The Act defines relatives and, therefore, we are unable to expand the scope of who may be considered for exemption due to statutory language. However, as there is an option in the final rule to develop alternative monitoring requirements for in-home providers at § 98.42(b)(2)(v), Lead Agencies may choose to explore this flexibility when care is provided in the child’s home by individuals who are not included in the list for exemption but the Lead Agency believes merit special considerations.

§ 98.43 Criminal Background Checks

The reauthorization added Section 658H on requirements for comprehensive criminal background checks, which are a basic safeguard essential to protect the safety of children in child care and reduce children’s risk of harm. Parents have the right to be confident that their children’s caregivers, and others who come into contact with their children, do not have a record of violent offenses, sex offenses, child abuse or neglect, or other behaviors that would disqualify them from caring for children. A GAO report found several cases in which individuals convicted of serious sex offenses had access to children in child care facilities as employees, because they were not subject to a criminal history check prior to employment (Overview of Relevant Employment Laws and Cases of Sex Offenders at Child Care Facilities, GAO-11-757, GAO, 2011).

Comprehensive background checks have been a long-standing ACF policy priority. According to an analysis of the FY 2016-2018 CCDF Plans, all States and Territories require that child care center staff undergo at least one type of criminal background check, and approximately 45 require an FBI fingerprint check for centers. Fifty-five States and Territories
require family child care providers to have a criminal background check, and approximately 45 require an FBI fingerprint check. For some States and Territories, these requirements are currently limited to licensed providers, rather than all providers that serve children receiving CCDF subsidies.

**Background check effective dates.** The Act requires that States and Territories shall meet the requirements for the provision of criminal background checks for child care staff members not later than the last day of the second full fiscal year after the date of enactment of the Child Care and Development Block Grant Act of 2014. This delayed effective date requires States and Territories to come into compliance with the background check requirements by September 30, 2017.

**Comment:** Several States requested clarifying language be added to the preamble around the statutory effective dates for the background check requirements.

**Response:** A State must have policies and procedures in place that meet the background check requirements not later than September 30, 2017. In addition, in accordance with Section 658H(d)(2), staff members who were employed prior to the enactment of the CCDBG Act of 2014 must have submitted requests for background checks that meet all the requirements by September 30, 2017. Section 658H(d)(4), the Act provides that a provider need not submit a new request for a child care staff member if the staff member received a background check meeting all the required components under the Act within the past five years while employed by, or seeking employment by, a child care provider within the State. If a staff member employed prior to the CCDBG Act of 2014 satisfies all of those requirements, then it is not necessary for a provider to submit a new request until five years following the background check completion. It will be important to evaluate the current background check requirements to ensure that all new
requirements are satisfied, including the disqualification factors. If the current background check requirements do not satisfy the new requirements or results of the current background checks are not maintained, then new background checks would need to be conducted.

We strongly encourage States to establish policies and procedures well in advance of the September 30, 2017, effective date, in order to allow sufficient time to clear the backlog of existing providers and staff members that must be checked prior to the deadline. It is also important to note that the HHS Secretary may grant the State an extension of up to one year to complete the background check requirements, as long as the State demonstrates a good faith effort to comply. This extension is separate from the transitional waiver described earlier in the preamble. States applying for an extension must be able to describe their current implementation efforts and present a timeline for compliance within one year, by September 30, 2018. ACF will release specific guidance to States interested in an extension. In addition, the reauthorized Act establishes a penalty for noncompliance. For any year that a State fails to substantially comply, ACF shall withhold up to 5 percent of the State’s CCDF funds for each year until coming into compliance.

**Background check implementation.** Section 658H(a) of the Act requires that States shall have in effect requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of child care providers. Having procedures in place to conduct background checks on child care staff members will require coordination across public agencies. The CCDF Lead Agency must work with other agencies, such as the Child Welfare office and the State Identification Bureau, to ensure the checks are conducted in accordance with the Act. In recognition of this effort, §
98.43(a)(1) clarifies that these requirements involve multiple State, Territorial, or Tribal agencies. We discuss the comments we received on this provision further below.

*Tribes and background checks.* In the final rule, Tribal Lead Agencies are also subject to the background check requirements described in this section, with some flexibility as discussed later in Subpart I.

*Applicability of background checks requirements.* The statutory language identifying which providers must conduct background checks on child care staff members is unclear. It is our interpretation of the Act that all licensed, regulated, and registered child care providers and all child care providers eligible to deliver CCDF services (with the exception of those individuals who are related to all children for whom child care services are provided) are subject to the Act’s background check requirements. Section 98.43(a)(1)(i) of the final rules applies this requirement to all licensed, regulated, or registered providers, regardless of whether they receive CCDF funds and all license-exempt CCDF providers (with the exception of individuals who are related, as defined in the definition of *eligible child care provider*, to all children for whom child care services are provided).

**Comment:** Overall, the comments, from national organizations and multiple States, supported broadly applying the background check requirements to all licensed, regulated, or registered child care providers and all child care providers eligible to deliver CCDF services. One State and one Territory submitted comments disagreeing with our interpretation.

**Response:** ACF was pleased by the support for broad applicability of the background check requirements. We acknowledge that the statutory language is not clear about the universe of staff and providers subject to the background check requirement; however, our interpretation aligns with the general intent of the statute to improve the overall safety of child care services.
and programs. Furthermore, there is justification for applying this requirement in the broadest terms for two important reasons. First, all parents using child care deserve this basic protection of having confidence that those who are trusted with the care of their children do not have criminal backgrounds that may endanger the well-being of their children. Second, limiting those child care providers who are subject to background checks has the potential to severely restrict parental choice and equal access for CCDF children, two fundamental tenets of CCDF. If not all child care providers are subject to comprehensive background checks, providers could opt to not serve CCDF children, thereby restricting access. Creating a bifurcated system in which CCDF children have access to only a portion of child care providers who meet applicable standards would be incongruous with the purposes of the Act and would not serve to advance the important goal of serving more low-income children in high-quality care.

Comment: One comment suggested adding regulatory language to capture all State definitions of provider groups. The comment stated, "Some States may use words, such as 'certified' or 'listed care' that should not be exempt from a comprehensive check merely because the words 'licensed, regulated, or registered' are not used. For example, legislation is currently pending in at least one State that would eliminate the category of care called 'voluntarily registered' and replace it with a voluntary 'list.'"

Response: It is not necessary to insert additional regulatory language to address other State definitions of provider groups. As described earlier, the background check requirements apply to licensed, regulated, or registered providers, regardless of whether they receive CCDF funds as well as all providers eligible to deliver CCDF services. Our interpretation of the law applies these requirements broadly and includes providers who are "certified" or "listed."
Definition of child care staff member. Section 658H(i) of the Act defines a child care staff member as someone (other than an individual who is related to all children for whom child care services are provided) who is employed by the child care provider for compensation or whose activities involve unsupervised access to children who are cared for by the child care provider. Section 98.43(a)(2)(ii) of the final rule includes contract and self-employed individuals in the definition of child care staff members, as they may have direct contact with children. In addition, we require individuals, age 18 or older, residing in a family child care home to be defined as child care staff members and, therefore, subject to background checks, as well as the disqualifying crimes and appeals processes.

Comment: In the NPRM, at § 98.43(a)(2)(ii), we defined child care staff member to mean “an individual age 18 and older...” We received a letter from Senator Alexander and Congressman Kline asking us to revise this regulatory language to reflect current State practice. The letter stated, “The NPRM defines those staff required to receive a background check as individuals 18 and older, yet a number of State laws allow individuals younger than 18 to be employed by providers. To ensure the maximum amount of safety while still respecting individual States’ employment laws, we request the Department provide information or assistance to States on conducting background checks for both staff aged 18 and older, and those younger than 18 to ensure all States are able to comply with the background checks required in the Act.”

Response: ACF agreed with the concerns described in the letter. The reference to “age 18 or older” is removed from the final rule. This change better aligns with the original statutory language and removes the unintentional limitation placed on the definition of child care staff member. The original statutory language requires any individual, regardless of age, who is
Comment: Several comments continued to ask for clarification on who is included in the definition of child care staff member. A letter from Senator Alexander and Congressman Kline advised, “The scope of the NPRM’s definition of ‘child care staff member’ for the purposes of a required background check is unclear. We ask for clarity for providers so they may know definitively if an individual who receives ‘compensation, including contract employees or self-employed individuals’ is required to automatically receive a background check, or if such individuals should additionally have duties listed under subparagraph (B). As written, the definition is unclear if these requirements are mutually exclusive and would trigger a background check on their own regard or if a ‘child care staff member’ would need to fit both such requirements. We ask you also to review the administrative burden this definition could place on providers. While retaining the highest safety measures for children, we urge the Department to review this requirement and listen to comments from centers and providers to ensure their obligation captures individuals who may have unsupervised access to children but is not duplicative of State requirements or overly burdensome.”

