GEORGIA DEPARTMENT OF COMMUNITY HEALTH

Brian P. Kemp, Governor **Frank W. Berry, Commissioner**

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PUBLIC NOTICE OF PROPOSED RULES

Pursuant to the Georgia Administrative Procedures Act, Official Code of Georgia (O.C.G.A.) § 50-13-1, et seq., the Georgia Department of Community Health is required to provide public notice of its intent to adopt, amend, or repeal certain rules other than interpretative rules or general statements of policy. Accordingly, the Department hereby provides notice of its intent to adopt **Rules and Regulations for Criminal Background Checks, Ga. Comp. Rules & Regs., R. 111-8-12.** These rules are being proposed pursuant to the authority granted to the Department in OC.G.A. §§ 31-2-5 and 31-2-7. An exact copy of the proposed rules and a synopsis of the rules are attached to this public notice.

NOTICE OF PUBLIC HEARING

An opportunity for public comment will be held on July 9, 2019 at 10:00 a.m. at the Department of Community Health (2 Peachtree St., N.W., Atlanta, GA 30303) in the 5th Floor Board Room. Oral comments may be limited to ten (10) minutes per person. Individuals who are disabled and require assistance to participate during this meeting should contact the Office of General Counsel at (404) 657-7195 at least three (3) business days prior to the meeting.

Individuals wishing to comment in writing on the new rules should do so on or before July 12, 2019. Comments may be faxed to (404) 656-0663, emailed to vharrell@dch.ga.gov, or mailed to the following address:

Attention: Office of General Counsel
Georgia Department of Community Health
2 Peachtree Street, NW, 40th Floor
Atlanta, GA 30303

Comments from written and public testimony will be provided to the Board of Community Health prior to July 29, 2019. The Board will vote on the proposed changes on August 8, 2019.

NOTICE IS HEREBY GIVEN THIS 13th DAY OF June, 2019

Frank W. Berry, Commissioner

RULES OF
GEORGIA DEPARTMENT OF COMMUNITY HEALTH
HEALTHCARE FACILITY REGULATION DIVISION

CHAPTER 111-8-12
RULES AND REGULATIONS FOR CRIMINAL BACKGROUND CHECKS

SYNOPSIS OF PROPOSED RULES

STATEMENT OF PURPOSE: The Georgia Department of Community Health proposes to adopt Rules and Regulations for Criminal Background Checks, Chapter 111-8-12. These rules are being proposed pursuant to the authority granted the Department of Community Health in O.C.G.A. § 31-2-5 and O.C.G.A. § 31-2-7.

MAIN FEATURE OF THE PROPOSED RULE: Adoption of new rules to comply with the provisions of Senate Bill 406 from the 2018 Session of the General Assembly which requires fingerprint criminal background checks for owners and direct access employees of certain long term care facilities.

RULES OF
DEPARTMENT OF COMMUNITY HEALTH

CHAPTER 111-8
HEALTHCARE FACILITY REGULATION

111-8-12
RULES AND REGULATIONS FOR CRIMINAL BACKGROUND CHECKS

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111-8-12-.01 Legal Authority

These rules are adopted and published pursuant to the Official Code of Georgia Annotated (O.C.G.A.) § 31-7-350 et seq. (effective Oct. 1, 2019).

Authority: O.C.G.A. §§ 31-2-5, 31-2-7 and 31-7-360.

111-8-12-.02 Title and Purpose

These rules, known as the Rules and Regulations for Criminal Background Checks, establish the minimum standards for the Georgia Long-term Care Background Check Program for conducting criminal background checks of owners, applicants for employment, administrators, onsite managers, directors and direct access employees at certain facilities.

Authority: O.C.G.A. § 31-7-350 et seq.

111-8-12-.03 Definitions

In these rules, unless the context otherwise requires, the terms set forth herein shall mean the following:

(1) "Abuse" means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish. Such term includes the deprivation by an individual of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. Such term includes verbal abuse, sexual abuse, physical abuse, and mental abuse, including abuse facilitated or enabled through the use of technology.

(2) "Conviction" means a finding or verdict of guilty or a plea of guilty regardless of whether an appeal of the conviction has been sought.

