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Licensing and Certification
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**SUMMARY OF PUBLIC COMMENTS AND DEPARTMENT RESPONSES
AND LIST OF CHANGES MADE IN THE FINAL RULE**

10-144 CMR Chapter 60, Maine Background Check Center Rule

The Department of Health and Human Services, Maine CDC Division of Licensing and Certification held a public hearing on proposed rule 10-144 CMR Chapter 60, Maine Background Check Center Rule at 286 Water St., Augusta, ME on May 31, 2018. Written comments were accepted through June 10, 2018. Comments were received from the following people:

TABLE OF COMMENTERS

ID #	First Name	Last Name	Date	Representing	Format
1	Nadine	Grosso	5/11/18; 5/31/18	Maine Health Care Association	Oral and Written
2	Elizabeth	Sjulander	5/30/18	Saco River Health Services	Written
3	Deb	Fournier	5/31/18	Maine Veteran's Homes	Written
4	Jeff	Austin	5/31/18; 6/7/18	Maine Hospital Association	Oral and Written
5	Lydia	Dawson	5/31/18; 6/9/18	Maine Association for Community Service Providers	Oral and Written
6	Melinda	Ward	6/1/18	OHI	Written
7	Michelle	Bush	6/9/18	MaineHealth	Written
8	Jessica	Lachance	6/10/18	Tri-County Mental Health Services	Written
9	Peter	Gartland	6/10/18	FirstLight Home Care	Written
10	Peter	Violette	6/10/18	Comfort Keepers	Written
11	Nadine	Grosso	5/14/18	Maine Health Care Association	Oral and Written

Commenters #1, 4 and 5 presented oral comments at the public hearing, and subsequent written comments, listed below. The Department's response follows each comment and explains whether the suggestions were or were not followed by the Department. If the Department made no change in response to a comment, then an explanation of the reason(s) why no changes were made also is provided below. The summary list of changes following these comments identify changes to the proposed rule resulting from either public comment or Assistant Attorney General review of the Rule for form and legality.

GENERAL COMMENTS

- Comment:** Commenter 1 expressed appreciation for the time and work that has gone into the development of the Maine Background Check Center (MBCC), and finds the Department and the MBCC have been accessible and timely in their response to questions and concerns.

Response: The Department thanks the commenter.

- Comment:** Commenter 5 stated the MBCC is both over-inclusive and under-inclusive, as there are background checks (such as Child Protective Services and Bureau of Motor Vehicles) which were anticipated to be included in the MBCC, which are not currently and do not have an effective date; and there are checks that are

automatically included which are not required for specific direct access workers. The commenter requested that the Department require the MBCC to create an a la carte function which allows employers to request the specific background checks needed to certify the direct access worker for employment and pay accordingly.

Response: The Department is unable at present to access certain databases, due to restrictions and limitations on the part of the database owner. These include Child Protective Services and the Bureau of Motor Vehicles. Development of the MBCC functions is ongoing, and should access to those databases change, those searches may be added to the MBCC comprehensive background check. The rule reflects this ongoing development by the use of the word “may” in the definition of “comprehensive background check”.

The Department found that the functionality and databases searched were developed to address the needs of the wide variety of regulated entities identified in statute, and represent the minimum search required to preserve the health and safety of children and adults in need of support and care. An ‘a la carte’ function is expressly prohibited by statute, as the MBCC is required to perform a comprehensive background check for employers.

The Department found that the function of rule is to clarify, codify, and operationalize statute. Where the language of 22 MRS Chapter 1691 does not require clarification or emphasis, it has not been repeated in this rule. No change was made to the rule as a result of this comment.

- 3. Comment:** Commenter 5 stated that there does not appear to be a means of maintaining a direct access worker within the system, when the worker begins employment with a new provider under the same position, resulting in providers conducting unnecessary and expensive background checks for individuals who have already certified their fitness. The commenter requested that the Department require the MBCC to retain a system of information regarding direct access workers which allows new employers to see whether a direct access worker is within the five (5) year window of rap back monitoring such that an additional check is unnecessary.

Response: The Department found that the employer is required to use the MBCC to conduct a background check for all direct access workers. The Department also found that statute requires each employer to obtain authorization from the direct access worker to conduct the required background check. No change was made to the rule as a result of this comment.

- 4. Comment:** Commenter 5 asked that the comments and feedback of Commenters 1, 3, and 4 be incorporated by reference into their comments. Commenter 6 asked that that every single comment of Commenter 5 “be multiplied by 2” because Commenter 6 registered the same comments. Commenter 7 expressed support for all comments made by Commenter 4.

Response: The Department thanks these commenters. The Department has reviewed each comment and carefully considered each comment on its own merits.

- 5. Comment:** Commenter 9 described the MBCC as “fatally flawed” due to the following assertions: it does not check national-level databases or motor vehicle history, costs exceed private sector prices, the search is name-based rather than social security number-based, the results of the background check are not portable when the employee changes employers, the MBCC site is frequently off-line, and the website runs one employee at a time, rather than a list of employees. Commenter 10 stated that aliases are not reviewed nor screened unless provided at time of search; utilizing the person's name as a search element causes additional unrelated information to be included in the search results, making it difficult to determine what information belongs to whom; and that the program is cumbersome to use.

