

**Plan for Criminal Background Checks of  
Health Care Professionals who are not yet  
Subject to Minn. Stat. § 214.075**

***Report to the Minnesota Legislature 2017***

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## EXECUTIVE SUMMARY

*The Minnesota Health Licensing Boards (“HLBs”) have as their primary mission the protection of public health and safety by providing reasonable assurance that licensees are competent, ethical practitioners with the necessary knowledge and skills to successfully fulfill their titles and roles. As evidenced by the laws of a majority of states, the timely use of an individual’s criminal history information in the licensure and complaint resolution processes is a key component to this public protection mission.*

*In 2013, the HLBs obtained statutory authority to conduct fingerprint-based criminal background checks on new applicants for licensure, on those seeking relicensure or reinstatement after lapse in licensure, and in certain limited investigation situations. See Minn. Stat. § 214.075, subs. 1-2 (2013). Some HLBs have begun conducting criminal background checks on those individuals. The remaining HLBs are in the process of implementing background checks into their licensure processes. The enabling statute also requires collaboration by multiple state agencies to develop a plan to complete background checks on existing licensees. See *id.* at subd. 8.*

*The plan contained within this report is designed to balance the HLBs’ public protection mission with individual practitioners’ property and due process rights. Moreover, the plan has an additional goal to reduce the number of criminal background checks that a professional health care licensee is required to undergo throughout the course of his or her career in health care. This can be most effectively achieved through the implementation of the Federal Bureau of Investigation (FBI) Rap Back system, which allows fingerprints to be collected once during an initial background check, with ongoing monitoring and notification to the HLBs of subsequent criminal activity. The proposed legislation is designed to implement Rap Back over time. This balances the need to move this important public safety tool forward with competing limited resources by allowing agencies to cooperatively plan for full Rap Back implementation over the next five years.*

## **I. Legislative charge**

Minnesota Statutes, Section 214.075 (2013), requires a state and federal fingerprint-based criminal background check for applicants for initial licensure, licensure by endorsement, license reinstatement, and relicensure after a lapse in licensure. *See id.* The background check requirement does *not* apply to individuals who were licensed before the criminal background check requirement became effective, except in certain limited investigative situations. *See id.*

Regarding existing licensees, the enabling statute gives the following specific instructions to the HLBs:

Subd. 8. Instructions to the board; plans. The health-related licensing boards, in collaboration with the commissioner of human services and the BCA, shall establish a plan for completing criminal background checks of all licensees who were licensed before the effective date requirement under subdivision 1. The plan must seek to minimize duplication of requirements for background checks of licensed health professionals. The plan for background checks of current licensees shall be developed no later than January 1, 2017, and may be contingent upon the implementation of a system by the BCA or FBI in which any new crimes that an applicant or licensee commits after an initial background check are flagged in the BCA's or FBI's database and reported back to the board. The plan shall include recommendations for any necessary statutory changes.

Minn. Stat. § 214.075, subd. 8.

With this instruction from the Legislature, the HLBs initiated a series of meetings with representatives from other state agencies in order to share information, explore available options, and collaborate in the development of this report and the plan it recommends.

## **II. Legislative Report Collaborating Agencies**

The agencies required by statute to participate in preparing this report are the Minnesota Health Licensing Boards and the Minnesota Department of Human Services. Additionally, the Minnesota Department of Health participated in group meetings and preparation of this report.

The Minnesota Bureau of Criminal Apprehension also collaborated in the preparation of this report. The BCA plays a crucial role in the criminal background check process, serving as the point of contact with the FBI for all fingerprint and criminal history record transmissions.

Each of these agencies has its own specific mission, its own enabling statute and regulatory framework. In order to better understand the role that criminal background checks play in the core functions of each agency, it is useful to briefly examine each agency, including discussion of the following, where relevant:

1. Statutory authority to conduct background checks;
2. Population of regulated persons the agency has jurisdiction over for purposes of criminal background checks;
3. Approximate number of criminal background checks the agency conducts or expects to conduct; and
4. Significant ongoing or pending agency projects that will impact the process of conducting criminal background checks.

## **A. Minnesota Health Licensing Boards**

Each Health Licensing Board (“HLB”) is comprised of gubernatorial-appointed members. Each Board oversees the regulation of health-related professions in Minnesota. With the assistance of each Board’s staff, these Boards are entrusted with the protection of public health and safety through licensing of health-related professionals, and through ensuring compliance with the provisions of their individual practice acts. The criminal background check requirement of Minnesota Statute, Section 214.075 applies to the following 15 Minnesota Boards<sup>1</sup>:

- Board of Behavioral Health and Therapy
- Board of Chiropractic Examiners
- Board of Dentistry
- Board of Dietetics and Nutrition Practice
- Board of Marriage and Family Therapy
- Board of Medical Practice
- Board of Nursing
- Board of Examiners of Nursing Home Administrators
- Board of Optometry
- Board of Pharmacy
- Board of Physical Therapy
- Board of Podiatric Medicine
- Board of Psychology
- Board of Social Work
- Board of Veterinary Medicine

### Statutory Authority

Minnesota Statute, Section 214.075 provides the legal authority for the HLBs to conduct criminal background checks. The statute was enacted in 2013. It provides a five-year planning and rollout period such that by January 1, 2018, all fifteen HLBs listed above must be conducting criminal background checks as part of the licensure process. This five-year rollout window allowed for the complexity and resource challenges involved in the startup of mandatory criminal background checks. It also allowed the HLBs time to develop a comprehensive and coordinated implementation plan, including a staggered rollout schedule and flexibility to address the differing implementation concerns facing each HLB.