(3) "Crime" means commission of:

(a) Any of the following offenses:

1. A violation of O.C.G.A. § 16-5-70;
2. A violation of O.C.G.A. § 16-5-101;
3. A violation of O.C.G.A. § 16-5-102;
4. A violation of O.C.G.A. § 16-6-4;
5. A violation of O.C.G.A. § 16-6-5;
6. A violation of O.C.G.A. § 16-6-5.1; or
7. A violation of O.C.G.A. § 30-5-8;

(b) A felony violation of:

1. Chapter 5, 6, 8, 9, or 13 of O.C.G.A. Title 16;

2. O.C.G.A. § 16-4-1;

3. O.C.G.A. § 16-7-2; or

4. O.C.G.A. § 31-7-12.1; or

(c) Any other offense committed in another jurisdiction which, if committed in this state, would be deemed to constitute an offense identified in this paragraph without regard to its designation elsewhere.

(4) "Criminal background check" means a search of the criminal records maintained by the Georgia Crime Information Center and the Federal Bureau of Investigation to determine whether an owner, applicant for employment, or employee has a criminal record.

(5) "Criminal record" means any of the following:

(a) Conviction of a crime;

(b) Arrest, charge, and sentencing for a crime when:

1. A plea of nolo contendere was entered to the crime;

2. First offender treatment without adjudication of guilt was granted to the crime; or

3. Arrested and charged for a crime if the charge is pending, unless the time for prosecuting such crime has expired pursuant to Chapter 3 of Title 17;

(c) Such term shall not include an owner, applicant for employment, or employee for which at least ten years have elapsed from the date of his or her criminal background check since the completion of all of the terms of his or her sentence; provided, however, that such ten-year period or exemption shall never apply to any crime identified in subsection (j) of O.C.G.A. § 42-8-60.

(6) "Department" means the Department of Community Health of the State of Georgia, its agents and employees.

(7) "Direct access" means having, or expecting to have, duties that involve routine personal contact with a patient, resident, or client, including face-to-face contact, hands-on physical assistance, verbal cuing, reminding, standing by or monitoring or activities that require the person to be routinely alone with the patient's, resident's, or client's property or access to such property or financial information such as the patient's, resident's, or client's checkbook, debit and credit cards, resident trust funds, banking records, stock accounts, or brokerage accounts.

(8) "Employee" means any individual who has direct access and who is hired by a facility through employment, or through a contract with such facility, including, but not limited to, housekeepers, maintenance personnel, dieticians, and any volunteer who has duties that are equivalent to the duties of an employee providing such services. Such term shall not include an individual who contracts with the facility, whether personally or through a company, to provide utility, construction, communications, accounting, quality assurance, human resource management, information technology, legal, or other services if the contracted services are not directly related

to providing services to a patient, resident, or client of the facility. Such term shall not include any licensed healthcare provider, including, but not limited to, physicians, dentists, nurses, and pharmacists who are licensed by the Georgia Composite Medical Board, the Georgia Board of Dentistry, the Georgia Board of Nursing, or the State Board of Pharmacy.

(9) "Facility" means:

(a) A personal care home required to be licensed pursuant to O.C.G.A § 31-7-12;

(b) An assisted living community required to be licensed pursuant to O.C.G.A. § 31-7-12.2;

(c) A private home care provider required to be licensed pursuant to O.C.G.A. § 31-7-301;

(d) A home health agency required to be licensed pursuant to O.C.G.A. § 31-7-151;

(e) A hospice required to be licensed pursuant to O.C.G.A. § 31-7-173;

(f) A nursing home, skilled nursing facility, or intermediate care home required to be licensed pursuant to O.C.G.A. § 31-7-1 et seq.; or

(g) An adult day center required to be licensed pursuant to O.C.G.A. § 49-6-83.

(10) "Fingerprint records check determination" means a satisfactory or unsatisfactory determination by the department based upon fingerprint based national criminal history information.

(11) "GCIC" means the Georgia Crime Information Center established under Article 2 of Chapter 3 of Title 35.

(12) "License" or "Permit" means the document issued by the department to authorize a facility to operate.

(13) "Owner" in the context of a nursing home or intermediate care home means an individual who is not an "excluded party" as such term is defined in O.C.G.A. § 31-7-3.3, otherwise such term means an individual or any person affiliated with a corporation, partnership, or association, who has 10 percent or greater ownership interest in a facility and who performs one or more of the following:

(a) Purports to or exercises authority of a facility;

(b) Applies to operate or operates a facility;

(c) Maintains an office on the premises of a facility;

(d) Resides at a facility;

(e) Has direct access at a facility;

(f) Provides direct personal supervision of facility personnel by being immediately available to provide assistance and direction when such facility services are being provided; or

(g) Enters into a contract to acquire ownership of a facility.

(14) "Records check application" means fingerprints in such form and of such quality as prescribed by GCIC under standards adopted by the Federal Bureau of Investigation and a records search fee to be established by the department by rule and regulation, payable in such form as the department may direct to cover the cost of obtaining a criminal background check.

