



MEMORANDUM

TO: Kim Mansaray
Chief of Program Operations

FROM: Stuart Axenfeld, Assistant Inspector General for Audit
Robert Walters, Assistant Inspector General for Investigations

DATE: November 3, 2016

RE: NACHC CNCS Missed Opportunities

Special Review: Prohibited Activities: Missed Opportunities, Red Flags Ignored and Next Steps To Improve Grants Management at CNCS

In April 2016, the Office of Inspector General, Corporation for National and Community Service (CNCS-OIG) reported that the National Association of Community Health Clinics (NACHC), an AmeriCorps grantee, allowed a few AmeriCorps members serving at one of its subgrantees, the Institute for Family Health (IFH), to provide emotional support to women during abortion procedures. The Federal statute authorizing the AmeriCorps Program expressly forbids the use of AmeriCorps resources to "provid[e] abortion services or referrals for receipt of such services."

Our investigation focused on the conduct of the grantee, subgrantee and AmeriCorps members. This Management Implication Report discusses points at which the Corporation for National and Community Service (CNCS or the Corporation) could have, but did not, reduce, prevent or detect the prohibited activities that occurred. These observations concerning CNCS do not absolve NACHC of its responsibility for violating the law or mitigate its conduct. But they do suggest actions that are long overdue at CNCS to detect any similar activities and avert future violations.

Factual Background

The Edward M. Kennedy Serve America Act of 2009 (the Serve America Act or SAA) prohibits the use of AmeriCorps resources for "...abortion services or referrals for receipt of such services." 42 USC 12584a(a)(9). CNCS made all grantees aware of the list of prohibited activities and called

special attention to the abortion restrictions, which were newly imposed on the AmeriCorps Program.

In October 2009, a representative of NACHC emailed its AmeriCorps Program Officer (PO) to relay a subgrantee's question about the abortion restrictions, "Does this also include acting as a support person for women undergoing abortions?" Email dated October 7, 2009. After consulting with the Office of General Counsel (OGC), the PO sought greater specificity about what the AmeriCorps members would be doing. NACHC responded with the following detail from the service site:

To answer your question, our HealthCorps member is acting as a support person for patients undergoing various reproductive health procedures in our Women's Clinic. She primarily provides emotional support for women in our waiting rooms—i.e. sits with them if they are alone, talks to them about what to expect during the procedure, etc. She does not provide referrals for abortion services nor does she perform abortions.

Email dated October 21, 2009. While awaiting an answer to that question, NACHC also sent the PO a "clarification" that it had distributed to subgrantees, in light of the many questions about the abortion prohibition. That clarification explained NACHC's interpretation of the SAA abortion prohibition:

NACHC classifies the following activity as unallowable under the provisions of the SAA:

- Providing abortions
- Providing a direct referral for an abortion specifically
- Providing direct education or information on abortions specifically

NACHC classifies the following activities as allowable under the provisions of the SAA:

- Providing a general referral for family planning services.
- Providing general education or information on family planning services.
- Acting as a support person for patients undergoing family planning services (sitting with them, talking to them about what to expect during procedures, etc.).

Email dated October 22, 2009 (emphasis supplied). NACHC continued to use similar language in its guidance to subgrantees as recently as August 2014. See Guidance on Member Roles and Activities at

<http://www.communityhealthcorps.org/client/documents/Member%20Roles%20and%20Activities.pdf>.

In none of these communications did NACHC seek approval for AmeriCorps members to provide services during an abortion procedure or use the term “abortion doula” to describe the activities of AmeriCorps members.

OGC advised the PO that it had made a considered decision not to provide general guidance about the scope of the abortion restrictions, preferring to answer specific questions from grantees. Email dated October 23, 2009. On November 5, 2009, the PO advised NACHC of OGC's response, to the effect that, based on the description, OGC “[did not] think their program design presents a problem.” According to OGC's explanation,

In this case, we caution the program against using members to provide support in any way that would *promote* the acquisition of an abortion, or abortion services or referrals. In an informal review of some case studies regarding Medicaid (which has a similar prohibition), which concluded that any time of *promotion* of abortion would be considered a referral, but that providing information a person requested would not. (emphasis supplied).

The PO appended her own warning to NACHC, “So, armed with this information, I’d caution you to be very vigilant about NACHC’s program’s activities but could not disallow the activities you’ve described as allowable in your scenarios below.” None of this exchange was captured in eGrants, CNCS’s grants management system.

In 2010, following correspondence from the American Civil Liberties Union, CNCS General Counsel Frank Trinity directed NACHC to drop the prohibition on providing direct education and information about abortions from its training and Member Agreements, and instead to employ the statutory language. Email dated August 9, 2010; *see also* emails dated July 9, 2010 and notes for conversation among PO, OGC and NACHC’s AmeriCorps Program Director. NACHC removed the verbiage about abortion-related education and information from the Member Agreements, but it did not otherwise substitute the language of the statute. Until 2015, the Member Agreements continued to state that “providing or promoting abortions” was prohibited, as was “providing a direct referral for an abortion.” The Agreement also defined a “referral” to “[consist] of a name, address, telephone number, and other relevant factual information, such as what insurance is accepted.”¹ The same language persisted in guidance sent by NACHC to subgrantees. No one from CNCS followed up to ensure that NACHC made the changes directed by OGC.

In mid-2011, CNCS revealed to Congress that two AmeriCorps members assigned to Planned Parenthood in New York City had engaged in prohibited legislative advocacy related to abortion. The Corporation discovered this by happenstance rather than through monitoring activities. After

¹ The conjunctive “and” suggests that all of the listed information must be provided to fall within the definition of a prohibited referral. Under this definition, the SAA would permit an AmeriCorps member to tell a patient that Clinic X performs abortions, without violating the SAA.

a broader inquiry, CNCS also learned that an AmeriCorps member in Tacoma, WA had been escorting abortion patients and staff past protesters at a Planned Parenthood Clinic. NACHC was not involved in these events. Until that time, the measures undertaken by CNCS regarding prohibited activities were limited, with few opportunities to test grantees' compliance.