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<sup>1</sup> Minn. Stat. § 214.075 does not apply to the Board of Barber Examiners, the Board of Cosmetologist Examiners, and the Emergency Medical Services Regulatory Board.

## The HLB Criminal Background Check Program

In order to meet their statutory obligation regarding criminal background checks, the HLBs collectively established a Criminal Background Check (CBC) Program office. This program facilitates the collection of criminal history information for use in licensing. The CBC Program also provides technical and policy assistance to the Boards to ensure compliance with all applicable state and federal requirements. Each participating Board contributes to the funding of the CBC Program. The CBC Program is governed by an Oversight Committee drawn from the executive management of the participating Boards.

The CBC Program works with license applicants to ensure that each applicant signs appropriate legal consent forms and also provides a set of high quality fingerprint images for use in the criminal background check process. CBC Program staff then use a secure electronic network to transmit those fingerprints and other essential identification data to the Minnesota Bureau of Criminal Apprehension (BCA). The BCA conducts checks of state records within its control, and also forwards the fingerprint images to the Federal Bureau of Investigation (FBI) for comparison with FBI records. The FBI and BCA both produce summary criminal history reports which BCA staff then combine into a single report for each applicant that is returned to the CBC Program. Staff at the CBC Program distribute those reports to the Boards, document all background check activities in compliance with applicable law, and maintain required records in a secure environment until they are audited and eventually destroyed.

## Population of Regulated Persons

The criminal background check requirement of Minnesota Statute, Section 214.075 currently applies to the following individuals:

applicants for initial licensure, licensure by endorsement, or reinstatement or other relicensure after a lapse in licensure, as defined by the individual health-related licensing boards....

*Id.* at subd. 1.

The vast majority of these individuals are seeking a Minnesota health care professional license for the first time. In addition to such “new license” applicants, Minnesota Statute, Section 214.075 also authorizes criminal

background checks on existing licensees in certain limited investigation situations:

If a health-related licensing board has reasonable cause to believe a licensee has been charged with or convicted of a crime in this or any other jurisdiction, the health-related licensing board may require the licensee to submit to a criminal history records check.

*Id.* at subd. 2.

Beyond the two provisions listed above, the statute does *not* authorize criminal background checks of current licensees. Instead, the statute requires development of a plan to complete criminal background checks of all licensees, which is the purpose of this report. *See* Minn. Stat. § 214.075, subd. 8.

#### Number of Criminal Background Checks Per Year

As of the date of this report, four of the HLBs are conducting criminal background checks. Below is a listing by year of the criminal background checks conducted by each of the participating Boards:

<u>Board Name</u>	<u>2015</u>	<u>2016</u>	<u>Total to date</u>
Board of Dentistry	591	766	1357
Board of Physical Therapy	484	550	1034
Board of Psychology	80	125	205
Board of Veterinary Medicine	<u>0</u>	<u>57</u>	<u>57</u>
	1155	1498	2653

It is projected that when all fifteen HLBs are conducting criminal background checks, they will collectively complete background checks on approximately 17,340 new applicants each year. In addition to the new applicants discussed above, the HLBs also will need to eventually conduct background checks on approximately 235,662 existing license holders.

#### Significant Agency Projects Impacting Criminal Background Checks

A significant project that will impact criminal background checks conducted by the HLBs is the rollout of the existing HLB Criminal Background Check Program to include all fifteen Boards. As of December 1, 2016, only four of fifteen HLBs were conducting background checks. As the remaining eleven HLBs begin implementing the CBC Program, additional staff will be needed to handle the increased volume of records. The CBC Program and the Boards also need to develop a common interface between the Program and databases of each of the Boards. Four different platforms are used for the

board databases and Program staff must access each database separately.

## **B. Minnesota Department of Health (“MDH”)**

MDH collaborated on the development of this Legislative report, even though MDH is not directly listed as a collaborating agency within Minnesota Statute, Section 214.075, subdivision 8. As will be explained more fully below, MDH has two subdivisions that have unique relationships with the HLBs and criminal background checks conducted pursuant to Minnesota Statute, Section 214.075.

### **i. MDH Office of Unlicensed Complementary and Alternative Care Practice (“OCAP”)**

Minnesota Statute, Section 146A.02 creates the Office of Unlicensed Complementary and Alternative Health Care Practices ("OCAP") within the Minnesota Department of Health (“MDH”). OCAP is housed in the Health Occupations Program (“HOP”) of the Health Regulation Division (“HRD”). Minnesota Statute, Section 214.01 defines OCAP as a health licensing board. However, OCAP was created within MDH as a consumer protection entity. OCAP's regulatory activity includes investigating consumer complaints and serving as an information clearinghouse for consumers and practitioners. OCAP does *not* license practitioners. Because Minnesota Statute, Section 214.075 applies only to applicants for licensure, OCAP does *not* have authority to conduct criminal background checks on these practitioners. Further, as a practical matter, conducting background checks is not possible, as the agency is generally unaware of the identity of individuals practicing under OCAP, unless the individual is the subject of a complaint.

### **ii. MDH Health Occupations Program ("HOP")**

#### Statutory Authority (MDH)

The Health Occupations Program (HOP) of MDH collaborated in the report that led to enactment of Minnesota Statute, Section 214.075. Section 12 of the law that enacted Minnesota Statute, Section 214.075, mandated MDH to conduct criminal background checks for specified

occupations it regulates, subject to a contingency (MDH not being reviewed by the Sunset Advisor Commission). The contingency occurred. Language from Section 12 of the 2013 law was recently codified in Minnesota Statute, Section 144.0571 (2016), which states:

144.0571 INCLUSION OF OTHER HEALTH-RELATED OCCUPATIONS TO CRIMINAL BACKGROUND CHECKS.

- (a) If the Department of Health is not reviewed by the Sunset Advisory Commission according to the schedule in section 3D.21, the commissioner of health, as the regulator for occupational therapy practitioners, speech-language pathologists, audiologists, and hearing instrument dispensers, shall require applicants for licensure or renewal to submit to a criminal history records check as required under section 214.075 for other health-related licensed occupations regulated by the health-related licensing boards.
- (b) Any statutory changes necessary to include the commissioner of health to section 214.075 shall be included in the plan required in section 214.075, subdivision 8.