Response: The Department found that these suggestions lie outside the scope of rulemaking. Suggestions regarding the ongoing performance of the MBCC should be directed to its Program Manager. No change was made to the rule as a result of these comments.

6. **Comment:** Commenter 9 offered a series of recommendations regarding the Department’s management of the background check center:
- The State should focus its efforts on ensuring their data bases are up-to-date and accurate.
 - The State should provide background check companies access to the data for reasonable fee.
 - DHHS should utilize InforME as its background check system (as it had in the past).
 - The State should require DHHS amend its current definition of Comprehensive Background Check to include national criminal records and Maine Federal Court records.
 - DHHS should eliminate the rap back provision; or eliminate the \$40 per inquiry charge for inquiries to county records.
 - DHHS should replace MBCC with the original InforME which worked well, at a reasonable cost. InforME provided Maine criminal data plus motor vehicle data for a fee of \$21. In addition we were allowed to check the Maine sex offender registry and the CNA licensing registry at no charge.

Response: The Department found most of these suggestions to lie outside the scope of rulemaking. The Department is not currently statutorily authorized to collect biometrics in order to access federal records. Rap back monitoring is specifically required by statute. No change was made to the rule as a result of this comment.

SECTION 1 DEFINITIONS

7. **Comment:** Commenter 4 requested that the definition for “applicant” be clarified to state that vendors that never go on site (such as IT, billing, and helplines which have access to the Personally Identifying Health Information of a patient, but do not have physical contact with the patient), are not subject to this rule.

Response: The Department has removed the definition of “applicant”, and has substituted the phrase “direct access worker” throughout the final rule, and defined “direct access worker.”. The MBCC Act used the term “direct access worker” and the rule definition of “direct access worker” is identical to the definition of “direct access worker” set forth in 22 MRS § 9053(14). Now, both the law and the rule clearly articulate what workers are subject to this law and must be checked.

8. **Comment:** Commenter 5 asked for clarification on the definition of direct access worker in “applicant”, and suggested that this rule and the Maine Background Check Center Act align with the language defining providers and direct access workers under the MaineCare Benefits Manual.

Response: See the response to Comment # 7.

9. **Comment:** Commenters 2 and 8 stated, in the context of the definition for “comprehensive background check”, that the Maine Background Check Center (MBCC) does not currently check or report information from the Maine Sex Offender Registry, Maine Child Protective Services records, or other applicable registries and professional licensing records. Commenter 1 stated that these entities have to be checked separately, which requires additional fees for the Maine Child Protective Services record check. Commenter 1 stated that driver's license information (BMV) is not on the list of "checks," though most direct care employees are required to have this check, which requires an additional fee. Commenter 1 stated the additional use of the MBCC is on top of the fees providers currently pay for background checks and is a significant expense on top of current fees. Commenter 8 asked if employers are required to use only the MBCC as the sole source, or if they may use free online sites for specific databases, such as Maine and national Sex Offender Registries. Commenter 9 stated that the MBCC does not check federal court records.

Response: Please see responses to comments 2 and 6 above. The Department also found that the ongoing use of another vendor, in addition to the required use of the MBCC, is a provider decision and is outside the scope of this rulemaking. The Department found that providers may access online databases at their discretion. No change was made to the rule as a result of these comments.

10. Comment: Commenter 6 recommended that the Department cross-reference the Fair Credit Reporting Act against the “conditional employment” definition, specifically regarding the applicant or grandfathered employee seeking to correct an error on a comprehensive background check report generated by the MBCC to assure the deadlines do not conflict.

Response: The Department found that the period of conditional employment is clearly stated in statute at 22 MRS §9057(2) and that this rule aligns with statute. No change was made to the rule as a result of this comment.

11. Comment: Commenter 6 asked if “rap back monitoring” includes ongoing national checks, such as the FBI, and suggested that it should be made clear in the definition if rap back monitoring only includes arrests which occur in Maine.

Response: Please see the response to comment 6. The MBCC lacks the authority to search databases accessed by biometrics. The Department found that the rule is clear as written, and should remain as written in the event that biometric capacity is developed as a future function of the system. No change was made to the rule as a result of this comment.

12. Comment: Commenter 9 stated that the definition for rap back monitoring does not specify the frequency meant by the word “periodically, and asked how frequently an alternate vendor would be required to re-check an individual during the 5-year interim between background checks.

Response: The Department agreed with the commenter, and revised the rule to replace the phrase “periodically searching” to “constantly monitoring”.

SECTION 2 SCOPE, ENROLLMENT, AND FEES

13. Comment: Commenters 3 and 6 requested that Section 2(C) be amended to allow users/facilities to have more than one administrator.

Response: The Department agreed with the commenter, and revised the rule to replace the phrase “a single individual” with “at least one individual”.

