

RULEMAKING ISSUE  
(Notation Vote)

April 9, 2010

SECY-10-0045

FOR: The Commissioners

FROM: R. W. Borchardt  
Executive Director for Operations

SUBJECT: PROPOSED RULE: REQUIREMENTS FOR  
FINGERPRINT-BASED CRIMINAL HISTORY RECORDS  
CHECKS FOR INDIVIDUALS SEEKING UNESCORTED ACCESS  
TO RESEARCH OR TEST REACTORS (RIN 3150-AI25)

PURPOSE:

To request Commission approval to publish a proposed rule in the *Federal Register* (FR) that would amend Title 10 of the *Code of Federal Regulations* (10 CFR) 73.57, "Requirements for Criminal History Records Checks of Individuals Granted Unescorted Access to a Nuclear Power Facility or Access to Safeguards Information," to add research and test reactor (RTR) licensees to the scope of licensees subject to fingerprinting requirements for unescorted access.

SUMMARY:

The proposed rule would amend 10 CFR 73.57 to require that licensees for RTRs (also referred to as nonpower reactors) be subject to fingerprint-based criminal history records check requirements for individuals who seek unescorted access at their facilities. This action is necessary to comply with the requirements of Section 652 of the Energy Policy Act of 2005 (EPAAct), which amended Section 149 of the Atomic Energy Act of 1954, as amended (AEA), to require fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal

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history records check of any person who is permitted unescorted access to a utilization facility. In the longer term, the Commission will need to consider whether to modify the previously issued orders on this matter for RTR licensees.

#### BACKGROUND:

Section 652 of the EAct of 2005, enacted on August 8, 2005, amended the AEA fingerprinting requirements. Specifically, the EAct amended Section 149 of the AEA to require fingerprinting and FBI identification and criminal history records checks before anyone may have unescorted access to any utilization facility (including RTRs) or radioactive material or other property subject to regulation by the U.S. Nuclear Regulatory Commission (NRC) that the NRC determines to be of such safety significance to the public health and safety as to warrant fingerprinting and background checks.

In SECY-05-0201, "Implementation of the Energy Policy Act", dated October 31, 2005, the NRC staff informed the Commission of the staff's plan for implementing the NRC's responsibilities under the EAct and requested Commission approval of the staff's funding recommendation for fiscal year (FY) 2006. The Commission approved the staff's recommendations and directed the staff to identify appropriate interim regulatory actions that the NRC should implement while it developed the generic requirements for granting unescorted access, including those in Section 652 of the EAct on fingerprinting.

In SECY-07-001, "Interim Implementation of Fingerprinting Requirements in Section 652 of Energy Policy Act 2005", dated January 12, 2007, the NRC staff provided information and recommendations to the Commission on its EAct interim implementation plan. In a Staff Requirements Memorandum (SRM), "Staff - Requirements Interim Implementation of Fingerprinting Requirements in Section 652 of Energy Policy Act 2005," dated March 12, 2007, the Commission directed the NRC staff to issue orders to RTRs to require fingerprint-based criminal history records checks for individuals requesting unescorted access to risk-significant areas or materials within these facilities. The Commission also directed the NRC staff to proceed with a rulemaking and, as part of that rulemaking, to determine whether to require fingerprint-based criminal history records checks for additional personnel beyond those specified in the orders.

The NRC imposed fingerprinting requirements for unescorted access on the applicable RTR licensees by order (Order EA-07-074, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Research and Test Reactors," dated April 30, 2007 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML070750140), and Order EA-07-098, "Order Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access To the General Atomics' Research and Test Reactors (Effective Immediately)," dated August 1, 2007 (ADAMS Accession No. ML072050494)). The NRC required licensees to submit the fingerprints of individuals who were seeking or who currently had unescorted access. Individuals who had previously undergone fingerprinting that would satisfy the requirements for unescorted access (e.g., access to Safeguards Information (SGI)) did not need to be fingerprinted again. These orders required that an NRC-approved reviewing official consider the results of the FBI criminal history records

check in conjunction with other applicable requirements to determine whether an individual may be granted or allowed continued unescorted access<sup>1</sup>. The reviewing official could be the same official that the NRC previously approved for the SGI order (Order EA-06-203, "Issuance of Order Imposing Fingerprinting and Criminal History Records Check Requirements for Access to Safeguards Information," dated September 29, 2006 (ADAMS Accession No. ML061510049)).