Population of Regulated Persons

The commissioner of health is authorized by the provisions in Minnesota Statute Chapters 144 and 153A, Minnesota Statute, Sections 148.511 – 5198 and Minnesota Statutes, Sections 148.6401- 6450; to regulate the following health occupations:

<b>Occupation</b>	<b>Number of Licensees</b>
Occupational Therapy Practitioners	4912
Speech-Language Pathologists	1780
Audiologists	470
Hearing Instrument Dispensers	238

Number of Criminal Background Checks Per Year

HOP expects to conduct approximately 1,350 criminal background checks on new applicants in 2018 and 2019. Pursuant to the plan being developed, HOP would commence criminal background checks for practitioners licensed prior to January 1, 2018 when Rap Back, described in Part IV of this report, becomes available. To achieve full background information about all credentialed practitioners, individuals for whom a criminal background check is conducted before Rap Back is implemented would have to have a repeat check. This will result in approximately 7,650 background checks for practitioners licensed prior to 2018.

### Relationship with Other Agencies

Pursuant to Minnesota Statute, Section 144.057, the Health Regulation Division (HRD) of MDH contracts with DHS to conduct background studies on individuals applying for employment in a MDH facility or program. Background studies are authorized by Minnesota Statute, Chapter 245C.01 and, generally, are required for individuals who will have access to persons receiving services at a care facility or governmental agency or program. The background study includes licensed and non-licensed personnel working in MDH-licensed facilities and programs, including hospitals, nursing homes, hospices, treatment centers, and residential care facilities. In calendar year 2015, DHS conducted 187,000 background studies for MDH, accounting for 57 percent of the total number of background studies that year (n=327,000).

Due in part to the differing organizational structures between the HLBs and MDH, HOP staff have evaluated a number of different approaches for conducting CBCs and developing a system that is the most cost effective and efficient. During their research, HOP staff determined that based on the practice settings and populations served, between 75 and 85 percent of speech-language pathologists, audiologists, and occupational therapy practitioners will likely undergo a DHS background study prior to providing services in a MDH or DHS facility or program. Therefore, HOP is collaborating with DHS to develop a feasible plan to conduct criminal background checks on behalf of MDH. Any proposed plan that requires access to criminal history must be approved by the US Attorney General.

Hearing instrument dispensers renew annually, and the remaining health professions subject to criminal background checks renewal biennially.

### Significant Agency Projects Impacting Criminal Background Checks

As discussed above, MDH is already mandated by statute to contract with DHS for background studies. MDH facilities impacted by this mandate, like HOP, are in the Health Regulations Division. Therefore, it only makes sense for HOP to build on relationships, expertise, and legal agreements already in place as it looks to implement the criminal background check requirement for practitioners it regulates.

## **C. Minnesota Department of Human Services (“DHS”)**

### Statutory Authority

While Minnesota Statutes, Chapter 245C (Department of Human Services Background Studies Act) provides authority for DHS to complete background studies, there are references in other Minnesota statutes requiring a background study under Chapter 245C. *See* Minn. Stat. § 245C.03.

### Population of Regulated Persons

By statute, DHS is the entity responsible for conducting background studies on people providing direct contact services in programs licensed by the Department of Human Services and the Minnesota Department of Health, including facilities serving children or youth licensed by the Department of Corrections, unlicensed Personal Care Provider Organizations, group residential housing providers, and non-emergency medical transportation providers and as otherwise specified in statute. DHS is the entity responsible for conducting background studies for the Minnesota Department of Health (MDH). *See* Minn. Stat. § 245C.03, subd. 5.

### Number of Criminal Background Checks Per Year

DHS conducts approximately 325,000 background studies each year.

### Relationship with Other Agencies

Pursuant to a statutorily mandated contract, DHS performs the background studies for MDH-licensed facilities. This background study includes licensed and non-licensed personnel working in MDH-licensed facilities and programs, including hospitals, nursing homes, hospices, boarding care homes, outpatient surgical centers, and board and lodging establishments that are registered to provide supportive or health supervision services.

Additionally, DHS interacts with the HLBs regarding the maltreatment component of background studies. When DHS determines an individual regulated by an HLB is responsible for substantiated maltreatment, rather than making a decision regarding disqualification, DHS reports the matter to the applicable Board to determine whether to impose disciplinary or corrective action. *See* Minn. Stat. § 245C.31. If the board determines it does not have jurisdiction to take disciplinary

or corrective action, the Board shall inform DHS and the agency shall make the appropriate disqualification decision

#### Significant Agency Projects Impacting Criminal Background Checks

Over the last three years DHS has worked with stakeholders and others to improve its background study system. This includes development of NETStudy 2.0, which is a secure internet based system that streamlines background study processes for employers and makes background study clearances available in real time to employers when the individual's background study was initiated in NETStudy 2.0.