14. Comment: In regards to the statutory user fee cap stated in Section 2(D)(2)(d), Commenter 1 expressed the hope that the present user fee is based on conservative estimates, and that the fee may be reduced after all providers are using the MBCC. Commenter 2 asked if an increase is anticipated in the near future, and if adding checks of the databases listed in the definition of “comprehensive background check” in Section 1 will increase the user fee.

Response: The Department found that the process for fee adjustments is adequately stated in rule, and is based on the balance required to operate the program. The Department has amended the final rule to reflect that changes in fees must be made through formal rulemaking.

15. Comment: Commenter 5 stated that the user fees in Section 2(D)(1) are unsustainable, and recommended that the Department supplement the MBCC operations with State funds. Commenter 5 further suggested that the range of user fees be narrowed to \$25 to \$75; that the MBCC provide at least 90 days of notice of an increase, with written notice to any provider required to use the MBCC; that the balance of the MBCC operating budget be posted on the MBCC website on January 1, 2019 and every two years thereafter; that the Department create an exemption or forbearance process to support providers who are unable to pay a fee increase without financial hardship; or alternatively, keep user fees at a fixed reasonable cost or require proportional rate increases to providers with every fee increase.

Response: The Department found the majority of these comments to be addressed by the statutory requirements of the MBCC. The suggestions regarding rate increases to providers and forbearance measures are outside the

scope of this rulemaking. The Department has amended the final rule to reflect that changes in fees must be made through formal rulemaking.

16. Comment: Commenter 6 stated that the user fees in Section 2(D)(1) exceed current costs for background checks that include both motor vehicle checks and child protective checks, and that this fee and the fact it can increase to \$150/background check is exorbitant and unreasonable. The commenter recommends removal of the word “comprehensive”; that the fee be reduced to \$35 per background check (because providers still have to pay separately for the motor vehicle check and the child protective check); that the fee stay the same for two years; and that employers receive at least 90 days’ notice of the intent to increase the rate. Commenter 9 stated that the agency’s cost for background checks has increased from \$47 per inquiry to \$91 per inquiry, as they continue to conduct background checks with their current vendor and the MBCC to assure thorough results.

Response: As stated above, The Department found the majority of these comments to be addressed by the statutory requirements of the MBCC. The Department found that the current user fee was established at a level to allow the MBCC to be sustainable, and is at the lower end of the range established by statute. The Department found that the providers’ increased costs were due to the decision to continue to use another vendor in addition to the MBCC. As noted above, the Department has amended the final rule to reflect that changes in fees must be made through formal rulemaking.

17. Comment: Commenters 1 and 3 requested that Section 2(D)(2)(d) add that users will be notified of any fee changes via mail or email, in addition to notification on the website.

Response: As noted above, the Department has amended the final rule to reflect that changes in fees must be made through formal rulemaking.

SECTION 3 CONDUCTING BACKGROUND CHECKS

18. Comment: Commenter 6 questioned the need to use Department-provided forms as required in Section 3(A), when that provider has forms already in place which are in compliance with the Fair Credit Reporting Act. The commenter recommended that the language in the rule be amended to indicate that Department forms are optional, as long as the employer’s forms are compliant with the rule.

Response: The Department found that use of Department-approved forms is mandated by statute, and that the most cost-effective means of assuring provider compliance was to create the required forms, and make them easily accessible to providers on the MBCC website. No change was made to the rule as a result of this comment.

19. Comment: Commenter 7 proposed that Section 3(B) be amended to clarify that alternate vendors may use their own authorization and release forms, and not be required to use the forms provided by the Department.

Response: Please see the response to comment 18 above. No change was made to the rule as a result of this comment.

20. Comment: Commenter 2 asked if employers must retain the forms required by Section 3(B)(2)(a) for all applicants who are not hired for any reason, and if electronic records are acceptable for auditing purposes.

Response: The Department found that the retention requirement (one year) is clearly stated in rule. The Department found that paper records are not mandated by rule, therefore, an electronic record would meet the requirement of rule, as long as it can be readily accessed by a site surveyor or licensing staff. No change was made to the rule as a result of this comment.

21. Comment: Commenter 2 asked if the former employees’ records required in Section 3(B)(2)(a)(iii) may be retained electronically, for auditing purposes.

Response: Please see the response to comment 20 above. No change was made to the rule as a result of this comment.

22. Comment: Commenter 2 asked if the employer is liable if the employee does not furnish complete or accurate information as required in Section 3(C)(1), and if so, what penalties might the employer incur.

Response: The Department found that the direct access worker is responsible for providing accurate information to the potential employer, and that intentionally providing false information would constitute fraud under 17-A MRS §905-A. No change was made to the rule as a result of this comment.

23. Comment: Commenter 2 asked if the State-issued identification card or driver's license required in Section 3(C)(1)(d) must be issued by the State of Maine.

