

CALIFORNIA DEPARTMENT OF JUSTICE

TITLE 11. LAW

DIVISION 1. ATTORNEY GENERAL

CHAPTER 4.5. CALIFORNIA VOLUNTEER AND EMPLOYEE CRIMINAL HISTORY SERVICE (CalVECHS) PROGRAM

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

Federal law generally prevents the California Department of Justice (DOJ) from disseminating federal-level criminal offender record information (CORI) to private, non-governmental agencies.

The National Child Protection Act, as amended by the Volunteers for Children Act (NCPA/VCA), codified in United States Code, title 34, section 40102 et seq, allows states to authorize fingerprint-based federal background checks of employees and volunteers of organizations that serve children, the elderly, or individuals with disabilities, some of which organizations would otherwise be disqualified from receiving federal-level CORI due to the restrictions of Public Law 92-544.

The state programs established under the NCPA/VCA are commonly known as Volunteer and Employee Criminal History System (VECHS) programs. Without a VECHS program incorporating forms required by the NCPA/VCA, non-governmental agencies are unable to receive federal CORI. In September 2023, the California Legislature enacted Senate Bill 135 amending Penal Code section 11105.3, allowing DOJ to establish the California Volunteer and Employee Criminal History Service (CalVECHS) Program. Penal Code section 11105.3, subdivision (b), allows DOJ to disseminate federal-level CORI to qualified entities under the authority of United States Code, title 34, section 40102 and sets forth controls on access and use of the federal-level CORI.

DOJ proposes these regulations to implement the CalVECHS Program and specify procedures for participation by qualified entities, enabling qualified non-governmental agencies to receive a detailed federal response when their employees and volunteers undergo fingerprint-based criminal history background checks.

BENEFITS ANTICIPATED FROM REGULATORY ACTION

This rulemaking action will particularly benefit private, non-governmental entities that serve children, the elderly, and individuals with disabilities that would otherwise be unable to receive federal-level CORI due to the restrictions of Public Law 92-544.

SPECIFIC PURPOSE AND NECESSITY OF EACH SECTION

Article 1. General

§ 401. Definitions of Key Terms.

This section defines the terms that will be used throughout the chapter.

Subdivisions (a) and (b) define “Qualified entity” and “Care,” which are necessary to establish the types of organizations, and the services they provide, that can participate in the CalVECHS Program. These terms are consistent with United States Code, title 34, section 40104(a)(5) and (a)(10) of the NCPA/VCA.

Subdivisions (c) defines “Child,” which is necessary to further clarify the definition of “Care” and establish the types of organizations that can participate in the CalVECHS Program. This term is consistent with United States Code, title 34, section 40104(a) of the NCPA/VCA. Section 40104(a)(2) defines “child” to mean a person who is a child for purposes of a state’s child abuse law. In California, a “child” under the Child Abuse and Neglect Reporting Act is defined in Penal Code section 11165 as a person under 18 years of age.

Subdivision (d) defines “Elderly,” which is necessary to further clarify the definition of “Care” and establish the types of organizations that can participate in the CalVECHS Program. This term is not defined in the NCPA/VCA. However, California’s Welfare and Institutions Code section 9018 defines “elderly” as 60 years of age or older.

Subdivision (e) defines “individual with a disability,” which is necessary to further clarify the definition of “Care” and establish the types of organization that can participate in the CalVECHS Program. The term is consistent with United States Code, title 42, section 12102.

Subdivision (f) defines “Covered individual,” which is necessary to establish the population that will be subject to fingerprint-based background checks under the CalVECHS Program. This term is consistent with United States Code, title 34, section 40104(a)(9).

Subdivision (g) defines “Criminal offender record information” or “CORI,” which is necessary to establish the type of information that qualified entities should expect to receive and are required to maintain proper security of after submitting a request for the fingerprint-based background check of a covered individual.

Subdivision (h) defines “Department,” which is necessary for brevity.

Article 2. Procedures for CalVECHS Program Participation

§ 402. Enrollment in CalVECHS.

This section establishes procedures for qualified entities to enroll in the CalVECHS Program and incorporates the CalVECHS User Agreement Conditions for Release of Criminal Offender

Record Information, BCIA 9017 (Orig. 07/2024). The enrollment procedures and User Agreement are necessary for basic program operation and expectation setting.

BCIA 9017:

The BCIA 9017 captures data pertinent to processing requests by qualified entities to enroll in the CalVECHS Program.