Changes to the background study process include using:

- Scanned electronic fingerprint images to match subjects with state criminal records, instead of using name and date of birth
- Photographs to verify the identity of the subject when the person's background study results are being transferred to another employer (with the background study subject's knowledge)
- Data from the Minnesota Court Information System (MNCIS) to automatically notify DHS of new state criminal information on a person who was previously studied, as is done with state maltreatment data
- NetStudy 2.0 to link to professional health and human service licensing information in Minnesota and other states.
- Electronic notices and links to provide clearance and other notices and determination updates to employers

## **D. Minnesota Bureau of Criminal Apprehension (“BCA”)**

The BCA has also participated in meetings leading to the preparation of this report as it is the repository for criminal history records in Minnesota that are used to conduct criminal background checks. The BCA is the State Identification Bureau for Minnesota. This means it is the agency that must submit an individual’s fingerprints to the Federal Bureau of Investigation (FBI) and accept the results before disseminating those results to the HLBs and DHS. The BCA also serves as the point of contact for all communications with the FBI and the State Identification Bureaus in other states on both substantive and procedural matters relating to sharing of criminal history information from those repositories.

In addition to the criminal background checks and background studies conducted for the HLBs and DHS, the BCA processes state and federal fingerprint-based criminal background checks for other government and private agencies. Examples include: applicants for licensure as a teacher or peace officer, driver training instructors, and security guards employed by a security company.

### Statutory Authority

Statutory authority to conduct criminal background checks appears throughout the Minnesota Statutes. State statutes authorizing federal, fingerprint-based background checks must be approved by the United States Attorney General pursuant to Public Law 92-544.

### Number of Criminal Background Checks Per Year

In fiscal year 2016, the BCA conducted 56,535 fingerprint-based criminal background checks that include FBI records (this includes the checks for the HLBs, DHS and MDH mentioned elsewhere in this report).

### Relationship with Other Agencies

As the State Identification Bureau, BCA has significant interaction with the FBI and numerous state agencies conducting criminal background checks.

### Significant Agency Projects Impacting Criminal Background Checks

The BCA is in the midst of replacing its current criminal history system. This must be completed before plans to utilize Rap Back can be developed and implemented. (Further details on page 17.)

### III. Scope of the Plan

The challenge facing the HLBs and the other participating agencies is to develop a viable plan to complete criminal background checks on the large number of existing licensees. The best estimate of the number of existing licensees is currently 235,662. This number includes the total of all existing HLB licensees plus all MDH licensees who are licensed pursuant to the HOP Program

At a current cost of \$32.00 each, the one-time cost to complete CBCs of all licensed health care professionals would be over \$7.5 million (\$7,541,184), a portion of which is sent to the FBI. This amount reflects only the fee paid by the applicant/licensee to cover the cost of having their fingerprints run through the BCA and FBI criminal history systems. This amount does *not* include the cost of fingerprinting, nor does it include any of the administrative costs associated with the processing and storage of criminal history data.

Currently, when a person submits fingerprints and undergoes a criminal background check, the criminal history report that is generated as the result of that check shows only whatever criminal history exists at the time the fingerprints were electronically submitted to the BCA and FBI criminal history computer systems. Such a report obviously does not document future criminal activity that might arise *after* the date the criminal background check was submitted. In a sense, all such criminal history reports become “stale” immediately after they are conducted, as there is not currently a system in place in Minnesota for ongoing monitoring of a person’s criminal history status. If the Boards were to require licensees to complete a CBC with each license renewal, in order to have relatively recent information, the \$7.5 million cost would be repeated at least every two years. (All boards require licensure renewal at least biennially).

The static nature of criminal history reports thus prompts important policy concerns regarding how frequently criminal background checks should be conducted in the absence of a more “real time” monitoring system. On one side of this policy issue is the goal of protecting public safety by having access to up-to-date criminal history reports, so that HLBs can promptly review new incidents to

determine if license action is necessary to protect public safety. On the other side of this policy issue are the costs and resources associated with maintaining up-to-date criminal history reports on licensed individuals. In addition to the cost of \$32 per study, there are additional costs such as the fee for fingerprinting itself, which varies by location, administrative costs for staff, equipment and program operational space within which to scan, transmit, document and store criminal history information in accordance with all FBI security requirements. There is also the added burden on the licensee to arrange to have new fingerprints taken each time a new criminal history report is required, since 28 C.F.R. § 20.33 (d) prohibits the “re-use” of fingerprints and the resulting criminal history report.

Finding an appropriate balance between receiving timely criminal history information and responsible management of the associated financial cost of administering a criminal background check program is paramount. A method to ensure the regulators continually have up-to-date information without repeated criminal background checks would be to utilize a component of the FBI’s Next Generation Identification Program, the Rap Back service.

#### **IV. Rap Back**

“Rap Back” is a service offered by the FBI through which any new crimes that an applicant or licensee commits after an initial background check are flagged in the FBI criminal history system and reported back to the Board or MDH. With Rap Back, the applicant or licensee provides their fingerprints during the initial background check, the FBI retains the prints to match against future reports of criminal activity, and then the FBI provides notifications about new activity (e.g. arrests, convictions, etc.) for a specified period of time, known as a “subscription.” If a fingerprint match reveals new criminal activity, the Board is notified. Rap Back thus greatly reduces the number of times that a person needs to provide fingerprints over the course of their health care career, and also provides ongoing monitoring.

## **A. Advantages of Rap Back**

As explained more fully below, Rap Back offers significant cost savings, promotes public safety by providing faster notification of new criminal activity, and reduces the burden on licensees by reducing the need for repeated fingerprinting.

### **i. Cost savings**

Without Rap Back, a one-time CBC at the time of initial licensure provides only a “snapshot” of the person’s criminal history at that point in time. The individual could commit future offenses *after* providing fingerprints, and the HLBs and HOP would not have a formal mechanism to learn about such offenses. Accordingly, a single background check in the absence of Rap Back has diminishing value as time passes, and a recheck would need to be completed periodically.