Response: The Department found that “State-issued” is commonly understood to mean a driver's license or identification card issued by a state that issues licenses and identification cards, and that the rule does not specify the State of Maine. No change was made to the rule as a result of this comment.

24. Comment: Commenter 5 requested that the Department provide further clarity in Section 3(C)(3) regarding the documentation retention requirement of the United States Citizenship and Immigration Services (USCIS) Employment Eligibility Verification Form I-9: what documentation, in addition to the I-9, are employers required to retain, and how long it must be retained. Commenter 6 stated that federal law requires employers to retain the I-9 documentation for three years after the date of hire or one year after termination, whichever is later.

Response: The Department found that the federal law regarding employment eligibility verification supersedes this rule, and does not need to be repeated in this rule. The Department found that commenter 6 accurately stated the retention requirements. No change was made to the rule as a result of this comment.

25. Comment: Commenter 3 stated that Section 3(C)(4), the requirement to notify the MBCC of the name change of any employee and submit proof, is an unnecessary burden for employers as that information would be recorded on the master list required by this rule. Commenter 5 requested that the Department extend the time to provide the MBCC with proof of a name change from 10 to 30 calendar days after notification of a name change. Commenter 6 also recommended extending the time period, to 15 business days. Commenter 8 noted that employers may not learn of a name change within the timeline for reporting, and suggested that employers be allowed to report the change and provide proof when it becomes available.

Response: The Department found that name changes within the system must be completed by the MBCC, and that rap back monitoring would become non-functional as the MBCC will not receive any further criminal records without that notification. The Department found that the phrase “within ten business days of learning of the change” provides recognition that the employee may not immediately notify the employer, and that 10 business days is sufficient time for the administrator to notify the MBCC. No change was made to the rule as a result of these comments.

26. Comment: Commenter 2 asked the following questions about Section 3(D)(2), regarding grandfathered employees:

- Considering that MBCC is operational currently, though not comprehensive, what date are employers expected to use as the start date?
- Are employers liable for inaccurate reports from MBCC?
- Will MBCC assume liability for issues that may result from hiring an individual not properly annotated on the MBCC reports, to include fines and fees that the state, DHHS, or Maine Care imposes on the employer? If

not, what can we expect from MBCC for accountability in a situation where the information is not comprehensive?

Response: The Department found that rule is clear in stating that employers have 365 days from the date that the MBCC becomes operational for that provider type to complete background checks for grandfathered employees. The notification letter sent to currently mandated users included the date when that 365 day period began. The Department found that issues of liability lie outside the scope of this rule. No change was made to the rule as a result of this comment.

27. Comment: Commenter 2 asked where the master list of employers referenced in Section 3(D)(3)(a) is maintained in the system, and if this is the list of checks conducted located on the MBCC website. Commenter 6 also asked what “system” is being referred to in the proposed rule, and recommended that “30 calendar days” be changed to “30 business days”, to allow the administrator sufficient time to update the system as needed.

Response: The Department found that the master list is kept in the MBCC, and that the “system” is the MBCC. The Department determined that 30 calendar days is sufficient time for the employer’s administrator(s) to update information. No change was made to the rule as a result of these comments.

28. Comment: Commenters 2 and 3 asked for clarification on Section 3(D)(4) regarding the background checks for temporary employees: Is it necessary for the temporary agency and facility to both conduct a background check on the same individual, in the event that the facility hires that individual?

Response: The Department has clarified Section 3(D)(4) to remove any confusion that both a temporary agency hiring an employee, and an employer hiring that temporary employee on a regular basis, must complete a background check, in accordance with 22 MRS §9054(4).

29. Comment: Commenters 2, 3, 5 and 7 supported the inclusion of the process for approval of an alternate vendor in Section 3(D)(5).

Response: The Department thanks the commenters.

30. Comment: Commenters 1 and 3 asked how the Department will manage Section 3(D)(5) regarding the requirement for providers to apply for an alternate vendor 14 days from notification of enrollment, as the MBCC was operational prior to the adoption of rule. Commenter 4 suggested that the MBCC have a one-time deadline for 2018 that applies for the first-time application of the rule, allowing employers to review the rule and submit a vendor application by December 28, 2018; the opportunity to submit a new vendor application could be different after the rule is adopted. Commenter 8 asked if that agency may continue to use their current vendor.

Response: The Department found that allowing mandated users the flexibility to retain alternate vendors, that demonstrated the ability to complete comprehensive background checks, during the rollout of the MBCC was reflective of the desire to respect and support current effective business relationships, and did not place vulnerable people at risk. Mandated users enrolled after the adoption of rule will need to comply with the requirements of rule. No change was made to the rule as a result of these comments.

31. Comment: Commenter 4 suggested that the Department eliminate the grandfathering deadline for the use of alternate vendors in Section 3(D)(5)(a)(i), as this provision would eliminate the ability of any employer to use an alternate vendor unless that vendor was being used on February 6, 2017.

