



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 13, 2010

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-09-0181

TITLE: PROPOSED RULE: PHYSICAL PROTECTION OF
BYPRODUCT MATERIAL (RIN 3150-AI12)

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of May 13, 2010.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
OGC
EDO
PDR

VOTING SUMMARY - SECY-09-0181

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X				X	3/15/10
COMR. SVINICKI	X				X	5/3/10
COMR. APOSTOLAKIS	X				X	4/29/10
COMR. MAGWOOD	X				X	5/6/10
COMR. OSTENDORFF	X				X	4/30/10

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on May 13, 2010.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Chairman Jaczko
SUBJECT: SECY-09-0181 – PROPOSED RULE: PHYSICAL
PROTECTION OF BYPRODUCT MATERIAL (RIN 3150-
AI12)

Approved X Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below ___ Attached X None' _____



SIGNATURE

3/15/10

DATE

Entered on "STARS" Yes X No _____

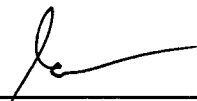
**Chairman Jaczko's Comments on SECY-09-0181,
"Proposed Rule: Physical Protection of Byproduct Material"**

I approve the staff's recommendation to publish, for public comment, the proposed rule that would add a new Part 37 to Title 10 of the Code of Federal Regulations and make conforming changes to other parts of Title 10. I applaud the excellent work that the staff has performed to codify security requirements for the use of Category 1 and Category 2 quantities of radioactive materials, and for shipments of small quantities of irradiated reactor fuel. I appreciate the staff's efforts to consider the various security orders, lessons learned during implementation of those orders, the recommendations of the Independent External Review Panel and the Materials Program Working Group, and stakeholder comments on the preliminary rule language.

This addition of requirements in the areas of access authorization, security during use of the materials, and transportation security will enhance security at materials licensees, and the codifying of these requirements into the regulations will provide for a transparent and predictable regulatory scheme.

I believe that source security is a high priority for the agency and this new Part 37 will mark an important milestone in the progress that the agency has made in this area. Through this rulemaking and other interrelated activities such as the implementation of the National Source Tracking System, the ongoing rulemaking for limiting the quantity of byproduct material in a generally licensed device, and the efforts of the Radiation Source Protection and Security Task Force, the agency is contributing to an increase in the effectiveness of the Nation's security.

I agree with the overall approach taken in this proposed rule but note that the staff should consider whether observation of suspicious activities should also be included in the reporting requirements described in this proposed rule. The staff should highlight the reporting requirements as one area for which public comments are specifically requested.



Gregory B. Jaczko

3/15/10

Date

NOTATION VOTE

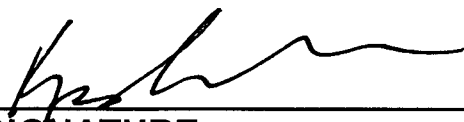
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-09-0181 – PROPOSED RULE: PHYSICAL
PROTECTION OF BYPRODUCT MATERIAL (RIN 3150-
AI12)

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached XX None _____



SIGNATURE

05/3 /10

DATE

Entered on "STARS" Yes No _____

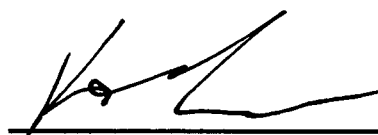
Commissioner Svinicki's Comments on SECY-09-0181
Proposed Rule: Physical Protection of Byproduct Material (RIN 3150-A112)

I approve the staff's recommendation, subject to the attached edits, to publish in the *Federal Register* the proposed amendments to Parts 30, 32, 33, 34, 35, 36, 37, 39, 51, 71, and 73 for a public comment period of 120 days. I appreciate that staff has worked with the Agreement States and has made preliminary rule language available to NRC's stakeholders in order to better inform the proposed rule now in front of the Commission. This outreach has revealed a number of substantive concerns regarding the practicability of some of the changes proposed in the new rule, which extend beyond the measures imposed in the NRC's post-September 11, 2001 security orders to this community of licensees. Specifically, some Agreement States have expressed that some of the proposed new measures would exceed their legal authorities and require changes to state statute. In other cases, commenters have questioned the practicality of enforcing the requirement for local law enforcement to execute written agreements with licensees, the logistical challenges of applying some of the requirements at temporary job sites in the oil and gas fields or railroad yards, or the safety consequences of having vehicle disabling devices on vehicles relied upon for evacuation purposes. For instance, in one new provision, NRC proposes to add a requirement that local law enforcement notify a licensee when the local law enforcement agency's "response capabilities become degraded." I question the practicality and wisdom of such a requirement, and how it would even be enforceable.

