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Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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Re: Docket ID NRC-2008-0120

In response to the proposed rule "Physical Protection of Byproduct Material" published in the Federal Register Vol. 75 No. 114, we respectively submit the comments below:

37.5 Definitions

Background investigation – according to the definition, this investigation must be conducted by licensee. In order for these checks to be most effective and efficient for the licensees, it may be beneficial to solicit help from outside entities in conducting one or more components of these checks. Since the Reviewing Official (RO) will be making the determination of access approval, the data gathering is just a resource for this individual to use in the evaluation of trustworthiness and reliability.

Trustworthiness & Reliability – the NRC should consider a change to the characteristics derived from the background investigation. For the Reviewing Official (RO) to state that an individual is "trustworthy and reliable" implies more of an intimate knowledge of the characteristics of a person than would be gained from simply running the required checks. Defining an individual as "low-risk" may be more appropriate. In this situation, the RO would grant unrestricted access only to those individuals determined to be low-risk.

37.23 Access Authorization Program Requirements:

(e) Determination basis.

(3) For individuals who no longer require unescorted access, the licensee is required to "immediately remove" those individuals from the unrestricted access list and take measures to ensure they do not have such access. The term "immediately" is too subjective in this rule. The point at which a person is no longer an employee of the licensee would require simultaneous removal of individual from the access list and any software programs used to grant access. This is unreasonable as it may require multiple interfaces between various computer systems, departments, etc. "Timely manner," although also subjective, would allow some flexibility for the licensee. Guidance documents may assist in defining this time frame. In the event that an individual engages in

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some activity that brings into question that individual's "trustworthiness and reliability," then "immediate" action to assure that this individual does not have unrestricted access would be appropriate.

(g) Right to correct and complete information.

Section (1) refers to the individual's right to correct, complete, and explain the results of the background investigation. A minimum timeframe for an individual to take such action should be defined. Section (2) requires a minimum of 10 days for an individual to initiate challenge procedures after the criminal history record is made available to the individual for review. In that same regard, at least 10 days should be allowed for the individual to correct, complete, or explain other components of the background investigation.

37.25 Background investigations

(a) Initial investigation.

(3) Employment history evaluation. The licensee is required to verify employment for the most recent 10 years. This time period is excessive. For example, an individual just out of college may have had multiple short-term jobs during the previous ten years (e.g., internships, summer jobs, etc.). It would be extremely burdensome and unnecessary to verify every employment for such an individual. A statement such as "for the most recent 10 years or the last two employers, whichever is less restrictive" may be more appropriate. In addition, it should be left to the discretion of the licensee based on the situation of the applicant (e.g., length of past employments).

(4) Verification of education. This section requires verification of period of education, not the education itself. In most situations, verification of the highest level of education received would be most appropriate. A diploma/transcript may then satisfy this requirement. The way this section is currently written, the individual is required to provide time frames for education. For those individuals completing their education over numerous years at various institutions, it would be an unnecessary burden to verify every time period at every institution.

(6) Credit history evaluation. Overall, the credit history check is intrusive and unreliable. The NRC should seriously consider the value of information to be gained from such a report, the reliability of that information, and the validity of correlating the data obtained to the likelihood that an individual would take part in activities that would jeopardize the safety and security of our nation. In addition, the current economic crisis has taken its toll on the financial situation of many otherwise upstanding citizens. To use their credit history as a component of this access authorization program can be viewed as discrimination. The NRC must also keep in mind that the cost in obtaining these reports, in the hundreds of dollars for foreign reports, is not justified when the information obtained in such a report most likely will be of little or no value in the overall background investigation. If the NRC were to insist that such checks be conducted, the requirement to evaluate "the full credit history" of an applicant is excessive. This requires the licensee to potentially go back many years and include outdated information regarding the individual's credit history. The way the rule is written, a review of

the most recent 7 years of U.S. credit history is acceptable for foreign nationals and others residing outside of the U.S. It seems that a 7 year review should be appropriate for everyone. It would be discriminatory to require a lengthier credit history review for those U.S. citizens residing in the U.S. for many years. Finally, with the common reporting errors in credit checks and the lack of training for Reviewing Officials who will evaluate these reports, it is anticipated that many man-hours will be spent reviewing/interpreting records and correcting errors. If the NRC mandates such checks, licensees should be provided concrete information and guidance, such as how to view a lack of credit history, to be referenced when reading and interpreting these reports.

