

June 14, 2010

EGM 10-002

MEMORANDUM TO: Samuel J. Collins, Regional Administrator, Region I
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Michael R. Johnson, Director, Office of New Reactors

FROM: Roy Zimmerman, Director /RA/
Office of Enforcement

SUBJECT: ENFORCEMENT GUIDANCE MEMORANDUM – GUIDANCE FOR
DISPOSITIONING ENFORCEMENT ISSUES ASSOCIATED WITH
ORDERS IMPOSING FINGERPRINTING AND CRIMINAL HISTORY
RECORDS CHECK REQUIREMENTS FOR UNESCORTED ACCESS
TO CERTAIN RADIOACTIVE MATERIAL

Beginning December 5, 2007, the U.S. Nuclear Regulatory Commission (NRC) issued Orders entitled, "Imposing Fingerprinting and Criminal History Records Check Requirements for Unescorted Access to Certain Radioactive Material" (Fingerprint Order, or FP Order). The FP Order was issued to radioactive material licensees who had previously received an Order addressing "Increased Controls for Licensees that Possess Sources Containing Radioactive Material Quantities of Concern," (IC Orders) in November and December of 2005, as well as to those licensees subsequently issued IC Orders upon possession of such material. The December 2007 FP Order imposes, in part, additional requirements in response to the new fingerprinting requirements in the Atomic Energy Act, as amended by Section 652 of the Energy Policy Act of 2005 (enacted August 8, 2005). Specifically, the FP Order modifies IC Order Sections 1.b., 1.c., and "Table 1: Radionuclides of Concern."

Previously, this office issued an Enforcement Guidance Memorandum (EGM 06-003) to address enforcement actions related to the IC Orders. The staff will use EGM 06-003 in conjunction with this EGM (EGM-10-002) for matters of enforcement related to increased control requirements. After the first inspection of the Fingerprint Order, the good faith discretion identified in this EGM does not apply. This EGM remains in effect until such time as the Office of Enforcement withdraws the EGM. Finally, the supplement enclosed with this EGM is intended to provide interim guidance examples for the disposition of violations of the FP Order, until the agency updates the Enforcement Policy and Manual guidance to identify severity level examples.

Disposition of Violations of Fingerprinting and Criminal History Requirements

If an inspector identifies a potential noncompliance with the FP Order requirements, he or she should notify the applicable Regional Branch Chief before the exit meeting with the licensee. The disposition of all potential violations will be identified after the inspector returns to the regional office and consults with applicable contacts and management.

The FP Order requires by the prescribed dates: notification of the NRC if compliance with the Order would not be possible; the establishment of a fingerprinting program; and certification to the NRC that a Trustworthiness and Reliability Official was deemed trustworthy and reliable. In particular, the Order is considered to clearly require the following: (1) fingerprinting and a Federal Bureau of Investigation (FBI) identification and criminal history records check must be completed for an individual prior to allowing the individual unescorted access to radioactive material of concern (i.e., Table 1); (2) notifying the NRC within 24 hours is required if an individual that is subjected to the FBI identification and criminal history check is also identified on the FBI Terrorist Screening Data Base; and (3) granting unescorted access to Table 1 radionuclides is permitted only after completion of both the fingerprinting requirements and the remaining trustworthy and reliability review requirements of the IC Order. Consequently, the application of discretion for “good faith” implementation of the FP Order requirements identified above is expected to be limited when compared to the “good faith” discretion identified in EGM 06-003. In general, the failures to comply with the requirements identified above (Items (1), (2), and (3)) are not considered matters appropriate for enforcement discretion on the basis of a “good-faith” attempt to implement the FP Order. Although enforcement discretion is not appropriate for lack of compliance with the three basic requirements identified above, the process in which the licensee takes fingerprints and the more administrative requirements of the FP Order (e.g., adequate documentation and record keeping) are viewed as potential areas for determination of discretion based on a “good-faith” implementation attempt.

The regional office will evaluate each potential noncompliance and make one of two conclusions as discussed below.