The cost to submit a single set of fingerprints for a CBC under Minnesota Statute, Section 214.075 is currently \$32.00. Of this amount, \$15.00 is for the BCA check, and \$17.00 is for the FBI check. Per statute, the applicant pays this fee. Applying this \$32 fee to the approximately 235,662 licensed health care professionals in Minnesota, the current one-time cost to complete CBCs of all licensed health care professionals would be \$7,541,184. That would mean an ongoing annual expense of approximately \$7.5 million in order to keep criminal history information current every 12 months. Indeed, even using a 2-year recheck period would mean an average cost of \$3.25 million each year. Moreover, these amounts do *not* include the cost of fingerprinting, which varies by location. Nor do they include the cost for staff time, equipment, mailing, office space and other costs associated with the collection and processing of fingerprints and criminal history information.

With Rap Back such annual costs would be enormously reduced, as most applicants would not need to be rechecked each year. There is no cost for the FBI portion of a Rap Back subscription. A fee may be needed for the BCA portion of Rap Back, however this cannot be determined until legislation is passed that describes the work the BCA will do to manage subscriptions and notifications to

subscribing agencies. Even without knowing the exact BCA cost, it is difficult to see the BCA Rap Back fee being greater than BCA's \$15 initial CBC fee. Accordingly, overall savings through implementation of Rap Back would grow exponentially each year through elimination of the need for most rechecks.

## **ii. Public safety**

Implementing Rap Back would promote public safety by allowing agencies to obtain more timely notification of new criminal activity. Instead of having to wait until the annual renewal date in order to obtain updated criminal history information, the agency would be notified soon after any new criminal event occurs. This would save months--or even as much as a year--of delay between a new criminal event occurring and an HLB receiving notice of it. This reduction in the time lag between criminal activity and the HLB learning of it allows for more rapid intervention and greater public protection.

## **iii. Reduced burden on licensee**

Another advantage of Rap Back is that it reduces the burden on the licensee. Without Rap Back, the licensee would need to take time off from work at each renewal period in order to get new fingerprints taken and have an updated criminal background check completed. With Rap Back there would be no need to recheck the criminal history of that individual, unless the person's license lapses and is later renewed, or unless the person applies for a new and different kind of licensure or begins work with a new employer. Rap Back thus greatly reduces the number of times that most licensees will need to be fingerprinted over the course of their careers.

# **B. Resource Challenges to Implementing Rap Back**

## **i. Required statutory changes needed for Rap Back**

The first challenge to implementing Rap Back is the need for Minnesota to enact a state statute that authorizes named entities, like the HLBs and DHS, to submit fingerprints to the FBI for purposes of the initial criminal background check; for the FBI to keep the fingerprints on file and for the fingerprints to be searched by future submissions to the FBI, including latent fingerprints from crime

scenes and appropriate responses sent to authorized entities. The statute must also require that the licensee/applicant be notified Rap Back will be used and the privacy risk mitigation strategies<sup>2</sup> that Minnesota chooses to deploy. Like laws authorizing CBCs, the statute authorizing use of Rap Back must be approved by the United States Attorney General pursuant to Public Law 92-544 before Rap Back can be used.

## **ii. Required BCA infrastructure changes needed for Rap Back**

A second challenge to implementing Rap Back is that the BCA would need to create a system to manage the Rap Back subscriptions including their creation, maintenance and deletion. The BCA would similarly need to develop a process to communicate with subscribing agencies when a Rap Back event has occurred for one of their subscribers.

The FBI recently eliminated all fees related to Rap Back, however, the cost of management of subscriptions by the BCA may require a fee. The issue of the fee would need to be addressed in any Rap Back legislation, however identifying the specific cost to roll out Rap Back is challenging because it will depend on a number of policy choices in terms of what specific features of Rap Back will be included in the system utilized in Minnesota. Examples of some of the elements that will impact total cost of Rap Back include which “triggering events” will be communicated to the agencies, the duration of the Rap Back subscriptions and the methods for agencies to add or remove individuals from the Rap Back subscription service.

## **iii. Current BCA resource limitations**

A third challenge to implementing Rap Back involves limited BCA resources. Specifically, the new criminal history system currently does not include the implementation of Rap Back functionality, however, the system is being designed to allow for future development and implementation of Rap Back should the Legislature authorize it.

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<sup>2</sup> Examples of privacy risk mitigation strategies include: 1) the use of specific notice language to ensure that individuals are aware of the present and potential future uses of their fingerprints; and 2) pre-notification when there is a subsequent criminal event, by which BCA must verify whether the subscribing HLB is still authorized to receive Rap Back information about a particular individual before sharing the new criminal event information. For example, if a person no longer holds a license issued by the HLB, then the new information would not be shared.

In light of these limitations, work on implementation of Rap Back cannot begin until the criminal history system replacement is completed in June 2017.

## V. **Duplication of Background Checks**

In addition to minimizing the need for repeated CBCs for licensees by utilizing Rap Back, the HLBs, MDH and DHS recognize that some health professionals will be required to complete a DHS-managed **background study** for employment and a **criminal background check** required for licensure. What follows is a brief explanation of the Criminal Background Checks (“CBCs”) conducted by HLBs, the “background studies” conducted by DHS, a comparison of the two, and a discussion of applicable federal law relating to the sharing of such criminal history information between state agencies.

### A. **Criminal Background Checks (“CBCs”)**

The CBCs required by Minnesota Statute, Section 214.075 currently apply only to persons seeking licensure by a HLB or HOP. **All** of the CBCs under this law require **fingerprints** to check both Minnesota conviction records **and** to check FBI records for convictions from other states. Unlike the background studies, the HLBs and HOP do not obtain substantiated maltreatment records as a result of this statutory CBC.

