

## PART 37 PHYSICAL PROTECTION OF BYPRODUCT MATERIAL

### PRELIMINARY DRAFT LANGUAGE

(April 2009)

The Nuclear Regulatory Commission (NRC) is making available preliminary draft proposed rule language to amend its regulations to add a new part 37 to Title 10 of the Code of Federal Regulations. This new part 37 will contain security (physical protection) requirements that are designed to provide reasonable assurance of preventing the theft or diversion of category 1 and category 2 quantities of radioactive material. The new provisions will address background investigations, access control, physical security during use, and physical security during any transport of category 1 and category 2 quantities of radioactive material. At this time the staff is only posting the preliminary draft language for the background investigation and access control program.

The availability of the preliminary draft rule language is intended to inform stakeholders of the current status of the NRC's activities and solicit public comments on the provided information. The NRC will review and consider any comments received for information only; the NRC will not respond to any comments received at this pre-rulemaking stage. As appropriate the Statements of Consideration for the proposed rule will briefly discuss any substantive changes made to the proposed rule language as a result of comments received. Once published as a proposed rule, stakeholders will have an opportunity to comment on the proposed rule language and, the NRC will respond to any such comments in the Statements of Consideration for the final rule.

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### **§ 37.3 Definitions.**

As used in this part:

*Background Investigation* means the investigation conducted by a licensee or applicant to support the determination of trustworthiness and reliability.

*Trustworthiness and reliability* are characteristics of an individual considered dependable in judgment, character, and performance, such that unescorted access to category 1 or category 2 quantities of radioactive material by that individual does not constitute an unreasonable risk to the public health and safety or common defense and security. A determination of trustworthiness and reliability for this purpose is based upon a background investigation.

*Reviewing Official* means the individual who shall make the trustworthiness and reliability determination of an individual to determine whether the individual may have, or continue to have, unescorted access to category 1 or category 2 quantities of radioactive materials that are possessed by the licensee.

Subpart B — Background Investigations and Access Control Program

### **§ 37.21 Personnel access authorization requirements for category 1 or category 2 quantities of radioactive material.**

(a) *General.* (1) Each licensee who is authorized to possess category 1 or category 2 quantities of radioactive material at a facility shall comply with the requirements of this subpart.

(2) Each licensee shall establish, implement, and maintain its access authorization program in accordance with the requirements of this subpart.

(3) Each applicant for a license or license amendment to possess category 1 or category 2 quantities of radioactive material at a facility shall implement the requirements of this subpart before taking possession of category 1 or category 2 quantities of radioactive material.

(b) *General performance objective.* The licensee's or applicant's access authorization program must ensure that the individuals specified in paragraph (c)(1) of this section are trustworthy and reliable.

(c) *Applicability.* (1) Licensees or applicants shall subject the following individuals to an access authorization program:

(i) Any individual to whom a licensee intends to permit unescorted access to category 1 or category 2 quantities of radioactive material;

(ii) Vehicle drivers and accompanying individuals for road shipments of category 1 quantities of radioactive material;

- (iii) Movement control center personnel for shipments of category 1 quantities of radioactive material;
- (iv) Any individual whose assigned duties provide access to shipment information on category 1 quantities of radioactive material; and
- (v) Reviewing officials.

(2) Licensees or applicants need not subject the categories of individuals listed in § 37.41(a) through (l) to the access authorization program.

(3) Licensees or applicants shall approve for unescorted access to category 1 or category 2 quantities of radioactive material only those individuals with job duties that permit unescorted access to category 1 or category 2 quantities of radioactive material.

(4) Licensees or applicants shall not grant access to individuals who have been rejected for unescorted access to category 1 or category 2 quantities of radioactive material, Safeguards Information, or as a reviewing official.

### **§ 37.23 Program requirements.**

(a) *Granting unescorted access authorization.* Licensees and applicants shall implement the requirements of this subpart for granting initial or reinstated unescorted access authorization. The investigatory information collected to satisfy the requirements of this subpart for individuals who are being considered for unescorted access authorization shall be valid for a trustworthiness and reliability determination by a licensee or applicant for 60 calendar days.

(b) *Reviewing officials.* (1) Each licensee or applicant shall nominate one or more individuals to be reviewing officials and shall submit the names of these individuals and their fingerprints to the NRC for a criminal history records check. The nominated individuals shall undergo the background investigation aspects that are required by § 37.25(a)(2) –(a)(9) before their names and fingerprints are submitted to the NRC. The fingerprints of the nominated reviewing official must be taken by a law enforcement agency, federal or state agencies that provide fingerprinting services to the public, or commercial fingerprinting services authorized by a State to take fingerprints.

