

Pursuant to the authority vested in the Public Health Council by sections 225(5)(p) and 225(5)(q) of the Public Health Law and in the Commissioner of Health by section 201(1)(r), of the Public Health Law, Part 16 of the State Sanitary Code, contained in Chapter I of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended by adding a new section 16.112, to be effective upon publication of the Notice of Adoption in the New York State Register, to read as follows:

#### Section 16.112 Fingerprinting and criminal background check requirements

##### (a) Applicability.

This section applies to any licensee who possesses, or is authorized to possess, radioactive material that is: (1) listed in Table 1 (“Radionuclides of Concern”) of this Section and (2) in a quantity equal to or exceeding that listed in Table 1.

##### (b) Definitions

- (1) Trustworthiness and Reliability (T&R) Official means an individual appointed by the licensee who is responsible for determining the trustworthiness and reliability of another individual requiring unescorted access to one or more radioactive materials identified in Table 1 of this section.
- (2) “Affected individual” means an individual who has or is seeking unescorted access to radioactive material identified in Table 1 of this section in a quantity equal to or exceeding that listed in Table 1.

(3) “Unescorted access” means access without an escort to radioactive material identified in Table 1 of this section which is in a quantity equal to or exceeding that listed in Table 1.

(c) The T&R Official, if he/she does not require unescorted access, must be deemed trustworthy and reliable by the Licensee in accordance with its Increased Controls license conditions before making a determination regarding the trustworthiness and reliability of another individual. If the T&R Official requires unescorted access, the Licensee must consider the results of the Federal Bureau of Investigation (FBI) identification and criminal history records check before approving a T&R Official.

(d) Prior to requesting fingerprints from any individual, the Licensee shall provide a copy of this section to that person.

(e) Upon receipt of the results of FBI identification and criminal history records checks, the Licensee shall control such information as specified in subdivision (i) of this section and its Increased Controls license conditions.

(f) Specific Requirements Pertaining to Fingerprinting and Criminal History Records Checks

(1) Each Licensee subject to the provisions of this section shall fingerprint each affected individual.

(2) For affected individuals employed by the Licensee for three years or less, and for affected individuals who are nonlicensee personnel, such as physicians, physicists, house-keeping personnel, and security personnel under contract, trustworthiness and reliability shall be determined, at a minimum, by verifying employment history, education, personal references, and fingerprinting and the review of an FBI identification and criminal history records check.

(3) The Licensee shall also obtain independent information to corroborate that provided by the employee (e.g. seeking references not supplied by the individual). For an affected individual employed by the Licensee for longer than three years, trustworthiness and reliability shall be determined, at a minimum, by a review of the employee's employment history with the Licensee and fingerprinting and an FBI identification and criminal history records check.

(4) Service provider Licensee employees who are affected individuals shall be escorted unless they are determined to be trustworthy and reliable by a NRC-required background investigation. Written verification attesting to or certifying the person's trustworthiness and reliability shall be obtained by the Licensee from the Licensee providing the service.

(5) The Licensee must submit one completed, legible standard FBI fingerprint card (Form FD-258,ORIMDNRCOOOZ)<sup>1</sup> for each affected individual, to the NRC's Division of Facilities and Security. The name and address of the individual (T&R Official) to whom the criminal history records should be returned must be included with the submission.

(6) The Licensee shall review and use the information received from the FBI identification and criminal history records check as part of its trustworthiness and reliability determination required by its Increased Controls license conditions.

(7) The Licensee shall notify each affected individual that his/her fingerprints will be used to secure a review of his/her criminal history record and inform the affected individual of the procedures for revising the record or including an explanation in the record, as specified in subdivision (h) of this section.