### B. **DHS Background Studies**

Minnesota Statutes, Section 245C.03 identifies who is required to have a DHS background study, and includes **licensed** and **unlicensed** personnel working in state-licensed facilities and certain programs. While many licensed health practitioners work in places of employment included in the DHS background study requirements, there are many settings for which the DHS background study is not required. Examples include physicians, advanced practice registered nurses, dentists, or psychologists in private practice or pharmacists in retail pharmacies. The DHS background study obtains information regarding the study subject’s: 1) criminal history; and 2) maltreatment data.

The DHS background study generally consists of a check of state criminal history data and substantiated maltreatment findings, and does not automatically include multi-source criminal history data through the FBI. A federal check may be done when there is information from the Minnesota Bureau of Criminal Apprehension ("BCA") indicating the individual might be a multi-source offender, when the information from the BCA indicates that the multi-source offender status is inconclusive, or when DHS receives a report from a third party indicating criminal history in a jurisdiction other than Minnesota.

By statute, DHS is the entity responsible for managing the background studies for both DHS and MDH. *See* Minn. Stat. § 245C.03, subd. 5. MDH contracts with DHS to perform the background studies for MDH-licensed facilities. DHS obtains and reviews BCA records, maltreatment records, and, when reasonable cause exists, FBI records to determine whether the study subject should be disqualified from the facility or program requesting the study.

DHS uses the criminal history data to determine whether an individual should be disqualified from having direct contact or access to persons who receive services in the identified types of facilities. *See* Minn. Stat. §§ 144.057; 245C.03 (2013). The period of disqualification is set in statute but the study subject may appeal their disqualification or request a set-aside.

DHS must also disqualify individuals who have been substantiated as perpetrators of serious or recurring maltreatment. However, as noted above, if the substantiated perpetrator is licensed by an HLB, DHS will report the maltreatment to the applicable board for the board to determine whether to impose discipline.

### **C. Comparison of CBCs by HLBs with Background Studies by DHS: Overlap and Gaps**

The background study conducted by DHS on behalf of MDH and DHS facilities has no direct impact on an individual's licensure. DHS uses the background study data to determine eligibility for employment according to their statutorily-mandated criteria; HLBs and HOP are not informed of any criminal history identified by the DHS employment background study.

The regulations and criteria used by DHS differ from those applied by the HLBs and serve different purposes. Whereas DHS is using criminal history data to make determinations for eligibility for employment in state-licensed facilities and programs, the HLBs use the data to determine an individual's qualifications for licensure. As the system currently exists, an individual may be disqualified from employment at a DHS or MDH facility or program but still meet qualifications to hold a license. Conversely, a HLB licensee may seek to work for an employer for which a DHS background study is not required.

#### **D. Federal Law and FBI Security Policy Prohibitions On Sharing Criminal Justice Information**

One commonly perceived form of background check duplication that appears to exist is when an HLB-licensed health care professional begins work in a facility where a DHS background study is required in order to have direct contact with vulnerable individuals. Another potential duplication scenario is when a person licensed by one HLB pursues additional licensure by another HLB; *e.g.* a Psychologist also seeks licensure as a Marriage and Family Therapist.

In looking for ways to minimize duplication of background checks, the agencies participating in this report asked BCA to make an inquiry through the FBI to learn where sharing of Criminal Justice Information (“CJI”) would be permissible and where it would not. The FBI response was essentially that sharing of CJI is prohibited when the CJI is obtained for different purposes. This includes licensing by two separate HLBs, as well as a HLB licensing decision and a DHS employment decision. Below is the direct text of the questions that were sent to the FBI, as well as the FBI’s response to each question:

**Question #1:** If an individual was previously licensed by a health board and now is changing careers and will be licensed by another health board, can the criminal history results from “board 1” be shared with “board 2?” For example, if an individual licensed as a nurse goes to medical school and wishes to be licensed as a medical doctor, can the Board of Nursing share CJI with the Board of Medical Practice?

**Answer from FBI:** In most scenarios, this would not be acceptable. In the example given, the licensing is being done for two separate unrelated needs; therefore, the CJI could not be shared. Title 28, Code of Federal Regulations (C.F.R.), Section 20.33 and the Compact specify that the exchange of CHRI is subject to cancellation if dissemination is made outside the receiving departments or related agencies. They also stipulate that CHRI shall be used only for the purpose requested and a current record should be requested when needed for a subsequent authorized use.

**Question #2:** Is it appropriate for a licensing board to share CJI with MN DHS for purposes of an employment background check?

**Answer from FBI:** This would not be appropriate. Under general practices, licensing and employment are handled separately and not considered to be related purposes; therefore, the re-use and sharing of CJI is not acceptable.

**Question #3:** Can a state legislature authorize the sharing of CJI among government agencies?

**Answer from FBI:** Yes, but only if the sharing and associated use of CHRI is not otherwise prohibited by requirements established by federal laws, regulations, or rules/policies promulgated by the FBI and Compact Council. For example, if governmental agencies are related for the purpose of adjudicating a single type of application (e.g. a state Dept. of Education and local county school board both play a role in adjudicating applicants for school employment) then it would be acceptable.

*January 11, 2016 email response from Criminal Justice Information Law Unit of the FBI.*

Accordingly, sharing of criminal justice information between the HLBs and DHS is prohibited under both federal law and the FBI Security Policy. This is because criminal history results obtained for one purpose may not be used or shared beyond that particular purpose. Thus the criminal history portion of a DHS background study obtained for purposes of making an employment determination on whether a person may have direct contact with certain vulnerable populations may not be shared with a HLB in order to allow the Board to use that same information to make a determination about professional health care licensure. Indeed, even two different Health Licensing Boards who issue licenses in related areas of practice may not share criminal history results with each other.