In hearings that followed the 2011 disclosures, Congress made clear that it expected far greater vigilance from CNCS. In response, CNCS committed to more active oversight, offering a list of 13 measures to strengthen its monitoring in this area. Many of these involved better training and education for grantees and members, as well as requiring grant applicants to describe their plans for preventing prohibited activities and creating a hotline for reporting prohibited activities related to CNCS programs.² Also as promised, the AmeriCorps Program began in October 2011 to conduct a quarterly review of a sample of member Position Descriptions (PDs). CNCS discontinued this review after February 2013, without notifying Congress or CNCS-OIG.

For the most part, the training that CNCS instituted for grantees consisted of repeating the categories of prohibited activities, together with an admonition about the importance of compliance and an offer to answer specific questions.³ In 2014, CNCS offered its first interpretive guidance regarding prohibited activities, in the form of an online interactive training module. Under the heading "No Abortion Services or Referrals," the training materials state:

- No referral to abortion services as part of the national service role
- No accompaniment of clients at facilities that perform abortions
- No protesting or demonstrating in support of or against abortions services or laws.

See

http://www.nationalservice.gov/sites/default/files/olc/captivate/asn_prohibited_activities/.

Notably, the second of these bullet points bars more than escorting clients to a clinic. It also prohibits remaining with a patient at the abortion facility,⁴ making no distinction between accompaniment before, during or after the procedure. The training was not mandatory, and there is no audit trail to demonstrate whether anyone from NACHC completed it. CNCS reiterated in 2016 that "abortion services" means far more than performing or providing abortions; commenting on the NACHC investigation, CNCS stated publicly that the abortion services prohibition applies to conduct before, during and after an abortion procedure. See, e.g., *Six AmeriCorps Volunteers Broke Law by Providing Emotional Support during Abortions*, available at

² CNCS neglected to create such a hotline until prompted by CNCS-OIG in July 2012.

³ CNCS leadership remained sensitive to Congressional concerns about prohibited activities. For that reason, CNCS declined to assist local jurisdictions in constructing temporary polling places following Hurricane Sandy, which occurred days before the 2012 Presidential election. Although OGC opined that such assistance would not violate the prohibitions on partisan or non-partisan political activity or voter registration, CNCS concluded that it was best to avoid any appearance that national service dollars were used for political ends.

⁴ The term "accompaniment" is used by CNCS in the context of criminal history checking to mean remaining in someone's physical presence.

<http://www.newsweek.com/mericorp-volunteers-abortion-services-investigation-452759>
(statement attributed to CNCS spokesperson Samantha Jo Warfield).

In September 2014, the PO assigned to oversee NACHC's grant conducted what she described as AmeriCorps' first site visit in more than six years, and the first since the abortion prohibitions went into effect. The PO had no knowledge of the email exchange between her predecessor and NACHC, or of OGC's guidance. Although AmeriCorps had just issued training materials that interpreted the abortion restrictions, the PO does not appear to have treated abortion-related activities as a particular risk or focused on whether NACHC understood, complied with and monitored its subgrantees for compliance with the restrictions on prohibited activities.

Unbeknownst to CNCS, in 2013, the then-Director of NACHC's AmeriCorps program had learned through social media postings that an AmeriCorps member at an IFH clinic in New York City was serving as an "abortion doula," providing emotional support to women while they underwent abortions. The Director did not inform anyone at CNCS about this discovery. Instead, he concluded based on his own analysis that the conduct was not a violation of the Serve America Act. It is not clear whether he reviewed the 2009 email correspondence or acted solely from memory. (He also spoke with NACHC's counsel, but that conversation appears to have concerned whether IFH's service site, as a Federally Qualified Health Clinic, was permitted to perform abortions.) Between 2013 and October 2015, IFH allowed at least six AmeriCorps members to serve as abortion doulas.

In 2015, the successor Director of NACHC's AmeriCorps program learned of further social media postings regarding AmeriCorps members accompanying clinic patients during abortions. While previously serving as the Deputy National Director, he had conducted the 2009 email correspondence on behalf of NACHC and had been copied on NACHC's internal emails in 2013 about abortion doula services. For the first time, the Director advised NACHC's Program Officer at CNCS that AmeriCorps members were serving as abortion doulas, identifying it as a possible prohibited activity. CNCS informed CNCS-OIG, which conducted an investigation.

Following the disclosures about NACHC and IFH in late 2015, CNCS required NACHC to take certain interim measures, including revising its Member Agreements and conducting additional training, which also restricted pre- and post-abortion services. The NACHC Agreements were revised to provide:

Per 42 USC 12584(a)(9) and 45 CFR 2520.65, AmeriCorps members are prohibited from providing abortion services or referrals for receipt of such services. Specifically, Members will not perform any activity which –

1. Directly or indirectly counsels or provides information about the availability of abortion services
2. Involves providing services to a patient seeking or considering abortion services, including but not limited to—
 - a. Escorting, in-processing or preparing patients or potential patients for a procedure

- b. Assisting in or attending any part of the procedure, or
- c. Providing any post-procedure support, processing or assistance.

Elaborating, the revised NACHC training presentation also prohibited the “accompaniment of or comfort services to clients at facilities that perform abortions” and admonished members to “avoid any activity related to abortion.” We are not aware of CNCS disseminating the same language to other grantees.

CNCS-OIG completed its investigation and reported the results to CNCS on March 17, 2016. The investigation concluded, *inter alia*, that NACHC had violated the abortion prohibition of the Serve America Act by allowing AmeriCorps members at three IFH clinics to serve as abortion doulas and to offer assistance during abortions. On April 12, 2016, CNCS forwarded the Report of Investigation (ROI) to NACHC for response, detailing specific reforms that CNCS would require “in lieu of immediate termination of the grant.” Those reforms included:

- No enrollment of additional AmeriCorps members;
- Engagement of an Independent Oversight Monitor, at NACHC’s expense, with prescribed authority and responsibilities;
- Appointment of an Ombudsperson to independently receive and handle complaints concerning the administration of the AmeriCorps grant; and
- Engagement of an expert in AmeriCorps administration with specific responsibilities.