(i) Reviewing officials must be permitted unescorted access to category 1 or category 2 quantities of radioactive materials or access to Safeguards Information, if the licensee possesses Safeguards Information, as part of their job duties.

(ii) Reviewing officials nominated by the licensee or applicant and approved by the NRC are the only individuals who shall make trustworthiness and reliability determinations and grant unescorted access to category 1 or category 2 quantities of radioactive materials possessed by the licensee.

(iii) Reviewing officials cannot approve other individuals to act as reviewing officials.

(2) Reviewing officials shall not make any trustworthiness and reliability determinations or grant unescorted access to any individual until the reviewing officials have been approved by the NRC.

(3) Reviewing officials shall be re-approved by the NRC every 10 years.

(4) Individuals nominated as reviewing officials who receive a preliminary denial from the NRC have the right to complete, correct, and explain information obtained through the background investigation prior to a final adverse determination.

(c) *Informed consent.* (1) Licensees and applicants shall not initiate a background investigation without the informed and signed consent of the subject individual. This consent shall include authorization to share personal information with other individuals or organizations as necessary to complete the background investigation. Prior to a final adverse determination, the licensee or applicant shall provide the individual with an opportunity to correct any inaccurate or incomplete information that is developed during the background investigation.

(2) The subject individual may withdraw his or her consent at any time. Licensees shall inform the individual that:

(i) If an individual withdraws his or her consent, the licensee or applicant may not initiate any elements of the background investigation that were not in progress at the time the individual withdrew his or her consent. The licensee or applicant shall record and maintain the status of the individual's background investigation, his or her withdrawal of consent for the background investigation, the reason given by the individual for the withdrawal, and any pertinent information collected from the background investigation elements that were completed.

(ii) The licensee or applicant shall inform the individual that the withdrawal of consent for the background investigation is sufficient cause for denial or termination of unescorted access authorization.

(d) *Personal history disclosure.* Any individual who is applying for unescorted access authorization shall disclose the personal history information that is required by the licensee's or applicant's access authorization program for the reviewing official to make a determination of the individual's trustworthiness and reliability. Refusal to provide, or the falsification of, any personal history information required by this subpart is sufficient cause for denial or termination of unescorted access.

(e) *Determination basis.* (1) The reviewing official shall determine whether to grant, deny, unfavorably terminate, maintain, or administratively withdraw an individual's unescorted access authorization status based on an evaluation of all of the information required by this subpart.

(2) Reviewing officials may not grant unescorted access to an individual until the reviewing official has evaluated all of the information required by this subpart and determined that the individual is trustworthy and reliable. Reviewing officials may deny unescorted access to any individual based on disqualifying information obtained at any time during the background investigation.

(3) The licensee or applicant shall document the basis for concluding whether or not there is reasonable assurance that an individual granted unescorted access to category 1 or category 2 quantities of radioactive material is trustworthy and reliable. Licensees shall maintain a list of persons approved for unescorted access authorization and a list of those individuals that have been denied unescorted access authorization.

(f) *Procedures.* (1) Licensees and applicants shall develop, implement, and maintain written procedures for conducting background investigations for persons who are applying for unescorted access authorization to category 1 or category 2 quantities of radioactive material.

(2) Licensees shall develop, implement, and maintain written procedures for updating background investigations for persons who are applying for reinstatement of unescorted access authorization.

(3) Licensees shall develop, implement, and maintain written procedures to ensure that persons who have been denied unescorted access authorization are not allowed access to category 1 or category 2 quantities of radioactive material even with an escort.

(4) Licensees and applicants shall include a procedure for the notification of individuals who are denied unescorted access. The procedures must include provisions for the review, at the request of the affected individual, of a denial or termination of unescorted access authorization. The procedure must contain a provision to ensure that the individual is informed of the grounds for the denial or termination of unescorted access authorization and allow the individual an opportunity to provide additional relevant information and an opportunity for an objective review of the information upon which the denial or termination of unescorted access authorization was based. The procedure must provide for an impartial and independent internal management review.

(g) *Right to correct and complete information.* (1) Prior to any final adverse determination, licensees or applicants shall provide each individual subject to this subpart with the right to complete, correct, and explain information obtained as a result of the licensee's background investigation. Confirmation of receipt by the individual of this notification must be maintained by the licensee for a period of 1 year from the date of the notification.

