

**RULEMAKING ISSUE
(Notation Vote)**

December 19, 2008

SECY-08-0196

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: ADVANCE NOTICE OF PROPOSED RULEMAKING - REQUIREMENTS FOR FINGERPRINTING FOR CRIMINAL HISTORY RECORD CHECKS OF INDIVIDUALS GRANTED UNESCORTED ACCESS TO RESEARCH AND TEST REACTORS (NRC-2008-0619) (RIN-A125)

PURPOSE:

To obtain Commission approval to issue an Advance Notice of Proposed Rulemaking (ANPR) soliciting stakeholder feedback on rulemaking issues associated with requirements for fingerprint-based criminal history record checks for individuals granted unescorted access to special nuclear materials or areas at research and test reactors (RTRs) licensed by the U.S. Nuclear Regulatory Commission (NRC).

BACKGROUND:

The Energy Policy Act of 2005 (EPAct) extended the NRC's authority to require fingerprint-based criminal history record checks on individuals having unescorted access to NRC-licensed RTRs. As an interim measure, on April 30, 2007, the NRC issued orders to all operating RTRs to require fingerprint-based criminal history record checks for individuals with unescorted access to these facilities. Although the orders were focused on unescorted access to the special nuclear material possessed by RTRs, the Commission directed the staff to reconsider during the rulemaking whether the requirements should be extended to additional persons. Prior to formally initiating the rulemaking, the staff recommends seeking advance stakeholder input through an ANPR on several key issues that will inform the development of generically-applicable regulations. At the conclusion of this ANPR phase and taking into consideration

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any public comments received, the staff will proceed with publishing a proposed rule to seek additional public comment on the specific requirements it proposes. The anticipated date of the proposed rule will be 9 months after publication of the ANPR in the *Federal Register*.

DISCUSSION:

Before the terrorist actions of September 11, 2001, NRC regulations governing the security of RTRs were primarily focused on the physical protection of the special nuclear material possessed by those licensees. Only a limited class of licensees was subject to enhanced measures for protection against radiological sabotage. Subsequent to September 11, 2001, the NRC evaluated the adequacy of security at RTRs and considered whether additional actions should be taken to help ensure the trustworthiness and reliability of individuals with unescorted access. RTRs were advised to consider taking immediate additional precautions including observation of activities within their facility.

From 2002 through 2004, RTRs voluntarily implemented compensatory measures (CM). Individuals granted unescorted access at RTRs underwent site-specific background investigations or checks. In addition, security assessments which helped to identify risk-significant areas and materials at certain RTRs were also conducted.

The EPAct amended Section 149 of the Atomic Energy Act of 1954 (AEA) and provided the NRC with additional authority to require fingerprint-based criminal history record checks for unescorted access for its RTR licensees. Before the passage of the EPAct, the NRC's authority was limited by Section 149 to requiring fingerprinting of individuals being considered for unescorted access to nuclear power plants.

On October 31, 2005, the NRC staff issued SECY-05-0201, "Implementation of the Energy Policy Act," to provide the Commission with the NRC staff's plan for implementing the NRC's responsibilities under the EPAct. On January 5, 2006, in its staff requirements memorandum (SRM) related to SECY-05-0201, the Commission directed the staff to identify the most appropriate potential interim method to implement the fingerprinting requirements for unescorted access while the rulemaking was being developed.

On January 12, 2007, the NRC staff issued SECY-07-0011, "Interim Implementation of Fingerprinting Requirements in Section 652 of the Energy Policy Act of 2005," to the Commission. In its response, March 12, 2007, SRM-SECY-07-0011, the Commission directed the NRC staff to issue orders to RTRs to require fingerprint-based criminal history record checks for individuals with unescorted access to risk-significant areas or materials within these facilities. The Commission also directed the NRC staff to proceed with a rulemaking to determine if fingerprint-based criminal history record checks should be required for additional personnel.

On April 30, 2007, the NRC staff issued orders requiring RTR licensees to conduct Federal Bureau of Investigations (FBI) fingerprint-based criminal history record checks for individuals granted unescorted access to special nuclear materials at their facilities on an interim basis (NRC Order EA-07-074, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors," (Agencywide Documents Access and Management System (ADAMS) Accession No. ML070750140). All RTRs have implemented the requirements of those orders and no significant implementation issues have been identified by licensees or the NRC staff.

The staff is now working toward meeting the Commission's second directive in SRM-SECY-07-0011. Because a number of unresolved issues exist that could be significantly aided by early stakeholder interaction, the staff recommends that the Commission initiate the rulemaking process by publishing an ANPR instead of a proposed rule at this time. The staff's specific rationale for publication of an ANPR rather than proceeding directly to a proposed rule is outlined below.