NACHC agreed to those measures by letter dated April 20, 2016, before submitting its response to the ROI. In its response, and in subsequent correspondence with CNCS-OIG, NACHC asserted that the 2009 email correspondence authorized NACHC to allow AmeriCorps members to provide emotional support during abortions. After learning that it would not receive another grant from CNCS, NACHC withdrew from the agreed-upon terms, and the grant terminated on July 31, 2016.

Following disclosure of the investigation results, the House of Representatives Committee on Education and the Workforce, Subcommittee on Higher Education and Workforce Training, held an oversight hearing on May 24, 2016, titled *Demanding Accountability at the Corporation for National and Community Service*. Materials from that hearing are available at <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=400691>

I. CNCS should develop and communicate a clear explanation of what constitutes "abortion services" and "referrals" for those services.

CNCS still has not clearly informed the grantee community and the public how it interprets and applies the abortion restrictions. Nor has the Corporation assisted grantees and national service participants by directing them how to respond to common and anticipated situations. Because OGC has never prepared a comprehensive analysis of the scope and meaning of abortion restrictions, agency staff may provide inconsistent guidance to grantees about what they may

and may not do. The staff involved in the original decisions are gone, leaving no record of the basis for their actions and advice.

CNCS's decision in 2009 to respond to individual questions without explaining generally how it would interpret and apply the new abortion restrictions may have been well intentioned, but it was extremely misguided.⁵ CNCS assumed that grantees would recognize potentially subtle issues, take the initiative to contact their Program Officers with questions rather than acting unilaterally, appreciate fine distinctions in CNCS's advice and correctly apply it. By relying on grantees to come forward with questions, CNCS created an obvious risk of inconsistent and incorrect interpretations and violations of law. Transferring these risks to grantees was not an appropriate strategy, especially given the controversial nature of abortion, the novelty of the abortion restrictions and the potential consequences to national service in the event of violations.

CNCS failed to establish and maintain a central repository to capture its advice to individual grantees, or to track any changes in guidance. Without this, neither POs nor grantees could determine whether they were handling these issues consistently, nor could they maintain accountability. In addition, addressing grantee questions on an individual basis kept CNCS's actions out of the public view. Only recently has CNCS done more than remind grantees about the prohibitions, and it has still not issued the kind of guidance that would ensure proper and consistent application.

A. The original abortion guidance was flawed.

CNCS's response to NACHC's 2009 inquiry was off-target in its legal interpretation and in its failure to recognize and resolve inconsistencies in NACHC's request. The Corporation's response did not address directly whether the abortion services prohibition would bar AmeriCorps members from providing emotional support or information before an abortion, nor did it explain what constituted prohibited conduct. The legal analysis focused exclusively on whether the waiting room role that NACHC described would "promote the acquisition of an abortion," and therefore constitute a referral. Email dated November 5, 2009. The phrase "abortion services" appeared in the legal advice once in passing. There is no record of the lawyer consulting anyone else in OGC.

CNCS staff overlooked qualifying language in the description of the service activities undertaken by AmeriCorps members. NACHC has argued that the use of "primarily" and "etc," in that description made CNCS's approval completely open-ended, and that CNCS thereby authorized AmeriCorps members to provide emotional support to patients during abortions. While that argument is untenable,⁶ the qualifiers did indicate that the list of abortion-related service

⁵ CNCS leaders may have been reluctant to offer an interpretation of the prohibition for fear of becoming embroiled in a political dispute. Rather than hash these issues out in advance, CNCS effectively transferred that risk to its grantees, without equipping them to manage it.

⁶ Under all of the circumstance, including the heightened sensitivity about abortion-related prohibited activities following the 2011 Congressional hearings, no reasonable grantee would have treated the approval of specific pre-

activities was not exhaustive. Yet CNCS staff did not inquire what other activities were contemplated or restate in their response the specific activities that they were approving, leaving some imprecision about the limitations of that approval. Likewise, CNCS did not instruct NACHC to seek advance approval for any additional AmeriCorps duties related to abortions. If there was ever a time to tell a grantee that it should seek permission and not expect forgiveness, this was it.

Furthermore, CNCS did not note ambiguities and inconsistencies in the “clarification” document that NACHC had distributed to its subgrantees. First, when interpreting the SAA to permit an AmeriCorps member to act as a “support person for patients undergoing family planning services (sitting with them, talking to them about what to expect during procedures, etc.),” the clarification did not specify whether the “family planning services” in question included abortion. CNCS, however, clearly knew that NACHC’s inquiry related specifically to abortions; the original October 7, 2009 email remained in the thread of subsequent communications between NACHC and CNCS. Nevertheless, CNCS did not point out this ambiguity about abortion-related service activities in NACHC’s guidance to subgrantees.

Second, the “clarification” states that NACHC considers it *unallowable* for AmeriCorps members to “provid[e] direct education or information on abortions specifically” but *allowable* for AmeriCorps members to talk to patients about what to expect during an imminent “procedure,” which CNCS knew NACHC intended to include abortions. Neither the PO nor the attorney appears to have noted the inconsistency.

Third, the clarification does not provide a principled basis for distinguishing between allowable and unallowable activities. Without a clear understanding of what distinguishes permissible from impermissible activities, a subgrantee might easily misapply the guidance. Finally, while NACHC offered in the clarification to respond to individual questions, it did not require subgrantees to clear any abortion-related activities by members of AmeriCorps in advance, raising obvious questions as to how NACHC intended to monitor and ensure compliance. CNCS did not raise any of these issues with NACHC.