While I appreciate that the staff is soliciting comments on these topics, I suspect they will receive many of the same comments they have now. These are substantive concerns. If these new requirements are to be proposed, what is needed are practical means of addressing or mitigating these concerns. Further, given these substantive concerns (coupled with the experiences learned from the update to 10 CFR Part 73 where many licensees needed additional time to implement the enhancements to the security orders imposed by the rule), I do not believe the staff's proposed effective date for the final rule of 180 days after publication in the *Federal Register* will be sufficient. Further, in contrast to Part 73, which impacted large, power reactor licensees, this proposed rule is estimated to impact approximately 1,400 licensees, a number of whom qualify as small business entities. In light of this, I believe 270 days or longer would likely be more reasonable.

As an outgrowth of this rulemaking, the staff indicates in the paper that the NRC "would terminate the Orders once the requirements have become effective." Since this has not happened in response to the issuance of the final Part 73 rule, when the staff submits the draft final rule at issue here to the Commission for its action, it should submit, as an accompanying enclosure to the SECY paper, an implementation plan for terminating the corresponding orders upon finalization of the rule.

Finally, I join Commissioner Apostolakis in supporting the staff's plan to publish guidance documents for public comment during the comment period on the proposed rule. This is an important practice that increases public understanding of the proposed rule and generates more informed comment.



Kristine L. Svinicki

05/ 3 /10

The requirements put in place by the orders supplement the existing regulatory requirements. These additional requirements are primarily intended to provide reasonable assurance of preventing the theft or diversion of this risk-significant material. These requirements provide the Commission with reasonable assurance that public health and safety and the common defense and security continue to be adequately protected.

Although an order, like a rule, is legally binding on the licensee receiving the order, a rule is generally applicable to all licensees and is implemented through an open and public process. The notice-and-comment rulemaking process allows members of the public to provide comments on the proposed rule. It is Commission policy to implement generally applicable requirements through rulemaking.

If promulgated, this rulemaking would adopt security requirements for category 1 and category 2 quantities of radioactive material into the regulations. New requirements for background investigations and an access authorization program are proposed to ensure that individuals who have access to these materials have gone through background investigations and are determined to be trustworthy and reliable. New requirements are also proposed to establish physical protection systems to detect, assess, and respond to unauthorized access to category 1 and category 2 quantities of radioactive material. For transport of the radioactive materials, new requirements for recipient license verification; preplanning and coordination of shipments; advance notification of shipments; notification of shipment delays, schedule changes, and suspected loss of a shipment; and control and monitoring of shipments are proposed. The proposed amendments would also include security requirements for shipments of irradiated reactor fuel that weighs 100 grams (0.22 pounds (lb)) or less in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 1 sievert (Sv) (100 rem) per hour at a distance of 91 meters (m) (3 feet (ft)) from any accessible surface without intervening shielding.

X
This should be 0.91 meters

adequate parking, and can be used for emergency repair or to wait for LLEA response on a 24-hour a day basis; and additional telephone facilities are available should the communications system of the transport vehicle not function properly. Possible safe haven sites include: Federal sites having significant security assets; secure company terminals; State weigh stations; truck stops with secure areas; and LLEA sites, including State police barracks.

In addition, in response to comments on the preliminary rule text, the NRC revised the proposed § 37.75(a)(2) to clarify that the preplanning and coordination of all category 1 shipments with the governor ^{'s office or designee} of each state that the shipment will pass through will require the identification of safe havens.

7. Is the Shipping Licensee Required to Notify the Receiving Licensee if the No-Later-Than Arrival Time Changes?

Yes. If the no-later-than arrival time will not be met, then under § 37.75(d) of the proposed rule, the shipping licensee must inform the receiving licensee of the new no-later-than arrival time for shipments of category 1 or category 2 quantities of radioactive material. This provision allows licensees the ability to modify departure and arrival time due to unforeseen events and was added at the suggestion of commenters on the preliminary rule text.

8. Whom Would the Licensee Notify When the Shipment Arrives?

Proposed § 37.75(c) would require that the receiving licensee notify the shipping licensee when the shipment of a category 1 or category 2 quantity of radioactive material arrives at its destination. The notification must be no later than 4 hours after the package arrives. A timeframe was added to the proposed rule at the suggestion of commenters on the preliminary rule text.

