

UNITED STATES
NUCLEAR REGULATORY COMMISSION
OFFICE OF NEW REACTORS
OFFICE OF NUCLEAR REACTOR REGULATION
OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS
OFFICE OF FEDERAL AND STATE MATERIALS AND
ENVIRONMENTAL MANAGEMENT PROGRAMS
WASHINGTON, DC 20555-0001

DATE, 2008

**NRC REGULATORY ISSUE SUMMARY 2008-yy —
NOTICE REGARDING INDIVIDUALS UNDER A
FEDERAL FIREARMS DISABILITY**

ADDRESSEES

All U.S. Nuclear Regulatory Commission (Commission or NRC) licensees, certificate holders, and applicants for a license or certificate of compliance who use armed security personnel as part of their physical protection system and security organization. All Radiation Control Program Directors and State Liaison Officers.

PURPOSE

Licensees and certificate holders who voluntarily apply for section 161A authority (enhanced weapons) in the future will be required to have, for each armed security officer, a Federal firearms background check.

The NRC is issuing this Regulatory Issue Summary (RIS) primarily to provide time for advance planning by licensees, certificate holders, applicants, and their respective security personnel before the NRC issues new requirements on these Federal firearms background checks.

In addition, the NRC recommends that licensees, certificate holders, and applicants with armed security officers review their suitability evaluations for armed security officers to specifically evaluate the disqualifying criteria currently stipulated under 18 U.S.C. § 922(d) as discussed in this RIS. It is noted that the NRC is not aware of any instances where security personnel at NRC-regulated facilities inappropriately possessed firearms or ammunition as part of their official duties.

The NRC also wishes to inform licensee security personal, in advance of being subject to a future firearms background check, that they may wish to consider applying to the FBI under the FBI's Voluntary Appeal File (VAF) program to obtain a Federal firearms determination.

In addition, the NRC recommends that licensees, certificate holders, and applicants discuss this RIS with their armed security officers.

For radioactive materials licensees, there are no current or planned NRC requirements necessitating the use of armed security personnel. However, radioactive materials licensees may use armed personnel for purposes other than directly providing security for their radioactive materials. Therefore, this RIS is issued to Radiation Control Program Directors and State Liaison Officers for information only.

This RIS requires no specific action or written response.

BACKGROUND INFORMATION

Current Statutory Requirements

Under section 922 of Title 18 of the United States Code (18 U.S.C. § 922), individuals in any of the categories listed in subsections (g) and (n) are prohibited from shipping or transporting in interstate or foreign commerce, possessing in or affecting commerce, or receiving any firearm or ammunition shipped or transported in interstate or foreign commerce. Such individuals are under a "Federal firearms disability."

These statutory restrictions have been in place for many years and apply even in the case of an individual, who falls under such a prohibition, from taking possession of a firearm or ammunition without knowing that this specific prohibition exists. Furthermore, under 18 U.S.C. § 922(d), it is unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such a person falls within the categories of individuals who are prohibited from possessing or receiving a firearm or ammunition. In this context, the term "person" is very broad and includes any individual, corporation, company, association, firm partnership, society, or joint stock company.

The U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is responsible for regulating these statutory requirements. ATF's regulations implementing 18 U.S.C. § 922(d), (g), and (n) are found under 27 CFR 478.32 "Prohibited shipment, transportation, possession, or receipt of firearms and ammunition by certain persons," and a copy of these regulations are enclosed. Additional information can also be found at ATF's Web site (see Reference 1).

Firearms Background Check Forthcoming Requirements

The Energy Policy Act of 2005 amended the Atomic Energy Act of 1954 (AEA) and provided new authority to the NRC under new section 161A (42 U.S.C. § 2201a). Section 161A authorizes the Commission to enhance security at facilities owned or operated by an NRC licensee or certificate holder and for designated radioactive material or other property that is being transported to or from a facility owned by such a licensee or certificate holder. Specifically, section 161A permits licensees and certificate holders to apply to the NRC for approval to obtain enhanced weapons (e.g., machineguns) and thereby increase their defensive capabilities. Prior to the enactment of section 161A, with limited exceptions, only Federal, State or local law-enforcement agencies could lawfully possess machineguns.