Response: The Department found that allowing the continued use of an existing vendor would be in the best interest of the employer, and was consistent with the intent of statute. The Department also found that allowing providers to establish new vendor relationships would not be consistent with the statutory requirement for the MBCC to be sustainable. No change was made to the rule as a result of this comment.

32. Comment: Commenter 6 recommended that rule 3(D)(5)(a)(ii) be changed to allow 30 business days to apply for use of an alternate vendor.

Response: The Department found that 14 business days was a sufficient period of time for an employer to provide the information required in rule. No change was made to the rule as a result of this comment.

33. Comment: Commenter 4 requested that the Department clarify the continuous monitoring (rap back) requirement for alternate vendors in Section 3(D)(5)(a)(iii). The commenter stated that the proposed rule is not consistent with statute at 22 MRS §9054(5) and (8). Commenters 4 and 7 requested that rule clarify that rap back monitoring is not required for alternate vendors by deleting the phrase from sub-section (5)(a)(iii) "...including continuous monitoring of convictions (rap back)."

Response: The Department found that rap back monitoring is an essential component of a comprehensive background check, according to statute. The Department found that the rule is consistent with statute, as 'use of the MBCC' includes using the MBCC to conduct an approval process for a vendor that is currently conducting background checks. No change was made to the rule as a result of these comments.

34. Comment: Commenters 5, 7 and 9 stated that no vendor in the state could meet the rap-back requirement for approval, as stated in Section 3(D)(5)(a)(iii). Commenter 5 requested that the Department remove the requirement that an alternate vendor be used on or before February 6, 2017 to ensure this provision of the regulations is operable and to allow for the cultivation of alternate vendor; and also requested that the Department require criminal background checks only as frequently as required for licensing for alternate vendors that do not have Rap Back Monitoring.

Response: As noted in previous responses, the Department found that rap back monitoring is a statutory requirement, and the effective date for existing vendor relationships coincides with the date of initial operation of the MBCC. No change was made to the rule as a result of these comments.

35. Comment: Commenter 6 questioned the necessity of and evidence supporting the need for rap back monitoring, and recommended that rap back monitoring not be required for the first two years, or to amend the rule to say "rap back or its equivalent", where the equivalent is a criminal check every two years. Commenter 8 asked if it was required that an alternate vendor provide rap back monitoring.

Response: Please see previous responses. No change was made to the rule as a result of these comments.

36. Comment: Commenters 7 and 8 suggested that only the rap back feature be available to employers using an alternate vendor to bridge the gap, at a reduced cost.

Response: The Department found that the development of an isolated rap back feature may be a potential future enhancement of the MBCC, but it is not feasible to include in rule or the operation of the center within the timeframe of this rulemaking. No change was made to the rule as a result of these comments.

37. Comment: Commenter 8 asked if the rap back feature is currently functional, and if so, how employers would be notified of a new conviction.

Response: The Department found that rap back monitoring has been active for over a year. The MBCC provides electronic notifications through the system: the employer receives an updated rap sheet by email when any new sentencing data is found. No change was made to the rule as a result of this comment.

38. Comment: Commenters 3 and 6 questioned the necessity of annual attestation as required in Section 3(D)(5)(a)(iv), as it presents a burden to providers and could be verified during licensing surveys. Commenter 6 recommended that attestation occur every five years.

Response: The Department found that attestations will be made to the MBCC, and will be verified during licensing surveys. The Department also found that annual attestations are necessary to assure that alternate vendors continue to meet the requirements of statute. No change was made to the rule as a result of these comments.

39. Comment: Commenter 6 noted that Section 3(D)(5)(a)(v) requires an employer to provide DHHS access to the master list of “all employees” upon request during regular business hours, and recommended this be changed to “direct access workers”.

Response: The Department agrees with the commenter, and has changed the rule to read “master list of all direct access employees”.

40. Comment: Commenter 4 requested clarification of the waiver options for employers using an alternate vendor in Section 3(D)(5)(a)(vii), by clarifying that employers who otherwise use alternate vendors may use the MBCC on a case-by-case basis for purposes of allowing access to the waiver process.

Response: The Department has added provision at Section 3(D)(5)(b) that requires an alternate vendor to provide any report, underlying data and analysis made by the alternate vendor pursuant to these rules to be made available to the Department, upon the Department’s written request, as a contingency for approval. Such reports, underlying data and analysis will allow the Department to determine, upon request, if a waiver may be granted.

41. Comment: Commenter 3 asked when the application form alluded to in Section 3(D)(5)(b) will be available.

Response: The Department found that the MBCC will create and disseminate an application form upon the adoption of this rule. No change was made to the rule as a result of this comment.

42. Comment: Commenter 3 disagreed with the requirement to use the MBCC in the event of the vendor’s ability to conduct a comprehensive background check, as required in Section 3(D)(5)(d), and stated that use of another alternate vendor should be allowed, if approved.

Response: The Department found that the decision to allow the use of alternate vendors existing at the time of the development of the MBCC and the proposed rule was an adequate concession to the use of such vendors, but in the event that a vendor is unable to meet the requirements of statute or is no longer in business, the employer must begin use of the MBCC. No change was made to the rule as a result of this comment.