Response: The Act states that a child care staff member means an individual (other than an individual who is related to all children for whom child care services are provided) who is employed by a child care provider for compensation; or whose activities involve the care or supervision of children for a child care provider or unsupervised access to children who are cared for or supervised by a child care provider. This definition, like the definition of child care provider, is broad. It encompasses not only caregivers, teachers, or directors, but also janitors, cooks, and other employees of a child care provider who may not regularly engage with children,
but whose placement at the facility gives them the opportunity for unsupervised access. Given that these individuals are employed by a child care provider, they are included in the statute’s definition. Therefore, it is important that they also complete a comprehensive background check in order to ensure and protect children’s safety.

The final rule adds the terms “contract employees” and “self-employed individuals” to the definition of “child care staff member.” These terms are meant to clarify the definition, particularly for family child care providers. Many family child care providers are self-employed individuals who own their own businesses. The final rule specifically requires any individual residing in a family child care home age 18 or older to complete a background check. We discuss this requirement in greater detail below. These individuals may also have unsupervised access to children, so completing a background check is a necessary safeguard to protect the children in care. The definition of child care staff member generally covers any individual who is employed by the child care provider and any individual who may have unsupervised access to children in care.

Comment: The comments were mixed on whether other adults in a family child care home should be subject to the background checks requirements. Several national organizations and States wrote in support, while child care worker organizations, a few national organizations, and one State did not support the provision. One State wrote, “We currently require background reviews on all household members 18 years or older and have found multiple individuals whose presence could place children at risk.”

Response: As illustrated by the State’s comment, requiring other adults in family child care homes to complete background checks is vital to ensuring children’s health and safety. A majority of States already require other adults in family child care homes to receive background
checks. Forty-three States require some type of background check of family members 18 years of age or older that reside in the family child care home (Leaving Child Care to Chance: NACCRRA’s Ranking of State Standards and Oversight for Small Family Child Care Homes, National Association of Child Care Resource and Referral Agencies, 2012).

Although these individuals may not be directly responsible for caring for children, they have ample opportunity for unsupervised access to children. For this reason, as proposed in the NPRM, we are specifically requiring other adults in family child care homes to complete the background check requirements. Because these individuals are included in the definition of child care staff member, they are subject to the same disqualifications and appeals processes described in the Act and the regulations. We strongly discourage States from identifying any additional disqualifying crimes for residents of family child care homes, and encourage them to consider that casting too wide a net could have adverse effects on the supply of family child care providers and other consequences for individuals returning from incarceration. As described later in the preamble, we also strongly encourage States to implement a waiver review process that meets the recommendations of the U.S. Equal Employment Opportunity Commission for any additional disqualifying crimes (U.S. Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

Comment: In the NPRM, ACF asked for comment on whether additional individuals in the family child care homes should be subject to the background check requirements. There was only lukewarm support for requiring background checks for minors in family child care homes.
Several States recommended checking individuals over ages 12, 13, or 16 to mirror current State policy and practice.

**Response:** ACF is declining to require background checks for individuals under age 18 in family child care homes. However, States that check individuals younger than age 18 may continue checking all background check components permitted by State law. The Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 16901) requires States to include in their sex offender registries juveniles convicted as adults and juveniles who are convicted of an offense similar or more serious than aggravated sexual abuse. We allow States the flexibility to follow current State laws and registry policies to check those individuals younger than 18 in family child care homes; however, we strongly encourage States to implement a waiver process that meets the recommendations of the U.S. Equal Employment Opportunity Commission for any additional disqualifying crimes (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

**Comment:** A few comments asked for clarification around volunteers. One State wrote, “In many circumstances, a parent volunteer (for activities such as field trips) would fit into the definition of child care staff member (‘activities involve the care or supervision of children’ and they may be unsupervised for periods of time) and therefore [would] require them to meet all background check requirements. This requirement could prevent some parents from involvement in enrichment activities, particularly because of the cost associated with the background checks.”

**Response:** Volunteers who provide infrequent and irregular service that is supervised or parent volunteers who are supervised do not meet the definition of child care staff.
member. Volunteers who come into a child care facility to help with a classroom party, read to students, or assist with recess are not caring for or supervising children for a child care provider. Rather, volunteers in the situations described above are providing additional assistance under supervision of the primary caregiver.

Volunteers are not specifically included in the Act, nor have we specifically included them in the regulation. We are allowing States the discretion to create their own policies and screening processes for volunteers. However, it is ACF’s view that volunteers who have not had background checks may not be left with children unsupervised. Volunteers who have unsupervised access to children must have background checks that comply with the statute. These volunteers will be subject to the same disqualifications and appeals process as described in the Act and regulations. As with other adults in the household, we strongly discourage States from adding additional disqualifications outside the Act. We also encourage Lead Agencies to require that volunteers who have not had background checks be easily identified by children and parents, for example through visible name tags or clothing.

Components of a criminal background check. The Act outlines five components of a criminal background check: 1) a search of the State criminal and sex offender registry in the State where the staff member resides and each State where the staff member has resided for the past five years; 2) a search of the State child abuse and neglect registry in the State where the staff member resides and each State where the staff member has resided for the past five years; 3) a search of the National Crime Information Center; 4) a Federal Bureau of Investigation (FBI) fingerprint check using the Integrated Automated Fingerprint Identification System; and 5) a search of the National Sex Offender Registry.
After extensive consultation with the FBI and other subject-matter experts, we made technical changes to address duplication among these components. In the final rule, we are consolidating the list of required components in the regulations at § 98.43(b) to:

1) A Federal Bureau of Investigation fingerprint check using Next Generation Identification;

2) A search of the National Crime Information Center’s National Sex Offender Registry; and

3) A search of the following registries, repositories, or databases in the State where the child care staff member resides and each State where such staff member resided during the preceding 5 years:

   i. State criminal registry or repository, with the use of fingerprints being required in the State where the staff member resides, and optional in other States;

   ii. State sex offender registry or repository; and

   iii. State-based child abuse and neglect registry and database.

It is our understanding that there is some duplication among the National Crime Information Center’s (NCIC) National Sex Offender Registry (NSOR), the FBI fingerprint searches, and the searches of State criminal, sex offender, and child abuse and neglect registries. An FBI fingerprint check provides access to national criminal history record information across State lines on people arrested for felonies and some misdemeanors under State, Federal, or Tribal law. However, there are instances where information is contained in State databases, but not in the FBI database. A search of the State criminal records and a FBI fingerprint check returns the
most complete record and better addresses instances where individuals are not forthcoming regarding their past residences or committed crimes in a State in which they did not reside.

In addition to gaps in the FBI fingerprint and the State criminal records, there are a number of instances in which an individual may be listed in the State sex offender registry and not in NSOR, and vice versa. For example, some States have statutes that disallow the removal of offenders, regardless of offender status, while in the NSOR, the agency owning the record is required to remove the offender from active status once his/her sentencing is completed. In addition, federal, juvenile, and international sex offender records may be included in the NSOR; whereas, State laws may prohibit the use of this information in the State sex offender registry. Because of these discrepancies, it is important to check the State sex offender registries in addition to an FBI fingerprint check and a check of the NCIC’s NSOR. It is our belief that the Act requires such thorough background check to ensure that offenders do not slip through the cracks to be given access to children.

Comment: Commenters, including several national organizations, child care worker organizations, and a couple of States, argued that an FBI fingerprint check should be considered a sufficient check of the National Crime Information Center (NCIC) and the National Sex Offender Registry (NSOR) because it checks the fingerprint records of several NCIC files, including the NSOR.

Response: Based on consultation with the FBI, we understand that the comments are partially correct. The FBI fingerprint check using Next Generation Identification (NGI) (formerly the Integrated Automated Fingerprint Identification System- IAFIS) will provide a person’s criminal history record information which will incorporate data from three NCIC person files, including the NSOR, provided certain identifying information has been entered into the
NSOR record. The change in the language from IAFIS to NGI is a technical change and should not impact Lead Agency background check processes. The NGI is the biometric identification system that has now replaced the older IAFIS.

There is significant overlap between the FBI fingerprint check and the NSOR check (via the NCIC), yet there are a number of individuals in the NSOR who are not identified by solely conducting an FBI fingerprint search. The FBI links fingerprint records to the NSOR records via a Universal Control Number, but a small percentage of cases are missing the fingerprints. In some cases, individuals were not fingerprinted at the time of arrest, or the prints were rejected by the FBI for poor quality. This small percentage of records can be accessed through a name-based search of the NCIC. A number of those individuals may also be identified by a search of the State sex offender registries, but it is impossible to know whether there is complete overlap. In the absence of verification of complete duplication of records, it is important to require separate searches of an FBI fingerprint check and a name-based search of the NCIC’s NSOR. Because Congress included each of these searches in the Act, it is our belief that the intent is for the background check to be as comprehensive and thorough as possible.