9. What Does State Refer to in the Requirements?

As used in the definitions section of the proposed rule, the term "State" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam,

	<p>Off-site Property: Reduced risk that off-site property will be affected by radiological releases from unauthorized use of radioactive material.</p> <p>On-site Property: Reduced risk that on-site property will be affected by radiological releases from unauthorized use of radioactive material.</p> <p>Regulatory Efficiency: Enhanced regulatory efficiency through regulatory and compliance improvements.</p> <p><u>Qualitative Costs:</u></p> <p>None.</p>
<p>Option 3: Rulemaking (Authorization Base)</p> <p>Industry: (\$1,078,740,403) using a 7% discount rate (\$1,421,576,173) using a 3% discount rate</p> <p>NRC/State: <i>not</i> (\$14,848,144) using a 7% discount rate (\$20,363,061) using a 3% discount rate</p> <p>Agreement States: (\$8,575,460) using a 7% discount rate (\$10,965,631) using a 3% discount rate</p>	<p><u>Qualitative Benefits:</u></p> <p>Safeguards and Security: Increased level of assurance that category 1 and category 2 quantities of radioactive material are safeguarded.</p> <p>Public Health (Accident): Reduced risk that public health will be affected by radiological releases from unauthorized use of radioactive material.</p> <p>Occupational Health (Accident): Reduced risk that occupational health will be affected by radiological releases from unauthorized use of radioactive material.</p> <p>Off-site Property: Reduced risk that off-site property will be affected by radiological releases from unauthorized use of radioactive material.</p> <p>On-site Property: Reduced risk that on-site property will be affected by radiological releases from unauthorized use of radioactive material.</p> <p>Regulatory Efficiency: Enhanced regulatory efficiency through regulatory and compliance improvements.</p> <p><u>Qualitative Costs:</u></p> <p>None.</p>

X

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Apostolakis
SUBJECT: SECY-09-0181 – PROPOSED RULE: PHYSICAL
PROTECTION OF BYPRODUCT MATERIAL (RIN 3150-
AI12)

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached X None



SIGNATURE

4/29/10

DATE

Entered on "STARS" Yes X No

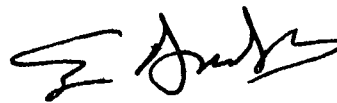
Commissioner Apostolakis's Vote on SECY-09-0181– Proposed Rule: Physical Protection of Byproduct Material

I approve the staff's recommendation to publish in the *Federal Register* the proposed amendments to Parts 30, 32, 33, 34, 35, 36, 37, 39, 51, and 73, subject to the edits listed below. I appreciate the staff's effort to engage the Agreement States and other stakeholders to inform the development of this proposed rule. The staff's plan to publish the draft guidance documents during the 120-day public comment should provide all interested parties with the information they need to understand the proposed requirement. I believe that providing the draft guidance documents during the public comment period for the proposed rule is a benefit to both the stakeholders and the NRC.

The staff has provided a logical basis for conducting this rulemaking under a health and safety basis. I appreciate the staff efforts to develop a comprehensive proposed rulemaking on the physical protection requirements for byproduct material.

Edits to *Federal Register*

1. Page 9, second to last sentence replace 91 meters with 0.91 meters.
2. Page 61, 8th line from the top, add "or governor's designee" after "governor".
3. Page 120, section (3), replace "appropriate Regional Administrator" with "NRC regional office specified in 30.6."
4. Page 156 and 157, include the mailing address for the Director, Division of Security Policy, Office of Nuclear Security and Incident Response.



George Apostolakis

Date 4/29/10

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MAGWOOD
SUBJECT: SECY-09-0181 – PROPOSED RULE: PHYSICAL
PROTECTION OF BYPRODUCT MATERIAL (RIN 3150-
AI12)

Approved X Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below X Attached X None _____

Approved with the attached comments and edits.



SIGNATURE

5-6-10


DATE

Entered on "STARS" Yes X No _____

Commissioner Magwood's Vote and Comments on
SECY-09-0181: Proposed Rule Physical Protection of Byproduct Material

I approve the staff's recommendation to publish a proposed rule in the *Federal Register* for public comment that would add a new part 37 to Title 10 of the Code of Federal Regulations (CFR) and make conforming changes to parts 30, 32, 33, 34, 35, 36, 39, 51, 71, and 73, subject to the edits in the attached.