43. Comment: Commenter 3 stated that the requirement to notify the MBCC to cease rap back monitoring in Section 3(F)(2) is unnecessary, as this is covered in Section 3(D)(3)(b).

Response: The Department found that these sections relate to different requirements: Section 3(D)(3)(b) addresses the master list required of the employer; which is not functionally connected to the rap back monitoring function of the MBCC. The Department also found that the rule is intentionally repetitive to assure compliance in this area. No change was made to the rule as a result of this comment.

44. Comment: Commenter 2 asked if the Quick Check function in Section 3(E) is legal, and if a signed consent is necessary to conduct this check. Commenter 2 asked if this information needs to be kept on file as stated in Section 3(B)(2)(i).

Response: The Department found that all information accessed in the Quick Check is publically accessible information. The authorization and releases required by Section 3(B)(2)(i) should be completed prior to accessing

the Quick Check function, and should be retained in accordance with rule. The Department clarified the definition of “Quick Check” on page 2 by replacing “background” with “publically accessible registries.”

- 45. Comment:** Commenter 3 suggesting adding the phrase “ unless a background check has already been conducted by the employer” to Section 3(H).

Response: The Department agreed with the commenter, and changed the rule to add: “unless a comprehensive background check has already been conducted by the MBCC or the facility’s approved alternate vendor.”

- 46. Comment:** Commenter 1 asked if the table in Section 3(I)(1) is the same as the content on the MBCC website.

Response: The Department has reviewed the table of disqualifying offenses on a regular basis since the MBCC became operational. As a result of that review, criminal attempt was changed from a 10 year disqualification to a 30 year disqualification. Five year disqualifications for Class D receiving stolen property, Class D negotiating a worthless instrument, and Class E refusing to submit to arrest or detention were removed. The Department found that the MBCC will update the content on its website when the rule is adopted.

- 47. Comment:** Commenter 2 asked if the disqualification for the conviction for “Operating after suspension - accident with death” in the table in Section 3(I)(1) is for any suspension, or only accident with death.

Response: The Department found that only an operating after suspension conviction resulting in an accident with death is a disqualifying offense. No change was made to the rule as a result of this comment.

- 48. Comment:** Commenter 6 stated that the list of convictions in Section 3(I)(1) far exceeds, and may conflict with, requirements within any licensing rules, and also may conflict with current contractual allowances with DHHS, citing contractual language which reads “employment of persons with records of such convictions more than five years ago is in its discretion, after consideration of the individual’s criminal record in relation to the nature of the position.” The commenter recommended cross referencing the table of convictions against the licensing rules to assure there are no conflicts, and considering EEOC guidelines and legal actions taken against employers as they relate to the employment of those convicted of crimes.

Response: The Department found that the disqualifying offenses contained in the rule create a standard across all mandated users that is supported by statute, and creates an environment of health and safety for children and adults in need of support and care. The inclusion of these disqualifying offenses in this rule creates an equivalence for all mandated users of the system, and is legally enforceable, following the authority of statute. No change was made to the rule as a result of this comment.

- 49. Comment:** Commenter 2 asked if the employer must wait for new results posted with MBCC before initiating the hire, should the applicant provide proof that the information regarding a disqualifying event listed in Section 3(I)(3) is incorrect, and wants to appeal with MBCC. Commenter 2 also asked if the employer must pay for a new check with MBCC, if the proof provided does in fact show that the information is not correct.

Response: The Department found that MRS 22 §9057(1) and (2) outline the procedure for conditionally hiring a direct access worker. The Department also found that issuance of a corrected report is part of the error correction process, and does not require an additional background check. No change was made to the rule as a result of these comments.

- 50. Comment:** Commenter 2 asked if the employer has to follow this rule, should they receive disqualifying information issued by the MBCC under Section 3(J), and the employer receives information (from another source or report) that contradicts the MBCC check, or if a "judgment call" may be made in that situation. Commenter 2 also asked if the employer has an obligation to furnish the contradictory information to MBCC, and

at what point MBCC would be liable for inaccurate information being reported on the checks they provide employers.

Response: The Department found that the employer must follow the error correction procedures outlined in rule. The Department also found that questions of liability fall outside the scope of rulemaking. No change was made to the rule as a result of these comments.

51. Comment: Commenter 8 asked how the employer would be notified if the MBCC issues a new report, in accordance with Section 3(J)(2).

Response: The Department found that providers are updated through system notifications, specific to the employer, upon log in to the MBCC website. No change was made to the rule as a result of this comment.

SECTION 4 ERROR CORRECTIONS AND WAIVERS

52. Comment: Commenter 5 expressed appreciation for the opportunity and process for applicants to request corrections or waivers.

Response: The Department thanks this commenter.

53. Comment: Commenter 2 asked if Section 4(C) applies if the individual is outside the "unemployable" timeline listed on the table.