#### Advance Notice of Proposed Rulemaking

On April 14, 2009, the NRC published an advanced notice of proposed rulemaking (ANPR) (74 FR 17115) to obtain stakeholder views on the issues associated with the proposal to require fingerprint-based criminal history records checks for individuals granted unescorted access to RTRs. The ANPR indicated that the NRC was beginning the process of establishing generic requirements for RTR licensees to obtain fingerprint-based criminal history records checks on individuals having unescorted access to their facilities. The ANPR was intended to inform external stakeholders of the options that the NRC was considering for implementing the fingerprinting requirements (as a rulemaking) for RTR licensees.

The ANPR provided interested stakeholders an opportunity to comment on the options under NRC consideration. The NRC received seven letters in response to its ANPR—four from RTR licensees; one from the Nuclear Energy Institute; one from the National Organization of Test, Research and Training Reactors; and one from an individual. In addition, the staff considered comments it received during the public workshop held on June 4, 2009. Most of the commenters expressed the view that the NRC should codify the previously imposed NRC orders and should not include any additional requirements. Several NRC licensees expressed that the regulation should be "identical" to the orders and that expanding the requirement beyond the orders is "neither justifiable nor effective" and would cause an "undue burden on the effected licensees." Some licensees indicated that defining "areas of significance" for which unescorted access would be controlled, as suggested in the ANPR, could be problematic especially during normal operations. Commenters stated that the regulation should permit reciprocity of unescorted access authorization between licensed facilities and that the NRC should authorize the electronic transfer of fingerprints. Licensees also expressed that they should be permitted to submit fingerprints directly to FBI instead of through the NRC. They asked whether it would be appropriate for the regulation to reduce the burden on some small facilities by waiving the fee to have the fingerprint check performed, based on the reasoning for exempting universities from paying the annual licensing fees. Commenters expressed concern that fingerprinting would not help determine the trustworthiness and reliability of foreign nationals and minors. The *Federal Register* Notice (FRN) for the proposed rule includes a detailed analysis of the public comments on the ANPR and their resolution.

Based on the feedback received on the ANPR and Commission direction, the NRC staff developed the enclosed proposed rulemaking FRN.

#### DISCUSSION:

The proposed amendments would establish generically applicable fingerprinting requirements for RTR licensees similar to those previously imposed by the Commission orders for the granting

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<sup>1</sup> The NRC does not currently require approval of reviewing officials for power reactors.

of unescorted access. Specifically, the proposed amendments would implement the requirements in Section 149(a)(1)(B)(i)(I) of the AEA that the Commission require to be fingerprinted any individual who is permitted unescorted access to a utilization facility. Section 149 of the AEA grants the NRC the authority to impose FBI fingerprint-based identification and criminal history records checks for individuals seeking unescorted access at a broader range of NRC licensees and regulated facilities. Before the EPAct amended Section 149, the NRC required fingerprinting for unescorted access to facilities licensed under Sections 103 and 104b of the AEA. Because of the amendment, which eliminated the references to Sections 103 and 104b, utilization facilities licensed under Section 104c (i.e., RTR licensees) of the AEA, which were not previously subject to these requirements, are now required to meet these fingerprint requirements, and the primary focus of this proposed rulemaking is this specific expansion.

In developing these proposed provisions, the NRC staff recognized that when constructing requirements for RTR licensees, it should be cognizant of the direction in Section 104c of the AEA, which states, in part, that:

The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under the Act to promote common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

Accordingly, the staff has developed the provisions in the enclosed proposed rule notice in accordance with the requirements of Section 149 of the AEA and consistent with Section 104c of the AEA. The NRC staff recognizes that future nonpower utilization facilities (none of which are currently licensed) could be licensed under Section 103 of the AEA (e.g., molybdenum-99 medical isotope production facilities). The NRC staff concludes that the proposed provisions would establish an adequate set of minimum fingerprinting requirements for unescorted access at these Class 103 nonpower reactor facilities, but since such facilities do not currently exist, the NRC staff cannot contemplate at this time the specific challenges that these facilities may present. If the Commission decides that these fingerprinting requirements need supplementation for these hypothetical Class 103 nonpower utilization facilities, the NRC staff recommends that the Commission supplement these minimum requirements as necessary during the licensing process through the use of license conditions.

#### NRC Approved Reviewing Official

The proposed provisions contained in the enclosed FRN include a requirement that no person shall be permitted unescorted access to a nonpower reactor facility unless an NRC-approved reviewing official has determined that person to be trustworthy and reliable based on the results of an FBI fingerprint-based criminal history records check. This provision was also included in the orders previously issued by the NRC. The staff included this proposed provision to require an NRC-approved reviewing official because it is essential that the persons making the decision to grant unescorted access (the reviewing officials) be trustworthy and reliable, otherwise the entire process is fundamentally undermined. Consequently, the staff concludes that a trustworthy and reliable reviewing official is required to adequately implement the fingerprinting provisions of Section 149 of the AEA. One way to achieve this is to require NRC approval for

the reviewing official. The staff proposed this because it is the most straightforward and the simplest approach. This proposal would not impose new requirements on current RTR licensees since they are free to continue using the currently approved reviewing officials (i.e., approved as a result of the previous orders—either the unescorted access order or the SGI access order). It should be noted, however, that because Section 149 of the AEA only allows the collection of fingerprints from persons with either unescorted access or access to SGI, the proposed rule includes a provision that would require the reviewing official either have unescorted access or access to SGI.

