



To: Michael Smith, Chief Executive Officer

From: Carly Bruder, Acting Chief Program Officer  
Atalaya Sergi, Director, AmeriCorps Seniors  
Fernando Laguarda, General Counsel

cc: Jenny Mauk, Chief of Staff

Date: April 11, 2024

Re: Regulatory Prohibition on State Commissions Operating AmeriCorps Seniors Programs

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## Decisions to Be Made

1. Whether to enforce the regulatory prohibition against State Commissions operating AmeriCorps Seniors programs.
2. Whether to initiate a rulemaking to seek public comment on removing, modifying, or retaining the regulatory prohibition.

## Background

State Commissions are prohibited by regulation from directly carrying out any national service program under title II of the Domestic Volunteer Service Act of 1973, as amended (DVSA).<sup>1</sup> Those programs include RSVP, the Foster Grandparent Program, the Senior Companion Program, and senior demonstration programs (“AmeriCorps Seniors”).<sup>2</sup> A separate regulatory provision prohibits any AmeriCorps Seniors grantee from delegating or contracting overall management responsibilities to another entity,<sup>3</sup> effectively creating a categorical ban on State Commissions being AmeriCorps Seniors grantees—as they can neither directly operate nor delegate/contract the program.

After discovering that AmeriCorps Seniors grants had been awarded to several State Commissions<sup>4</sup>, the agency notified Serve Wyoming that it would not administratively renew their RSVP grant.<sup>5</sup> America’s Service Commissions argues that state commissions serve as

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<sup>1</sup> 45 CFR §2550.80(j).

<sup>2</sup> 42 U.S.C. §§5000-5028a.

<sup>3</sup> See 45 CFR 2551.22, 2552.22, and 2553.22, respectively.

<sup>4</sup> See Appendix A for the list of AmeriCorps Seniors grants to State Service Commissions.

<sup>5</sup> See March 28, 2024 letter from Robin Corindo, Deputy Director, AmeriCorps Seniors to Shelly McAlpin, Authorized Representative and Sarah Roberts, Project Director, Serve Wyoming, re: AmeriCorps Seniors RSVP Grant Award – Competitive Award Grant Number: 21SRDWY003 Notice of Grant Award Dates: 04/01/2021 – 03/31/2024; AmeriCorps Seniors RSVP Grant Award



sponsors for these grants to ensure AmeriCorps Seniors programming is available in their state, and requests removal of the prohibition.<sup>6</sup> Serve Wyoming urges the agency to reassess its decision and allow the RSVP grant to continue, noting the harm the decision places on RSVP volunteers and the communities across Wyoming that they serve, arguing that the regulation inappropriately limits the role of state service commissions.<sup>7</sup> We consider these communications as requests for waiver of the rule.

### **Authority to Waive Regulatory Prohibition**

The Chief Executive Officer (CEO) has specific authority under Section 178(f) of the National and Community Service Act of 1990, as amended, to waive administrative requirements applicable to State Commissions. 42 U.S.C. §12638(f).<sup>8</sup> The CEO also has authority to assign to State Commissions specific programmatic functions upon a determination that doing so will increase the efficiency of program operation or oversight under the national service laws, 42 U.S.C. §12651j(a), and to take actions consistent with the objectives and provisions of the national service laws as determined to be necessary or appropriate, §12651d(c)(11).

The prohibition on State Commissions directly operating AmeriCorps Seniors grants is an “administrative requirement” imposed by regulation and is not required or prohibited by statute.<sup>9</sup> As an administrative requirement, the regulatory prohibition on State commissions directly operating AmeriCorps Seniors grants may be waived under NCSA Section 178(f).

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– Administrative Renewal Award Grant Number 24SRDWY001 Notice of Grant Awards Dates: 04/01/2024 – 03/31/2027.

<sup>6</sup> See March 29, 2024 email from Rachel Bruns, Chief Engagement Officer, America’s Service Commissions to Jennifer Bastress Tahmasebi, Deputy Director, AmeriCorps State and National, re: Commissions and AmeriCorps Seniors (“Bruns Letter”).

<sup>7</sup> See April 1, 2024 letter from Melissa Stahley-Cummings, PhD, ServeWyoming Chair, Andrea Harrington, Esq., ServeWyoming Vice Chair, to Robin Corindo, Deputy Director, AmeriCorps Seniors.

<sup>8</sup> Subsection (e)(1) of Section 178 requires State commissions to prepare a State plan but does not require submission of the plan to the agency; rather it is subject to approval by the chief executive officer of the State. 42 U.S.C. 12638(e)(1)(C). Therefore, the State’s submission of a plan to the agency is not a prerequisite to the agency’s exercise of waiver authority.