Comment: In the NPRM, we requested comments on the feasibility of a search of the NCIC and the level of burden required by the Lead Agency. We received comments from 12 States and two State police departments that all emphasized that without further guidance from the FBI, name-based searches of the NCIC and NSOR will be extremely difficult because these databases are limited to law enforcement purposes only.

Response: The comments are correct. The NCIC is a law enforcement tool consisting of 21 files, including the NSOR. The 21 files contain seven property files that help track missing property and 14 person files with information relevant to law enforcement (e.g., missing persons
or wanted persons). State criminal records are not stored in the NCIC. The only file with information that would aid in determining whether an individual could be hired as a child care employee is the NSOR. The other files do not contain information on the disqualifying crimes listed in the Act. Further, the FBI has advised that a general search of the NCIC database will return records that cannot be made privy to individuals outside of law enforcement (i.e., the Known or Appropriately Suspected Terrorist File). Therefore, we are clarifying that a check of the NCIC will only need to search the NSOR file.

The comments call out a number of potential challenges, also identified by ACF, in requiring an NCIC check. It is our understanding that an NCIC check has not been included in any other non-criminal background check law applicable to States to date, and so, resolving these challenges is in many ways unchartered territory.

First, access to the NCIC, including, in some cases, physical access to computers capable of searching the NCIC, is limited, and it is primarily available to law enforcement agencies. Therefore, to conduct this check, Lead Agencies will have to partner with a State, Tribal, or local law enforcement agency. Because the NCIC has not been used this way, we do not know of examples of other State agencies partnering in this way or what such partnerships would entail. We also do not know the implications for Lead Agencies that use third-party vendors to conduct background checks. Third-party vendors do not have authorized access to conduct name-based checks of the NCIC for noncriminal justice purposes.

Secondly, the NCIC is a name-based check, rather than fingerprint based. Hit verification of name-based checks may be labor intensive, especially when searching for individuals with common names. While we are concerned about the burden on Lead Agencies to conduct this check, we recognize that the NCIC was included in the statute, and we are
concerned about the potential for missing sex offenders by not conducting a comprehensive search.

Because of the challenges identified by both the commenters and ACF, we will not begin to determine compliance with the requirement to search the NCIC’s NSOR until after guidance is issued by ACF and the FBI. ACF has been working closely with the FBI to find solutions for State access. We plan to release guidance that will be shared with both State Lead Agencies and State Identification Bureaus. We expect that Lead Agencies will be required to partner with local law enforcement to perform NCIC checks of the NSOR. This guidance will give States further instruction in how to search the NCIC’s NSOR and how to utilize the results. We understand that States may not be able to begin implementing the check of the NCIC’s NSOR until the specific guidance is released. ACF will address implementation timeframes for this particular search in the future guidance. Lead Agencies should begin to form partnerships with local law enforcement and State Identification Bureaus in order to meet the requirement to check the NCIC’s NSOR database.

Comment: Several commenters, including States and a State police department, suggested requiring a search of the National Sex Offender Public Website (NSOPW) instead of a search of the NSOR.

Response: A search of the NSOPW does not satisfy the statutory requirement for a search of the NSOR, and therefore, we declined to make any changes in the final rule. ACF does encourage an additional search of the NSOPW at www.nsopw.gov, although it is not required. The NSOPW acts as a pointer for each State, Territory, and Tribally-run sex offender registry. The registries are updated and kept in real time and may be searched by name, but other identifying information may be limited in these records.
Comment: In the NPRM, we proposed to require that the search of the State criminal records would include a fingerprint check in the State where the individual resides and the States the individual has resided for the past five years. However, State commenters, including State police departments, recommended removing the requirement to search other States’ criminal repositories using fingerprints. The comments emphasized that the technology does not exist to allow States to send fingerprints electronically to check other States’ repositories. A law enforcement representative wrote, “For State Identification Bureaus that are the ones sending the prints on to the FBI, it could be easy; however, requests coming from other States would be a very manual process - hard copy cards, scanned in, and mailed responses back. We have no way of disseminating results back to every other State via an automated means.”

Response: ACF is removing the proposal to check other States’ criminal repositories using fingerprints. It was not our intent to create an additional burden for States. Instead, in the final rule, we are requiring States to do a fingerprint-based check of the criminal repository only in the State where the individual resides. Use of fingerprints is optional in other States where the individual resided within the past five years. Fingerprint searches reduce instances of false positives and also help capture records filed under aliases. We do not believe that a fingerprint search of the State repository is an additional burden. States can use the same set of fingerprints to check both the State criminal history check and the FBI fingerprint check. When conducting searches of other States’ criminal repositories, the State may utilize a name-based search, instead of a fingerprint.

Comment: The Act requires States to check the State criminal registry or repository; sex offender registry or repository; and child abuse and neglect registry and database for every State where a child care staff member has lived in for the past five years. Based on our preliminary
conversations with States, the requirement to conduct cross-State background checks of the three different repositories is another unexplored area for Lead Agencies. In the NPRM, we asked for comments on whether States have any best practices or strategies to share and how ACF can support Lead Agencies in meeting the cross-State background check requirements.

Comments we received from national organizations and States reinforced that these cross-State checks are indeed new territory for Lead Agencies. These comments offered a variety of suggestions of how ACF can support States in meeting the cross-State background check requirements, including introducing an electronic information exchange system, drafting a standard Memorandum of Understanding, maintaining a national contacts list, and studying the viability of cross-State background checks at the regional level.

Response: ACF is continuing to work closely alongside our technical assistance partners to learn how we can support and help facilitate these cross-State checks. In the months since the CCDBG Act of 2014 was enacted and the NPRM was published, we have been engaged in Regional level calls with States to understand supports needed to overcome barriers to the required cross-State checks. We have also been reaching out to other Federal partners to explore existing systems and opportunities to collaborate. We have not found an existing system that would support States in conducting all of the cross-State checks.

We appreciate the suggestions from the commenters and have already begun work toward bringing some of them to fruition. We know States want tools and guidance to complete these checks. ACF has recently announced a pilot project to develop a National Interstate Background Check Clearinghouse to support Lead agencies in meeting the cross-State background check requirements. The goal of this system is to enable Lead Agencies to exchange background check information securely with other State, Territory, and Tribal Lead Agencies. ACF is also working
on developing a national CCDF information sharing agreement as part of this project. We ask that States continue to make a good faith effort toward complying with these checks and that States work to build partnerships across State lines.

While ACF is still working to understand how we can support cross-State background checks, this rule also requires a couple of provisions to help create transparency around the process. At § 98.43(a)(1)(iii), Lead Agencies are required to have requirements, policies, and procedures in place to respond as expeditiously as possible to other States’, Territories’, and Tribes’ requests for background check results in order to accommodate the 45 day timeframe. The final rule also requires Lead Agencies to include the process by which another Lead Agency may submit a background check request on the Lead Agency’s consumer education website, along with all of the other background check policies and procedures. In addition, this final rule requires, at § 98.16(o), that Lead Agencies describe in their Plans the procedures in place to respond to other State, Territory, or Tribal requests for background check results within the 45 day timeframe. ACF will use this question in the Plan to help ensure compliance with the background check requirements in the Act. These provisions are intended to minimize confusion about the correct contact information for background check requests and to ensure that there are processes in place for timely responses. Having policies and procedures in place to respond to outside background check requests is a first step toward an effective cross-State background check system.

Comment: We heard from a number of States that are closed-record States, which means they cannot release an individual’s background check records or information to other States. One State explained that it is, “a closed record State and does not release criminal history information to any out-of-state entity for civil purposes, one of which is determining employment eligibility.
This is a fundamental tenant of being a closed record State. However, there is a process by which an individual residing in another State may obtain his/her fingerprint-based personal criminal background history from [the State’s] Bureau of Criminal Identification and Information (Bureau) within the Office of State Police and provide it to a Lead Agency in another State.”

Response: States need to have a methodology in place to respond to other States’ requests for background check results. ACF does not expect to penalize States that have made a good faith effort to request information from other States. For States with closed-record laws or policies, we understand that this requirement may be in direct opposition with State law. States will need to either change their laws to allow for the exchange of background check information for child care staff members or create other solutions. Although the Act requires States to be in compliance by September 30, 2017, States (including closed-record States) may request an extension of up to one year in order to make the necessary legislative or other changes to share background check information across State lines. ACF is currently working with our technical assistance partners to understand the impact of closed-record laws.