Response: The Department found that if sufficient time has elapsed from the date of conviction, as listed for each disqualifying offense, the direct access worker would be found to be eligible for employment, and a waiver request is not required. No change was made to the rule as a result of this comment.

54. Comment: Commenter 6 asked if "direct personal supervision" in Section 4(A) regarding conditional employment means the eyes-on physical presence of a supervisor, or if there are other acceptable ways to provide "direct personal supervision". The commenter recommended that the definition of "direct personal supervision" be revised to read: "That the supervisor or qualified designee (which could be an experienced Direct Support Professional) have immediate access to the conditionally employed individual with ability to promptly respond to an emergency situation, for the purpose of conditional employment."

Response: The Department found that the definitions of "direct personal supervision" on page 1 of the rule, and "supervision" in 22 MRS §9053, does not require the eyes-on physical presence of a supervisor, but does require that the supervisor have the ability to respond promptly in an emergency situation. The Department also found that a supervisor may not delegate supervisory responsibility to the peer of an employee. No change was made to the rule as a result of this comment.

55. Comment: Commenter 2 supported the inclusion of the process for the request of a waiver in Section 4(C).

Response: The Department thanks the commenter.

56. Comment: Commenter 5 suggested that the opportunity to request a waiver may be overly broad, and that certain categories of criminal offense should be closed to waiver requests.

Response: The Department found that statute clearly requires the availability of a waiver process for all direct access workers. No change was made to the rule as a result of this comment.

SECTION 5 ENFORCEMENT AND APPEALS

57. Comment: Commenter 5 expressed understanding and appreciation for the Department and legislature’s intention to create a system of one-stop background checks.

Response: The Department thanks this commenter.

58. Comment: Commenter 6 recommended that Section 5(C)(1) be amended to allow employers ten business days to submit a completed plan of correction, to align with the ten business days allowed to the Department for review in Section 5(C)(2).

Response: The Department conducted a review of this section, and has extensively revised Section 5. The Department removed the subsections that described statements of deficiencies, plans of correction, and licensing sanctions in Section 5 (A), (B), and (E), as those outcomes are stated in the rule relevant to the licensing of each type of mandated user. The Department has added additional information regarding the sanctions allowed by statute, as clarification and emphasis on the statutory authority of the MBCC, as new subsections at Section 5 (B) and (C).

59. Comment: Commenter 4 requested clarification on which applicants must be screened in accordance with Section 5(D)(3), and the corresponding definition of “applicant”, as regards “direct access worker” and “direct access employment.” The commenter suggested that the rule delete the phrase “for direct access employment” and instead use the phrase “as a direct access worker”.

Response: The Department has added definitions for direct access, direct access employment, and direct access worker to the final rule.

SUMMARY OF CHANGES RESULTING FROM COMMENTS:

Note that the page numbers below follow the pagination of the proposed rule.

TABLE OF CONTENTS:

- **Page i:** Section 5 was revised to reflect changes noted below.

SECTION 1

- **Page 1, Section 1:** The definition of “rap back monitoring” was changed to replace “periodically searching” with “constantly monitoring”.
- **Page 1, Section 1:** The definition of “conditional employment” was changed to include the phrase “or an employer may request a waiver of a disqualifying offense”.
- **Page 2, Section 1:** The definition of “Quick Check” was changed to replace “background” with “publically accessible registries.”

SECTION 2

- **Page 3, Section 2(C)(1):** The phrase “a single” was replaced with “at least one”.
- **Page 4, Section 2(D)(2)(c):** “30” was replaced with “90”.

SECTION 3

- **Page 7, Section 3(D)(4):** The term “employees” was replaced with “temporary workers”, and “subsequent to their initial placement with the employer as a temporary worker in the employ of a placement or temporary agency” was replaced with “in accordance with 22 M.R.S. §9054(4).”
- **Page 7, Section 3(D)(5)(a)(v):** The phrase “direct access” was inserted.
- **Page 8, Section 3(H):** The clause “unless a comprehensive background check has already been conducted by the MBCC or the facility’s approved alternate vendor” was added.
- **Pages 9-11, Section 3(I)(1):** Criminal attempt was changed from a 10 year disqualification to a 30 year disqualification. Five year disqualifications for Class D receiving stolen property, Class D negotiating a worthless instrument, and Class E refusing to submit to arrest or detention were removed.

SECTION 4

- No changes were made to Section 4.

SECTION 5

- **Page 17, Section 5(A):** The phrases “substantial noncompliance with this rule ” and “including but not limited to providing false or substantially incorrect information to the Department” were added to this subsection, relocated from previous Section 5(D)(1) and (2).
- **Page 17, Section 5(B):** This section was deleted, and replaced with a new Section 5(B), as noted below.
- **Page 17, Section 5(C):** This section was deleted. and replaced with a new Section 5(C), as noted below.
- **Page 17, Section 5(B):** This revised section was Section 5(D) in the proposed rule. This section was renamed “Penalties”. Sections 5(D)(1), (2), (6), and (7) were deleted. Section 5(D)(4) was separated into two subsections, now Sections 5(B)(2) and (3).
- **Page 18, Section 5(C):** This new section was added to the rule.
- **Page 18, Section 5(E):** This section was deleted.
- **Page 18, Section 5(F):** This section is now Section 5(D).