CNCS-OIG sees no merit in the suggestion by some at CNCS that the PO and OGC were confused as to whether NACHC’s references in the 2009 communications to “various reproductive health procedures” and “family planning services . . . [and] procedures” were intended to include

abortion activities in 2009 as *carte blanche* in 2013 for AmeriCorps members to serve as abortion doulas and perform service activities during abortions. NACHC knew that CNCS had refused to provide wholesale authorization for an AmeriCorps member to “act as an emotional support person for women undergoing abortions” and instead requested greater specificity regarding the contemplated activities. All of the activities that NACHC described in its response took place prior to an abortion procedure, and nothing in the response stated or implied that AmeriCorps members would be providing services *during* abortions. The PO’s caution to NACHC “to be very vigilant about NACHC’s program’s activities” was necessary precisely because CNCS’s approval was limited. Moreover, NACHC was clearly surprised to learn in 2013 that IFH was allowing AmeriCorps members to participate during abortions; if NACHC did not understand in 2009 that IFH was doing this, it clearly had no basis to believe that CNCS understood and intended to authorize it.

abortion. The Corporation's written response demonstrates clearly that CNCS personnel understood the questions to relate to abortion; OGC's two sentences of legal advice used the word "abortion" three times. See November 5, 2009 email. Moreover, NACHC engaged CNCS only because the conduct involved abortion, the sole reproductive health procedure addressed by the Serve America Act.

The NACHC investigation and its public consequences will likely give rise to further questions about how grantees should and do apply the abortion restrictions. Issuing general guidance to all grantees will aid them in complying with requirements for which noncompliance carries an extremely high risk. It will also help bolster confidence in the Corporation's commitment to consistent enforcement of the SAA's restrictions on prohibited activities.

B. Future guidance should be public and transparent.

CNCS-OIG recommends that CNCS issue guidance promptly and publicly, and then formalize it through rulemaking. The current regulation is unhelpful, because it merely repeats verbatim the prohibition in the Serve America Act and provides no insight into its meaning or application. The Corporation should avoid the temptation to limit dissemination of this guidance to training or similar internal communications.⁷ Congress and the public have an interest in knowing, and a right to know, how CNCS is handling these issues. Formal rulemaking will give all stakeholders an opportunity to be heard concerning the interpretation and application of the abortion prohibitions, identifying any ambiguities or points of dispute requiring resolution. The fact that issues surrounding abortion are contentious and politically charged argues in favor of more transparency and public input, not less.

C. CNCS should bar abortion-related service activities, whenever and wherever they take place, define "referral" and advise AmeriCorps members how to respond to questions about abortion.

The guidance should be based on the plain meaning of the statute, as interpreted by the 2014 training module and CNCS's recent public statements that the abortion services prohibition extends to pre- and post-abortion care and emotional support. The training module further states that a member may not provide even general information that includes referrals for abortions, but it does not elaborate or give any examples, such as whether a member may participate in "options counseling" or distribute a pamphlet that identifies abortion providers on a list of other women's health resources. CNCS should address these issues directly, to ensure uniformity. Moreover, grantees should not be subject to unpredictable or unpublicized shifts in CNCS's interpretations. Formal rulemaking can alleviate all of these concerns.

Under normal rules of statutory interpretation, a prohibition on "providing abortion services" differs from a prohibition on "promoting or providing abortions." Given the age and typical role

⁷ Even when training materials are made available on the Internet, the sheer volume of information can make them obscure and difficult to locate.

of AmeriCorps members, it seems implausible that Congress believed it necessary to prohibit them from *performing* abortions, so the prohibition must mean something else.⁸ Based on the text of the prohibition, CNCS's view in 2011 that an AmeriCorps member could not serve as a clinic escort, the training materials from 2014, and CNCS's recent press statements on the subject, CNCS-OIG believes that the new guidance should construe abortion services to include all services and activities directed at or generally offered in connection with an abortion. That would include activities in preparation for an abortion and those that take place afterwards as a consequence of an abortion, including escorting a patient to a clinic for an abortion, providing administrative assistance, companionship or emotional support before, during or after the abortion procedure, furnishing information about what to expect in connection with an abortion procedure, and participation in follow-up.⁹ This list is not exhaustive; it focuses on the purpose and/or end result of the medical services sought by the patient. Nothing in the SAA forbids an AmeriCorps member from providing non-abortion-related services, *e.g.*, contraception or general healthcare, to a patient who is also seeking an abortion.¹⁰ CNCS-OIG's views are generally consistent with paragraph 2 of the language that CNCS provided to NACHC during the investigation for inclusion in the Member Agreements.

NACHC's original "referral" definition was also problematic, and CNCS should explain the scope of this prohibition, as well. A referral should mean any information that directs an inquirer to one or more abortion providers: the name of a doctor or facility, the address or approximate location, the phone number, or any of the other elements included in NACHC's definition. Information need not contain all of those elements in order to qualify as a "referral" for purposes of the SAA.

Finally, CNCS should describe precisely how an AmeriCorps member or grant-funded staff should respond if asked for assistance that he or she is not permitted to render. This includes stating whether an AmeriCorps member, who may not make a referral, may direct the inquirer to a staff member or volunteer who is legally permitted to do so. Members should also be told what to do if a supervisor or patient asks them to perform an activity that they believe may be forbidden. Anticipating these scenarios and providing a suggested script so that individuals are prepared to respond when put on the spot will help grantees conform to the law. Grantees and members should also be told what to do if they suspect or believe that a prohibited activity has occurred, *i.e.*, how to contact CNCS and CNCS-OIG to report the matter.

⁸ We understand that other agencies construe the term "abortion services" in their authorizing statutes more narrowly, making CNCS reluctant to prohibit pre- and post-abortion service activities as a matter of statutory construction. While we believe that the context of the SAA warrants a different interpretation, CNCS clearly has the authority to bar pre- and post-abortion activities by policy or regulation. Put another way, CNCS is not obligated to support activities ancillary to abortion, even if the SAA does not prohibit them.