Although ACF discourages this practice, a closed-record State may utilize a process similar to what the State commenter describes above. The closed-record State may give the background check results directly to the individual to relay to the requesting State. States are required to respond to other States’ requests for background check requests, and when a State is giving the results directly to an individual, that State must have a process in place to inform the requesting State. This practice increases the potential for fraud relating to the results and also places the burden on the individual. States should carefully consider these factors and the impact they could have on the supply of child care providers. ACF encourages States to find other solutions, whenever possible.
We encourage State partnerships and agreements, whenever possible, in order to meet the requirements of the Act. One potential solution may be for the closed-record States to determine whether the individual is eligible or ineligible for employment given the State background check results. The closed-record State could disclose this determination with the requesting State, without revealing the background check information. We do recognize that this is an imperfect solution, since States use different definitions and criteria for disqualification, particularly in the case of child abuse and neglect findings. However, States may use this solution to comply with the statutory requirements, as long as States also comply with the requirements related to the appeals process.

If the individual is deemed ineligible by a closed-record State, then the closed-record State is also responsible for notifying the individual and following the requirements at § 98.43(e)(2)(ii). The closed-record State must provide information related to each disqualifying crime in a report to the individual. The closed-record State must also send information on the opportunity to appeal and adhere to the appeals process described at § 98.43(e)(3).

Comment: Comments from States and national organizations asked ACF to provide clarity around what to do if a State does not respond to another State’s request for results from the State’s criminal repository, sex offender registry, and child abuse and neglect registry.

Response: As discussed later in the preamble, we are allowing States the flexibility to make employment decisions in the event that not all background check components are completed within 45 days. ACF does not expect to penalize States that have made a good faith effort to request information from other States.

Comment: Before publishing our NPRM, we heard particular concern about the statutory requirement for cross-State checks of the child abuse and neglect registries. We understand that
States have developed their own requirements for submitting requests, and there is not a uniform method of responding. Therefore, in the NPRM, we solicited comments on how States will meet this requirement and respond to other State requests.

Comments from national organizations and child care worker organizations suggested new regulatory language that would only require a search of the State-based child abuse and neglect registries “if one exists and such a search is allowable for such purposes under State law and practice.” Other comments emphasized the importance of cross-State child abuse and neglect registries. A letter co-signed by several child care resource and referral agencies, asserted, “We do not support language that would circumvent the concept of checking against a State child abuse registry or listing or whatever such a registry may be called in a State. States have the systems, although they may be called different names. It is time to have effective cross-checks in place to promote the safety of children.”

Response: ACF is declining to add the suggested regulatory language. The Act includes, as the final component of a comprehensive background check, the search of the State child abuse and neglect registries in the State where the individual lives and the States where the individual has resided for the past five years. States, including those that do not have formal child abuse and neglect registries, are expected to comply with this requirement. We recognize that implementation of this critically important component of protecting children will vary across States. Every State has procedures for maintaining records of child abuse and neglect, but only 41 States, the District of Columbia, American Samoa, Guam, and Puerto Rico require central registries by statute. The type of information contained in central registries and department records differ from State to State. Some States maintain all investigated reports of abuse and neglect in the central registry, while others maintain only substantiated or indicated reports. The
length of time the information is held and the conditions for expunction also vary. Access to information maintained in registries also varies by State, and some States may need to make internal changes to meet the requirement for a search of the State’s own child abuse and neglect registry. Approximately 31 States and the District of Columbia allow or require a check of the central registry or department records for individuals applying to be child or youth care providers. *(Establishment and Maintenance of Central Child Abuse Registries, Children’s Bureau, July 2014).*

**Comment:** We received a number of requests for guidance on what information from child abuse and neglect registries States need to make employment decisions and how to interpret that information. Simply being part of a State-based child abuse and neglect registry is not a disqualification under the Act, so just knowing that an individual is on the registry is not enough information to make a determination. States need to know what types of information they need and how to interpret that information in order to make employment eligibility determinations for child care staff members.

**Response:** The commenters are correct that the Act only requires that the child abuse and neglect registries be checked and did not require an individual be disqualified because of child abuse and neglect findings. Because many child abuse and neglect registries use name-based searches, States may need to take additional steps to verify that the individual is the same person as is listed on a registry. There is so much variation in the information maintained in each registry, so we are allowing Lead Agency flexibility in how to handle findings on the child abuse and neglect registries. ACF does suggest that the Lead Agency not necessarily immediately disqualify an individual, depending on the finding and evaluate any findings carefully, on a case by case basis.
The definitions of child abuse and neglect, what is considered substantiated or indicated child abuse and neglect, and other legal terminology associated with child abuse and neglect registries varies from State to State. In addition, some registries may contain unsubstantiated complaints or incidences. Lead Agencies should be cautious when using unsubstantiated allegations of child abuse and neglect in determining an individual’s employment eligibility.

Based on consultation with the Children’s Bureau at ACF, we understand that State Child Welfare agencies or State Child Protective Services agencies already have policies and procedures in place to make determinations about the suitability of substitute care providers using child abuse and neglect findings. We are working to ensure that child welfare agencies are also aware of the requirements in the Act for a search of the State child abuse and neglect registry in the State where the individual lives and the States where the individual has resided for the past five years. Lead Agencies should partner closely with the relevant State agencies to seek guidance in making employment decisions.

Comment: We received several comments from States that do not conduct due process when placing an individual on their child abuse and neglect registry. One State wrote, “In the course of abuse/neglect investigations in our State, we do not offer up-front due process for findings made against an individual. If a background check is requested on the individual in the course of employment in child care in [the State] or as part of a foster care/adoption application in [the State], our agency uses that opportunity to offer a hearing in front of an administrative law judge through the State Office of Administrative Hearings. If an individual chooses to contest the finding(s), the process can be lengthy. It requires our agency to schedule and prepare for a hearing, including contacting appropriate witnesses and providing opposing council (if one exists) with redacted case files.”
Response: We understand the issue the commenters are raising relates to procedures that some State child welfare agencies have on due process for individuals in state child abuse and neglect registries that may delay the Lead Agency in providing information about an individual who is seeking employment with a child care provider. The Act requires States to carry out background checks requests, including searches of State-based child abuse and neglect registries, as quickly as possible, in not less than 45 days. States that have a due process approach as described by the commenters may not be able to meet the 45 day timeframe for providing the registry information for child care employment purposes. As such, we encourage the Lead Agencies to work with their child welfare agencies to assist them in understanding the statutory requirements to meet the 45 day timeframe. ACF is working on joint guidance to be released by the Children’s Bureau and the Office of Child Care to ensure that both the State Lead Agencies and State child welfare agencies are aware of their roles in the background check process.

Comment: In the NPRM, ACF requested comment from States about whether cross-State background check systems for foster or adoptive parents could be used to support cross-State background checks for prospective child care staff members as well. Comments varied. Two States believe that their foster and adoptive parent systems would be able to support cross-State background checks for child care staff members. However, the national association of State child care administrators expressed concern about this suggestion: “Administrators understand that these data are housed in the child welfare agency and use of and compliance with this proposal would vary.”

Response: The cross-State background check requirement has similarities to language at Section 152(a)(1)(C) of the Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. 671(a)(1)(C)) for foster or adoptive parents. That law requires a State to check any child abuse
and neglect registry maintained by the State for information on any prospective foster or adoptive parent and on any other adult living in the home of such a prospective parent, and request any other State in which any such prospective parent or other adult has resided in the preceding five years, to enable the State to check any child abuse and neglect registry maintained by such State for such information, before the prospective foster or adoptive parent may be finally approved for placement of a child. We encourage Lead Agencies to reach out to the State Child Welfare or Protective Services to explore whether the process in place for foster or adoptive parents could also be used to support a process for child care staff members.

**Disqualifications.** The Act specifies a list of disqualifications for child care providers and staff members who are serving children receiving CCDF assistance. Unlike the other requirements in the background check section, the Act only applies the restriction against employing ineligible child care staff members to child care providers receiving CCDF assistance. These employment disqualifications specifically do not apply to child care staff members of licensed providers who do not serve children receiving CCDF subsidies. This gives Lead Agencies the flexibility to impose similar restrictions upon child care providers who are licensed, regulated, or registered and do not receive CCDF funds.

The list of disqualifications from the Act includes a list of felonies and misdemeanors that disqualify an individual from being employed as a child care staff member. We understand that States define crimes differently, but our expectation is that States will match the equivalent crimes to those on this list. These disqualification requirements appear at § 98.43(a)(1)(ii) and § 98.43(c). We are not adding any additional disqualifications to the final rule.

Even though the Act includes a specific list of disqualifications, it also allows Lead Agencies to prohibit individuals' employment as child care staff members based on their
convictions for other crimes that may impact their ability to care for children. If a Lead Agency
does disqualify an individual’s employment, they must, at a minimum, give the child care staff
members or prospective staff members the same rights and remedies described in § 98.43(e).
This language from Section 658H(h) of the Act is restated in the final rule at § 98.43(h. In the
final rule, we also added language to link this paragraph to the list of disqualifications at §
98.43(c)(1).