## **VI. Criminal Offenders Rehabilitation Act, Minn. Stat. § 364.**

In addition to implementing Rap Back, another recommendation of this report is amending during the criminal background check process for licensed health care professionals under Minnesota Statute, Section 214.075.

Applicants to some HLBs are already exempt from the Criminal Offenders Rehabilitation Act. *See, e.g.*, Minn. Stat. § 364.09 (d), (e) and (f) (exempting Board of Medical Practice, Board of Chiropractic, and Board of Nursing from the limitations imposed by the Criminal Offenders Rehabilitation Act). Similarly, all background studies conducted by DHS under Minnesota Statute, Sections 245A and 245C are likewise already exempted. Most HLBs, however, are not exempt. This creates inconsistency among the HLBs conducting criminal background checks, since some are required to comply with the limitations of Minnesota Statute, Section 364.09, and others are not. As there are already ample examples of other similarly situated agencies being exempted from the statute, Minnesota Statute, Section 364.09 should be amended to likewise exempt the HLBs from the Criminal Offenders Rehabilitation Act.

Exempting the HLBs from the Criminal Offenders Rehabilitation Act would also save time and expense. This is illustrated by examination of the way criminal history reports are processed. When the BCA receives fingerprints for use in the criminal background check process, they are electronically transmitted to the FBI for processing. The FBI likewise electronically transmits the criminal history reports back to BCA. The most efficient way for the state and federal criminal history report information to be sent to the HLBs would also be by direct electronic submission. The technology needed for this electronic transmission is already in place, but is currently not being used because it is legally prohibited by Minnesota Statute, Section 364.04. That statute provides that:

### 364.04 AVAILABILITY OF RECORDS.

The following criminal records shall not be used, distributed, or disseminated by the state of Minnesota, its agents or political subdivisions in connection with any application for public employment nor in connection with an application for a license:

- (1) Records of arrest not followed by a valid conviction.
- (2) Convictions which have been, pursuant to law, annulled or expunged.
- (3) Misdemeanor convictions for which no jail sentence can be imposed.

*Id.*

The state and federal criminal history reports transmitted directly from the FBI and BCA include not only conviction data, but also other categories of criminal record information such as arrest data and expungement data. It is data like this that Minnesota Statute, Section 364.04 specifically prohibits the BCA from distributing or disseminating. In order to comply with the statute, BCA staff members review individual criminal history reports in order to determine whether such data is present and to redact it where appropriate. After review and redaction, BCA staff print hardcopies of the revised reports and send them by postal mail to the HLBs. This existing process thus delays receipt of criminal history reports by adding both BCA staff processing time and mailing time to every report processed.

A statutory amendment exempting background checks conducted under Minnesota Statute, Section 214.075 from the limitations of the Criminal Offenders Rehabilitation Act would thus result in immediate savings in BCA staff and resource costs. The same exemption would also reduce the turnaround time for criminal history reports by eliminating the need for human handling of reports, and eliminating the delays associated with using postal mail to deliver reports.

## **VII. Recommended Plan**

Due to the significant and cumulative cost associated with annual rechecking of licensee criminal histories, as compared with the much lower cost of utilizing Rap Back to establish ongoing monitoring, the following plan is recommended:

- i. The HLBs should not be required to begin conducting background checks on existing licensees until Rap Back is available.
- ii. The HLBs recommend that a target date should be set upon which the BCA shall have Rap Back available for implementation in all criminal history records checks conducted pursuant to Minnesota, Statutes, Section 214.075, including checks of existing HLB licensees. In light of the ongoing replacement of the current BCA criminal history system, which is scheduled for completion in June, 2017, Rap Back shall be made available no later than June 30, 2022. (5 years)
- iii. The HLBs, DHS, MDH and BCA shall collaborate to determine all necessary features and other details needed to implement Rap Back for all criminal history record checks conducted pursuant to Minnesota, Statute, Section 214.075, including checks of existing HLB licensees, as authorized by the Minnesota Legislature.
- iv. Each HLB may roll out, in a graduated fashion over time, criminal history records checks utilizing Rap Back on its existing licensees who have not yet undergone a background check under Minnesota Statute, Section 214.075. Implementation of these checks with Rap Back shall be based upon each HLB's determination of the most appropriate schedule, after considering factors such as available resources, number of licensees, existing application and renewal cycles, efforts to minimize duplication of background checks, coordination with the roll out of other HLBs, and such other factors as each HLB deems appropriate
- v. Each HLB must complete criminal background checks of all existing licensees within five years of the date that Rap Back capability becomes available to the HLBs.
- vi. The Criminal Offender Rehabilitation Act, Minnesota Statute, Section 364.09, should be amended to exempt all HLBs.

## VIII. Recommended Statutory Changes

### PROPOSED AMENDMENT OF:

#### Minn. Stat. § 214.075

#### 214.075 HEALTH-RELATED LICENSING BOARDS; CRIMINAL BACKGROUND CHECKS.

Subdivision 1. **Applications.** (a) By January 1, 2018, each health-related licensing board, as defined in section 214.01, subdivision 2, shall require applicants for initial licensure, licensure by endorsement, or reinstatement or other relicensure after a lapse in licensure, as defined by the individual health-related licensing boards, to submit to a criminal history records check of state data completed by the Bureau of Criminal Apprehension (BCA) and a national criminal history records check, including a search of the records of the Federal Bureau of Investigation (FBI).

(b) Each health-related licensing board is authorized to require all existing licensees to submit to a criminal history records check of state data completed by the Bureau of Criminal Apprehension (BCA) and a national criminal history records check, including a search of the records of the Federal Bureau of Investigation (FBI).