A. Good-Faith Attempt To Implement the Requirement

For the first inspection after the licensee receives the FP Order, the regional office may make a determination for certain specific requirements that the licensee has made a “good faith” attempt to implement the Order requirements. As noted above, the agency would make “good faith” determinations for violations of requirements that are generally viewed as more administrative in nature or resulting from confusion related to NRC communications to the licensee, such as:

- Performing the fingerprinting and access assessment, but failing to document the basis for determining whether to grant or continue to allow unescorted access to the radioactive materials and quantities listed in Attachment 2 of the FP Order;
- Failing to establish and maintain a system of files and procedures for protecting the FBI record and personal information from unauthorized disclosure, provided that the information was not released and/or compromised;
- Failing to implement the fingerprint, identification, and criminal history check program in the time period specified in the FP Order (requirements in A.4. and E. of the FP Order, Section

III) because of the delay in receiving the criminal history information, if (1) the fingerprint information was sent to the NRC prior to the deadline specified in the FP Order and (2) there is not a significant delay between the time the licensee receives the information and completes its unescorted access reviews. Depending on the number of unescorted access reviews and inspector evaluation of the specific licensee circumstances, a maximum of 35 days from the date of receipt is considered within the scope of a “good faith” attempt to implement the Order for licensees with significant numbers of unescorted access determinations to be made. However, “good faith” related discretion is not a matter of consideration when a licensee fails to notify the NRC within 24 hours, if the results from an FBI identification and criminal history check indicate that an individual is identified on the FBI Terrorist Screening Data Base (Section III, A.5.).

“Good faith” discretion may also be considered for certain violations of the FP Order requirements resulting from misunderstandings by entities that are newly regulated by the NRC as a result of their possession of radium-226.

In addition, all of the following conditions must be met for issuance of enforcement discretion based on a “good-faith” attempt to implement the FP Order:

- The licensee made a reasonable attempt to implement the requirement, even if the attempt was not completely successful;
- The licensee’s failure to implement the requirement was not willful;
- The licensee has committed to agreed-upon corrective actions and time-frames for correcting the non-compliance by the end of the inspection; and
- The licensee’s failure to implement the requirement did not result in theft, diversion, or sabotage of radioactive material, or unauthorized disclosure of security information.

For Non-escalated Enforcement Findings:

A potential non-escalated violation of a requirement, which the regional office determines to be a “good-faith” attempt to implement the requirement, will be documented in the inspection record and a letter to the licensee transmitting the results of the inspection. The text of the inspection record will describe the non-compliance(s), the licensee’s corrective actions, and the schedule for taking corrective actions. These cases will not typically receive an enforcement action number (EA number).

For Escalated Enforcement Findings:

For an otherwise apparent Severity Level III violation, where the NRC Region proposes to exercise enforcement discretion to not cite the violation based upon the licensee’s “good-faith” attempt to implement the requirement, the case will follow the normal enforcement process, including the development of an enforcement panel package, and will receive an enforcement action number. A potential Severity Level III violation of an FP Order requirement will be documented in an inspection report, in a letter to the licensee transmitting the results of the inspection (as appropriate), and in the Enforcement Action Tracking System. The text of the inspection report will describe the potential violation, the licensee’s corrective actions, and the

schedule for taking corrective actions. If an enforcement panel agrees that “good faith” discretion should be applied, the region will follow the documentation guidance below.

Documenting Good-Faith Attempt to Implement the FP Order Requirements:

Although this approach represents an exercise of enforcement discretion in accordance with Section VII.B.6, “Violations Involving Special Circumstances,” of the Enforcement Policy, unlike normal practice, the cover letter transmitting the results of the inspection will not mention discretion and the subject line in the cover letter will not include the words, “Exercise of Enforcement Discretion.” However, the letter will include an enforcement action number if the violation was the subject of an enforcement panel.

The text of the inspection record or report (as applicable pursuant to Inspection Manual Chapter 2800, “Materials Inspection Program”) will describe the noncompliance(s), the licensee’s corrective actions, and the schedule for taking corrective actions (see example text in the next section).

The NRC will document a decision to grant credit for a “good faith” attempt to implement an FP Order requirement in the inspection record or report and applicable cover letter as described below.

Sample Text for the Inspection Record or Report:

“During the initial inspection after issuance of the Order imposing fingerprinting and criminal history records check requirements, the NRC identified a violation of the Order. However, the NRC is not pursuing enforcement action because: (1) the licensee made a good-faith attempt to implement the Order requirement; (2) the failure to implement the requirement did not result in theft, diversion, sabotage, or unauthorized disclosure of security information; and (3) the licensee committed to take prompt corrective actions, which included...[insert description of corrective actions].”