⁹ CNCS should specify whether, in a state that mandates specific tests or procedures before an abortion or imposes a waiting period, an AmeriCorps member may render any services related to those prerequisites.

¹⁰ The language in the 2014 training materials and in the 2015 NACHC re-training materials forbids accompaniment "at facilities that perform abortions" (emphasis added). However, nothing in the SAA prevents AmeriCorps members from providing non-abortion services to patients at a facility that also performs abortions. It is not clear whether the language was merely inexact or whether CNCS, out of an abundance of caution, intended the prohibition to be broader than the corresponding provisions of the SAA.

D. The guidance should distinguish the abortion prohibitions from garden-variety compliance requirements.

CNCS should help grantees appreciate that strict compliance with the abortion prohibitions is of the utmost importance and must be treated as a top priority. The ban on prohibited activities is not a mere regulatory requirement or a cost/allowability principle. Rather, these restrictions safeguard the legitimacy and public acceptance of national service programs. Congress has designated certain contentious or divisive matters off-limits for national service, so that national service can unite all Americans. A grantee that engages in prohibited activities, even minimally, jeopardizes not only its own funding but the continued existence of all CNCS programs. Because this is a high-risk, high-stakes subject, CNCS is prepared to assist a grantee in complying with these requirements. At the same time, however, the guidance should state unequivocally that a grantee proceeds at its peril if it undertakes any activities that potentially implicate “abortion services” or “referrals” without first obtaining written authorization from CNCS. CNCS cannot afford to tolerate or excuse noncompliance.

II. CNCS should actively direct the new guidance to grantees likely to encounter abortion-related issues, together with a requirement to identify and report prior prohibited activities.

Consistent with the risk-based approach to grant monitoring long recommended by CNCS-OIG, grantees should receive guidance about the prohibited activities that they are likely to confront by virtue of their clientele and the nature of their programmatic activities. AmeriCorps grantees and subgrantees that provide healthcare services to women and girls of childbearing years are likely to encounter issues relating to abortion. CNCS has advised us that it has conducted some assessment and outreach to grantees operating in the healthcare space and found no other violations, but it has not yet provided CNCS-OIG with detailed information. CNCS-OIG recommends that the guidance about the abortion restrictions also be provided to any AmeriCorps grantee whose members mentor or work with at-risk youth of middle school age and older; it is readily foreseeable that an individual with a crisis pregnancy may turn to a mentor for advice or assistance.¹¹

Routine written communications or optional training to push out this guidance is not enough. The communications must convey clearly that prohibited activities is a high-priority and high-risk subject, warranting heightened care and vigilance beyond the many rules and compliance requirements to which grantees and members are subject. Information about prohibited activities should be given prominence and not be buried in the large volume of dense materials distributed to participants. This is particularly true for communications with members, who are

¹¹ This recommendation is limited to AmeriCorps because the list of prohibited activities applicable to Senior Corps and VISTA does not include abortion. See 42 USC 5043 and 5044.

expected to quickly absorb a daunting amount of unfamiliar information. CNCS-OIG has seen several grantees that orient members with comprehensive PowerPoint presentations consisting of more than 60 slides, with material about prohibited activities sandwiched somewhere in the middle; this does not help members appreciate the importance of the subject.

Making online training about prohibited activities voluntary likewise suggests that mastery of the subject is optional or relatively unimportant. However good the training may be, there is no guarantee that the information will reach the people who need it most. Instead, CNCS should develop mandatory online training for all programmatic grantee staff and for AmeriCorps members, including an audit trail that shows who has completed the training. The training should include a quiz to ensure mastery of the key points.

Especially for grantees at high risk of encountering prohibited activities, POs should conduct personal outreach, to ensure that these issues are being handled appropriately. In addition to educating them, CNCS should require at-risk grantees to survey their subgrantees and service sites about any prior activities that are inconsistent with the new guidance, so that these events can be investigated, quantified, corrected, root causes determined and/or confirmed, and accountability maintained. Above all, CNCS should make clear that a grantee should seek authority in advance for any service activities that may impinge on prohibited categories, and that the grantee should give the same direction to its subgrantees and to members.

III. Other prohibited activities should undergo the same systematic risk assessments, identification of at-risk grantees, outreach and targeted monitoring.

CNCS should apply the same approach to each prohibited activity: determining which grantees are particularly at-risk, by virtue of their clientele and activities. For example, faith-based organizations are more likely to pose a risk of proselytizing, worship or religious instruction than are secular organizations. Indeed, CNCS-OIG and one of the State Commissions investigated at least one grantee that began its daily AmeriCorps meetings with a prayer until directed to cease that practice. Grantees affiliated with a for-profit organization are more likely to run afoul of the prohibition on providing benefits to a for-profit entity.

CNCS should also identify any other factors that may give rise to heightened risk. Prohibited activities such as legislative advocacy or voter registration may be at increased seasonal risk, *e.g.*, during legislative sessions or in election years.¹² Others, including protests, petitions, boycotts and strikes, may be triggered by external events, such as social unrest or teacher strikes. In communities where protests are occurring, grantees and members should be reminded that they may engage in such activities on their own time but must not wear AmeriCorps attire when doing so.

¹² For this reason, Federal agencies routinely remind all employees about the Hatch Act prior to Presidential elections.

IV. CNCS's monitoring plans must be more risk-based, targeted and sophisticated.

From 2009, CNCS was on written notice that one of NACHC's subgrantees was (a) performing abortions and (b) having AmeriCorps members provide information and emotional support immediately prior to the procedure. Yet CNCS did not ask the identity of the subgrantee and did not target either NACHC or the subgrantee for focused monitoring. The staff did not record this key risk-related information in the grant file. Important institutional knowledge was lost due to employee turnover, inadequate recordkeeping and lack of sensitivity to risk.