I commend the staff for drafting a comprehensive, sensible, and logical proposed rulemaking on access authorization and physical protection requirements for byproduct material. This effort will continue to strengthen security and controls for risk-significant radioactive sources by establishing regulations that are consistent with the already implemented increased control orders from 2005. The staff should also be recognized for their extensive stakeholder outreach efforts. The 120-day public comment period should provide ample time for stakeholder input and releasing the draft guidance documents along with the draft rule should help to inform any stakeholder comments.



William D. Magwood, IV 5/4/2010
Date

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 32, 33, 34, 35, 36, 37, 39, 51, 71, and 73

RIN 3150-A112
[NRC-2008-0120]

Physical Protection of Byproduct Material

AGENCY: U. S. Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U. S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations to establish security requirements for the use and transport of category 1 and category 2 quantities of radioactive material, which the NRC considers to be risk-significant and therefore to warrant additional protection. Category 1 and category 2 thresholds are based on those established in the International Atomic Energy Agency (IAEA) Code of Conduct on the Safety and Security of Radioactive Sources. ^{in which NRC endorses} The objective of this proposed rule is to provide reasonable assurance of preventing the theft or diversion of category 1 and category 2 quantities of radioactive material. The proposed regulations would also include security requirements for the transportation of irradiated reactor fuel that weighs 100 grams or less in net weight of irradiated fuel. The proposed rule would affect any licensee that is authorized to possess category 1 or category 2 quantities of radioactive material, any licensee that transports these materials using ground transportation, and any licensee that transports small quantities of irradiated reactor fuel.

26. *What Doesn't This Proposed Rule Cover?*

The proposed rule does not address air or water transport. Transport of radioactive material within airports and by air is regulated by the Federal Aviation Administration. Transport of radioactive material within ports and by waterway is regulated by the U.S. Coast Guard.

The proposed rule also does not address transshipments of category 1 or category 2 quantities of radioactive material through the United States. Transshipments are shipments that are originated by a foreign company in one country, pass through the United States, and then continue on to a company in another country. Transshipments are regulated by the DOT and DHS.

Finally, this rulemaking does not address transport of spent fuel, except irradiated reactor fuel weighing 100 g (0.22 lb) or less in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 1 Sv (100 rem) per hour at a distance of (3 ft) from any accessible surface without intervening shielding.

↑
0.91 m

III. Discussion of Proposed Rule by Section

Section 30.6 Communications.

This section would be revised to include a reference to the new 10 CFR part 37.

Section 30.13 Carriers.

This section would be revised to include 10 CFR part 37 in the list of regulations that exempt common carriers.

Section 30.32 Application for specific licenses.

Paragraph (I) would be added to require that an application under 10 CFR part 30

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER OSTENDORFF
SUBJECT: SECY-09-0181 – PROPOSED RULE: PHYSICAL
PROTECTION OF BYPRODUCT MATERIAL (RIN 3150-
AI12)

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below Attached X None

W. Ostendorff
SIGNATURE

4/30/10
DATE

Entered on "STARS" Yes X No

I approve of the staff's recommendation to publish for comment the proposed rule, "Physical Protection of Byproduct Material", subject to the attached edits. This rulemaking is another critical step in the Commission's efforts to enhance the security of radioactive materials. I believe it is important to establish requirements through rulemaking when possible to ensure predictability and consistency in our regulatory framework. I commend the staff's efforts to incorporate lessons learned from implementation of the 2005 security orders, the Materials Program Working Group, the External Independent Review Panel, and a related Petition for Rulemaking, into the rule. While there are issues requiring careful resolution involving for example the appropriate elements of background investigations and coordination with local law enforcement agencies, I recognize that the staff has gone above and beyond in soliciting early and extensive feedback on these issues by posting preliminary rule language for comment and requesting public comments on specific areas of disagreement. I also agree with the staff's recommended basis change from common defense and security to public health and safety and believe this change contributes to the strong working relationship and trust with its agreement state partners.