(7) Criminal history review. Since an FBI report is reviewed for each applicant, it would be a significant unnecessary burden to expect the licensee to conduct local criminal checks as well. If an individual has committed a crime worthy of questioning his/her access to high level radiation sources, the conviction would show up on the FBI report. If the NRC were to insist on a local criminal history review, a few items need to be considered. In the proposed rule, it is expected that the licensee will review local criminal history for "all residences of record." The NRC does not define "all residences of record." Is the expectation that all the residences will be obtained from the credit report, from information provided by the applicant, or by some other source? Also, the proposed time period of the past ten years can be an excessive burden to the licensee. In a research environment, many individuals seeking unrestricted access may be recent college graduates who have lived in numerous locations in pursuit of their educational advancements (i.e., regional college campuses, foreign studies, internships, etc.). The way the rule is written, the licensee would be expected to obtain reports from all of these locales. As with the comment above regarding employment verification, it may be more appropriate to have the licensee review the local criminal history for all residencies during the past ten years or at least two different criminal history locales, whichever is less restrictive.

(8) Character and reputation determination. In order for a reference to provide a worthwhile evaluation of the applicant, a minimum time frame for contact with the applicant should be established. For example, the NRC may require that individuals who are used as character and reputation references know the applicant for at least one (1) year. Also, this section does not exclude from references those individuals who may benefit from or have a personal advantage to the applicant's unrestricted access. For example, it may not be appropriate for the supervisor of the applicant to serve as a character and reputation reference since he/she has most likely requested that the applicant complete the unrestricted access procedures.

(9) This section addresses the NRC's expectation that licensees obtain independent information to substantiate the applicant's information. In order to place this additional requirement on licensees only if it is truly necessary, the NRC should consider a change to this section and only require this independent check in situations where there is doubt of the accuracy or completeness of information provided by the applicant or if the licensee cannot confidently make an evaluation based on the analysis of all the components required by the regulations. In either situation, the licensee would be expected to obtain independent information "to the

extent possible" before making the determination. At a minimum, if the NRC does not want to place this qualifier in the rule, the phrase "to the extent possible" should be changed to "to the extent practicable." To expect the licensee to do this additional check "to the extent possible" is a significant, subjective decision. If it will take great measures to do this (e.g., foreign nationals), but it is "possible," will the licensee be expected to do it? This is not a reasonable request.

37.29 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

This section should also include exemption provisions for reputable security system vendors. These vendors perform extensive background checks as part of their hiring process. Provided the elements used in their evaluations are comparable to those in the proposed regulations, it seems reasonable to consider the service providers, software engineers, etc. who work at or with a licensee's institution authorized to access the controlled areas. These employees have intimate knowledge of and access to software such that they could legitimately give themselves access to said rooms at any point in time. The security software used by these companies is proprietary information, the details of which may only be known to the employees of said company. It is unreasonable to expect the licensee to conduct their own background checks on all employees of the company who may be involved in the security system at the particular institution. By not allowing this exemption, the licensee may be less inclined to use the state-of-the-art security systems available. This may be detrimental to the overall security of the sources/devices. Although security service providers are addressed in the "protection of information" section (37.43 (d)), they should be included here as well, since they not only have knowledge of the security program, they may also have the ability to grant access.

37.43 General security program requirements

(d) Protection of information.