The NRC published a proposed rule on October 26, 2006, that would provide new requirements to implement section 161A. Requirements implementing section 161A would be located in two new sections 10 CFR 73.18 and 73.19 (see pages 71 FR 62847 thru 62850). These proposed regulations would require that security personnel who have access to any firearms and ammunition (at licensees and certificate holders who apply to the NRC for section 161A authority) must be subject to a firearms background check by the U.S. Attorney General.

Licensees and certificate holders who do not apply to the NRC for section 161A authority are not subject to a firearms background check by the U.S. Attorney General. In addition, licensees and certificate holders who do not apply to the NRC for section 161A authority are not eligible by statute to request a firearms background check by the U.S. Attorney General.

Application for section 161A authority by NRC licensees and certificate holders is voluntary and such application cannot occur until after the firearms guidelines mandated by section 161A are published in the *Federal Register*. Consequently, licensees and certificate holders cannot begin firearms background checks until after they have applied to the NRC for section 161A authority. A final rule implementing the firearms guidelines is under development by the NRC and will be published subsequent to the publication of the firearms guidelines.

SUMMARY OF ISSUE

The NRC's current regulations in 10 CFR Part 73, Appendix B, Criteria I.A.1 "Employment suitability and qualification" requires licensees and certificate holders to accomplish a suitability evaluation of individuals prior to employment or assignment to the licensees', certificate holders', or applicants' security organization. Criteria I.A.1.b states:

Felony convictions—Have no felony convictions involving the use of a weapon and no felony convictions that reflect on the individual's reliability.

In contrast with the NRC's current requirements, U.S. law under 18 U.S.C. § 922(d) is both more restrictive (with regard to convictions) and includes additional disqualifying criteria and states that the sale or disposal of any firearm or ammunition is prohibited to a person who—

1. *Is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year,*
2. *Is a fugitive from justice,*
3. *Is an unlawful user of, or addicted to, any controlled substance,*
4. *Has been adjudicated as a mental defective or has been committed to a mental institution,*
5. *Being an alien, is illegally or unlawfully in the United States or has been admitted to the United States under a nonimmigrant visa (see 8 U.S.C. § 1101(a)(26)),*
6. *Has been discharged from the U.S. Armed Forces under dishonorable conditions,*
7. *Has renounced their U.S. citizenship,*
8. *Is subject to a court order that restrains the individual from harassing, stalking, or threatening an "intimate partner" of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, or*
9. *Has been convicted of a misdemeanor crime of domestic violence.*

ATF has indicated that the statutory prohibitions of 18 U.S.C. § 922(d) above apply to an NRC licensee, certificate holder, or applicant issuing firearms and ammunition to a security officer for the purposes of performing their official duty—including circumstances where the firearms and ammunition are returned to the licensee, certificate holder, or applicant at the end of a security officer's duty shift.

Additional information on these disqualifying criteria can be found at ATF's firearms Web site (see Reference 1). In general, these disqualifying criteria generally apply to all persons in all circumstances; however, ATF's regulations under 27 CFR 478.141, "General," also provide

limited exemptions. ATF has indicated that any questions on the applicability of these exemptions should be discussed directly with ATF.

Licensees who are U.S. government agencies may qualify for exemptions. Therefore, licensees who are U.S. government agencies should discuss with the ATF concerning the applicability of these exemptions for their agency.

Additionally, ATF's regulations under 27 CFR 478.142, "Effect of pardons and expungement of convictions," addresses the removal of a Federal firearms disability following a pardon, an expungement, or the restoration of civil rights following a conviction.

Licensee, Certificate Holder, and Applicant Obligations on Security Officer Suitability

The NRC's current regulations do not require licensees, certificate holders, or applicants who use armed security personnel as part of their physical protection system to confirm that their armed security personnel are not prohibited under 18 U.S.C. § 922(d) from receiving or possessing firearms or ammunition. However, the ATF has indicated that the statutory prohibitions of 18 U.S.C. § 922(d) apply to an NRC licensee, certificate holder, or applicant issuing firearms and ammunition to a security officer for the purposes of performing their official duty—including circumstances where the firearms and ammunition are returned to the licensee, certificate holder, or applicant at the end of a security officer's duty shift. Consequently, licensees, certificate holders, and applicants who utilize armed security personnel as part of their NRC-approved physical protection system are prohibited under 18 U.S.C. § 922(d) from issuing any firearms or ammunition to an individual if they know or have reasonable cause to believe the individual is prohibited from receiving the firearm or ammunition because a security officer meets one or more of the nine categories listed above.