### Vital Area

The Commission directed the staff to consider whether this rulemaking should expand the scope of fingerprinting for RTR unescorted access beyond that of the previously issued fingerprinting orders. The proposed provisions are largely consistent with the previous unescorted access orders, so in general the staff does not believe that a significant shift in the scope of persons fingerprinted is necessary. However, in constructing the proposed provisions of the rule, the staff did elect to use different terminology from that used in the unescorted access order. The staff designed the proposed provisions to use two different criteria: one focused on material (special nuclear material (SNM)) and one focused on an area (the vital area). The staff acknowledges the challenge in establishing generic rule language that works for the wide variety of RTR licensees and situations. The staff also notes that the two criteria may overlap significantly, and that in large measure, the SNM criterion (which is consistent with the previous unescorted access order) would in most situations determine whether an individual is required to be fingerprinted in accordance with the proposed provisions. The vital area criterion brings additional personnel within the scope of fingerprinting at higher powered RTRs where, for example, individuals who do not wish to have access to SNM (and therefore have not been fingerprinted), wish to have access to vital equipment. The staff also notes that historically, RTR licensees have usually associated the vital area with the storage of unirradiated highly enriched uranium, and that the principal security concern for most RTR facilities has been the theft and diversion of highly enriched uranium. However, the staff is using “vital area” in the enclosed provisions as defined in 10 CFR 73.2, “Definitions.” A vital area at a particular RTR will vary as a function of the facility design. Security assessments performed for a number of licensees can provide the licensees with insight into what constitutes a vital area.

### Proposed Fingerprinting Requirements

Nonpower reactor licensees would be added to the scope of 10 CFR 73.57 in order to employ the current fingerprint requirement provisions that the agency is using successfully for other licensees subject to an FBI fingerprint-based criminal history records check. This would ensure that RTR licensee fingerprints are handled in a manner that is both consistent with the process used for other licensees and that ensures that the NRC meets its obligations under the AEA for the handling and processing of fingerprints with FBI. Additionally, the inclusion of RTR licensees into 10 CFR 73.57 would provide RTR licensees with many of the reliefs afforded to other licensees subject to fingerprinting requirements.

The NRC would add proposed 10 CFR 73.57(g) to provide the new fingerprint-based criminal history records check requirements for RTR licensees. The scope of the proposed requirements is judged to be consistent with the previous orders on unescorted access that the agency issued

in 2007. Orders EA-07-074 and EA-07-098 require RTR licensees to conduct FBI fingerprint-based identification and criminal history records checks for individuals granted unescorted access to SNM at these facilities. The NRC issued the orders as interim measures until the agency could formulate generically applicable requirements for incorporation into the CFR. The staff expects that RTR licensees will need to evaluate their current security plans and procedures considering the definitions of vital area (in 10 CFR 73.2) and unescorted access in proposed 10 CFR 73.57(g), as well as any other security assessment information that might be available, to determine which individuals should be fingerprinted for unescorted access. The staff recognizes that RTR licensees may, for practical reasons, elect to fingerprint individuals who wish to have unescorted access within the controlled access area, since this would typically ensure that the proposed provisions are satisfied.

The staff expects that for most cases, the provisions of 10 CFR 73.57(g) would call for procedures similar to those currently used to implement the unescorted access and SGI access fingerprinting orders. More importantly, since the proposed fingerprinting provisions for RTRs would be added to 10 CFR 73.57, the proposed approach enables use of the fingerprinting procedures and handling requirements already incorporated into that section.