We strongly encourage Lead Agencies that chose to consider other crimes as
disqualifying crimes for employment to ensure that a robust waiver and appeals process is in
place. As discussed later, a waiver and appeals process should conform to the recommendations
of the U.S. Equal Employment Opportunity Commission, including the ability to waive findings
based on factors as inaccurate information, certificate of rehabilitation, age when offense was
committed, time since offense, and whether the nature of offense is a threat to children. (U.S.
Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of
Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act
of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). Moreover, we
strongly discourage Lead Agencies from considering additional disqualifying crimes. Casting
too wide a net could have adverse effects on the supply of family child care providers and other
consequences for individuals returning from incarceration. The disqualifications described in the
Act are appropriate to determine whether an individual should be able to care for children.

Comment: A couple of States requested clarification on the length of time an individual
would be ineligible if convicted of one of the disqualifying crimes listed in the Act. One State
said, “[the State’s] Supreme Court rendered a decision that precludes the State from imposing
lifetime employment bans. Enforcing the regulation as proposed will require the program office
to challenge that decision. Additionally the proposed regulation appears to go beyond what the statute provides and encroaches on the State’s police powers to decide who can be licensed in the State.”

Response: ACF is not requiring any additional disqualifications or parameters around disqualifications that are not already required by the Act. The Act includes a list of disqualifications at Section 658H(c), with a list of disqualifying crimes at Sections 658H(c)(1)(D) and (E). With the exception of a felony conviction of a drug-related offense committed during the preceding five years, all of the felony and violent misdemeanor convictions listed by the Act are lifetime bans against employment by a child care provider delivering CCDF services. The Act does not allow any flexibility to grandfather in current child care staff members who have been convicted of one of the crimes described in the Act. States do have the option to individually review drug-related felony convictions that were committed during the preceding five years. As discussed later in the preamble, we encourage States to conduct these reviews in accordance with guidance from the U.S. Equal Employment Opportunity Commission.

Comment: Several comments from national organizations and child care worker organizations urged ACF to redact self-disclosure language that originally appeared in the preamble of the NPRM. A letter co-signed by 80 national organizations, wrote, “Given the complexity of the background checks as prescribed and the specific disqualifying crimes established in Act, we recommend that ACF not encourage self-disclosure as it could prevent employment of a qualified child care staff member or prospective staff member. Individuals with a criminal history completely unrelated to their ability to care for and have responsibility for the safety and well-being of children, as well as those with no record whatsoever who might be
intimidated, could inaccurately assume that they would not be eligible for employment. It could also violate a child care staff member’s right to privacy with his or her employer."

**Response:** We agreed with the commenters and have removed the self-disclosure language from the preamble.

**Frequency of Background Checks.** Section 658H(d) of the Act requires child care providers to submit requests for background checks for each staff member. The requests must be submitted prior to when the individual becomes a staff member and must be completed at least once every five years. These requirements are included in the regulations at § 98.43(d)(1) and (2). For staff members employed prior to the enactment of the CCDBG Act of 2014, the provider must request a background check prior to September 30, 2017 (the last day of the second full fiscal year after the date of enactment) and at least once every five years.

Although not a requirement, we encourage Lead Agencies to enroll child care staff members in rap back programs. A rap back program works as a subscription notification service. An individual is enrolled in the program, and the State Identification Bureau receives a notification if that individual is arrested or convicted of a crime. States can specify which events trigger a notification. Rap back programs provide authorizing agencies with notification of subsequent criminal and, in limited cases, civil activity of enrolled child care staff members so that background check information is not out of date. However, unless the rap back program includes all the components of a comprehensive background check under the Act, the Lead Agency is responsible for ensuring that child care staff members complete all other components at least once every five years.

Section 658H(d)(4) of the Act specifies instances in which a child care provider is not required to submit a background check for a staff member. Staff members do not need
background check requests if they satisfy three requirements: 1) the staff member received a background check that included all of the required parts within the past five years while employed by, or seeking employment by, another child care provider in the State; 2) the State gave a qualifying result to the first provider for the staff member; and 3) the staff member is employed by a child care provider within the State or has been separated from employment from a child care provider for less than 180 days. These requirements are included in the final rule at § 98.43(d)(3). Lead Agencies should consider how to facilitate tracking this type of information and maintaining records of individual providers so that unnecessary checks are not repeated.

Comment: We received several comments from States asking whether staff members' background checks could be re-assessed when they seek employment by another child care provider in the State. One State wrote, "We allow a child care staff to carry forward his or her fingerprint-based background check from one child care operation to another, as long as the person maintains a name-based recheck every 24 months. However, our agency also has a process where we re-assess an individual with certain criminal or abuse/neglect history for each child care operation in which he/she would like to work. [The State] looks at a variety of factors, including details about the role the individual will be working in and the compliance history of the specific child care operation, and makes a determination of overall risk given the results of the background check."

Response: If a staff member meets the three requirements described in the Act, then the child care provider does not need to submit a background check request. However, States do have the option of creating more stringent requirements, such as requiring background to be performed with greater frequency or when a staff member changes the place of employment. Where possible, ACF encourages States to keep processes in place, like the one described by the
State, that allow them to make nuanced decisions about individuals’ employment eligibility and that carefully consider extenuating circumstances relating to the individual’s background check records.

Provisional Employment. The Act requires child care providers to submit a request for background check results prior to a staff member’s employment but does not describe instances of provisional employment while waiting for the results of the background check. We received many comments on this issue in the 2013 NPRM, with commenters expressing concern that the background check requirements could prevent parents from accessing the provider of their choice, if the provider’s staff has not already received a background check. Parents often need to access child care immediately, for example, as they start new jobs, and commenters were worried that this could lead to delays in accessing care.

In recognition of the possible logistical constraints and barriers to parents accessing the care they need, § 98.43(d)(4) of the final rule allows prospective staff members to provide services to children while under supervision and on a provisional basis, after completing either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides.

Comment: In the NPRM, we proposed that a prospective staff member could begin work for a child care provider after the background check request was submitted, as long as that staff member was continually supervised by someone who had already completed the background check requirements. Although several commenters supported the idea of provisional employment, others were concerned that the provision as proposed did not protect children’s health and safety.
Response: We agreed with the commenters. The final rule allows a prospective staff member to begin work while under supervision after completing the FBI fingerprint check or the search of the State criminal repository using fingerprints in the State where the staff member resides. Until all the background check components have been completed, the prospective staff member must be supervised at all times by someone who has already received a qualifying result on a background check within the past five years. States may pose additional requirements beyond this minimum. We note that the new regulatory language aligns with the requirements in the Head Start Performance Standards and hope the language allows for better partnerships between the two programs.

In addition, we encourage Lead Agencies to require child care providers to inform parents about background check policies and any provisional hires they may have. Allowing provisional hiring does offer more flexibility, but it is also important that Lead Agencies ensure that any provisional status is limited in scope and implemented with transparency.

Comment: Several commenters asked ACF to clarify what should happen to provisional employees if all of the required background check components are not completed by the end of the statutory 45 day timeframe.

Response: A State must process, at the very least, either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides, before a child care staff member may begin work. As described in further detail later in the preamble, we expect all of the checks to be completed in the timeframe established by the Act. However, the final rule gives Lead Agencies the discretion to make decisions in the limited cases in which not all of the required components are completed.
Completion of Background Checks. Once a child care provider submits a background check request, Section 658H(e)(1) of the Act requires the Lead Agency to carry out the request as quickly as possible. The process must not take more than 45 days after the request was submitted. These requirements are included in the final rule at § 98.43(e)(1).

Comment: Many comments from State continue to be concerned with being able to meet the statutory 45-day timeframe, especially for cross-State checks. Several comments asked ACF for an exception to the 45-day timeframe in those cases.

Response: The Act does not give ACF the authority to grant States exceptions to the 45-day timeframe. While we expect checks to be completed in the timeframe established by the Act, we will allow Lead Agencies to create their own procedures in the event that all of the components of a background check are not complete within the required 45 days. As described earlier in the preamble, prospective child care staff members are required to complete either the FBI fingerprint check or the search of the State criminal repository, using fingerprints in the State where the staff member resides, before they begin work.

Lead Agencies must work together with the relevant State/Territory entities to minimize delays. After the FBI receives electronic copies of fingerprints, they typically process background check results within 24 hours. There can be delays when the submitted fingerprint image quality is poor. Some States use hard copy fingerprints that must be made electronic for submission to the FBI, which can lead to delays. We encourage Lead Agencies to adopt electronic fingerprinting, which allows for background check results to be processed more quickly.