(15) "Registry check" means a review of the nurse aide registry provided for in O.C.G.A. § 31-2-14, the state sexual offender registry, and the List of Excluded Individuals and Entities as authorized in Sections 1128 and 1156 of the federal Social Security Act, as it existed on February 1, 2018, or any other registry useful for the administration of, or mandated under, these rules.

(16) "Satisfactory determination" means a written determination that an individual for whom a criminal background check was performed was found to have no criminal record.

(17) "Unsatisfactory determination" means a written determination that an individual for whom a criminal background check was performed was found to have a criminal record.

(18) "Willful" means acting deliberately, not that there is an intention to inflict injury or harm.

Authority: O.C.G.A. §§ 31-7-351 and 31-7-355.

111-8-12-.04 Registry and Professional Licensing Board Checks

(1) Prior to a criminal background check required by these rules, the facility shall perform a registry check of the owner, administrator, onsite manager, director, and employees. If an individual has not resided in this state for at least two years, the facility shall conduct registry checks of each state in which the individual resided for the previous two years, as represented by such individual or as otherwise determined by the facility.

(2) If the subject of the criminal background check is a licensed healthcare professional or is required to hold a professional license as a qualification for the position, a query of available information maintained by the Georgia Composite Medical Board, the Secretary of State, or other applicable licensing boards shall be conducted prior to a criminal background check to determine that such individual has a professional license and is in good standing.

(3) If the individual appears on a registry or has a professional license that is not in good standing, the facility must comply with the Rule 111-8-12-.06.

(4) Except as provided in subsection (c) of O.C.G.A. § 31-7-359, nothing in these rules shall be construed to limit the responsibility or ability of a facility to screen owners, applicants for employment, administrators, onsite managers, directors or employees through additional methods.

Authority: O.C.G.A. §§ 31-7-352 and 31-7-354.

111-8-12-.05 Records Check Application

(1) A records check application shall be required:

(a) For each owner, upon application for a new license;

(b) For each owner, upon application for a change of ownership;

(c) For each administrator, onsite manager or director of a facility, upon application for employment or prior to placement in the position;

(d) For each direct access employee, upon application for employment or prior to placement in the position; and

(e) For existing owners, administrators, onsite managers, directors and direct access employees, on or before January 1, 2021.

(2) In lieu of a records check application, the facility may submit documentation, satisfactory to the department, that the individual has received a satisfactory determination within the immediately preceding 12 months (provided the prior satisfactory determination was issued on or after October 1, 2019) or at any time prior if the individual's fingerprints have been retained under authority of O.C.G.A. § 35-33-3(a)(1)(f).

Authority: O.C.G.A. §§ 31-7-353 and 31-7-354.

111-8-12-.06 Employment Prohibition; Grace Period; Personnel Files; Notice

(1) Except for the Grace Period described in paragraph (3) below, an individual required to submit to a registry check and criminal background check shall not be employed by, contracted with, or allowed to work as an employee at a facility, or to serve as an administrator, onsite manager or director of the facility, if:

(a) The individual appears on a registry check;

(b) There is a substantiated finding of neglect, abuse, or misappropriation of property by a state or federal agency pursuant to an investigation conducted in accordance with 42 U.S.C. Section 1395i-3 or 1396r as it existed on February 1, 2018;

(c) The individual's professional license, if applicable, is not in good standing; or

(d) The facility receives notice from the department that the individual has been found to have an unsatisfactory determination as a result of a criminal background check.

(2) An individual whose professional license is not in good standing may be employed by a facility in a position wherein his or her duties do not require professional licensure, so long as he or she has a satisfactory determination.

(3) **Grace Period**

(a) During pending criminal background checks. While a criminal background check is pending, the facility may permit an individual to have direct access to residents for a period not to exceed 30 days, provided that the individual is under the direct supervision of a staff member who has a satisfactory determination or otherwise meets the requirements of these rules. At the end of 30 days, if no background check determination has been issued by the department and the individual is working at the facility, the facility shall ensure that the individual does not have direct access to residents. The 30-day grace period shall not apply to placement of an administrator, onsite manager or director; the facility shall not appoint any individual to serve as an administrator, onsite manager or director while the background check for that individual is pending. In order for facilities subject to federal regulations that require background screening before employment to utilize the 30-day grace period, the facility first must obtain a GCIC state criminal history record check comparison of data with information other than

fingerprints in order to verify that the individual has not been found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment by a court of law.