Qualified Entity Information:

Descriptor fields like qualified entity name and address, Originating Agency Identifier (ORI) number, point of contact name, and contact information for the point of contact, provide DOJ with information necessary to enroll the agency in the CalVECHS Program, register a new ORI number when applicable, and contact a representative of the agency as needed.

Purpose:

The Purpose section informs the qualified entity of the functions of the CalVECHS User Agreement.

This section requires the agency to (1) declare which group it provides care for (children, the elderly, and/or individuals with disabilities), (2) provide a description of their intended purpose to receive CORI, including details about the services they offer and the individuals or clients they serve, and (3) provide the law(s) requiring or allowing the receipt of CORI. This is necessary for DOJ to determine the entity's eligibility to enroll in the CalVECHS Program.

Agreements:

This section establishes expectations for both DOJ and the qualified entity as signatories to the CalVECHS Program User Agreement. It specifies DOJ's role in providing CORI, ensuring accuracy of CORI, and conducting compliance audits, which are necessary to comply with requirements set forth in Penal Code section 11105.3, subdivision (b), United States Code, title 34, section 40102, subdivision (b), and the Federal Bureau of Investigation's (FBI) CJIS Security Policy.

The second part of this section informs the entity of their responsibilities to (1) comply with the terms of the User Agreement and state and federal laws and policies regarding the receipt, use, and dissemination of CORI, (2) assess applicant fitness, (3) ensure CalVECHS forms are properly completed and retained, (4) inform applicants of their right to challenge the accuracy of their background check results, and (5) allow compliance audits by DOJ. These are necessary to comply with requirements set forth in Penal Code section 11105.3, subdivision (b), United States Code, title 34, section 40102, subdivision (b), and the FBI's CJIS Security Policy.

Signature:

DOJ requires a representative of the entity and a representative of DOJ to sign and date the CalVECHS User Agreement, establishing both parties' (1) acknowledgement of the CalVECHS User Agreement's contents and (2) commitment to uphold the contract.

§ 403. Determination by the Department.

Subdivision (a) conveys DOJ's responsibilities upon receipt of an agency's application for enrollment in the CalVECHS Program. This section is necessary to establish the conditions upon which DOJ will proceed with making an eligibility determination for a CalVECHS Program application.

Subdivision (b) allows for the exclusion of agencies that have, outside of Penal Code 11105.3, statutory mandates to fingerprint applicants who would otherwise fall under the definition of covered individuals. This section is necessary to preclude gratuitous fingerprinting and to affirm the authority of the state's regulatory agencies to mandate the fingerprinting of applicants under their jurisdiction.

Subdivision (c) requires DOJ to notify the agency of enrollment confirmation or denial. This section is necessary to ensure that the agency is aware of DOJ's eligibility determination.

§ 404. Compliance Audit.

The purpose of this section is to establish DOJ's responsibility to complete regular compliance audits. This section is necessary to comply with applicant agency auditing requirements set forth in Penal Code section 11105.3, subdivision (b), and the FBI's CJIS Security Policy.

Article 3. Procedure for Requesting Criminal Offender Record Information as a Qualified Entity

§ 405. CalVECHS Waiver.

This section establishes procedures for qualified entities to request the CORI of covered individuals and incorporates the BCIA 9018 and BCIA 8016VECHS forms.

Subdivision (a) requires that a covered individual and qualified entity complete the CalVECHS Waiver Agreement Conditions for Release of Criminal Offender Record Information, BCIA 9018 (Orig. 07/2024). This section is necessary to comply with requirements set forth in Penal Code section 11105.3, subdivision (b), and United States Code, title 34, section 40102, subdivision (b).

Subdivision (b) requires the qualified entity to retain the CalVECHS Waiver Agreement for a minimum of three years or until a successful compliance audit has been assessed. This section is necessary to comply with applicant agency auditing requirements set forth in Penal Code section 11105.3, subdivision (b), and the FBI's CJIS Security Policy.

BCIA 9018:

The CalVECHS Waiver Agreement is a contract between the qualified entity and the covered individual that establishes the agency's authority to receive and use CORI and the applicant's rights to challenge the accuracy of the background check report. It is necessary to comply with requirements set forth in Penal Code section 11105.3, subdivision (b), and United States Code, title 34, section 40102, subdivision (b).