We encourage Lead Agencies to leverage existing resources to build and automate their background check systems. One potential resource for States is the National Background Check
Program (NBCP), as established by Section 6201 of the Patient Protection and Affordable Care Act, which aims to create a nationwide system for conducting comprehensive background checks on applicants for employment in the long-term care (LTC) industry. The NBCP is an open-ended funding opportunity that can award up to $3 million dollars (with a $1 million dollar State match) to each State to support building State background check infrastructure. The Centers for Medicare & Medicaid Services (CMS) administers the NBCP and since 2010, has awarded over $63 million in grant funds to participating States to design, implement, and operate background check programs that meet CMS’s criteria.

Privacy of results. Section 658H(e)(2) of the Act requires the Lead Agency to make determinations regarding a child care staff member’s eligibility for employment. The Lead Agency must provide the results of the background check to the child care provider in a statement that indicates only whether the staff member is eligible or ineligible, without revealing specific disqualifying information. If the staff member is ineligible, the Lead Agency must provide information about each specific disqualifying crime to the staff member, as well as information on how to appeal the results of the background check to challenge the accuracy and completeness. In the final rule, we clarify the language at § 98.43(e)(2)(ii) to specifically require that when an individual is sent the information on the disqualifying crimes, the State must, at the same time, provide information on the opportunity to appeal. This change is discussed in greater detail below.

In order for a Lead Agency to conduct FBI fingerprint checks, it must have statutory authority to authorize the checks. The Act may be used an authority to conduct FBI background checks, but Lead Agencies may continue to use other statutes as authorities to conduct FBI background checks on child care staff as well. Most Lead Agencies currently use Public Law
92-544 or the National Child Protection Act/Volunteers for Children Act (NCPA/VCA) (42 U.S.C. 5119a) as the authority to conduct FBI background checks. Public Law 92-544, enacted in 1972, gave the FBI authority to conduct background checks for employment and licensing purposes. The majority of States are using Public Law 92-544 as authority to conduct background checks, but a few States use the NCPA/VCA.

Public Law 92-544 is similar to the Act and only allows the State to notify the provider whether an individual is eligible or ineligible for employment. Similarly, the NCPA/VCA requires dissemination of the results to a governmental agency, unless the State has implemented a Volunteer and Employee Criminal History System (VECHS) program. Thus, a major difference between the Act and the NCPA/VCA with a VECHS program is in the protection of privacy of results. Through the NCPA/VCA VECHS program, Lead Agencies may share an individual’s specific background check results with the child care provider, provided the individual has given consent. Lead Agencies have the flexibility to continue to use these statutes as authority to complete the FBI fingerprint check, as long as the employment determination process required by the Act is followed. That is, Lead Agencies must make employment eligibility determinations in accordance with the requirements in the Act, but they also may exercise the flexibility allowed through the NCPA/VCA VECHS program to share results of background checks with child care providers. Comments from States that utilize differing statutes were supportive of this flexibility.

Appeals and review process. Section 658H(e)(3) of the Act requires Lead Agencies to have a process for child care staff members (including prospective staff members) to appeal the results of a background check by challenging the accuracy or completeness of the information contained in their criminal background report. An appeals process is an important aspect of
ensuring due process for staff members and allows them to challenge the accuracy of the background check results. According to the Act, each child care staff member should be given notice of the opportunity to appeal and receive instructions about how to complete the appeals process if the child care staff member wishes to challenge the accuracy or completeness of their background report. The Lead Agency must complete the appeals process in a timely manner. The Lead Agency must work with other agencies that are in charge of background check information and results, such as the Child Welfare office and the State Identification Bureau, to ensure the appeals process is conducted in accordance with the Act. The appeals requirements appear at § 98.43(e)(3) of the final rule.

Section 658H(e)(4) of the Act allows for a review process specifically for staff members convicted of drug-related felonies committed during the previous five years. States may use this review process, also known as a waiver process, to determine those staff members convicted of drug-related felonies committed during the previous five years to be eligible for employment by a CCDF provider. The review process is different from the appeals process because it allows the Lead Agency to consider extenuating circumstances on a case-by-case basis. The Act’s review process requirements appear at § 98.43(e)(4) of the final rule.

Comment: A comment, co-signed by several national organizations, wrote advocating for more protections governing the appeals process for individuals who challenge inaccurate background checks. The letter advised, “[T]he regulations fail to include adequate standards governing appeals that seek to demonstrate that the background check information relied upon was inaccurate or incomplete. Given the CCDF program’s reliance on the FBI background check system, which routinely generate[s] faulty information, ACF should adopt more robust appeals rights to protect those workers – mostly workers of color – who, through no fault of their own,
often have inaccurate records in the federal and State criminal history information systems. Thus, the following key features of a fair and effective appeal process should be incorporated into the ACF regulations:

1. In response to an appeal filed by a worker challenging the accuracy of the background check report, the State should immediately make the background check report available in order for the worker to validate the State’s information and properly prepare an appeal.

2. The burden should be on the State to make a genuine effort to track down missing disposition information related to disqualifying offenses, not on the worker. Often, the worker is not in a position to locate information on an arrest that may have occurred in another State or may no longer be readily accessible in court or law enforcement systems due to the age of the offense.

3. The worker should be provided at least 60 days to prepare the appeal, and a longer period of time (up to 120 days) if the State requires the individual to produce official documentation of a record. The State should also allow for a ‘good cause’ extension of time to file the appeal or supporting material.

4. Once the State has received the appeal information from the worker, it should issue a written decision within a specific period of time (not to exceed 30 days).

5. In the case of a negative determination, the decision should indicate the State’s efforts to verify the accuracy of the information challenged by the worker. The decision should also indicate any additional appeal rights available to the worker, as well as information on how the individual can correct the federal or State records at issue in the case.
6. The State should collect and periodically report data on the number of appeals filed, the outcome of the appeals, and the State’s decision processing times.”

Response: ACF strongly agrees with the worker protections described in this comment. While background checks are a necessary safeguard to protect children in child care, we are also mindful of the disproportionate impact that they can have on low-income individuals of color. A robust and effective appeals process, that incorporates the elements described above, is critical to protect prospective child care staff members who have inaccurate or incomplete background check records. As such, we made changes to the regulatory language at § 98.43(e)(2)(ii) and § 98.43(e)(3) to incorporate many of these protections, while still preserving some State flexibility.

At § 98.43(e)(2)(ii), the final rule requires that when a staff member receives a disqualifying result from the State, that information should be accompanied by information on the opportunity to appeal. The State must provide information about each specific disqualifying crime to the staff member, and that information should allow the staff member to decide whether to challenge the accuracy and completeness of the background checks results. Each child care staff member will be given clear instructions about how to complete the appeals process. The instructions should include the process for appeals, with clear steps individuals may take to appeal and the timeline for each of these steps. Although we are not requiring a specific timeframe, we do recommend that States allow staff members a reasonable amount of time of at least 60 days to prepare the appeal.

If the staff member chooses to file an appeal, then, at § 98.43(e)(3)(iii), the final rule requires the State to attempt to verify the accuracy of the information challenged by the child care staff member, including making an effort to locate any missing disposition information related to the disqualifying crime. As the comment notes, child care staff members may not be
able to access court or law enforcement records, so the burden should be on the State to recover them.

The Act requires that the appeals process must be completed in a timely manner. Although the final rule does not require a specific timeframe, we recommend that States issue a decision within 30 days of the appeal. The final rule, at § 98.43(e)(3)(v), requires that every staff member who submits an appeal will receive a written decision from the State. In the case of a negative determination, the decision should indicate the State’s efforts to verify the accuracy of information challenged by the child care staff member, as well as any additional appeals rights available to the child care staff member. The final rule does not require that States collect and report data on the number of appeals filed, the outcome of the appeals, or the State’s decision processing times. However, States should consider tracking and publishing this information. This information can be used to gauge the speed and effectiveness of the appeals process, and States may be able to use it to make improvements to their appeals process over time.

Comment: A letter from Senator Alexander and Congressman Kline asked ACF to provide guidance on the obligations of a child care provider during the appeals process: “The NPRM strongly encourages Lead Agencies that choose to consider crimes other than those listed in the Act as disqualifying crimes for employment to ensure a robust waiver and appeals process is in place; however, it is unclear what the obligations of a provider are during the appeals process timeframe. We support the highest level of safety assurances for parents and children, as well as legal assurances for providers, and again we ask the Department to carefully consider the comments from providers and centers to ensure these provisions are easy to follow without causing great disruption to the delivery of care for children.”
Response: The Act does not address the obligations of child care providers while staff members or prospective staff members are engaged in the appeals process. In addition, ACF did not receive any comments from child care providers addressing this issue. Therefore, ACF opts not to include additional regulatory language in order to allow States to make decisions that will continue to protect children’s health and safety without causing great disruption to the delivery of care for children. States are responsible for determining the most appropriate obligations for providers during the appeals process, and must inform providers about those obligations during an appeals process. States have the option of allowing child care providers to employ staff members or prospective staff members while they are involved in the appeals process. We encourage States to consult the U.S. Equal Employment Opportunity Commission’s guidance (U.S. Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). In addition, we note Section 658H(e)(5) of the Act, which is reiterated at § 98.43(e)(5), requires that nothing in this section shall be construed to create a private right of action if a provider has acted in accordance with this section. If a child care provider acts in accordance with the requirements of the Act, private parties may not bring a lawsuit.