Even without red flags specific to NACHC, CNCS knew that this large grant included reproductive health services, elevating the risk of abortion-related activities. CNCS clearly appreciated that prohibited activities are a high-stakes matter. Indeed, the 2014 online training module cautioned grantees that a "violation of public trust may cost the national and community service field credibility, access to future funds, and more." Nevertheless, the AmeriCorps Program Office did not treat NACHC's abortion risks as particularly acute or monitor them more closely than for grantees outside the healthcare field. Even after the 2011 hearings about abortion-related activities by other grantees, CNCS did not hone its monitoring methodology to become more risk-based. A key detection control that CNCS promised Congress—quarterly review of position descriptions (PDs)—was discontinued after 18 months, without notice to Congress or to CNCS-OIG.¹³ Even that measure was *ad hoc* and poorly designed; a paper review cannot detect whether grantees are in fact deviating from seemingly acceptable position descriptions by allowing members to undertake prohibited tasks, as NACHC and IFH did in this case. When it discontinued the PD review, AmeriCorps did not, to the best of our knowledge, substitute any better detection measures.

Between 2013 and 2015, CNCS adjusted NACHC's "risk rating" from high, to low, to medium, for reasons apparently unrelated to the risk of prohibited activities. CNCS-OIG has repeatedly criticized the Corporation's one-size-fits-all approach to risk assessment and grant monitoring, noting that it has never been validated and is a poor predictor of negative outcomes. *See, e.g.,* Semiannual Report for the period ended March 31, 2015 at pp. 10-11, available on our website at http://www.cncsoig.gov/sites/default/files/sar_15-01_0.pdf.

CNCS calculates an aggregate risk score for each grantee and, with a few exceptions, subjects all grantees in the same range to the same general monitoring procedures. It does not routinely tailor its monitoring activities to the precise risks involved.¹⁴ The NACHC episode illustrates one

¹³ CNCS advised us that the level of effort associated with this review was unsustainable and incompatible with the workload associated with its ongoing Grant Application Review Process. It is troubling that CNCS promised to undertake internal controls that it did not have the resources to maintain and that it did not notify its stakeholders when it eliminated this measure.

¹⁴ For example, a grantee with an aggregate score in the "low" range will be subject to minimal monitoring, even if it carries a significant risk of a particular prohibited activity. A grantee that scores in the high range will be subjected to the full monitoring treatment, including for prohibited activities, even if its risk of prohibited activities is quite low.

way in which the existing generic risk monitoring program ill-serves CNCS.¹⁵ The risk of abortion-related prohibited activities was obvious and inherent in the nature of NACHC's program. CNCS was on notice that some of the grant-funded activities were, at a minimum, skating close to the edge and actually cautioned NACHC to be vigilant in that respect. Yet CNCS's risk assessments did not properly account for those risks or cause AmeriCorps to subject NACHC's grants to more frequent monitoring focused on these issues.¹⁶

CNCS-OIG has warned repeatedly about these inadequacies and predicted this very scenario, orally and in writing. For example, we reiterated this concern in recommendations that we submitted on January 28, 2015 for better risk-based monitoring, including the following:

Particularly in the area of prohibited activities, the nature of the grantee and focus of its efforts bears directly on the risk: a faith-based grantee probably presents a greater risk of prohibited religious worship activities than does a secular organization; **a grantee that furnished health services to young women presents a greater risk of abortion activities than does a grantee that serves senior citizens.** (Emphasis added).

Nevertheless, for many years CNCS made only modest changes to its risk assessment or monitoring program. In his 2011 testimony to Congress, then-Acting CEO Robert Velasco touted the Corporation's monitoring as rigorous, risk-based and sophisticated. Even more recently, a senior grants officer described the agency's limited approach as "the gold standard." A preliminary analysis conducted by CNCS-OIG, however, indicated that the Corporation's risk assessments do a poor job of predicting catastrophic outcomes. While promising to improve risk monitoring, the CEO's recent Congressional testimony continued to describe the current approach as robust and risk-based. An effort begun 18 months ago to develop a new approach has languished due to a lack of trained and experienced leadership, insufficient resources and conflicting priorities. The necessary improvements involve basic principles of risk management and need to be treated as the urgent priority that this recent event shows them to be. CNCS's repeated overstatements concerning the rigor and sophistication of its risk monitoring encourage complacency and discourage innovation and improvement.

To monitor effectively for prohibited activities, CNCS must also expand its repertoire of monitoring activities and tailor them to that particular risk. As the Inspector General advised

¹⁵ The inadequacy of the current grant monitoring strategy has been a recurring theme in OIG reports, Messages to Congress from the Inspector General accompanying Semiannual Reports and meetings with CNCS leadership.

¹⁶ Because CNCS grantees are not required to maintain itemized time records of members' activities, it may be advisable to conduct more frequent monitoring for prohibited activities. Here, the absence of detailed records forced CNCS-OIG and CNCS to rely on anecdotal estimates, social media postings, snowball sampling and self-reporting to reconstruct the extent and effect of prohibited activities. Those reconstructions become more difficult and less reliable with the passage of time, as members complete their terms of service and scatter. Indeed, depending on individuals to recount accurately events that might subject them to sanction or financial loss is inherently unreliable and likely to result in understatement. For these reasons, CNCS-OIG could not identify every individual who served as an abortion doula or the total number of abortions attended by AmeriCorps members. The Inspector General testified to that effect on May 24, 2016.

Congress, where prohibited activities come to light, it is not through CNCS's routine monitoring. Site visits, which the Corporation aspires to conduct every six years, take place too infrequently to be an effective detection device. Desk audits are similarly ineffective, because AmeriCorps members do not keep itemized records of their daily activities, leaving no basis to identify or quantify prohibited activity. For grantees whose programmatic activities place them at particular risk of one or more prohibited activities, CNCS-OIG recommends that POs perform routine searches of members' postings on social media sites.¹⁷ Frequent direct contact with members of those grantees is essential; we find that members tend to be more candid about their activities than some grantees, especially if grant-funded staff fear consequences such as the loss of funding and jobs. CNCS-OIG has recommended regular surveys of the members of at-risk grantees, perhaps through the My AmeriCorps Portal, which AmeriCorps members' access regularly. If OMB review of such surveys is required,¹⁸ CNCS should request that it be expedited. The surveys should be short and phrased in plain English, rather than reciting the statutory language; the results should be reviewed promptly and followed up. To the best of our knowledge, CNCS has never pursued this measure.