(2) If after reviewing the criminal history record an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, update, or explain anything in the record, the individual may initiate challenge procedures. These procedures include direct application by the individual challenging the record to the law enforcement agency that contributed the questioned information or a direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537-9700 as set forth in 28 CFR 16.30 through 16.34. In the latter case, the FBI will forward the challenge to the agency that submitted the data, and will request that agency verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. Licensees must provide at least 10 days for an individual to initiate action to challenge the results of an FBI criminal history records check after the record being made available for his or her review. The licensee may make a final adverse determination based upon the criminal history record only after receipt of the FBI's confirmation or correction of the record.

(h) *Records.* The licensee shall retain documentation regarding the trustworthiness and reliability of individual employees for 3 years after the individual's employment ends.

### **§ 37.25 Background investigations.**

(a) *Initial Investigation.* Before granting an individual unescorted access to category 1 or category 2 quantities of radioactive material, licensees and applicants shall complete a background investigation of the individual seeking unescorted access authorization. The scope

of the investigation shall encompass at least the past 5 years. The background investigation must include at a minimum:

(1) Fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check in accordance with § 37.31 or Part 73.

(2) Verification of true identity. Licensees and applicants shall verify the true identity of an individual who is applying for unescorted access authorization to ensure that the applicant is the person that they claim to be. A licensee or applicant for a license shall review official identification documents (e.g., driver's license, passport, government identification, state, province, or country of birth issued certificate of birth) and compare the documents to personal information data provided by the individual to identify any discrepancy in the information. Licensees shall document the type, expiration, and identification number of the identification, or maintain a photocopy of identifying documents on file in accordance with § 37.61. Licensees shall certify and affirm in writing that the identification was properly reviewed and maintain the certification and all related documents for review upon inspection.

(3) Employment history evaluation. Licensees and applicants shall complete an employment history evaluation. Licensees shall verify the individual's employment with each previous employer for the most recent 5 years before the date of application, and if not continuously employed then the scope shall be expanded to 7 years to verify employment with an employer of the longest duration.

(4) Verification of education. Licensees and applicants shall verify that the individual participated in the education process during the claimed period.

(5) Military history verification. Licensees and applicants shall verify that the individual was in the military during the claimed period.

(6) Credit history evaluation. Licensees and applicants shall evaluate the entire credit history of any individual who is applying for unescorted access authorization.

(7) Criminal history review. Reviewing officials shall obtain from local criminal justice resources the criminal history record of an individual who is applying for unescorted access authorization and evaluate the information to determine whether the individual has a record of local criminal activity that may adversely impact his or her trustworthiness and reliability. The scope of the applicant's local criminal history review shall cover all residences of record for the 5-year period preceding the date of the application for unescorted access authorization.

(8) Character and reputation determination. Licensees and applicants shall complete reference checks to determine the character and reputation of an individual who has applied for unescorted access authorization. Reference checks may not be conducted with any person who is known to be a close member of the individual's family, including but not limited to, the individual's spouse, parents, siblings, or children, or any individual who resides in the individual's permanent household. Reference checks under this subpart must be limited to whether the individual has been and continues to be trustworthy and reliable.

(9) The licensee or applicant shall also, to the extent possible, obtain independent information to corroborate that provided by the individual (i.e., seek references not supplied by the individual).

(10) If a previous employer, educational institution, or any other entity with which the individual claims to have been engaged fails to provide information or indicates an inability or unwillingness to provide information within 3 business days of the request, the licensee shall:

- (i) Document the refusal or unwillingness in the record of investigation; and
- (ii) Obtain a confirmation of employment, educational enrollment and attendance, or other form of engagement claimed by the individual from at least one alternate source that has not been previously used.

(b) *Reinvestigations.* For all individuals granted unescorted access to category 1 or category 2 quantities of radioactive material, trustworthiness and reliability shall be reinvestigated every 10 years. Reinvestigations shall include fingerprinting and an FBI criminal history check and a credit history check and shall address the 10 years following the previous investigation.

**§ 37.31 Requirements for criminal history records checks of individuals granted unescorted access to category 1 or category 2 quantities of radioactive material.**

(a) *General.* (1) Each licensee who is authorized to possess category 1 or category 2 quantities of radioactive material at a facility shall comply with the requirements of this subpart.

(2) Each applicant requesting authorization to possess category 1 or category 2 quantities of radioactive material shall comply with requirements of this subpart before taking possession of category 1 or category 2 quantities of material at a facility.

(b) *General performance objective and requirements.* (1) Except for those individuals in § 37.41 of this subpart, each licensee subject to the provisions of this subpart shall fingerprint each individual who is to be permitted unescorted access to category 1 or category 2 quantities of radioactive material. Licensees shall transmit all collected fingerprints to the Commission for transmission to the Federal Bureau of Investigation (FBI). The licensee shall use the information received from the FBI as part of the required background investigation to determine whether to grant or to deny further unescorted access to category 1 or category 2 quantities of radioactive materials for that individual.