(8) Fingerprints for unescorted access need not be taken if an employed individual (e.g., a Licensee employee, contractor, manufacturer, or supplier) is:

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

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1. Copies of these forms may be obtained from NRC. The Licensee shall establish procedures to ensure that the quality of the fingerprints taken results in minimizing the rejection rate of fingerprint cards due to illegible or incomplete cards. Licensees must have fingerprints taken by local law enforcement (or a private entity authorized to take fingerprints) because an authorized official must certify the identity of the person being fingerprinted. If the FBI advises the fingerprints are unclassifiable based on conditions other than poor quality, the Licensee must submit a request to NRC for alternatives. When those search results are received from the FBI, no further search is necessary. The NRC will receive and forward to the submitting Licensee all data from the FBI as a result of the Licensee's application(s) for criminal history records checks, including the FBI fingerprint record(s).

- (ii) A Member of Congress;
- (iii) An employee of a member of Congress or Congressional committee who has undergone fingerprinting for a prior U.S. Government criminal history check;
- (iv) The Governor or his or her designated State employee representative;
- (v) Federal, State, or local law enforcement personnel;
- (vi) State Radiation Control Program Directors and State Homeland Security Advisors or their designated State employee representatives;
- (vii) 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; or
- (viii) documentation is provided which demonstrates that the employed individual has been favorably-decided by a U.S. Government program involving fingerprinting and an FBI identification and criminal history records check within the last five calendar years of the effective date of this regulation, or documentation is provided which demonstrates that any person has an active federal security clearance. Written confirmation from the agency/employer which granted the federal security clearance or reviewed the FBI criminal history records results based upon a fingerprint identification check must be provided. The Licensee must retain this documentation for a period of three (3) years from the date the employed individual no longer requires unescorted access associated with the Licensee's activities.

(9) All fingerprints obtained by the Licensee pursuant to this section must be submitted to the NRC. Additionally, the Licensee shall submit a certification of the trustworthiness

and reliability of the T&R Official as determined in accordance with 16.112(c) to the NRC with each submission of fingerprints.

(10) The Licensee shall review and use the information received from the FBI identification and criminal history records check and consider it as part of its trustworthiness and reliability determination, in conjunction with the trustworthiness and reliability requirements set forth in its Increased Controls license conditions, in making a determination whether to grant an affected individual unescorted access. The Licensee shall use any information obtained from a criminal history records check solely for the purpose of determining an affected individual's suitability for unescorted access.

(11) The Licensee shall document the basis for its determination whether to grant, or continue to allow, an affected individual unescorted access.

(12) Licensees shall notify the Department and the U.S. NRC Headquarters Operations Office by telephone within 24 hours if the results from a FBI identification and criminal history records check indicate an individual is listed on the FBI Terrorist Screening Data Base.

(g) Prohibitions

(1) A Licensee shall not base a final determination to deny an affected individual unescorted access solely on the basis of information received from the FBI involving:

(i) an arrest more than one (1) year old for which there is no information regarding the disposition of the case, or

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

(2) A Licensee shall not use information received from a criminal history records check obtained pursuant to this section in a manner that would infringe upon the rights of any individual under the First Amendment to the Constitution of the United States or Article 1 of the New York State Constitution, nor shall the Licensee use the information in any way which would discriminate among individuals on the basis of race, religion, national origin, sex, or age.

#### (h) Right to Correct and Complete Information

Prior to any final adverse determination, the Licensee shall make available to the affected individual the contents of any criminal records obtained from the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the Licensee for a period of one (1) year from the date of the notification. If, after reviewing the record, an affected individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either a direct application by the

individual challenging the record to the agency (i.e., 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 FBI Identification Division.<sup>2</sup> The Licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of a FBI criminal history records check after the record is made available for his/her review. The Licensee may make a final unescorted access determination based upon an individual's criminal history record only upon receipt of the FBI's confirmation or correction of the record. Upon a final adverse determination on unescorted access the Licensee shall provide the individual its documented basis for denial. Unescorted access shall not be granted to an individual during the review process.

(i) Protection of Information

(1) Each Licensee who obtains a criminal history record on an affected individual pursuant to this section shall establish and maintain a system of files and procedures for protecting the record and the personal information in the record from unauthorized disclosure.