(b) **During administrative appeals.** Unless prohibited under federal regulations, the facility may retain a current director, administrator, onsite manager or employee who has an unsatisfactory determination during the period of his or her administrative appeal.

(4) **Personnel file.** A personnel file for each employee shall be maintained by the facility. Such files shall be available for inspection by the department but shall otherwise be maintained to protect the confidentiality of the information contained therein and shall include, but not be limited to, evidence of each employee's satisfactory determination, registry check, and licensure check, if applicable.

(5) **Notice to applicants.** Each application form provided by a facility to an applicant for employment shall conspicuously state the following: "FOR THIS TYPE OF EMPLOYMENT, STATE LAW REQUIRES A NATIONAL AND STATE BACKGROUND CHECK AS A CONDITION OF EMPLOYMENT."

Authority: O.C.G.A. §§ 31-7-354; 31-7-355 and 31-7-357.

111-8-12-.07 Ownership Prohibition

When the department determines that an owner has an unsatisfactory determination as a result of a criminal background check or has appeared on a registry check, the department shall notify such owner of the ineligible status for ownership and shall take the necessary steps to revoke the facility's license or refuse to issue a license if an application is pending.

Authority: O.C.G.A. § 31-7-358.

111-8-12-.08 Background Checks Initiated by the Department

The department may require a criminal background check on any facility owner, administrator, onsite manager, director or employee during the course of an abuse investigation involving such individual or if the department receives information that such individual was arrested for a crime. In such instances, the department shall require the owner or employee to furnish two full sets of fingerprints which the department shall submit to GCIC together with appropriate fees collected from the owner or employee.

Authority: O.C.G.A. § 31-7-355.

111-8-12-.09 Enforcement and Penalties

The department shall impose a civil monetary penalty fine in the amount of the lesser of $10,000.00 or $500.00 for each day that a violation of these rules occurs. The daily civil monetary penalty fine shall be imposed only from the time the facility knew or should have known that it employed an individual with a criminal record and until the date such individual's employment is terminated.

Authority: O.C.G.A. § 31-7-356.

111-8-12-.10 Contested Results and Appeals

(1) An owner, applicant for employment, employee, administrator, onsite manager or director may:

(a) Obtain information concerning the accuracy of his or her criminal record, and the department shall refer such individual to the appropriate state or federal law enforcement agency that was involved in the arrest or conviction;

(b) Challenge the finding that he or she is the true subject of the results from a registry check, and the department shall refer such individual to the agency responsible for maintaining such registry; and

(c) Appeal his or her disqualifying unsatisfactory determination pursuant to O.C.G.A. § 31-7-358.

(2) Applicants for employment, employees, administrators, onsite managers or directors who received an unsatisfactory determination or whose name appears on a registry check conducted pursuant to these rules shall be eligible to appeal such determination pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." In a hearing held pursuant to this paragraph, the hearing officer shall consider in mitigation the length of time since the crime was committed, the absence of additional criminal charges, the circumstances surrounding the commission of the crime, and other indicia of rehabilitation.

(3) Owners

(a) The department's unsatisfactory determination of an owner or any action by the department revoking or refusing to grant a license based on such determination, shall constitute a contested case for purposes of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," except that any hearing required to be held pursuant thereto may be held reasonably expeditiously after such determination or action by the department.

(b) In a hearing held pursuant to subparagraph (1)(c) above, the hearing officer shall consider in mitigation the length of time since the crime was committed, the absence of additional criminal charges, the circumstances surrounding the commission of the crime, other indicia of rehabilitation, the facility's history of compliance with the regulations, and the owner's involvement with the licensed facility in arriving at a decision as to whether the criminal record requires the denial or revocation of the license to operate the facility. When a hearing is required, at least 30 days prior to such hearing, the hearing officer shall notify the office of the prosecuting attorney who initiated the prosecution of the crime in question in order to allow the prosecuting attorney to object to a possible determination that the conviction would not be a bar for the grant or continuation of a license as contemplated under these rules. If objections are made, the hearing officer shall take such objections into consideration.

Authority: O.C.G.A. §§ 31-7-354 and 358.

111-8-12-.11 Severability

In the event that any rule, sentence, clause or phrase of any of these rules and regulations may be construed by any court of competent jurisdiction to be invalid, illegal, unconstitutional, or otherwise unenforceable, such determination or adjudication shall in no manner affect the remaining rules or portions thereof. The remaining rules or portions thereof shall remain in full force and effect as if such

rule or portions thereof so determined, declared or adjudicated invalid or unconstitutional were not originally part of these rules.

Authority: O.C.G.A. §§ 31-2-5, 31-2-7 and 31-7-360.