Sample Text for an Enclosure to the Cover Letter Transmitting the Results of the Inspection:

“Although a violation of [cite the specific Order requirement] was identified during this initial inspection after issuance of the NRC Order imposing fingerprinting and criminal history records check requirements, and the issue was discussed with you on [date] as the NRC exited from its on-site inspection, the NRC is not pursuing enforcement action because: (1) you made a good-faith attempt to implement [cite the specific requirement]; (2) the failure to implement the requirement did not result in theft, diversion, sabotage or unauthorized disclosure of security information; and (3) you provided prompt corrective actions with a commitment to ensure that long-term comprehensive corrective actions are taken to prevent the occurrence of violations with similar root causes.”

This example wording would be inserted as identified in EGM 08-002: “Documentation of Security-Related Sensitive Unclassified Non-Safeguards Information (SUNSI) in Enforcement Documents.” As of the date of this writing and pursuant to EGM 08-002, the wording above would remain in an attachment to a transmittal cover letter or other document appropriately designated “**Official Use Only-Security Related Information.**”

B. Not Attributable to a Good-Faith Attempt To Implement the FP Order

The NRC will use the normal enforcement process to disposition apparent violations of the FP Order that are not attributable to a good-faith attempt to implement a requirement of the Order.

Questions related to this EGM may be directed to Susanne Woods by electronic mail or by phone at (301) 415-2740.

Enclosure: EGM 10-002 Supplement –Fingerprinting, Identification, and Criminal History Check Requirements

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**EGM 09-005 SUPPLEMENT – FINGERPRINTING, IDENTIFICATION,
AND CRIMINAL HISTORY CHECK REQUIREMENTS**

This supplement provides examples of violations in each of the four enforcement severity level determinations as guidance in determining the appropriate severity level for violations of the subject requirements.

A. Severity Level I – Violations involving for example:

1. The theft, diversion, or sabotage of a Table 1 listed radioactive material type and quantity resulting from the failure to establish a program or implement a requirement of the Fingerprint Order.

B. Severity Level II – Violations involving for example:

1. The attempted theft, diversion, or sabotage of a Table 1 listed radioactive material type and quantity resulting from the failure to establish a program or implement a requirement of the Fingerprint Order.
2. Failure to notify the NRC Operations Office within 24 hours if the results from an FBI identification and criminal history records check indicate that an individual is identified on the FBI's Terrorist Screening Data Base.

C. Severity Level III – Violations involving for example:

1. Failure to establish or implement a program toward compliance with the Fingerprint Order, or programmatic issue/related failure.
2. Failure to establish and maintain a Trustworthiness and Reliability Official in accordance with the provisions of the Fingerprint Order.
3. Failure to fingerprint any individual and/or to complete the FBI identification and criminal history records check and, if applicable, the appropriate processes for correcting the information as specified in the Fingerprint Order, before allowing unescorted access to the radioactive material of concern identified in Table 1 of the Fingerprint Order (even as an isolated incident) and regardless of the extent to which the remaining trustworthiness and reliability determination is completed.
4. Failure to establish and maintain a program for protecting the records required pursuant to the Fingerprint Order.

D. Severity Level IV – Violations involving for example:

1. Isolated failure to notify each affected individual that the fingerprints will be used to secure a review of his/her criminal history record and inform the individual of the procedures for revising the record or including an explanation. (Within this document, the term isolated failure is intended to be limited to a small number or subset of the total number of individuals, as well as lasting a brief duration (e.g., a few days or weeks).)
2. Isolated failure to document the basis for determining whether to grant, or continue to allow unescorted access to radioactive material quantities of concern as identified in the Fingerprint Order.
3. Isolated failure to have an authorized individual take the fingerprints, as specified in the Fingerprint Order.
4. Isolated failure, without individual or other consequences, to retain fingerprint and criminal history records from the FBI or a copy of an individual's file for three years after either the individual has been (1) transferred or terminated from employment or (2) a determination of unescorted access as specified in the Fingerprint Order.