(2) The Licensee may not disclose the record or personal information collected and maintained to persons other than the affected individual, his/her representative, or to those who have a need to access the information in performing assigned duties in the

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<sup>2</sup> In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an official communication directly from the agency that

process of determining unescorted access. No individual authorized to have access to the information may disseminate the information to any other individual whose job duties do not require such information.

(3) The personal information obtained on an affected individual from a criminal history record check may be transferred to another Licensee if the Licensee holding the criminal history record check receives the affected individual's written request to provide the information contained in his/her file, and the receiving Licensee verifies information such as the affected individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

(4) The Licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the Department to determine compliance with this section.

(5) The Licensee shall retain all fingerprint and criminal history records from the FBI, or a copy if the affected individual's file has been transferred, for three (3) years after termination of employment or determination of unescorted access (whether unescorted access was approved or denied). After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.

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contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency (see 28 CFR Part 16.30 through 16.34).

Table 1: Radionuclides of Concern

Radionuclide	Quantity of Concern <sup>1</sup> (TBq)	Quantity of Concern <sup>2</sup> (Ci)
Am-241	0.6	16
Am-241/Be	0.6	16
Cf-252	0.2	5.4
Cm-244	0.5	14
Co-60	0.3	8.1
Cs-137	1	27
Gd-153	10	270
Ir-192	0.8	22
Pm-147	400	11,000
Pu-238	0.6	16
Pu-239/Be	0.6	16
Ra-226	0.4	11
Se-75	2	54
Sr-90 (Y-90)	10	270
Tm-170	200	5,400
Yb-169	3	81
Combinations of radioactive materials listed above <sup>3</sup>	See Footnote Below <sup>4</sup>	

<sup>1</sup> The aggregate activity of multiple, collocated sources of the same radionuclide should be included when the total activity equals or exceeds the quantity of concern.

<sup>2</sup> The primary values used for compliance with this Order are tera becquerel (TBq).

<sup>3</sup> Radioactive materials are to be considered aggregated or co-located if breaching a common physical security barrier (e.g., a locked door at the entrance to a storage room) would allow access to the radioactive material or devices containing the radioactive material.

<sup>4</sup> If several radionuclides are aggregated, the sum of the ratios of the activity of each source,  $i$  of radionuclide,  $n$ ,  $A_{(i,n)}$ , to the quantity of concern for radionuclide  $n$ ,  $Q_{(n)}$ , listed for that radionuclide equals or exceeds one. That is:

$$\sum_n \left\{ \sum_i \frac{A_{i,n}}{Q_n} \right\} \geq 1$$

## **REGULATORY IMPACT STATEMENT**

### **Statutory Authority:**

The Public Health Council is authorized by Section 225(4) of the Public Health Law (PHL) to establish, amend and repeal sanitary regulations to be known as the State Sanitary Code (SSC), subject to the approval of the Commissioner of Health. PHL Sections 225(5)(p) & (q) and 201(1)(r) authorize SSC regulation of the public health aspects of ionizing radiation. These provisions authorize the regulation of radioactive materials.

The Atomic Energy Act (see 42 USC §§ 2021(j)(1), 2021(o), and 2022) requires Agreement States such as New York to comply with and adopt federal standards or risk jeopardizing their authority to regulate certain radioactive material. The proposed regulatory changes to institute fingerprinting and criminal history records check requirements incorporate these federal standards.

### **Legislative Objectives:**

The legislative objectives of PHL Sections 225(5) and 201(1)(p) and (q) are to protect public health and safety. The proposed regulations enhance the security of radioactive material and are consistent with these purposes.

### **Needs and Benefits:**

The possession and use of radioactive material is regulated by the United States Nuclear Regulatory Commission (NRC). The NRC has relinquished that authority to states that have entered into agreements with NRC whereby the “Agreement State” takes over the authority for regulation of radioactive material. New York became the fourth Agreement State in 1962. Currently, 35 Agreement States exist.