Comment: Comments from national organizations and child care worker organizations urged ACF to include new regulatory language requiring the individualized review for drug-related felonies described at § 98.43(e)(4) to follow the U.S. Equal Employment Opportunity Commission’s (EEOC) guidelines. A letter co-signed by several national organizations stated, “Communities of color, and women of color in particular, have suffered immeasurably as a result of the collateral consequences of an arrest or conviction for a drug offense. Indeed, women now
represent the fastest growing segment of the criminal justice system, due largely to drug offenses, not violent crime. In fact, 24 percent of all incarcerated women were convicted of drug offenses, compared to just 16 percent of men. As the ACLU concluded in their analysis of the issue, '[w]omen of all races use drugs at approximately the same rate, but women of color are arrested and imprisoned at much higher rates.' We urge ACF to emphasize in the preamble that the States should adopt robust waivers procedure as applied to disqualifying drug offenses. In addition, ACF should specifically incorporate the EEOC guidelines in the regulations (Section 98.43(e)(4)), which would provide specific direction to the States beyond simply referencing Title VII.

Response: Section 658H(e)(4) of the Act, which is reiterated at § 98.43(e)(4) of the final rule, allows Lead Agencies to conduct a review process through which the Lead Agency may determine that a child care staff member (including a prospective child care staff member) convicted of a disqualifying felony drug-related offense, committed during the preceding five years, may be eligible for employment by a provider receiving CCDF funds. The law also requires that the review process must be consistent with Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), which prohibits employment discrimination based on race, color, religion, sex and national origin. ACF interprets the statutory reference to Title VII of the Civil Rights Act to mean that Lead Agencies must conduct the review processes in accordance with the EEOC’s current guidance on the use of criminal background checks in employment decisions, which requires individualized consideration of the nature of the conviction, age at the time of the conviction, length of time since the conviction, and relationship of the conviction to the ability to care for children, or other extenuating circumstances.
Lead Agencies should consult the EEOC’s current guidance on the consideration of criminal records in employment decisions to ensure compliance with Title VII’s prohibition against employment discrimination (U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf). As described in the comment, members of low-income communities of color are disproportionately charged and convicted of drug-related offenses. Establishing a robust process for an individualized review that follows EEOC guidance is important to protect these individuals. This process allows Lead Agencies to consider extenuating circumstances and to make nuanced decisions to deem an individual to be eligible for employment.

Comment: A letter co-signed by several national organizations also asked ACF to require an individualized review that complies with the EEOC guidance for any other disqualifying crimes added by the Lead Agency. The letter wrote, “This ‘individualized assessment’ of mitigating factors is a critical component of a fair background check process, as detailed in the EEOC guidance. It simply provides an opportunity for a prospective hire to explain why she is qualified for the position and does not pose a risk to child safety and well-being, even if she may have an otherwise disqualifying offense on her record. Individualized assessments are also particularly important for victims of domestic violence, who are often charged and convicted of a broad range of offenses, many of which are directly related to the abuse they experience. Accordingly, we urge ACF to incorporate the language of the EEOC guidance into Section 98.43(h)(1) of the CCDF regulations, thus mandating that the States take into account the
individual’s work history, evidence of rehabilitation, and other compelling factors that mitigate against disqualifying the individual from child care employment based on a conviction record."

Response: As described above, ACF interprets consistency with Title VII of the Civil Rights Act to mean that Lead Agencies must follow the EEOC guidelines. As such, we strongly encourage Lead Agencies to follow recommendations to implement an individualized assessment and waiver process in particular for any other disqualifying crimes not listed in the Act. In addition to challenging the record for accuracy and completeness, an individualized review allows the Lead Agency to consider other relevant information, and to provide waivers where appropriate. The EEOC recommends reviewing the following evidence: “the facts or circumstances surrounding the offense or conduct; the number of offenses for which the individual was convicted; older age at the time of conviction, or release from prison; evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct; the length and consistency of employment history before and after the offense or conduct; rehabilitation efforts (e.g., education/training); employment or character references and any other information regarding fitness for the particular position; and whether the individual is bonded under a federal, State, or local bonding program” (U.S. Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf).

Background check fees. Lead Agencies have the flexibility to determine who pays for background checks (e.g., the provider, the applicant, or the Lead Agency) but Section 658H(f) of the Act requires that the fees charged for completing a background check may not exceed the
actual cost of processing and administration. The cost of conducting background checks varies across States and Territories. The current FBI fee is $14.75 to conduct a national fingerprint check (subject to change). According to FY 2014-2015 CCDF State Plan data, most Lead Agencies report low costs to check State registries.

ACF recognizes the important role that fees play in sustaining a background check system. While States and Territories cannot profit from background check fees, we do not want to prevent fees that support the necessary infrastructure. Fees cannot exceed costs and result in return to State general funds, but they can be used to build and maintain background check infrastructure. Further, we expect that Lead Agencies using third party contractors to conduct background checks will ensure that these contractors are not charging excessive fees that would result in huge profits. ACF does not want background check fees to be a barrier or burden for entry into the child care workforce.

Comment: Comments from national organizations and child care worker organizations asked ACF to clarify whether CCDF funds could be used to cover the costs of background checks. One child care worker organization wrote, “We urge ACF to additionally clarify that States are permitted to use CCDBG funding to cover the cost of the background checks for legally exempt and family child care providers, and their household members, so that the cost of the background checks is not a barrier for these providers.”

Response: We agree with the comments. The intent of the Act is not to create additional burdens for certain provider groups. At Lead Agency discretion, CCDF funds may be used to pay the costs of background checks, including legally exempt and family child care providers, and their household members.
Consumer education website. The Act requires States and Territories to ensure that their background check policies and procedures are published on their websites. We require that States and Territories also include information on the process by which a child care provider or other State or Territory may submit a background check request in order to increase transparency about the process. Comments on this provision, located at § 98.43(g) of the final rule, were largely supportive. These background check policies and procedures should be included on the consumer education website discussed in detail in Subpart D at § 98.33(a).

§ 98.44 Training and Professional Development

Section 658E(c)(2)(G) of the Act requires Lead Agencies to describe in their CCDF Plan their training and professional development requirements designed to enable child care providers to promote the social, emotional, physical and cognitive development of children and to improve the knowledge and skills of caregivers, teachers, and directors in working with children and their families, which are applicable to child care providers receiving CCDF assistance. At § 98.44 we create a cohesive approach to the Act's provisions for training and professional development at Section 658E(c)(2)(G), provider training on health and safety at Section 658E(c)(2)(I)(i)(XI), and provider qualifications at Section 658E(c)(2)(H)(i)(III). This rule builds on the pioneering work of States on professional development and reflects current State policies.

We received comments from States concerned about the resources needed to meet these requirements and the capacity of professional development providers to fulfill the demand. We recognize that the Act and the rule require more attention to training and professional
(iv) The Lead Agency may, at its option:

(A) Use differential monitoring or a risk-based approach to design annual inspections, provided that the contents covered during each monitoring visit is representative of the full complement of health and safety requirements;

(B) Develop alternate monitoring requirements for care provided in the child’s home that are appropriate to the setting; and

(3) Ensure the ratio of licensing inspectors to such child care providers and facilities is maintained at a level sufficient to enable the State, Territory, or Tribe to conduct effective inspections on a timely basis in accordance with the applicable Federal, State, Territory, Tribal, and local law;

(4) Require child care providers to report to a designated State, Territorial, or Tribal entity any serious injuries or deaths of children occurring in child care.

(c) For the purposes of this section and § 98.41, Lead Agencies may exclude grandparents, great grandparents, siblings (if such providers live in a separate residence), aunts, or uncles, from the term “child care providers.” If the Lead Agency chooses to exclude these providers, the Lead Agency shall provide a description and justification in the CCDF Plan, pursuant to § 98.16(l), of requirements, if any, that apply to these providers.

§§ 98.43 through 98.47 [Redesignated as §§ 98.45 through 98.49]

22. Redesignate §§ 98.43 through 98.47 of subpart E as §§ 98.45 through 98.49.

23. Add new § 98.43 to subpart E to read as follows:

§ 98.43 Criminal background checks.
(a)(1) States, Territories, and Tribes, through coordination of the Lead agency with other State, territorial, and tribal agencies, shall have in effect:

(i) Requirements, policies, and procedures to require and conduct criminal background checks for child care staff members (including prospective child care staff members) of all licensed, regulated, or registered child care providers and all child care providers eligible to deliver services for which assistance is provided under this part as described in paragraph (a)(2) of this section;

(ii) Licensing, regulation, and registration requirements, as applicable, that prohibit the employment of child care staff members as described in paragraph (c) of this section; and

(iii) Requirements, policies, and procedures in place to respond as expeditiously as possible to other States’, Territories’, and Tribes’ requests for background check results in order to accommodate the 45 day timeframe required in paragraph (e)(1) of this section.