SUMMARY OF CHANGES RESULTING FROM REVIEW OF THE RULE FOR FORM AND LEGALITY:

The Attorney General’s office recommended adding, deleted, or changing the language of the proposed rule in order to comport with the law, and make the regulation enforceable. Note that the page numbers below follow the pagination subsequent to OAG review.

SUMMARY, page i:

- Added the last sentence to the summary: “The online system is maintained by the MBCC in coordination with the Department of Public Safety, the State Bureau of Identification and with other state and federal agencies, including the Federal Bureau of Investigation (FBI).”

TABLE OF CONTENTS, page ii:

- Added “EMPLOYER OBLIGATIONS” to the title of Section 2
- Added “AND REPORTS” to the title of Section 3.
- Added Section 5, CONFIDENTIALITY
- Renumbered Section 5 as Section 6.

SECTION 1:

- **Page 1:**
 - Deleted the introductory sentence “The definitions in this rule supplement the definitions in the applicable statutes. The definitions in the applicable statutes are not repeated in this rule.”
 - Deleted the definition for “applicant”.
 - Added the word “report” to the definition for Comprehensive background check, revised the definition to include: “comprehensive report generated by the Maine Background Check Center or an alternate vendor based on”, and added the sentence “The comprehensive background check report informs an employer when an offense appears in an individual’s record that may disqualify the individual from employment as a direct access worker.”
 - Added definitions for Direct access, Direct access employment, and Direct access worker.
- **Page 2:** Added definitions for Employer, Personally identifiable information, Protected individual, and Provider.
- **Page 3:** Deleted the definition for Sanctions.

SECTION 2:

- **Page 4, Section 2(A):** Replaced “applicant” with “direct access worker” here, and throughout the rule. (Indicated by underlined text and strikeouts in each subsequent instance; “direct access worker” has also replaced the terms “employee” and “potential employee.”)
- **Page 4, Sections 2(B) and (C):** Added provisions regarding Employer obligations and Mandatory use of the MBCC by providers.
- **Page 5:** Revised sections D(1) and (2); deleted sections D(2)(a-d).

SECTION 3:

- **Page 8, Section 3(C)(2):** Added the phrase “or the approved alternate vendor.”
- **Page 8, Section 3(D):** Revised to include the clause “unless the Employer has received written approval to use an alternate vendor, as set forth in this regulation”, and added “or approved alternate vendors” to 3(D)(1).
- **Page 9, Section 3(D)(4):** Replaced “temporary workers” with “individuals”.
- **Page 10, Section 3(D)(5)(b):** Added to rule; following provisions were re-numbered to reflect this change.
- **Page 11, Section 3(H):** Deleted the word “facility’s”.
- **Page 11, Section 3(I)(1):** Added the phrase “pursuant to 22 M.R.S. § 9054(11).”
- **Page 14, Section 3(J)(1):** Added the phrase “or the approved alternate vendor”, and added 22 MRS §9054(9) to the existing statutory citation.
- **Page 14, Section 3(J)(2):** New section added; subsequent sections renumbered accordingly.
- **Page 15, Section 3(J)(3):** Added the phrase “is considered preliminary until the individual subject to the background check has had the opportunity to challenge or decline to challenge the accuracy of the records obtained, after which the report...”
- **Page 15, Sections 3(J)(4) and (5):** Inserted the phrase “or the approved alternate vendor” four times.

SECTION 4:

- **Page 16, Section 4(A):** Added the phrase “or approved alternate vendor comprehensive background check report.”
- **Page 16, Section 4(B)(1)(c):** Deleted the phrase “applicant as a...”.
- **Page 16, Section 4(B)(2)(a):** Added the phrase “or an approved alternate vendor” in two places.
- **Page 17, Section 4(B)(2)(d):** Deleted the phrase “applicant as a...”
- **Page 18, Section 4(C)(3):** Deleted the phrase “in 22 M.R.S. §9054 (15) and Section 4(C)(2).”
- **Page 18, Section 4(C)(3)(b):** Added the word “above.”

- **Page 18, Section 4(C)(3)(c):** Revised to read: “objectively reasonable to conclude that the direct access worker is unlikely to cause harm to a protected individual or others in the employer’s care.”

SECTION 5:

- **Page 19:** New section and content regarding confidentiality added.

SECTION 6: ENFORCEMENT AND APPEALS

- **Page 22, Section 6 (D)(1):** Rephrased to read “challenge and correct”; added the phrase “or alternate vendors.”
- **Page 22, Section 6 (D)(1)(a):** Revised to read “and/or reports created or generated by the MBCC or approved alternate vendor.” Changed timeline to appeal from 10 days to 30 days.
- **Page 22, Section 6 (D)(2):** Replaced “sanctions issued” with “fines imposed.”