Accordingly, the NRC recommends that licensees, certificate holders, and applicants with armed security officers review their suitability evaluation program and suitability evaluations for armed security officers to specifically evaluate the disqualifying criteria stipulated under 18 U.S.C. § 922(d). The NRC recommends that licensees, certificate holders, and applicants use existing background check information and criminal history records check information (obtained as part of an existing access authorization or background check program required under the NRC's regulations in 10 CFR Chapter I) in evaluating whether or not their security personnel could be under a Federal firearms disability.

Finally, the NRC recommends that licensees, certificate holders, and applicants discuss this RIS with their armed security officers.

Security Officer Initiatives in Advance of Firearms Background Checks

Licensees and certificate holders who voluntarily apply for section 161A authority in the future will be required to submit to the NRC, for each armed security officer, a set of fingerprints and the personal information specified in proposed NRC Form 754 to accomplish a firearms background check. The NRC forwards these fingerprint impressions and personal descriptor information to the Federal Bureau of Investigation (FBI). The FBI then compares the name of the individual and other personal descriptors against the FBI's National Instant Criminal Background Check System (NICS) to identify whether the individual is prohibited from receiving or possessing firearms or ammunition. Licensees and certificate holders are not authorized to

request a firearms background check for their security personnel until the licensee or certificate holder applies to the NRC for section 161A authority.

Because NICS uses a name- and descriptor-based search process, rather than a fingerprint-based search process, an individual who has a common name, has been the victim of identity theft, or may have incomplete or inaccurate records in the NICS database (e.g., the expungement of a prior conviction or the receipt of a pardon may not have been recorded) could receive a “denied” response indicating she or he is under a Federal firearms disability. For a “denied” response, the NICS automatically refers the individual to the ATF for possible criminal investigation. The FBI will use the fingerprint impressions submitted by the security officer under a firearms background check to resolve questions of identity following the NICS search process, e.g., is security officer “John Smith” (applying for a firearms background check) one of the 18 individuals named “John Smith” with a record in the NICS database indicating whether or not they are under a Federal firearms disability. Consequently, while the use of fingerprints as part of a firearms background check will reduce the potential for misidentification of an individual as being under a Federal firearms disability, it will not completely eliminate such potential events and subsequent referrals to the ATF.

Therefore, in advance of being subject to a future firearms background check, security personnel may wish to consider applying to the FBI under the FBI’s Voluntary Appeal File (VAF) program. Individuals applying for entry into the VAF program submit descriptive data and fingerprint impressions to the FBI which are then examined against the NICS databases to determine whether they are under a Federal firearms disability. If no prohibitive criteria exist, the application is approved and the applicant is placed in the VAF. These individuals are issued a unique personal identification number (UPIN). Security officers can include their UPIN in the proposed NRC Form 754 they will submit when they are subject to a future firearms background check under section 161A. VAF applicants whose entry into the VAF is rejected due to the presence of prohibitive criteria will not be automatically referred to ATF. Additional information on the FBI’s VAF program can be found in Reference 2. Further, an individual who believes they should not be in the NICS database can appeal to the FBI to correct any inaccurate or incomplete records or provide proof of their identity.

BACKFIT DISCUSSION

Licensee, certificate holder, and applicant compliance with their statutory obligations under 18 U.S.C. § 922 are not subject to the NRC’s backfit regulations. Security officers’ voluntary participation in the FBI’s VAF program is also not subject to the NRC’s backfit regulations. This RIS requires no action or response. Any action on part of addresses in accordance with the guidance contained in this RIS is strictly voluntary and, therefore, is not a backfit under 10 CFR 50.109, 70.76, 72.62, or 76.76. Consequently, the staff did not performance a backfit analysis.