(1) RTR facilities are all uniquely configured making it difficult to establish generically-applicable requirements. Further, the material types and quantities of material to be controlled vary from licensee to licensee. Therefore, further interaction with licensees will aid the development of a generic definition of the areas where access should be limited. Defining this area too broadly could have consequences for many RTR licensees as it could inadvertently encompass parts of the facility that have limited or no safety or security significance, and would result in requiring fingerprinting for a number of individuals for whom this measure is not warranted. In the enclosed draft ANPR, the staff proposes that the rule would require licensees to designate an area which the rule would describe as the "area of significance" to which access would be restricted. The staff proposes that this be a performance-based requirement, and thus, the rule would provide some criteria by which licensees could define this area on a site-specific basis. The staff has determined that specific and early stakeholder input on the viability of this concept is crucial.

(2) Another complicating factor is defining "unescorted access" for RTRs. The current concept of "unescorted access" used for power reactors is not readily applicable to RTRs for many of the reasons described earlier. In some facilities it may be difficult for licensees to provide an escort who can devote uninterrupted surveillance of the individual in question. The staff believes it is important to get early stakeholder input on defining this concept with respect to RTRs.

(3) The fingerprinting and criminal history record check requirement creates a challenge. Section 149 of the AEA requires fingerprinting and an FBI criminal history record check for any individual who is permitted unescorted access to a utilization facility. Section 149.b. also authorizes the Commission to relieve certain persons from fingerprinting only by rule. For nuclear power plants NRC regulations currently relieve certain individuals, such as law enforcement officials and International Atomic Energy Agency inspectors, from this requirement under exceptions presented in 10 CFR 73.57. With respect to materials licensees, certain individuals are relieved from fingerprinting for unescorted access by a separate regulation at 10 CFR 73.61. However, there is no similar relief rule applicable to RTRs. The staff has determined that some limited exceptions to fingerprinting may be appropriate, but would like to obtain early stakeholder input on the specific categories of individuals who would be excepted for RTRs.

There are several categories of persons who are particularly problematic with respect to RTRs. Because the criminal history checks only report information about an individual from his or her 18th birthday and beyond, and only include offenses recorded in the United States, the usefulness of the checks for an individual who is only 18 or younger, or for a foreign national studying in the United States is questionable. The criminal history record will not return any results, even if the individual might have some pertinent

criminal history in a jurisdiction that does not feed into the FBI's database. The propriety of creating a blanket exception under Section 149 for these individuals is also questionable. The staff has determined that it would be valuable to obtain early stakeholder input on how to handle criminal checks and fingerprinting evaluations for these classes of individuals.

(4) Although the orders have been in place for over a year and a half, the staff has not assessed, except on a site-by-site basis, any lessons learned by licensees or the NRC from implementation of those requirements. The staff believes that it is important to engage stakeholders before the proposed rule stage of rulemaking to enhance the staff's ability to benefit from the lessons learned from the implementation of the orders it has imposed.

The staff does not recommend including specific rule text in the ANPR. Rather, the staff recommends that the ANPR be focused on soliciting stakeholder input on the issues presented above. This would be accomplished by presenting the reasons for rulemaking, discussing measures that the NRC is considering including in the proposed rule text, soliciting comments on these proposals, and soliciting stakeholder alternatives not yet considered by the staff.

As part of the ANPR process, the staff proposes to conduct a public workshop during the public comment period. The staff would consider the feedback from the workshop with any written comments received on the ANPR as part of the basis for the development of a proposed rule. Should the Commission direct the staff to forego the ANPR and to publish a proposed rule, the staff would still recommend conducting a public meeting before a proposed rule is published for public comment. However, the benefits of the receipt and reconciliation of formal public comments before rulemaking would not accrue.

RESOURCES:

The resources required to complete the proposed rule subsequent to the processing of the ANPR proposed in this paper have been budgeted in fiscal year (FY) 2009 and requested in FY 2010 as follows: 1.0 FTE and \$25K for NRR, 0.1 FTE for OGC, and <0.1 FTE for ADM in FY 2009 and 0.7 FTE for NRR, 0.1 FTE for OGC, and <0.1 FTE for ADM in FY 2010.

COMMITMENTS:

- (1) Subsequent to the publication of the enclosed *Federal Register* notice announcing the ANPR, the staff will schedule a public workshop to further explain its intentions, answer stakeholder questions, and entertain stakeholder comments.
- (2) Upon the receipt and consideration of the public comments on the ANPR, the staff will prepare a proposed rule for publication in the *Federal Register*.

RECOMMENDATIONS:

The staff recommends that the Commission:

- (1) Approve the publication of the enclosed ANPR soliciting stakeholder input on the staff's plans to publish requirements for fingerprint-based criminal history record checks for

individuals granted unescorted access to special nuclear material or areas of significance at RTRs; and

- (2) Approve the staff's plans to commence with normal notice and comment rulemaking upon the staff's receipt and consideration of any public comments on the ANPR.

COORDINATION:

The Office of the General Counsel has reviewed this ANPR and has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections.

/RA Bruce S. Mallett for/

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Executive Director
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Enclosure:
Federal Register Notice

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***via e-mail**

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