<sup>9</sup> The statutory prohibition applies only to AmeriCorps State and National grants. 42 U.S.C. 12638(h) (“Activity ineligible for assistance. A State Commission or alternative administrative entity may not directly carry out any national service program that receives assistance under section 121”). The inclusion of this express prohibition and no comparable prohibition on carrying out other programs reinforces the absence of a statutory basis to exclude State Commissions from receiving AmeriCorps Seniors grants. See Russello v. United States, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”). Accord Bruns Letter, *supra* n.3.



The decision to exercise the authority to grant a waiver is subject to the discretion of the CEO.<sup>10</sup> Likewise, the CEO has discretion to waive both prospectively and retrospectively as appropriate for the implementation of the national service laws.<sup>11</sup> A reasonable basis must justify the decision, although there are no provisions for judicial review.<sup>12</sup>

## Basis for Waiver

Section 178(f) does not provide mandatory criteria upon which to base any waiver. However, the underlying reasons for the regulatory prohibition are instructive and provide a basis for appropriate criteria.

The regulatory provision was first issued in 1993 to expand upon the statutory prohibition on State Commissions operating section 121 programs to also prohibit them from operating AmeriCorps Seniors or VISTA programs.<sup>13</sup> In 2005, the agency removed VISTA from the prohibition but retained the prohibition for AmeriCorps Seniors programs and section 121 programs.<sup>14</sup> The following excerpt from the preamble provides the agency's reasons for retaining the prohibition for AmeriCorps Seniors programs:

The Corporation does not believe that most State commissions are in a position to operate a Senior Corps program without the ability to delegate or subgrant, and agrees with the commenters that local organizations are in the best position to identify local needs and operate the programs. Furthermore, the Corporation received no indication that State commissions are in any way eager to operate Senior Corps programs.<sup>15</sup>

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<sup>10</sup> See Heckler v. Chaney, 470 U.S. 821, 823 (1985) (agency has discretion not to enforce its rules); id. at 838 (“Congress intends to allow broad discretion for [agencies] to make particular enforcement decisions”) (Brennan, J., concurring).

<sup>11</sup> See, e.g., Gulf Power v. FERC, 983 F.2d 1095, 1096 (D.C. Cir. 2003) (FERC waiver authorized by statute, retroactive waiver endorsed implicitly); Wakefield v. ViSalus, 51 F.4th 1109 (9th Cir. 2022) (FCC waiver authorized by rule, retroactive waiver endorsed implicitly).

<sup>12</sup> 5 U.S.C. §706 (2) (agency action may not be, inter alia, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority or limitations, or short of statutory right; without observance of procedure required by law). Nonenforcement generally is not subject to judicial review. See, e.g., Heckler, 470 U.S. at 831 (nonenforcement requires considering “whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all”).

<sup>13</sup> [58 Fed. Reg. 60978 \(November 18, 1993\)](#) (providing no explanation for the expanded prohibition)

<sup>14</sup> [70 Fed. Reg. 39562 \(July 8, 2005\)](#).

<sup>15</sup> Id. at 39594.



The basis for the regulatory prohibition as articulated above was therefore threefold:

- State Commissions lack interest to operate AmeriCorps Seniors programs;
- State Commissions lack capacity to operate AmeriCorps Seniors programs without contracting or delegating management responsibilities to another entity<sup>16</sup>; and
- State Commissions are structurally incapable of responding to uniquely “local” program needs.

With respect to the first factor, State Commission applications submitted for AmeriCorps Seniors programs clearly demonstrate interest, as they reflect time and resources preparing to operate AmeriCorps Seniors programs. With respect to the second factor, the track record to date demonstrates that State Commissions have the capacity to operate AmeriCorps Seniors programs. With respect to the third factor, there is no indication in the record that the commissions were incapable due to their *structure as commissions* to identify or respond to local needs in the operation of the programs. To the contrary, State Commissions have the necessary infrastructure to coordinate among local organizations, engage volunteers, and leverage existing resources to carry out grant activities respecting local community interests. Indeed, according to ASC, State Commissions serve as AmeriCorps Seniors sponsors to *ensure* local programming availability in their states.<sup>17</sup>

Importantly, in our Federal system, and given the role of State Commissions in the delivery of national service programs, federalism principles counsel the agency to waive rules where necessary and appropriate to “increas[e] opportunities for... flexible policy approaches” at the State level.<sup>18</sup> The National and Community Service laws further call on the agency to “build on the existing organizational service infrastructure” and capacity of the states where necessary to expand service opportunities.<sup>19</sup> A waiver is also consistent with the policy goals underlying title II of the DVSA, which establishes the AmeriCorps Seniors programs both as a means of engaging adults aged 55 and over in service and as a means to addressing unmet local, State and national needs through service.<sup>20</sup>

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<sup>16</sup> As mentioned in the Background section of this memorandum, the regulations currently prohibit any AmeriCorps Seniors grantee from delegating or contracting overall management responsibilities for AmeriCorps Seniors SCP, FGP, and RSVP grants to another entity. See [45 CFR 2551.22](#), [2552.22](#), and [2553.22](#), respectively.