(2) In this section:

(i) Child care provider means a center based child care provider, a family child care provider, or another provider of child care services for compensation and on a regular basis that:

(A) Is not an individual who is related to all children for whom child care services are provided; and

(B) Is licensed, regulated, or registered under State law or eligible to receive assistance provided under this subchapter; and

(ii) Child care staff member means an individual (other than an individual who is related to all children for whom child care services are provided):

(A) Who is employed by a child care provider for compensation, including contract employees or self-employed individuals;
(B) Whose activities involve the care or supervision of children for a child care provider or
unsupervised access to children who are cared for or supervised by a child care provider; or
(C) Any individual residing in a family child care home who is age 18 and older.

(b) A criminal background check for a child care staff member under paragraph (a) of this
section shall include:

1. A Federal Bureau of Investigation fingerprint check using Next Generation Identification;
2. A search of the National Crime Information Center’s National Sex Offender Registry; and
3. A search of the following registries, repositories, or databases in the State where the child
care staff member resides and each State where such staff member resided during the preceding
five years:
   i. State criminal registry or repository, with the use of fingerprints being:
      A. Required in the State where the staff member resides;
      B. Optional in other States;
   ii. State sex offender registry or repository; and
   iii. State-based child abuse and neglect registry and database.

(c)(1) A child care staff member shall be ineligible for employment by child care providers of
services for which assistance is made available in accordance with this part, if such individual:
(i) Refuses to consent to the criminal background check described in paragraph (b) of this
section;
(ii) Knowingly makes a materially false statement in connection with such criminal background
check;
(iii) Is registered, or is required to be registered, on a State sex offender registry or repository or
the National Sex Offender Registry; or
(iv) Has been convicted of a felony consisting of:

(A) Murder, as described in section 1111 of title 18, United States Code;
(B) Child abuse or neglect;
(C) A crime against children, including child pornography;
(D) Spousal abuse;
(E) A crime involving rape or sexual assault;
(F) Kidnapping;
(G) Arson;
(H) Physical assault or battery; or
(I) Subject to paragraph (e)(4) of this section, a drug-related offense committed during the preceding 5 years; or

(v) Has been convicted of a violent misdemeanor committed as an adult against a child, including the following crimes: child abuse, child endangerment, sexual assault, or of a misdemeanor involving child pornography.

(2) A child care provider described in paragraph (a)(2)(i) of this section shall be ineligible for assistance provided in accordance with this subchapter if the provider employs a staff member who is ineligible for employment under paragraph (c)(1) of this section.

(d)(1) A child care provider covered by paragraph (a)(2)(i) of this section shall submit a request, to the appropriate State, Territorial, or Tribal agency, defined clearly on the State or Territory website described in paragraph (g) of this section, for a criminal background check described in paragraph (b) of this section, for each child care staff member (including prospective child care staff members) of the provider.

(2) Subject to paragraph (d)(3) of this section, the provider shall submit such a request:
(i) Prior to the date an individual becomes a child care staff member of the provider; and

(ii) Not less than once during each 5-year period for any existing staff member.

(3) A child care provider shall not be required to submit a request under paragraph (d)(2) of this section for a child care staff member if:

(i) The staff member received a background check described in paragraph (b) of this section:

(A) Within 5 years before the latest date on which such a submission may be made; and

(B) While employed by or seeking employment by another child care provider within the State;

(ii) The State provided to the first provider a qualifying background check result, consistent with this subchapter, for the staff member; and

(iii) The staff member is employed by a child care provider within the State, or has been separated from employment from a child care provider within the State for a period of not more than 180 consecutive days.

(4) A prospective staff member may begin work for a child care provider described in paragraph (a)(2)(i) of this section after completing either the check described at paragraph (b)(1) or (b)(3)(i) of this section in the State where the prospective staff member resides. Pending completion of all background check components in paragraph (b) of this section, the staff member must be supervised at all times by an individual who received a qualifying result on a background check described in paragraph (b) of this section within the past five years.

(e) Background check results. (1) The State, Territory, or Tribe shall carry out the request of a child care provider for a criminal background check as expeditiously as possible, but not to exceed 45 days after the date on which the provider submitted the request, and shall provide the results of the criminal background check to such provider and to the current or prospective staff member.
(2) States, Territories, and Tribes shall ensure the privacy of background check results by:

(i) Providing the results of the criminal background check to the provider in a statement that indicates whether a child care staff member (including a prospective child care staff member) is eligible or ineligible for employment described in paragraph (c)(1) of this section, without revealing any disqualifying crime or other related information regarding the individual.

(ii) If the child care staff member is ineligible for such employment due to the background check, the State, Territory, or Tribe will, when providing the results of the background check, include information related to each disqualifying crime, in a report to the staff member or prospective staff member, along with information on the opportunity to appeal, described in paragraph (e)(3) of this section.

(iii) No State, Territory, or Tribe shall publicly release or share the results of individual background checks, except States and Tribes may release aggregated data by crime as listed under paragraph (c)(1)(iv) of this section from background check results, as long as such data is not personally identifiable information.

(3) States, Territories, and Tribes shall provide for a process by which a child care staff member (including a prospective child care staff member) may appeal the results of a criminal background check conducted under this section to challenge the accuracy or completeness of the information contained in such member's criminal background report. The State, Territory, and Tribe shall ensure that:

(i) Each child care staff member is given notice of the opportunity to appeal;

(ii) A child care staff member will receive clear instructions about how to complete the appeals process if the child care staff member wishes to challenge the accuracy or completeness of the information contained in such member's criminal background report;
(iii) If the staff member files an appeal, the State, Territory, or Tribe will attempt to verify the accuracy of the information challenged by the child care staff member, including making an effort to locate any missing disposition information related to the disqualifying crime;

(iv) The appeals process is completed in a timely manner for each child care staff member; and

(v) Each child care staff member shall receive written notice of the decision. In the case of a negative determination, the decision should indicate the State’s efforts to verify the accuracy of information challenged by the child care staff member, as well as any additional appeals rights available to the child care staff member.

(4) States, Territories, and Tribes may allow for a review process through which the State, Territory, or Tribe may determine that a child care staff member (including a prospective child care staff member) disqualified for a crime specified in paragraph (c)(1)(iv)(I) of this section is eligible for employment described in paragraph (c)(1) of this section, notwithstanding paragraph (c)(2) of this section. The review process shall be consistent with title VII of the Civil Rights Act of 1964 (42 U.S.C.2000e et seq.);

(5) Nothing in this section shall be construed to create a private right of action if a provider has acted in accordance with this section.

(f) Fees for background checks. Fees that a State, Territory, or Tribe may charge for the costs of processing applications and administering a criminal background check as required by this section shall not exceed the actual costs for the processing and administration.

(g) Transparency. The State or Territory must ensure that its policies and procedures under this section, including the process by which a child care provider or other State or Territory may submit a background check request, are published in the website of the State or Territory as described in § 98.33(a) and the website of local lead agencies.
(h) **Disqualification for other crimes.** (1) Nothing in this section shall be construed to prevent a State, Territory, or Tribe from disqualifying individuals as child care staff members based on their conviction for crimes not specifically listed in paragraph (c)(1) of this section that bear upon the fitness of an individual to provide care for and have responsibility for the safety and well-being of children.

(2) Nothing in this section shall be construed to alter or otherwise affect the rights and remedies provided for child care staff members or prospective staff members residing in a State that disqualifies individuals as child care staff members for crimes not specifically provided for under this section.

24. Add new § 98.44 to subpart E to read as follows:

**§ 98.44 Training and professional development.**

(a) The Lead Agency must describe in the Plan the State or Territory framework for training, professional development, and postsecondary education for caregivers, teachers, and directors, including those working in school-age care, that:

(1) Is developed in consultation with the State Advisory Council on Early Childhood Education and Care (designated or established pursuant to section 642B(b)(1)(A)(i) of the Head Start Act (42 U.S.C. 9837b(b)(1)(A)(i))) or similar coordinating body;

(2) May engage training and professional development providers, including higher education in aligning training and education opportunities with the State’s framework;

(3) Addresses professional standards and competencies, career pathways, advisory structure, articulation, and workforce information and financing;

(4) Establishes qualifications in accordance with § 98.41(d)(3) designed to enable child care and school-age care providers that provide services for which assistance is provided in accordance