(2) The licensee shall notify each affected individual that their fingerprints will be used to secure a review of their criminal history record, and shall inform them of the procedures for revising the record or adding explanations to the record.

(3) Fingerprinting is not required if a licensee is reinstating an individual's unescorted access authorization to category 1 or category 2 quantities of radioactive materials if:

- (i) The individual returns to the same facility that granted unescorted access authorization within 365 days of the termination of their unescorted access authorization; and

- (ii) The previous access was terminated under favorable conditions.

(4) Fingerprints do not need to be taken if an individual who is an employee of a licensee, contractor, manufacturer, or supplier has been granted unescorted access to category 1 or category 2 quantities of radioactive material or access to Safeguards Information by another licensee, based in part on a criminal history records check under this subpart or part 73 of this chapter. An existing criminal history records check file may be transferred to the licensee asked to grant unescorted access in accordance with the provisions of § 37.61(a)(3).

(5) All fingerprints obtained by a licensee under this subpart must be submitted to the Commission.

(6) Licensees shall review the criminal history records as part of the trustworthiness and reliability evaluation for each individual seeking unescorted access authorization to category 1 or category 2 quantities of radioactive material.

(7) Licensees shall use the information obtained as part of a criminal history records check solely for the purpose of determining an individual's suitability for unescorted access authorization to category 1 or category 2 quantities of radioactive materials or access to Safeguards Information.

(c) *Prohibitions.* (1) Licensees may not base a final determination to deny an individual unescorted access authorization to category 1 or category 2 quantities of radioactive material solely on the basis of information received from the FBI involving:

(i) An arrest more than 1 year old for which there is no information of the disposition of the case; or

(ii) An arrest that resulted in dismissal of the charge or an acquittal.

(2) Licensees may not use information received from a criminal history records check obtained under this subpart in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States, nor shall licensees use the information in any way that would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

(d) *Procedures for processing of fingerprint checks.* (1) For the purpose of complying with this subpart, licensees and applicants shall use an appropriate method listed in § 37.5, Communications, to submit to the Office of Administration, Security Processing Unit, Mail Stop TWB-05 B32M, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0012, one completed, legible standard fingerprint card (Form FD-258, ORIMDNRCOOOZ) or, where practicable, other fingerprint record for each individual requiring unescorted access to category 1 or category 2 quantities of radioactive material. Copies of these forms may be obtained by writing the Office of Information Services, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by calling (301) 415-7232, or by e-mail to [FORMS.Resource@nrc.gov](mailto:FORMS.Resource@nrc.gov). Acceptable alternative formats are referenced in § 37.5. The licensee shall establish procedures to ensure that the quality of the fingerprints taken minimizes the rejection rate of fingerprint cards due to illegible or incomplete cards.

(2) The Commission will review applications for criminal history records checks for completeness. Any Form FD-258 or other fingerprint record containing omissions or evident errors will be returned to the licensee for corrections. The fee for processing fingerprint checks includes one free resubmission if the initial submission is returned by the FBI because the fingerprint impressions cannot be classified. The one free resubmission must have the FBI Transaction Control Number reflected on the resubmission. If additional submissions are necessary, they will be treated as an initial submittal and require a second payment of the processing fee. The payment of a new processing fee entitles the submitter to an additional free resubmittal, if necessary. Previously rejected submissions may not be included with the third submission because the submittal will be rejected automatically.

(3)(i) Fees for the processing of fingerprint checks are due upon application. Licensees shall submit payment with the application for the processing of fingerprints through corporate check, certified check, cashier's check, money order, or electronic payment, made payable to "U.S. NRC." (For guidance on making electronic payments, contact the Security Branch, Division of Facilities and Security, at (301) 415-7404). Combined payment for multiple applications is acceptable.

(ii) The application fee is the sum of the user fee charged by the FBI for each fingerprint card or other fingerprint record submitted by the NRC on behalf of a licensee, and an administrative processing fee assessed by the NRC. The NRC processing fee covers administrative costs associated with NRC handling of licensee fingerprint submissions. The Commission publishes the amount of the fingerprint check application fee on the NRC public Web site. (To find the current fee amount, go to the Electronic Submittals page at <http://www.nrc.gov/site-help/e-submittals.html> and select the link for the Criminal History Program.) The Commission will directly notify licensees who are subject to this regulation of any fee changes.