<sup>17</sup> Bruns Letter, supra n.6.

<sup>18</sup> See [Executive Order 13,132, 64 Fed. Reg. 43255 \(Aug. 4, 1999\)](#) (section 7 addresses increasing flexibility for State and local waivers); Thomas Gais & James Fossett, “Federalism and the Executive Branch,” in *THE EXECUTIVE BRANCH* 486, 508 (Joel D. Aberbach & Mark A. Peterson eds., 2005) (“The most common administrative device that presidents and federal executives have used to change the operation of grant programs has been the waiver.”).

<sup>19</sup> 42 U.S.C. §12501(a)(7).

<sup>20</sup> 42 U.S.C. 5000.



The waiver also furthers the CEO's authority to take actions necessary and appropriate to fulfill the national service laws by ensuring that the communities that State Commissions currently serve will continue to receive services and that currently serving volunteers can continue their activities throughout the life of current grants and any renewals/continuations. The assignment of AmeriCorps Seniors programs to State Commissions increases efficiency in the operation of the programs in their respective states because the State Commissions have demonstrated that they are capable of coordinating with local organizations within the State to address community needs in their service areas.

A retrospective waiver of the regulatory prohibition furthers the purposes of the national service laws, as State Commissions have provided services to communities that may not have otherwise received such services and have engaged individuals aged 55 and over who may not have otherwise engaged in such service. A prospective waiver of the regulatory furthers the purposes of the national service laws by ensuring that the communities the State Commissions currently serve do not lose services. A prospective waiver allows renewal or continuation of grants that have already been awarded to State Commissions and allows State Commissions to apply for future AmeriCorps Seniors grants (unless and until AmeriCorps effectively revokes the waiver by promulgating a new rule reinstating the prohibition after public comment). The balance of interests favors issuance of the waiver to ensure the provision and availability of programming in the public interest as authorized under the National and Community Service laws. In the absence of a more complete record, the same factors counseling in favor of a waiver support the removal of the categorical regulatory prohibition on State Commissions operating AmeriCorps Seniors programs.

## **Recommendations**

1. Waive the regulatory prohibition on State Commissions operating AmeriCorps Seniors programs for each of the grants listed in Appendix A and any new AmeriCorps Seniors grants, based on the authorities and findings summarized in this memorandum. The waiver remains in effect until such time as AmeriCorps issues a final rule removing, modifying, or retaining the categorical regulatory prohibition on State Commissions operating AmeriCorps Seniors programs.
2. Publish an advance notice of proposed rulemaking (ANPRM) or notice of proposed rulemaking (NPRM) to seek public comment on removing, modifying, or retaining the categorical regulatory prohibition on State Commissions operating AmeriCorps Seniors programs.



**Decisions:**

**Recommendation 1 (Waiver):**

Michael Smith  
Approved

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Not Approved

**Recommendation 2 (Rulemaking):**

Michael Smith  
Approved

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Not Approved



**Appendix A:**

Grantee	Grant #	Program	Term	Notes
Utah Commission on Service & Volunteerism	21SCDUT002	SCP	07/01/2021-06/30/2024	A new year 1 application has been submitted.
	21SFDUT002	FGP	07/01/2021-06/30/2024	A new year 1 application has been submitted.
	22SDDUT001	ARP	07/01/2022-06/30/2024	This ARP award will end on 06/30/2024.
Serve Wyoming	21SRDWY003	RSVP	07/01/2021-03/31/2024	A written communication has been sent to the commission's executive director to inform them that the grant is not eligible for renewal as scheduled on 04/01/2024. Serve Wyoming replied by letter requesting reconsideration.
Volunteer Iowa	22SDEIA001	ARP	07/01/2022-06/30/2024	This ARP award will end on 06/30/2024.
Economic Development Missouri Department	22SDEMO002	ARP	07/01/2023-06/30/2024	<ul style="list-style-type: none"> <li>Listed on 424 Face Sheet as State Commission/State Commission/Alternative Administrative Entity</li> <li>This grant will end on June 30, 2024 and is not eligible for renewal or continuation</li> </ul>
Michigan Department of Labor and Economic Opportunity	22SDCMIO02	ARP	07/01/2023-06/30/2024	<ul style="list-style-type: none"> <li>Listed on 424 Face Sheet as State Commission/State Commission/Alternative Administrative Entity</li> <li>This grant will end on June 30, 2024.</li> </ul>

Note: New Jersey, Delaware, and Kentucky state entities awarded AmeriCorps Seniors grants were also investigated but determined not to be the same entity as the State Commission.