The Department of Health (DOH) regulates the use of radioactive material at approximately 1,100 facilities in order to protect people and the environment. DOH radioactive material licensees have the primary responsibility of maintaining the security and accountability of the radioactive material in their possession. The events of 9/11 put new emphasis on security to prevent the malicious use of radioactive material, such as in dirty bombs. In 2002, the New York State Office of Public Security commissioned a study of radioactive material security in the State. A task force comprised of state and federal radiation and security experts evaluated the current security posture. This evaluation included reviewing existing regulatory structures, policies and procedures and making site visits to several different types of facilities that possess and use radioactive materials. The task force developed several recommendations to improve radioactive material security. One of those recommendations was to explore using background investigations for assessing employees who have access to certain quantities of radioactive materials.

In 2005, DOH implemented new security requirements called Increased Controls (ICs) on radioactive material licensees that possess certain quantities of radioactive materials. The

NRC imposed ICs on their licensees as well. The ICs included requirements for enhancing physical security of radioactive materials, coordination of security plans with local law enforcement and procedures for limiting unescorted access to radioactive materials to only those who have been determined to be trustworthy and reliable (T&R). The T&R determination is based on an evaluation of the individual's work history, employment records and personal references but does not include fingerprinting and Federal Bureau of Investigation (FBI) criminal background checks.

On August 8, 2005, section 652 of the federal Energy Policy Act of 2005 (EPAct) was enacted. This provision amended the fingerprinting requirements of the Atomic Energy Act (AEA). Specifically, the EPAct amended Section 149 of the AEA (see 42 USC § 2169) to require fingerprinting and an FBI identification and criminal history records check for “any individual who is permitted unescorted access to radioactive materials or other property subject to regulation by the Commission [NRC] that the Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and background checks.” Therefore, in accordance with Section 149 of the AEA, as amended by the EPAct, on December 2, 2007, NRC imposed fingerprinting and FBI identification and criminal history records check requirements on all NRC IC licensees with an effective date of June 2, 2008 (NRC Order EA-07-305). Also, NRC directed the Agreement States to implement the fingerprinting requirements established in EA-07-305 on their licensees by the June 2, 2008 deadline. DOH has determined that such requirements must be established in regulation. Since DOH must establish these requirements in regulation, New York is the

only state not to have implemented the fingerprinting requirements on its radioactive material licensees by the June 2, 2008 deadline. The NRC and all other Agreement States were able to impose the fingerprinting requirements immediately via department orders or license conditions.

**Costs:**

The cost impact of these regulations is a total of \$50 for each affected individual: \$36 for the FBI identification and criminal history records check and \$10-15 for fingerprint impressions by a law enforcement agency. The latter cost varies with jurisdiction. This cost will apply to several New York State government entities including DOH, Roswell Park Cancer Center, State Emergency Management Office, and the State University of New York.

**Local Government Mandates:**

No local governments, county, city, town, village, school district, fire department or any other district possess the type or quantity of radioactive materials that would subject them to fingerprinting requirements.

**Paperwork:**

Licensees will need to obtain fingerprint cards from the NRC. Also, licensees will need to maintain records of fingerprinting, criminal history and identification checks and trustworthiness and reliability determinations for review by DOH.

**Duplication:**

There is no duplication of this requirement by any federal, state or local agency. New York State entered into an agreement with the federal government on October 15, 1962 by which the federal government discontinued its regulatory authority and New York assumed such authority.

**Alternatives:**

Taking no action was rejected as being inconsistent with State policies on public security. No other alternative exists for obtaining a FBI criminal background check.

**Federal Standards:**

These proposed fingerprinting and criminal background and identification checks are NRC standards based on the EPCAct.

**Compliance Schedule:**

The proposed rule was implemented as an emergency rule on November 18, 2008. It is expected that all affected licensees will have already implemented the requirements in the emergency rule before the adoption of the proposed rule. Applicants for a new radioactive materials license that authorizes the possession of radioactive material in quantities greater than those listed in Table 1 must comply with the requirements in section 16.112 prior to receiving such license.