(4) The Commission will forward to the submitting licensee or applicant all data received from the FBI as a result of the licensee's or applicant's application(s) for criminal history records checks.

**§ 37.41 Relief from fingerprinting, identification, and criminal history records checks and other elements of background investigations for designated categories of individuals permitted unescorted access to certain radioactive materials or other property.**

Fingerprinting, and the identification and criminal history records checks required by section 149 of the Atomic Energy Act of 1954, as amended, and other elements of background checks are not required for the following individuals prior to granting unescorted access to category 1 or category 2 quantities of radioactive materials

(a) An employee of the Commission or of the Executive Branch of the U.S. Government who has undergone fingerprinting for a prior U.S. Government criminal history check;

(b) A Member of Congress;

(c) An employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history check;

(d) The Governor of a State or his or her designated State employee representative;

(e) Federal, State, or local law enforcement personnel;

(f) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;

(g) Agreement State employees conducting security inspections on behalf of the NRC pursuant to an agreement executed under section 274.i. of the Atomic Energy Act;

(h) Representatives of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who have been certified by the NRC;

- (i) Emergency response personnel who are responding to an emergency;
- (j) Commercial vehicle drivers for road shipments of category 2 quantities of radioactive material;
- (k) An individual who has a favorably adjudicated U.S. Government criminal history record check within the last five (5) years, pursuant to a comparable U.S. Government program involving fingerprinting and an FBI identification and criminal history records check (e.g. National Agency Check, Transportation Worker Identification Credentials (TWIC) in accordance with 49 CFR 1572, Bureau of Alcohol Tobacco Firearms and Explosives background check and clearances in accordance with 27 CFR 555, Health and Human Services security risk assessments for possession and use of select agents and toxins in accordance with 42 CFR 73, Hazardous Material security threat assessment for hazardous material endorsement to commercial drivers license in accordance with 49 CFR 1572, Customs and Border Patrol's Free and Secure Trade (FAST) Program); and
- (l) Any individual who has an active federal security clearance, provided that they make available the appropriate documentation. Written confirmation from the Agency/employer who granted the federal security clearance or reviewed the criminal history record check must be provided to the licensee. The licensee must retain this documentation for a period of three (3) years from the date the individual no longer requires access to the facility.

**§ 37.61 Protection of information.**

- (a)(1) Each licensee and applicant who obtains background information on an individual under this subpart shall establish and maintain a system of files and procedures for protection of the record and the personal information from unauthorized disclosure.
- (2) The licensee or applicant may not disclose the record or personal information collected and maintained to persons other than the subject individual, his or her representative, or to those who have a need to have access to the information in performing assigned duties in the process of granting or denying unescorted access to category 1 or category 2 quantities of radioactive material or Safeguards Information. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need to know.
- (3) The personal information obtained on an individual from a background investigation may be transferred to another licensee:
  - (i) Upon the individual's written request to the licensee holding the data to re-disseminate the information contained in his/her file; and
  - (ii) The gaining licensee verifies information such as name, date of birth, social security number, sex, and other applicable physical characteristics for identification.
- (4) The licensee shall make background investigation records obtained under this subpart available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.
- (5) The licensee shall retain all fingerprint and criminal history records received from the FBI, or a copy if the individual's file has been transferred, on an individual (including data indicating no

record) for 3 years after termination or denial of unescorted access authorization to category 1 or category 2 quantities of radioactive material.

**§ 37.63 Reviews and corrective action.**

(a) Each licensee shall be responsible for the continuing effectiveness of the access authorization program. Each licensee shall ensure that access authorization programs are reviewed to confirm compliance with the requirements of this subpart and that comprehensive actions are taken to correct any non-conformance that is identified. The review program shall evaluate all program performance objectives and requirements. The review team shall include at least one person who is knowledgeable and practiced in access authorization program performance objectives to assist in the overall assessment of the site's program effectiveness. Each licensee shall ensure that its entire access program is reviewed nominally every 24 months. Licensees are responsible for determining the appropriate frequency, scope, and depth of additional review activities within the nominal 24-month period based on the review of program performance indicators, such as the frequency, nature, and severity of discovered problems, personnel or procedural changes, and previous audit findings.

(b) The results of the reviews, along with any recommendations, must be documented. Each review report must identify conditions that are adverse to the proper performance of the access authorization program, the cause of the condition(s), and, when appropriate, recommend corrective actions, and corrective actions taken. The licensee shall review the findings and take any additional corrective actions, to include re-assessment of the deficient areas where indicated, to preclude repetition of the condition.

(c) Review records shall be maintained for 5 years.