Both at the May 24, 2016 hearing and in subsequent statements, CNCS cited the decentralized structure of the AmeriCorps Program as a reason for its minimal oversight of prohibited activities by subgrantees. While the Program is certainly decentralized in many respects, nothing in the Serve America Act relieves CNCS of ultimate responsibility to ensure that all grantees follow the law, and nothing forbids CNCS from exercising direct oversight of critical risks, even at the subgrantee level. CNCS-OIG notes that, with respect to criminal history checking, another area of great consequence, CNCS has assumed an increasingly active role in monitoring directly the compliance of grantees and subgrantees. We suggest that prohibited activities in another area in which active and direct monitoring is warranted.

V. Failure to retain key email communications in the grant records interferes with oversight and accountability.

Notwithstanding the 2009 email correspondence with NACHC, CNCS's online grants management system contained no record that AmeriCorps members serving at a subgrantee were providing information and emotional support immediately prior to abortion procedures. AmeriCorps has no policy, practice or process to capture in eGrants key email exchanges between a grantee and a PO or Grant Officer (GO). The PO who conducted the site visit in 2014 did not know about and could not readily have accessed the 2009 and 2010 email exchanges that suggested a heightened

¹⁷ CNCS recommended that grantees survey social media as a means of detecting prohibited activities at subgrantees in 2013, but does not use this technique to monitor its own grantees. See <http://www.nationalservice.gov/sites/default/files/resource/rr2-ac-prohibited-activities-ho1-4-13-12.pdf>

¹⁸ The Paperwork Reduction Act requires that federally sponsored surveys and questionnaires undergo an often lengthy review by the Office of Management and Budget and that the proposed survey be published in the Federal Register.

risk of abortion-related prohibited activities at NACHC and its subgrantee.¹⁹ The inability to retain such email exchanges results in a loss of continuity and critical institutional knowledge upon the departure or reassignment of a responsible PO or GO. That loss, in turn, prevents informed decision-making about critical risks and impairs CNCS's ability to target its oversight accordingly. Because eGrants' capacity to store grant-related emails is limited, AmeriCorps has never developed guidelines for importing and retaining even critical emails, leaving this decision to the initiative and discretion of individual staff members. And without a record of prior directions and instructions, it is difficult to identify, and hold grantees responsible for, noncompliance.

As part of its information technology modernization effort and grant management upgrades, CNCS should enhance the capacity of eGrants to store and search critical emails. The various national service programs should then develop guidelines as to which emails should be saved in eGrants. For example, CNCS could direct POs and GOs to save in eGrants emails pertaining to matters of significant risk, including, for example, prohibited activities, criminal history checks, fraud, substantial mismanagement/misconduct and any communications involving advice from OGC. Risk assessment and monitoring plans for a particular grantee should take into consideration information from these key communications.

VI. The grant application and award process should include a more granular approach to prohibited activities.

Currently, all grant applicants are informed of the list of prohibited activities and asked to submit their plans for preventing them. This may be useful, but it does not focus on whether an application carries a heightened risk of a particular prohibited activity or require the prospective grantee to devote closer attention to preventing or detecting that conduct. This generic approach represents a missed opportunity to identify and address specific risks at the outset.

At the clarification stage, CNCS should determine whether the nature of the grantee or its programmatic design poses a particular risk and, if so, require the grantee to address that risk with specificity. We urge CNCS to require that grantees develop measures directed at *detecting* the prohibited activity, as well as those aimed at preventing it. This information should also be used to establish monitoring priorities and customize the monitoring to be conducted.

VII. CNCS has never effectively assessed the quality of its grants management and monitoring during the annual assessment of internal controls.

Both CNCS-OIG and the independent financial statement auditors have pointed out that the Corporation's annual internal control assessment has never attempted to evaluate the reliability

¹⁹ Except with respect to certain high-level decision-makers, CNCS retains only three years' worth of backup email, some of which is not easily accessible or searchable. With staff turnover and a six-year cycle for site visits to grantees, there is an obvious risk that key information maintained in email form will be unavailable when it is most needed.

and effectiveness of the risk assessments and monitoring program by which CNCS manages three-quarters of its budget, or determined whether the Corporation requires additional systems, processes, resources and expertise to do so.²⁰ This calls into question management's basis for signing the annual assurance statement required in the Agency Financial Report without assessing the soundness of the internal controls governing the vast majority of the Corporation's expenditures. Given the extent to which CNCS relies upon its risk assessments and monitoring program, it is particularly important that the Corporation regularly test and improve its approach.

VIII. Program Officers need better training to help them spot red flags, identify risks and cultivate professional skepticism in their oversight of grantees.

CNCS-OIG hopes that the introduction of Enterprise Risk Management (now in its infancy at CNCS) and its future application to grants management will educate staff and better enable them to recognize and act upon key risks, such as prohibited activities. In addition to helping grantees to accomplish their programmatic objectives, agency staff must also maintain curiosity and skepticism appropriate to their oversight responsibilities.²¹ As we have noted, NACHC's description of AmeriCorps members providing pre-abortion assistance included qualifiers—stating what members will do “primarily” and ending a list of specific tasks with “etc,”—that should have prompted questions. Yet neither the Program Officer nor counsel made sure that she understood the full scope of the members' contemplated role or activities or specified the service activities that CNCS was approving. NACHC tried to exploit this in order to escape accountability for the violations found in our investigation. While we agree that the emails do not reasonably support that contention, the exchange was by no means as crisp and clear as it should have been.