#### Additional Measures for Commission Consideration

As discussed above, the staff has designed the enclosed proposed provisions to implement the fingerprinting requirements mandated in Section 149 of the AEA for RTR licensees. During the development of these proposed provisions, the staff concluded that additional background investigation requirements may be appropriate for RTR licensees in order to provide greater confidence and validity to the unescorted access determinations. The additional background investigation requirements would provide the reviewing official important information to make an informed decision on the trustworthiness and reliability of the individual requesting unescorted access. For individuals that the FBI criminal history record checks returns no record, the additional background investigation elements may provide some information on which a licensee can make a decision to grant or deny unescorted access. The staff recognizes that the Commission is obligated under Section 104c of the AEA to establish the minimum requirements for RTR licensees and accordingly has not incorporated these additional background investigation requirements in the enclosed proposed rule. However, the staff does believe that it is constructive and worthwhile, as part of the enclosed proposed rule FRN, for the Commission to request public comment on whether additional investigatory elements should be required for unescorted access to nonpower reactors. The detailed questions, provided in the attached FRN, request public comment on whether background investigations supporting unescorted access at RTR facilities should also include background elements such as employment history, education, and personal references consistent with the definition of background check provided in 10 CFR 73.2 and with the recently revised more stringent SGI requirements (i.e., 10 CFR 73.21, "Protection of Safeguards Information: Performance Requirements"; 10 CFR 73.22, "Protection of Safeguards Information: Specific Requirements"; and 10 CFR 73.23, "Protection of Safeguards Information—Modified Handling: Specific Requirements").

The staff also notes that the proposed rule requirements in the enclosed FRN are less stringent than those imposed by order to byproduct material licensees, which required a trustworthiness

and reliability determination based on verification of employment history, education, and personal references, as well as fingerprinting and the review of an FBI criminal history records check. The proposed rule for 10 CFR Part 37 which is currently pending before the Commission, also calls for a background investigation that also includes a credit history check, local criminal history review, and verification of true identity in addition to the other elements. It should also be noted that some RTRs also possess byproduct material above the Category 2 threshold and would be subject to the background investigation elements of proposed 10 CFR Part 37.

In support of the request for comments included in the enclosed FRN, the staff has included an example of potential requirements that are intended to provide stakeholders a better understanding of how the agency might construct such requirements and thereby result in more informed feedback. Based on stakeholder feedback, the NRC would decide whether to revise the unescorted access requirements for RTR licensees further in a future rulemaking.

### Implementation

The staff recommends that the final rule provisions be effective 120 days after publication in the FR. This would provide time for licensees to develop or revise procedures and programs associated with the granting of unescorted access at their facilities. The staff believes that the majority of procedure and plan changes are currently in place as a result of the previously issued unescorted access order. The principal effort will be for RTR licensees to ensure that they revise the applicable procedures and plans as necessary to comply with the final 10 CFR 73.57(g) provisions. The staff has requested stakeholder feedback on the proposed 120-day effective date, as well as any other aggregate impacts that may adversely affect the ability of RTR licensees to implement the proposed fingerprinting provisions.

### COMMITMENTS:

None.

### RECOMMENDATIONS:

The staff recommends that the Commission take the following actions:

1. Approve for publication in the FR the proposed amendment to 10 CFR 73.57 (Enclosure 1).
2. Certify that this rule, if promulgated, will not have a significant impact on a substantial number of small entities. This certification is included in the enclosed FRN and satisfies the requirement of the Regulatory Flexibility Act (5 U.S.C. 605(b)).
3. Note the following:
  - a. The proposed amendments (Enclosure 1) will be published in the FR, allowing 75 days for public comment.

- b. The staff has prepared a draft regulatory analysis for this rulemaking (Enclosure 2).
- c. The staff will inform the appropriate congressional committees of this action.
- d. The NRC Office of Public Affairs will issue a press release when the proposed rulemaking is filed with the Office of the Federal Register.
- e. An Office of Management and Budget (OMB) review is required, and the staff will forward a clearance package to OMB no later than the date the proposed rule is submitted to the Office of the Federal Register for publication.

RESOURCES:

The resources required to complete the final rule have been budgeted in FY 2010 and requested in FY 2011 as follows: 0.9 full-time equivalent staff (FTE) for the Office of Nuclear Reactor Regulation (NRR), 0.1 FTE for the Office of the General Counsel (OGC), and 0.1 FTE for the Office of Administration (ADM) in FY 2010 and 0.8 FTE for NRR, 0.1 FTE for OGC, and 0.1 FTE for ADM in FY 2011.

COORDINATION:

OGC has no legal objection to the proposed rulemaking. The Office of the Chief Financial Officer has reviewed this Commission paper for resource implications and has no objections. The rule suggests changes in information collection requirements that must be submitted to OMB no later than the date the proposed rule is forwarded to the Office of the Federal Register for publication.

***/RA by Bruce S. Mallett for/***

R. W. Borchardt  
Executive Director  
for Operations

Enclosures:

1. *Federal Register* Notice
2. Draft Regulatory Analysis
3. Regulatory Analysis Appendix



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1. *Federal Register* Notice
2. Draft Regulatory Analysis
3. Regulatory Analysis Appendix

Package: ML100610314; SECY Paper: ML100570263 \*Concurred by email **WITS 200700108/EDATS: SECY-2010-0002**

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