executive director of the California Gambling Control Commission may investigate the criminal history of persons applying for employment and prospective service contractors and their agents, subcontractors, or employees, in order to make a final determination of a person's fitness to perform duties that would include access to any information or accountable items specified under paragraph (1) of subdivision (a). <b>Gov. Code 1042(g).</b>
Office of the State Chief Information Officer	Gov. Code 111456.6	Background checks, Fingerprinting	Any of the following: (1) A record of state or federal convictions and the existence and nature of state or federal arrests for which the person is free on bail or on his or her own

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			<p>recognizance pending trial or appeal.</p> <p>(2) Being convicted of, or pleading nolo contendere to, a crime, or having committed an act involving dishonesty, fraud, or deceit, or if the crime or act is substantially related to the qualifications, functions, or duties of a person employed by the State in accordance with this provision.</p> <p>(3) Any conviction or arrest, for which the person is free on bail or on his or her own recognizance pending trial or appeal, with a reasonable nexus to the information or data to which the employee shall have access.</p> <p><b>Gov. Code 11546.6(b)</b></p>
Various State Boards and Commissions*	Bus. & Prof. Code 144	Background Check, Fingerprinting	<p>An agency designated in subdivision (b) shall require an applicant to furnish to the agency a full set of fingerprints for purposes of conducting criminal history record checks. Any agency designated in subdivision (b) may obtain and receive at its discretion, criminal history information from the Department of Justice and the United States Federal Bureau of Investigation.</p> <p><b>Bus. &amp; Prof. 144(a).</b></p>
Dental Hygiene Committee of California	Bus. & Prof. Code 1916; 16 CCR 1132	Background Checks, Fingerprinting	<p>(a) As a condition for renewal for a license... furnish to the Department of Justice a full set of electronic fingerprints for the purpose of conducting a criminal history record check and to undergo a state and federal level criminal offender record information search conducted by the Department of Justice...</p>

\* California Board of Accountancy, State Athletic Commission, Board of Behavioral Sciences, Court Reporters Board of California, State Board of Guide Dogs for the Blind, California State Board of Pharmacy, Board of Registered Nursing, Veterinary Medical Board, Board of Vocational Nursing and Psychiatric Technicians, Respiratory Care Board of California, Physical Therapy Board of California, Physician Assistant Committee of the Medical Board of California, Speech-Language Pathology and Audiology and Hearing Aid Dispenser Board, Medical Board of California, State Board of Optometry, Acupuncture Board, Cemetery and Funeral Board, Bureau of Security and Investigative Services, Division of Investigation, Board of Psychology, California Board of Occupational Therapy, Structural Pest Control Board, Contractor's State License Board, Naturopathic Medicine Committee, Professional Fiduciaries Bureau; Board of Professional Engineers, Land Surveyors, and Geologists



## APPENDIX 2: FEDERAL REQUIREMENTS

*Centers for Medicare and Medicaid Services (CMS)*. Catalog of Minimum Acceptable Risk Standards for Exchanges (MARS-E), Exchange Reference Architecture Supplement.

Note: because the MARS-E is not publicly available at this time, the relevant section is copied below:

**Table 180. PS-3: Personnel Screening**

**PS-3: Personnel Screening**

**Control**

The organization:

- a. Screens individuals prior to authorizing access to the information system; and
- b. Rescreens individuals periodically, consistent with the criticality/sensitivity rating of the position.

For FTI: Individuals must be screened before authorizing access to information systems and devices containing FTI.

**Implementation Standards**

1. Perform criminal history check for all persons prior to employment.
2. Require appropriate personnel to obtain and hold a moderate-risk security clearance as defined in the DHHS Personnel Security/Suitability Handbook.

**Guidance**

Screening and rescreening are consistent with applicable federal laws, Executive Orders, directives, policies, regulations, standards, guidance, and the criteria established for the risk designation of the assigned position. The Catalog of Minimum Acceptable Risk Controls for Exchanges – Exchange Reference Architecture Supplement 135 Version 1.0 August 1, 2012 Centers for Medicare & Medicaid Services System and Communications Protection (SC) – Technical

**PS-3: Personnel Screening**

organization may define different rescreening conditions and frequencies for personnel accessing the information system based on the type of information processed, stored, or transmitted by the system.

**Applicability:**

Exchanges

**Reference(s):** IRS-1075: 9.12 **Related Control Requirements:**

**Assessment Procedure:** PS-3.1

**Assessment Objective**

Determine if:

- (i) the organization screens individuals prior to authorizing access to the information system;
- (ii) the organization defines conditions requiring re-screening and, where re-screening is so indicated, the frequency of such re-screening; and
- (iii) the organization re-screens individuals according to organization-defined conditions requiring re-screening and, where re-screening is so indicated, the organization-defined frequency of such re-screening.

**Assessment Methods and Objects**

**Examine:** Personnel security policy; procedures addressing personnel screening; records of screened personnel; security plan; other relevant documents or records.

**Interview:** Organizational personnel with personnel security responsibilities.

Also note: the MARS-E normalizes privacy and security standards found in the following publicly available documents:

1. NIST SP 800-37v1 (Guide for Applying the Risk Management Framework to Federal Information Systems), dated Feb 2010.
2. NIST SP 800-53v3 (Recommended Security Controls for Federal Information Systems and Organizations), dated Aug 2009.\*
3. CMS Minimum Acceptable Risk Standards for Exchanges – Exchange Reference Architecture Supplement v1, dated Aug 2012; and
4. CMS Information Security (IS) Authorization to Operate Package Guide v3, Dec 2011.

\*The NIST SP 800-53v3 is most relevant to this briefing paper.

*Internal Revenue Service (IRS)*. Publication 1075, Tax Information Security Guidelines for Federal, State and Local Agencies. Available online: <http://www.irs.gov/pub/irs-pdf/p1075.pdf>

<b>APPENDIX 3: BACKGROUND CHECK OPTIONS CONSIDERED</b>		
	<b>SSN-based Background Check</b>	<b>Fingerprint-based Background Check</b>
<b>Data Sources Checked</b>	<ul style="list-style-type: none"> <li>County data sources</li> </ul>	<ul style="list-style-type: none"> <li>County data sources</li> <li>California Department of Justice</li> <li>Federal Bureau of Investigation</li> </ul>
<b>Information Provided</b>	<ul style="list-style-type: none"> <li>Provides information about state and local convictions.</li> </ul>	<ul style="list-style-type: none"> <li>Provides positive identification of the individual being screened.</li> <li>Provides information about federal, state and local convictions and pending criminal charges.</li> <li>Provides subsequent arrest notifications.</li> </ul>
<b>Cost</b>	\$55 per background check	\$65 per background check