(3)(ii) The proposed background checks for individuals granted unescorted access to category 1 or category 2 quantities of radioactive material are quite extensive. Understandably, the NRC is concerned with individuals who may legitimately gain access and then have malicious intent with the material accessed; however, for those individuals who are not granted access, yet are privy to all the information in the licensee's security plan and implementing procedures in accordance with 37.43(d), it seems that the critical element of the background check (i.e., the fingerprinting identification and criminal history records check) is excluded for these individuals. The lack of authority granted to the NRC to mandate fingerprinting of these individuals jeopardizes the effectiveness of the entire security program. A licensee is either left to performing incomplete checks on individuals with whom information is shared, or the licensee may grant unrestricted access to individuals who

truly do not need the access, just to allow the licensee to conduct the main element of the background check (i.e., the FBI identification and criminal history records check).

(4) This section provides the licensee an exemption to performing background investigations for employees of security service providers. Written verification from the provider that documents comparable T&R components must be obtained for each employee. As mentioned in the relief from fingerprinting section above (37.29), it may be more appropriate to approve the security service provider as a whole since it may be difficult for the licensee to maintain a current list of all employees of the vendor who may have intimate knowledge of the security system at the licensee's location(s) and also to assure that individuals are removed "immediately" from the licensee's list of approved individuals when they are no longer with the company. It would not only be burdensome for the licensee to track individual employees of these companies, but it may also open the licensee up for non-compliance issues if the licensee did not maintain a current list of employees. A letter documenting the background investigation procedures of the security vendor could be provided to the licensee that would allow them to forego the access authorization procedures for the security vendor employees.

37.49 Monitoring, detection and assessment.

(a) Monitoring and detection.

(3)(ii) According to this section, the licensee would be expected to perform some type of source verification on a weekly basis. First of all, the "weekly verification" should only be required for sources/devices that do not have tamper-indicating devices. In addition, to require verification of the "radioactive material" may not be appropriate for sources housed in devices (e.g., irradiator, Gamma Knife, etc.). To comply with this requirement, a licensee would have to compare the output of the device to the expected output. This is labor-intensive and unnecessary when a visual check of the unit could provide source security assurance. The NRC should consider a change to this regulation that would require verification "to ensure that the source/device is present." This verification may be made by means of a camera in the room housing the source/device. This will be more efficient for the licensee without compromising the quality of the check.

37.51 Maintenance, testing, and calibration.

The NRC should consider changing the frequency of the system checks from every three (3) months to every (6) months. These checks may need to be coordinated with security vendors, computer analysts, and possibly other individuals. To require a short time interval such as 3 months may open licensees up to non-compliance issues due to scheduling and workload issues. Also, the term "calibration" should be changed to "appropriate operational checks." For radiation monitors, true calibrations would expose licensee staff to unnecessary radiation dose. Assuring operation via a check source would be appropriate for these monitors.

37.57 Reporting of events.

While it may be appropriate to notify the NRC in all cases of actual or attempted theft, sabotage, or diversion of material, section (b) also requires notification when there is "suspicious" activity related to "possible" theft, sabotage, or diversion. In these instances, it would only be appropriate to notify the NRC if the licensee, in conjunction with LLEA, determines that there is some validity to the suspicion. The NRC should encourage open communication between the licensee and LLEA. Licensees should feel free to express even minor concerns, uncertainties, etc. to LLEA for their assistance without having to notify the NRC in each instance.

General Comments:

While the risk of malevolent activities may diminish in situations of escorted access to category 1 or 2 quantities of radioactive material, there is nothing in the proposed rule that considers limitations on such access. At a minimum, the licensee should establish a policy to assure that escorted access to category 1 or 2 quantities of radioactive material is limited to those needing such access to perform a job function or assist in educational activities.

For individuals who wish to have access to Select Agents, a federal organization (CDC) grants the approval for such access. In this regard, the NRC should consider approving individuals for unrestricted access to high level radiation sources/devices, thereby taking the subjective decision-making process out of the hands of the licensee.

Based on discussions with individuals from various industries (i.e., source manufacturers, industrial radiographers, medical/research institutions, etc.), it has become widely apparent that source security issues vary greatly across these industries. The NRC should seriously consider, after a detailed review of each industry's concerns, separating portions of these rules to be more industry specific. This may result in the most efficient and effective regulations for each industry.

Sincerely,

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