Despite this, the Program Officer did not follow up or conduct any monitoring to ensure that the activities had not expanded inappropriately, that NACHC was properly overseeing its subgrantees, or that the grantee had implemented OGC's instructions to recite the statutory prohibitions verbatim in the Member Agreements. The next monitoring site visit did not occur for years, and the report of it displays no heightened attention or inquiry regarding the abortion restrictions. The PO overlooked the fact that the Member Agreements did not accurately reflect either the statutory language of the abortion prohibitions or the content of CNCS's recent training on that subject.

NACHC may be an appropriate case study for PO training in risk identification, assessment and monitoring, as well as the consequences of overlooking key risks. In CNCS-OIG's experience,

²⁰ Independent Auditor's Report on Internal Control over Financial Reporting for Fiscal Year 2015, p. 4: Based on the assessment documentation, OAO's testing of grants did not cover the entire material risk spectrum, focusing solely on timeliness of documentation and approvals. OAO performed no testing in the area of grants monitoring/grants management by OGM, the use of single audit results, or drawdowns, nor was there any testing of the grant application process, a key process for limiting the Corporation's risk.

²¹ To inculcate appropriate professional skepticism, CNCS must affirmatively acknowledge that not every grantee, or every person of responsibility within a grantee, is always honest, trustworthy, acting in good faith, skilled or careful.

many POs see themselves more responsible for assisting grantees than managing risks on behalf of taxpayers. Effective oversight requires a greater degree of professional skepticism, a willingness to hold grantees accountable and a more balanced view of PO responsibilities.

IX. CNCS should consider deterrence in dealing with issues of this kind.

In addressing high-stakes issues such as prohibited activities, CNCS needs to ensure that it deters grantees from flouting restrictions or treating compliance recklessly. CNCS-OIG has in the past identified a pattern of unwillingness to hold grantees accountable financially for serious violations of grant terms and conditions. *See, e.g., Semiannual Report for the period April 1 – September 30, 2014, pp. 22-29.* Given the difficulty that CNCS has experienced in detecting prohibited activities, basic deterrence theory argues in favor of a severe sanction. In responding to violations, CNCS must strike an appropriate balance between deterrence commensurate with the seriousness of the violation and a remedial approach.

Conclusion

The events concerning NACHC and the potential fallout from them exemplify the need for a more active and discerning approach to grant oversight. The risk of that one of CNCS's healthcare grantees might violate the abortion restrictions was eminently foreseeable (and was the subject of a warning by CNCS-OIG), given the nature of their activities. Merely informing the grantees of the prohibitions, which CNCS did repeatedly and in many forms, was simply not enough, in part because the abortion restrictions were not entirely self-explanatory. The Corporation's early reluctance to provide general guidance on the scope and application of the restrictions posed clear risks of misunderstandings, inconsistent application and noncompliance (whether deliberate or unintentional). The lack of an accurate risk assessment and absence of frequent monitoring actions focused on specific risks minimized the chance of detecting this problem. Particularly after the events of 2011, CNCS was on notice that the political consequences of further abortion-related prohibited activities could be severe.

Yet, only when faced with a second crisis has CNCS begun to act as though the abortion restrictions make certain activities high-risk and deserving of close attention. Only repeated Congressional scrutiny and public pressure have led CNCS to supplement its existing risk assessment and grant oversight in this area. Complacency about this risk suggests a lack of competent risk management in CNCS's core activities. CNCS and its stakeholders should be asking what other significant risks it is overlooking or underestimating.

Summary of Recommendations

1. Develop new guidance of general application on the scope of the abortion restrictions, along the lines suggested in Section I(B) through (D) of this report. Issue it first as guidance and then undertake a rulemaking, to provide substantive regulations on the

subject. Include any of the other listed prohibited activities that require clarification or elaboration, based on input from POs and grantees. Distribute guidance as to how an AmeriCorps member or grant-funded staff person should respond when asked to do something that he/she is prohibited from doing.

2. Identify all grantees and subgrantees whose service activities involve providing healthcare to women and girls of childbearing years, as well as those with service activities directed at education or mentoring of girls and young women middle school-aged and above. Communicate the new guidance about the abortion restrictions to them and require them to determine and report whether their current and past activities (within a pre-determined period) conform to the new guidance.
3. Conduct the same risk assessments, identification of at-risk grantees, communications and targeted monitoring for other prohibited activities.
4. Identify any other factors that may increase the risk of individual prohibited activities and use that information for targeted education, training and monitoring as appropriate.
5. Use the events regarding NACHC as a training exercise for POs regarding critical analysis, professional skepticism and curiosity, identification of red flags, verification procedures to ensure that a grantee has followed guidance and customizing monitoring activities.
6. Enhance the capacity of eGrants to store and search critical emails. Institutionalize policies and procedures to allow POs and GOs to capture key emails in eGrants, and develop criteria for identifying emails to be captured, including on the subjects listed in Section V of this report.
7. Build into CNCS's to-be-developed Enterprise Risk Management strategy and planning a component for specific prohibited activities, commensurate with magnitude of the risk, including the reputational and political risk to CNCS.
8. Accelerate development of a more focused, targeted and risk-based model and approach to all grant monitoring, including continuous assessment of the effectiveness of CNCS's grant risk assessments and monitoring.
9. Without waiting for the development of a comprehensive risk-based monitoring strategy, develop and implement monitoring strategies for specific prohibited activities that can be conducted frequently, do not depend on site visits and provide a meaningful opportunity for prompt detection of violations or red flags, including searches of social media sites and surveys of members in accessible language, using the My AmeriCorps Portal.
10. In the grant application process, determine whether an applicant is at particular risk for one or more specific prohibited activities. If so, require that the grantee develop

customized ways to address compliance with that prohibition, including detection controls. Incorporate the resulting information into the monitoring plan and target CNCS monitoring activities accordingly, including assessing the effectiveness of the measures taken by the grantee.

11. Consider general and specific deterrence when determining consequences for noncompliance.

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