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## **REGULATORY FLEXIBILITY ANALYSIS FOR SMALL BUSINESSES AND LOCAL GOVERNMENTS**

### **Effect of rule:**

No local governments possess the quantity and type of radioactive material that would subject them to the proposed rule. There are 10 small businesses affected by this regulation. Prior to the implementation of the emergency rule, program staff contacted these facilities and three had already implemented the requirements since they have offices in other states and must comply with the NRC fingerprinting requirements in those states. At that time all of the facilities contacted were aware of the regulations and while some facilities had questions on implementation and timing no one expressed opposition to the fingerprinting requirements.

### **Compliance requirements:**

All affected facilities are required to establish policies and procedures for implementing the fingerprinting requirements, including designating a Trustworthy and Reliable (T&R) Official, obtaining fingerprint cards from the Nuclear Regulatory Commission (NRC), having the fingerprints taken by local law enforcement, and submitting the cards to the NRC. The T&R Official will receive and review the results of the criminal history records check and then make a determination on unescorted access for each affected

individual. Also the T&R Official must notify the Department of Health (DOH) if any individual is identified on the Federal Bureau of Investigation (FBI) terror watchlist.

Records of approvals for unescorted access must be maintained for inspection by DOH.

The proposed regulations do not impose significant new requirements since affected facilities are already implementing procedures for determining the trustworthiness and reliability of these individuals. The proposed regulations will require that they take fingerprints and use the criminal history records check as part of their T&R determination.

**Professional services:**

Licensees will need the services of the FBI to perform the criminal history records check. Services of a law enforcement agency or other authorized party will be needed to verify identification and collect fingerprints.

**Compliance costs:**

The FBI criminal history records check cost is \$36 per individual, and the fee for taking fingerprinting is estimated to be \$10 -\$15 per individual. These are one-time costs per individual, not recurring or annual costs. Approximately four to six persons from each small business will be subject to fingerprinting. Indirect costs are estimated to be one hour of work time for fingerprinting for each individual.

**Economic and Technological Feasibility:**

There are no capital costs or new technology required to comply with the proposed rule.

**Minimizing Adverse Impacts:**

The proposed rule establishes requirements for obtaining and using information on an individual's criminal history for allowing access to radioactive material. However the proposed rule does not set criteria for making this determination. It is up to the licensee to set the criteria and make a determination on each affected individual. Since affected licensees already make T&R determinations using other criteria, DOH does not foresee significant adverse impacts as result of the proposed rule. Further, since there are a limited number of affected facilities, DOH intends to conduct workshops to assist licensees with any questions related to implementing the fingerprinting requirements.

**Participation:**

DOH issued a notice to all affected licensees in June 2007 informing them that the NRC was considering requirements requiring criminal history record checks as part of the T&R determination and that such requirements may be implemented in New York State (NYS). In October 2007, DOH initiated a series of statewide workshops on security of radioactive materials for NRC licensees that have received the Increased Controls (IC)

requirements. At the three most recent workshops conducted in Long Island, Buffalo and Rochester, the new fingerprinting requirements were discussed. In June 2008, another notice was sent to affected licensees informing them that DOH is moving forward with developing regulations requiring fingerprinting and FBI criminal background checks. Further the NRC has developed a web page for commonly asked questions. Since the proposed rule is essentially the same as the NRC requirements (NRC Order EA-07-305), NYS facilities are encouraged to use the NRC web page.

## **RURAL AREA FLEXIBILITY ANALYSIS**

### **Types and estimated numbers of rural areas:**

There are 55 facilities outside of New York City (NYC) that are affected by this regulation. The NYC Department of Health and Mental Hygiene will impose the same requirements on 24 facilities it regulates. The State Department of Health (DOH) facilities are generally located in larger cities. A few licensees (industrial radiographers) are in commercially zoned facilities near metropolitan areas.