FEDERAL REGISTER NOTIFICATION

A notice of opportunity for public comment on this RIS was not published in the *Federal Register* because this RIS is informational. However, the NRC did hold a public meeting on this RIS on March 14, 2008, at the NRC’s headquarters in Rockville, MD, where interested stakeholders had the opportunity to provide comments to the NRC.

CONGRESSIONAL REVIEW ACT

The NRC has determined that this action is not subject to the Congressional Review Act (5 U.S.C. §§ 801-808).

PAPERWORK REDUCTION ACT STATEMENT

This RIS discusses existing information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. § 3501, *et seq.*). These information collection requirements were approved by the Office of Management and Budget (OMB) under control number 3150-0002. This RIS also discusses proposed information collection requirements that will be subject to the Paperwork Reduction Act of 1995. However, these information collection requirements (which are associated with the proposed firearms background checks required by section 161A and the proposed NRC Form 754) have not been approved by OMB as of the date of issuance of this RIS.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

REFERENCES

1. ATF's Web page on Federal firearms disabilities — <http://www.atf.gov/firearms/faq/> under the link to Unlicensed Persons>Prohibited Persons.
2. FBI's Web page on NICS information — <http://www.fbi.gov/hq/cjisd/nics/index.htm> under the link to NICS Voluntary Appeal File Brochure.

CONTACT

This RIS requires no specific action or written response. If you have any questions on this RIS, please contact one of the technical contacts listed below.

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Enclosures:

1. Federal Firearms Disability Regulations (27 CFR 478.32)
2. List of Issued NMSS/FSME Generic Communications (2007)

Note: A complete listing of recent NRC generic communications may be found on the NRCs public Web site <http://www.nrc.gov> under the link to: Electronic Reading Room>Document Collections.

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* See previous concurrence

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OFC:	OGC:CRA	NRR:PMDA	OIS	FSME:MSEAB	LA:PGCB	PGCB
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Coordination: The NRC has coordinated this RIS with the general counsel staffs at ATF headquarters and at the FBI's Criminal Justice Information Services division.

Federal Firearms Disability Regulations

Title 27: Alcohol, Tobacco and Firearms

PART 478—COMMERCE IN FIREARMS AND AMMUNITION

Subpart C—Administrative and Miscellaneous Provisions

§ 478.32 *Prohibited shipment, transportation, possession, or receipt of firearms and ammunition by certain persons.*

(a) No person may ship or transport any firearm or ammunition in interstate or foreign commerce, or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, or possess any firearm or ammunition in or affecting commerce, who:

- (1) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year,
- (2) Is a fugitive from justice,
- (3) Is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802),
- (4) Has been adjudicated as a mental defective or has been committed to a mental institution,
- (5) Being an alien—
 - (i) Is illegally or unlawfully in the United States; or
 - (ii) Except as provided in paragraph (f) of this section, is a nonimmigrant alien: *Provided*, That the provisions of this paragraph (a)(5)(ii) do not apply to any nonimmigrant alien if that alien is-
 - (A) Admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;
 - (B) An official representative of a foreign government who is either accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States or is en route to or from another country to which that alien is accredited. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the representative's official capacity;
 - (C) An official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the official's or visitor's official capacity, except if the visitor is a private individual who does not have an official capacity; or
 - (D) A foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business,
- (6) Has been discharged from the Armed Forces under dishonorable conditions,
- (7) Having been a citizen of the United States, has renounced citizenship,
- (8) Is subject to a court order that—
 - (i) Was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
 - (ii) Restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(iii)(A) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(B) By its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury, or

(9) Has been convicted of a misdemeanor crime of domestic violence.

(b) No person who is under indictment for a crime punishable by imprisonment for a term exceeding one year may ship or transport any firearm or ammunition in interstate or foreign commerce or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(c) Any individual, who to that individual's knowledge and while being employed by any person described in paragraph (a) of this section, may not in the course of such employment receive, possess, or transport any firearm or ammunition in commerce or affecting commerce or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(d) No person may sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person:

(1) Is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year,

(2) Is a fugitive from justice,

(3) Is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802),

(4) Has been adjudicated as a mental defective or has been committed to a mental institution,

(5) Being an alien—

(i) Is illegally or unlawfully in the United States; or

(ii) Except as provided in paragraph (f) of this section, is a nonimmigrant alien: *Provided*, That the provisions of this paragraph (d)(5)(ii) do not apply to any nonimmigrant alien if that alien is-