Section 1:

In the first part of the form, the covered individual must identify the qualified entity to which they are authorizing DOJ to disseminate their CORI. This section establishes the applicant's rights to challenge the results of the background check and the entity's authority to receive CORI and use that information to make a determination regarding the applicant's suitability for unsupervised access to children, the elderly, or individuals with disabilities.

Section 2:

The second part of the form requires the covered individual to declare whether they have been convicted or pled guilty to a crime and to describe the crime if applicable. This is necessary to comply with requirements set forth in United States Code, title 34, section 40102, subdivision (b).

Section 3:

Part three requires the applicant to sign and date, acknowledging the content of the agreement, and to provide an address where they can receive a copy of their criminal history report. This is necessary to ensure that the covered individual affirms their understanding of the details of the waiver agreement and authorizes the qualified entity to receive their CORI.

Section 4:

The final portion of the form requires the qualified entity to input the agency name and contact information. This is necessary to affirm the agency's role as recipient of the covered individual's CORI.

Privacy Notice:

BCIA 9018 includes a privacy notice. Civil Code section 1798.17 requires a privacy notice, regarding the collection and use of personal information, to be provided on any form used to collect personal information from individuals. DOJ has determined the privacy notice is necessary to ensure compliance with Civil Code section 1798.17.

§ 406. Request for Fingerprint-based Criminal History Record.

Subdivision (a) incorporates the Request for Live Scan Service, BCIA 8016VECHS (Orig. 07/2024). This section is necessary to comply with requirements set forth in Penal Code section 11105.3, subdivision (b), and United States Code, title 34, section 40102, subdivision (b).

Subdivision (b) incorporates the Applicant Fingerprint Form, FD-258 (Rev. 11-1-2020) 1110-0046. This is necessary to comply with requirements set forth in Penal Code section 11105.3, subdivision (b), and United States Code, title 34, section 40102, subdivision (b).

Subdivision (c) establishes the exemption from state-level CORI fees for 501(c)(3) organizations. This section is necessary to comply with requirements set forth in Penal Code section 11105.3, subdivision (b), and United States Code, title 34, section 40102, subdivision (e).

BCIA 8016VECHS:

The BCIA 8016VECHS contains data elements necessary to process an electronic fingerprint submission, search for matching criminal history, and review the criminal history information. It differs from the generic Request for Live Scan Service form in the heading, the applicant address field, and two pre-populated data fields.

Applicant Submission:

The applicant submission section contains the data elements necessary to process an electronic fingerprint submission and search for matching criminal history information.

The *ORI* field ensures that the requesting agency has legal authorization to access CORI. The *Authorized Applicant Type* data field is similarly needed to ensure that the individual whose CORI is being requested belongs to a population that the agency is authorized to fingerprint. On the BCIA 8016VECHS, the *Type of License/Certification/Permit OR Working Title* data field is pre-populated with “NCPA/VCA.” This is necessary to comply with the FBI’s requirements for individuals fingerprinted under state VECHS programs.

Contributing Agency Information:

The *Agency Authorized to Receive Criminal Record Information* and the contact information fields in this section are necessary to ensure that the agency requesting CORI is authorized to do so and to contact them as needed.

Applicant Information:

The applicant information data elements are required by DOJ to process a Live Scan background check. These data elements, such as name, alias, date of birth, sex, height, weight, eye color, hair color, place of birth, social security number, address, and driver’s license number or miscellaneous number, help DOJ process the criminal background check results and ensure that the results match the individual. The *Address for Receiving Copy of Criminal History* field is so

phrased pursuant to Penal Code section 11105.3, subdivision (b). The *Billing Number* is used for billing the authorized agency.

DOJ also requires that the applicant acknowledge and sign and date that they read the privacy notice, Privacy Act Statement, and Applicant's Privacy Rights. This is important because Live Scan collects biometric data and DOJ wants to ensure that the applicant is aware of the protections afforded to their information.

Your Number:

The OCA Number (Agency Identifying Number) stands for "Originating Case Agency" and is an optional field for applicant agencies to use for internal needs. Some agencies populate this field with a facility number to sort applicants by facility/location, while others assign a unique number to each applicant to help match the response to the correct applicant.

Level of Service:

The Level of Service box is required because there are two different statutorily-approved levels of service for background checks: federal criminal history and California-state criminal history. Federal law limits who may access federal criminal history for purposes of licensing, employment, and certification. CalVECHS Program applicants are approved for federal level of service, pursuant to Penal Code section 11105.3, subdivision (b), and United States Code, title 34, section 40102, thus both boxes are pre-checked.