Commission determines to be of such significance to the public health and safety or the common defense and security as to warrant fingerprinting and a Federal Bureau of Investigation (FBI) criminal history records check. With this new authority, the Commission determined that individuals who have access to category 1 and category 2 quantities of radioactive material warrant fingerprinting and FBI criminal history records checks. On October 17, 2006, the NRC issued orders to panoramic and underwater irradiator licensees (EA-06-248) (71 FR 63043; October 27, 2006), manufacturer and distributor licensees (EA-06-250) (71 FR 63046; October 27, 2006), and licensees making shipments of category 1 quantities of radioactive material (EA-06-249) (71 FR 62302; October 24, 2006) to require fingerprinting and FBI criminal history records checks for unescorted access to risk-significant quantities of radioactive material at their facilities. In issuing these orders, NRC noted that a malevolent act by an individual with unescorted access to these materials could result in significant adverse impacts to the public health and safety or the common defense and security and, thus, necessitated expedited implementation of ~~additional~~ fingerprinting requirements. The orders were issued to both NRC and Agreement State licensees under the NRC's authority to protect the common defense and security. On December 5, 2007, the NRC issued orders to all other NRC licensees that possessed category 1 or category 2 quantities of radioactive material (EA-07-305) (72 FR 70901; December 13, 2007) to require fingerprinting and FBI criminal history records checks for unescorted access to category 1 or category 2 quantities of radioactive material. These orders were issued under the NRC's authority to protect the public health and safety and are available on the NRC public website at <http://www.nrc.gov/security/byproduct/orders.html>. To effect nationwide implementation, each Agreement State issued legally binding requirements to licensees under their regulatory jurisdiction.

The requirements put in place by the orders supplement the existing regulatory requirements. These additional requirements are primarily intended to provide reasonable assurance of preventing the theft or diversion of this risk-significant material. These requirements provide the Commission with reasonable assurance that public health and safety and the common defense and security continue to be adequately protected.

Although an order, like a rule, is legally binding on the licensee receiving the order, a rule is generally applicable to all licensees ~~and is implemented through an open and public process.~~ Further, the notice-and-comment rulemaking process allows members of the public to provide comments on the proposed rule. It is Commission policy to implement generally applicable requirements through rulemaking.

If promulgated, this rulemaking would adopt security requirements for category 1 and category 2 quantities of radioactive material into the regulations. New requirements for background investigations and an access authorization program are proposed to ensure that individuals who have access to these materials have gone through background investigations and are determined to be trustworthy and reliable. New requirements are also proposed to establish physical protection systems to detect, assess, and respond to unauthorized access to category 1 and category 2 quantities of radioactive material. For transport of the radioactive materials, new requirements for recipient license verification; preplanning and coordination of shipments; advance notification of shipments; notification of shipment delays, schedule changes, and suspected loss of a shipment; and control and monitoring of shipments are proposed. The proposed amendments would also include security requirements for shipments of irradiated reactor fuel that weighs 100 grams (0.22 pounds (lb)) or less in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, which has a total external radiation dose rate in excess of 1 sievert (Sv) (100 rem) per hour at a distance of 91 meters (m) (3 feet (ft)) from any accessible surface without intervening shielding.

5. *What is The Role of the Reviewing Official?*

The reviewing official would be the individual that makes the trustworthiness and reliability determinations for the licensee; the reviewing official determines who could be granted unescorted access authorization. Note that the Increased Control Fingerprinting Orders referred to a trustworthiness and reliability official or T&R official as the individual that made determinations on an individual's trustworthiness and reliability. Unlike the reviewing official the T&R official did not have to be fingerprinted and was not reviewed by the regulator. Licensees would need to nominate one or more individuals to be a reviewing official and submit their fingerprints to the NRC. The fingerprints of the nominated individual(s) would need to be taken by either a law enforcement agency, a Federal or State agency that provides fingerprinting services to the public, or a commercial fingerprinting service authorized by a State to take fingerprints. Before sending the nominated individual's fingerprints to the NRC, the licensee would need to conduct the rest of the elements of the background investigation. Reviewing officials must be permitted either access to safeguards information or unescorted access to category 1 or category 2 quantities of radioactive material since Section 149 of the Atomic Energy Act only authorizes the collection of fingerprints for the purposes of unescorted access or access to safeguards information. The Commission has requested statutory changes to the Atomic energy Act that would permit fingerprints of reviewing officials without requiring access for these purposes. The NRC would then transmit the nominated reviewing official's fingerprints to the FBI and would review the individual's criminal history records and, if appropriate, approve the reviewing official. Reviewing officials would not be able to make trustworthiness and reliability determinations until approved by the NRC. For certain licensees, the NRC may have already approved reviewing officials, either under the October 17, 2006, orders [(EA-06-248, 71 FR 63043; October 27, 2006), (EA-06-250, 71 FR 53046; October 27,

relief categories specified in 10 CFR 37.29, the licensee would not need to submit the individual's fingerprints to the NRC.