(A) Admitted to the United States for lawful hunting or sporting purposes or is in possession of a hunting license or permit lawfully issued in the United States;

(B) An official representative of a foreign government who is either accredited to the United States Government or the Government's mission to an international organization having its headquarters in the United States or en route to or from another country to which that alien is accredited. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the representative's official capacity;

(C) An official of a foreign government or a distinguished foreign visitor who has been so designated by the Department of State. This exception only applies if the firearm or ammunition is shipped, transported, possessed, or received in the official's or visitor's official capacity, except if the visitor is a private individual who does not have an official capacity; or

(D) A foreign law enforcement officer of a friendly foreign government entering the United States on official law enforcement business,

(6) Has been discharged from the Armed Forces under dishonorable conditions,

(7) Having been a citizen of the United States, has renounced citizenship,

(8) Is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child: *Provided*, That the provisions of this paragraph shall only apply to a court order that—

(i) Was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(ii)(A) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(B) By its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury, or

(9) Has been convicted of a misdemeanor crime of domestic violence.

(e) The actual notice required by paragraphs (a)(8)(i) and (d)(8)(i) of this section is notice expressly and actually given, and brought home to the party directly, including service of process personally served on the party and service by mail. Actual notice also includes proof of facts and circumstances that raise the inference that the party received notice including, but not limited to, proof that notice was left at the party's dwelling house or usual place of abode with some person of suitable age and discretion residing therein; or proof that the party signed a return receipt for a hearing notice which had been mailed to the party. It does not include notice published in a newspaper.

(f) Pursuant to 18 U.S.C. 922(y)(3), any nonimmigrant alien may receive a waiver from the prohibition contained in paragraph (a)(5)(ii) of this section, if the Attorney General approves a petition for the waiver.

[T.D. ATF-270, 53 FR 10493, Mar. 31, 1988, as amended by T.D. ATF-363, 60 FR 17451, April 6, 1995; T.D. ATF-391, 62 FR 34639, June 27, 1997; T.D. ATF-401, 63 FR 35522, June 30, 1998; T.D. ATF-471, 67 FR 5425, Feb. 5, 2002]

List of Recently Issued FSME Generic Communications			
Date	GC No.	Subject	Addressees
10/04/07	RIS-2007-22	Status Update For Implementation Of NRC Regulatory Authority for Certain Naturally-Occurring and Accelerator-Produced Radioactive Material	All U.S. Nuclear Regulatory Commission materials licensees, radiation control program directors, State liaison officers, and the NRC's Advisory Committee on the Medical Uses of Isotopes.
10/04/07	RIS-2007-23	Date For Operation Of National Source Tracking System	All licensees authorized to possess Category 1 or Category 2 quantities of radioactive materials. All Radiation Control Program Directors and State Liaison Officers.
12/05/07	RIS-2007-27	Improving Public Understanding of the Risks Associated with Medical Events	All U.S. Nuclear Regulatory Commission medical use licensees. All Radiation Control Program Directors, and State Liaison Officers
12/07/07	RIS-2007-28	Security Requirements for Portable Gauges	U.S. Nuclear Regulatory Commission portable gauge licensees and Agreement State Radiation Control Program Directors and Liaison Officers
12/14/07	RIS-2007-38	Ensuring Complete and Accurate Information in the Documentation of Training and Experience for Individuals Seeking Approval as Medical Authorized Users	All U.S. Nuclear Regulatory Commission medical use licensees and NRC master materials licensees. All Agreement State Radiation Control Program Directors and State Liaison Officers
02/01/08	RIS 2008-02	Actions to Increase the Security of High Activity Radioactive Sources	All U.S. Nuclear Regulatory Commission Materials and Master Materials Licensees. All Agreement State Radiation Control Program Directors and State Liaison Officers.
<p>Note: This list contains the six most recently issued generic communications, issued by the Office of Federal and State Materials and Environmental Management Programs (FSME). A full listing of all NRC generic communications may be viewed at the NRC's public Web site at the following address: http://www.nrc.gov/reading-rm/doc-collections/gen-comm/index.html.</p>			