### **Reporting, recordkeeping and other compliance requirements and professional services:**

Licensees will be required to obtain, process and mail fingerprint cards to the Nuclear Regulatory Commission (NRC). Licensees will maintain records of fingerprinting activities including determinations of trustworthiness and reliability for review by DOH. Licensees must notify the department if any individual is identified on the Federal Bureau of Investigation (FBI) terror watchlist. The need for professional services will be limited to use of the applicable local law enforcement for fingerprint impressions.

### **Costs:**

The cost estimate for regulated parties is approximately \$50 for each applicable individual. This includes \$36 for the NRC to process the FBI identification and criminal history records check and approximately \$10-15 for taking fingerprint impressions by a law enforcement agency. The latter varies with jurisdiction.

**Minimizing adverse impact:**

There are no alternatives with respect to rural areas. All affected licensees will need to use the services of an approved entity to take fingerprints.

**Rural area participation:**

The Department issued a notice to all affected licensees in June 2007 informing them that the NRC was considering requirements requiring criminal history record checks as part of the T&R determination and that such requirements may be implemented in New York State (NYS). In October 2007, the Department initiated a series of statewide workshops on security of radioactive materials for DOH Increased Controls licensees. At the three most recent workshops conducted in Long Island, Buffalo and Rochester the new fingerprinting requirements were discussed. In June 2008, another notice was sent to affected licensees informing them that DOH was moving forward with developing regulations requiring fingerprinting and FBI criminal background checks. Further the NRC has developed a web page for commonly asked questions. Since the proposed rule

is essentially the same as the NRC requirements (NRC Order EA-07-305), NYS facilities are encouraged to use the NRC web page.

## **JOB IMPACT STATEMENT**

### **Nature of Impact:**

It is anticipated that few, if any, persons will be adversely affected. The fingerprinting and criminal background check is an additional element or enhancement to the existing trustworthy and reliability (T&R) determination requirement. Department of Health (DOH) inspections of these facilities during 2007 indicated that all persons were deemed to be trustworthy and reliable. No person was adversely affected by that evaluation. A history of criminal activity is not automatically disqualifying. The T&R Official will review an individual's record of criminal activity and determine if that individual will be granted unescorted access to the applicable radioactive materials. If the determination indicates that an individual should not have unescorted access to radioactive materials, the person may be permitted to have escorted access. However, a situation where the licensee has no means to provide an escort, or has limited availability of an escort (e.g., shift work), could result in an affected individual not being able to perform tasks and duties that require access to applicable radioactive sources. In such situations the licensee may need to reassign the individual to tasks that do not require unescorted access, or reschedule tasks based on an escort's schedule.

### **Categories and numbers affected:**

DOH inspections indicate that approximately 500 persons will be subject to fingerprinting, including physicians and medical staff, researchers/scientists, laboratory workers, and industrial radiographers.

**Regions of adverse impact:**

No region will be disproportionately affected. The affected facilities are larger hospitals, universities, blood banks, research institutions and industrial radiographers. The affected parties are not rural entities.

**Minimizing adverse impact:**

The intent of a fingerprint check is to provide additional information on an employee's personal history. The licensee's T&R official will make a determination of an employee's trustworthiness and reliability based on various factors (employment history, education, etc.) and the results of the criminal activity report. A history of criminal activity is not automatically disqualifying. The licensee, not DOH, will establish disqualifying criteria.

Not all individuals who use radioactive sources will require a criminal background check. If the radioactive material is used in the presence of more than one individual only one of those individuals must be determined to be trustworthy and reliable and may escort other individuals. During inspections of the affected licensees, DOH inspectors determine if the applicable radioactive sources are generally used in the presence of several persons.

The use of radiation therapy units in hospitals involves a team of individuals including physicians, medical therapy physicists, nurses, and radiation therapy technologists. Use of industrial radiography sources is subject to two-person rule, meaning that two qualified individuals must be present. Blood banks/services are typically operated continuously (24/7) with several persons present.