10. What Should a Licensee Do if an Individual or Entity Contacted as Part of a Background Check Investigation Refuses to Respond?

If a previous employer, educational institution, or any other entity fails to provide information or indicates an inability or unwillingness to provide information in a timely manner, the licensee would be required to document the refusal, unwillingness, or inability to respond in the record of investigation. The licensee would then need to obtain confirmation from at least one alternate source that has not been previously used. In response to comments on the preliminary rule language, the NRC revised the rule language to provide more flexibility to licensees as to what would be considered a timely manner.

11. Does an Individual Have the Right to Correct His or Her Criminal History Records?

Yes, an individual has the right to correct his or her criminal history records before any final adverse determination is made. If the individual believes that his or her criminal history records are incorrect or incomplete in any respect, he or she can initiate challenge procedures. These procedures would include direct application by the individual challenging the criminal history records to the law enforcement agency that contributed the questioned information. Before an adverse determination on a request for unescorted access, individuals have the right to provide additional information.

12. Is a Licensee Required to have Procedures for Conducting Background Investigations?

Yes, licensees would be required to develop, implement, and maintain written procedures for conducting the background investigations. Procedures would address notification of individuals denied unescorted access authorization and would also ensure that individuals who have been denied unescorted access authorization are not allowed unescorted

access to category 1 or category 2 quantities of radioactive material (these individuals could be escorted by an approved individual.) The NRC agreed with comments on the preliminary rule language that the provision prohibiting even escorted access for those individuals denied unescorted access was too inflexible, licensees should be given the flexibility to escort individuals if they so choose.

The preliminary language also contained a provision that required a licensee to provide an opportunity for an independent management review if the individual was denied unescorted access. Several commenters noted that the requirement was too prescriptive and that a decision on whether and how to conduct a review should be left up to the licensee. The NRC agrees with the commenters and has not included the provision in the proposed rule.

13. *What Information Should the Reviewing Official Use to Determine that an Individual is Trustworthy and Reliable?*

The reviewing official would use all of the information gathered during the background investigation, including the information received from the FBI, in making a determination that an individual is trustworthy and reliable. The reviewing official may not determine that an individual is trustworthy and reliable and grant them unescorted access until all of the information for the background investigation has been obtained and evaluated. The reviewing official may deny unescorted access to any individual based on any information obtained at any time during the background investigation. However, as required by Section 149.c.(2)(c) of the Atomic Energy Act, the licensee may not base a final determination to deny an individual unescorted access to category 1 or category 2 quantities of radioactive material solely on the basis of information received from the FBI involving: (1) an arrest more than 1 year old for which there is no information of the disposition of the case; or (2) an arrest that resulted in dismissal of the charge or an acquittal. If there is no record on the disposition of the case, it may be that

As part of this rulemaking, the NRC considered what level of responsibility to place on its licensees regarding fingerprinting and criminal history records checks for persons involved in the transportation of category 1 and category 2 quantities of radioactive material. Licensees covered by the fingerprinting and criminal history records check requirements of this proposed rule may decide to transfer radioactive material away from the site or may receive radioactive material from another entity.

Such transfers or receipts may occur either as part of a shipment to or from a domestic company or an international company. Individuals involved in the shipment, in particular those employed by carriers or other organizations handling shipments, may have unescorted access to the material during the shipment process. These persons may not be employees of the licensee and thus may not be under the licensee's direct control. In this regard, proposed § 37.21(c) directs that licensees subject certain classes of individuals to the access authorization program. Specifically, the NRC is proposing that vehicle drivers and accompanying individuals for road shipments of category 1 quantities of radioactive material, movement control center personnel for shipments of category 1 quantities of radioactive material, and any individual whose assigned duties provide access to shipment information on category 1 quantities of radioactive material that is considered to be SGI-M, all be fingerprinted and undergo background investigations. This was discussed in Section II, question B3 of this document.

21. Who Would Be Relieved From the Background Investigation Requirements?

Under section 149.b. of the AEA, the NRC may, by rule, relieve individuals from the fingerprinting, identification, and criminal history records check requirements if it finds that such action is "consistent with its obligations to promote the common defense and security and to protect the health and safety of the public." The NRC issued a final rule, 10 CFR 73.61,