Original ATI Number:

Sometimes the Live Scan fingerprints are initially rejected. When an applicant resubmits their fingerprints via Live Scan (considered resubmissions), DOJ's Live Scan Program has required in those instances, that the original ATI Number, which is the automated transaction identifier number assigned specifically to the individual's fingerprint impressions when submitted through the Live Scan, be provided. If the fingerprints are rejected a second time, being able to identify both instances of the fingerprint submission can help determine if there is an issue with the individual's fingerprints and if they will need to submit a hard print copy.

The requirement to submit the rejection is also necessary because DOJ and Live Scan operators want to ensure that the individuals are not getting duplicate fingerprints and are instead re-submitting their fingerprints because of an error the first time. These data elements also help DOJ track and determine if positive identification cannot be established by fingerprints.

Employer Information:

This information is required to make sure that the applicant is submitting an application on behalf of an agency that is qualified to receive criminal history information.

The Live Scan Transaction Completed By:

This information is a requirement of DOJ's Live Scan Program. The Live Scan operator taking the fingerprint must complete the box to ensure the Live Scan Program can monitor the integrity and effectiveness of the Live Scan Program.

Privacy Notice:

BCIA 8016VECHS includes a privacy notice. Civil Code section 1798.17 requires a privacy notice, regarding the collection and use of personal information, to be provided on any form used to collect personal information from individuals. DOJ has determined the privacy notice is necessary to ensure compliance with Civil Code section 1798.17.

FD-258:

Where electronic fingerprint submissions via Live Scan within California are not possible, the Applicant Fingerprint Form, FD-258 is the universal form used in the United States to capture and record fingerprint impressions that are to be used for non-criminal justice purposes, such as: adoption, certification, employment, licensing, and permitting.

The FBI's FD-258 contains the data elements necessary to process a manual fingerprint submission and search for matching criminal history in DOJ's criminal history information system. DOJ chose to use this form because the FBI has approved it, it would need to be sent to the FBI for the federal criminal history information, and is the universal form used by fingerprint rollers.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

DOJ concludes:

- (1) The proposal would not create or eliminate jobs within the state. These regulations only establish procedures for qualified entities to participate in the CalVECHS Program and request the CORI of covered individuals.
- (2) The proposal would not create new businesses or eliminate existing businesses within the state. These regulations only establish procedures for qualified entities to participate in the CalVECHS Program and request the CORI of covered individuals.
- (3) The proposal would not result in the expansion of businesses currently doing business within the state. These regulations only establish procedures for qualified entities to participate in the CalVECHS Program and request the CORI of covered individuals.

DOJ also concludes that:

- (1) The proposal would benefit the health and welfare of California residents because these regulations will establish procedures for qualified entities to participate in the CalVECHS

Program and request the CORI of their employees and volunteers, which will help protect the children, elders, or individuals with disabilities that they serve.

(2) The proposal would not have a discernable impact on worker safety because it does not regulate worker safety standards.

(3) The proposal would not have a discernable impact on the state's environment because it does not regulate environmental standards.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS OR SIMILAR DOCUMENTS RELIED UPON

DOJ relied on a 2019 letter from the FBI's Criminal Justice Information Services Division to all state identification bureaus regarding amendments to the NCPA/VCA by the Child Protection Improvements Act.

EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

DOJ has made an initial determination that the proposed action would not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

DOJ determines that these proposed regulations will not have any adverse impact on small businesses.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY'S REASON FOR REJECTING THOSE ALTERNATIVES

DOJ finds that no alternatives were presented to, or considered by, DOJ that would be more effective in carrying out the purpose of these proposed regulations.

Performance Standard as Alternative:

The proposed regulations prescribe the forms to be used when enrolling in the CalVECHS Program and requesting CORI, as required by statute. Prescribing a form is the easiest way to make sure that the enrolling agency provides all required information to determine CalVECHS Program eligibility and is the only way to implement the waiver required by Penal Code section 11105.3, subdivision (b), and United States Code, title 34, section 40102, subdivision (b). By creating a procedure for DOJ to verify the eligibility of the agencies enrolling in the CalVECHS Program, and for an agency to document its role as recipient of a covered individual's CORI, the proposed regulation protects the confidentiality of the criminal history data.