(c) Each health-related licensing board may roll out the implementation of criminal history records checks on licensees in a graduated fashion over time, based upon each board's determination of the most appropriate schedule after considering factors such as available resources, number of licensees, existing application and renewal cycles, efforts to minimize duplication of background checks, coordination with other boards or agencies, and such other factors as the board deem appropriate for the efficient implementation of this background check requirement for licensees.

(d) An applicant or licensee must complete a criminal background check if more than one year has elapsed since the applicant or licensee last submitted a background check to the board.

Subd. 2. **Investigations.** If a health-related licensing board has reasonable cause to believe a licensee has been charged with or convicted of a crime in this or any other jurisdiction, the health-related licensing board may require the licensee to submit to a criminal history records check of state data completed by the BCA and a national criminal history records check, including a search of the records of the FBI.

Subd. 3. **Consent form; fees; fingerprints.** (a) In order to effectuate the federal and state level, fingerprint-based criminal background check, the applicant or licensee must submit a completed criminal history records check consent form and a full set of fingerprints to the respective health-related licensing board or a designee in the manner and form specified by the board.

(b) The applicant or licensee is responsible for all fees associated with preparation of the fingerprints, the criminal records check consent form, the criminal background check, and any fees associated with rap back upon its implementation. The fees for the criminal records background check and rap back shall be set by the BCA and the FBI and are not refundable. The fees shall be submitted to the respective health-related licensing board by the applicant or licensee as prescribed by the respective board.

(c) All fees received by the health-related licensing boards under this subdivision shall be deposited in dedicated accounts in the special revenue fund and are appropriated to health-related licensing boards to pay for the criminal background checks conducted by the Bureau of Criminal Apprehension and Federal Bureau of Investigation.

Subd. 4. **Refusal to consent.** (a) The health-related licensing boards shall not issue a license or renew a license to any applicant or licensee who refuses to consent to a criminal background check or fails to

submit fingerprints within 90 days after submission of an application for licensure or renewal of licensure. Any fees paid by the applicant to the board shall be forfeited if the applicant refuses to consent to the criminal background check or fails to submit the required fingerprints.

(b) The failure of a licensee to submit to a criminal background check or rap back system as provided in subdivisions 3 and 9 is grounds for disciplinary action by the respective health-related licensing board.

**Subd. 5. Submission of fingerprints to the Bureau of Criminal Apprehension.** The health-related licensing board or designee shall submit applicant or licensee fingerprints to the BCA. The BCA shall perform a check for state criminal justice information and shall forward the applicant's or licensee's fingerprints to the FBI to perform a check for national criminal justice information regarding the applicant or licensee. The BCA shall report to the board the results of the state and national criminal justice information checks.

**Subd. 6. Alternatives to fingerprint-based criminal background checks.** The health-related licensing board may require an alternative method of criminal history checks for an applicant or licensee who has submitted at least three sets of fingerprints in accordance with this section that have been unreadable by the BCA or the FBI.

**Subd. 7. Opportunity to challenge accuracy of report.** Prior to taking disciplinary action against an applicant or a licensee based on a criminal conviction, the health-related licensing board shall provide the applicant or the licensee an opportunity to complete or challenge the accuracy of the criminal history information reported to the board. The applicant or licensee shall have 30 calendar days following notice from the board of the intent to deny licensure or to take disciplinary action to request an opportunity to correct or complete the record prior to the board taking disciplinary action based on the information reported to the board. The board shall provide the applicant up to 180 days to challenge the accuracy or completeness of the report with the agency responsible for the record. This subdivision does not affect the right of the subject of the data to contest the accuracy or completeness under section 13.04, subdivision 4.

~~**Subd. 8. Instructions to the board; plans.** The health-related licensing boards, in collaboration with the commissioner of human services and the BCA, shall establish a plan for completing criminal background checks of all licensees who were licensed before the effective date requirement under subdivision 1. The plan must seek to minimize duplication of requirements for background checks of licensed health professionals. The plan for background checks of current licensees shall be developed no later than January 1, 2017, and may be contingent upon the implementation of a system by the BCA or FBI in which any new crimes that an applicant or licensee commits after an initial background check are flagged in the BCA's or FBI's database and reported back to the board. The plan shall include recommendations for any necessary statutory changes.~~

**Subd. 9. Rap Back.** (a) The health-related licensing boards shall require applicants and licensees to participate in the rap back system once it is implemented.

(b) Upon completion of the replacement of the BCA's criminal history system, currently scheduled for June 2017, the BCA, in collaboration with the health-related licensing boards and the commissioner of human services, shall begin taking all steps necessary for implementation of the rap back system for all criminal history records checks conducted pursuant to Minn. Stat. § 214.075, including checks of existing health-related licensing board licensees. The target date for implementation of rap back is June 20, 2022

(d) Each health-related licensing board must complete criminal background checks of all existing licensees within five years of the date that rap back capability is made available to the board.

**PROPOSED AMENDMENT OF:  
Minn. Stat. § 364.09, Criminal Offender Rehabilitation Act**

**364.09 EXCEPTIONS.**

(a) This chapter does not apply to the licensing process for peace officers; to law enforcement agencies as defined in section 626.84, subdivision 1, paragraph (f); to fire protection agencies; to eligibility for a private detective or protective agent license; to the licensing and background study process under chapters 245A and 245C; < to the licensing and background check process under chapter 214.075; > to the licensing and background investigation process under chapter 240; to eligibility for school bus driver endorsements; to eligibility for special transportation service endorsements; to eligibility for a commercial driver training instructor license, which is governed by section 171.35 and rules adopted under that section; to emergency medical services personnel, or to the licensing by political subdivisions of taxicab drivers, if the applicant for the license has been discharged from sentence for a conviction within the ten years immediately preceding application of a violation of any of the following: