

**POLICY ISSUE
NOTATION VOTE**

July 8, 2008

SECY-08-0050A

FOR: The Commissioners

FROM: Stephen G. Burns
Acting General Counsel

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SUBJECT: FIREARMS GUIDELINES IMPLEMENTING SECTION 161A. OF THE
ATOMIC ENERGY ACT OF 1954 AND ASSOCIATED POLICY ISSUES
— SUPPLEMENTAL INFORMATION

PURPOSE:

To obtain the Commission's approval of proposed actions necessitated by changes in the final version of the firearms guidelines implementing section 161A. of the Atomic Energy Act of 1954 (AEA).

SUMMARY:

This paper supplements the information provided to the Commission in SECY-08-0050, dated April 17, 2008. This paper replaces Enclosure 1 of SECY-08-0050 with the enclosed firearms guidelines and provides new recommendations on the issuance of a revised proposed rule. This paper also recommends against the issuance of orders to implement the firearms background checks.

BACKGROUND:

AEA section 161A. empowers the Commission to authorize security personnel of any NRC licensee or certificate holder to transfer, receive, possess, transport, import, and use firearms, ammunition, or devices listed in the section, if certain determinations are made by the

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SECY NOTE: THIS SECY PAPER, WITHOUT ENCLOSURES, TO BE MADE PUBLICLY AVAILABLE AFTER PUBLICATION OF THE FIREARMS GUIDELINES IN THE FEDERAL REGISTER.

Commission. Subsection d. of section 161A. of the Atomic Energy Act (AEA) provides that the section takes effect on the date on which guidelines (referred to in this paper as “the guidelines” or “the firearms guidelines”) are issued by the Commission, with the approval of the Attorney General (AG). In SECY-08-0050 the staff provided the Commission with such guidelines for its review and approval. These guidelines were developed by Nuclear Regulatory Commission staff working in coordination with Department of Justice (DOJ). SECY-08-0050 included, among other things, a draft Federal Register Notice of issuance of the guidelines, along with the text of the guidelines that had been agreed to by NRC staff and DOJ staff.

DISCUSSION:

In May of this year, following submission of SECY-08-0050 to the Commission, DOJ made a significant change in its interpretation of subsection c. of section 161A. Subsection c. provides the following:

“A person that receives, possesses, transports, imports, or uses a weapon, ammunition, or a device under subsection [b.] shall be subject to a background check by the Attorney General, based on fingerprints and including a background check under section 103(b) of the Brady Handgun Violence Prevention Act (citation omitted) to determine whether the person is prohibited from possessing or receiving a firearm under Federal or State law.”¹

Section 103(b) of the Brady Handgun Violence Prevention Act required the Attorney General to establish the national instant criminal background check system (NICS), which conveys information by telephone or other electronic means, on whether receipt of a firearm by a prospective transferee would violate 18 U.S.C. 922 or State law. 18 U.S.C. 922(g) contains a list of persons for whom it is unlawful to possess in or affecting commerce, or to receive, any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. The list of persons includes, among others, any person who has been convicted of a felony, is an unlawful user of or addicted to any controlled substance, is an illegal alien, has received a dishonorable discharge from the U.S. Armed Forces, or has been convicted of a misdemeanor crime of domestic violence.

Initially, DOJ staff interpreted section 161A.c. as only requiring NICS checks of security personnel of licensees and certificate holders that had applied for enhanced weapon or preemption authority. However, in May of this year, DOJ determined that section 161A.c. requires NICS checks of all Commission-designated licensees’ and certificate holders’ security personnel who have access to any weapon in carrying out their official duties. This interpretation requires a considerable increase in the number of individuals who will be required to have a NICS check under section 161A. Commissioners’ Assistants were made aware of the

¹ Subsection 161A.b. of the Atomic Energy Act covers handguns, rifles, shotguns, short-barreled shotguns, short-barreled rifles, machineguns, semiautomatic assault weapons, ammunition for any such gun or weapon, and large capacity ammunition feeding devices.

change in DOJ interpretation at a meeting with OGC representatives that was held after OGC was informed of the change by DOJ. This change in interpretation requires a change in the firearms guidelines and in the regulations implementing the guidelines. The revised guidelines are enclosed with this paper (Enclosure 1). A comparative text is also enclosed, highlighting the recent changes (Enclosure 2).

Staff estimates that approximately 8000 security personnel would undergo NICS checks once the requirement becomes effective, with each check costing the industry \$35, totaling \$280,000. These checks will be required to be repeated every three years thereafter, meaning the industry will continue to incur costs of approximately \$94,000 per year.

In SECY-08-0050, the staff proposed that upon issuance of the guidelines, staff would issue a direct final rule and accompanying proposed rule that would implement the guidelines. With these additional changes, the likelihood of receiving adverse public comments has increased and we now recommend that the Commission issue a revised proposed rule affording members of the public 45 days to comment on the changes that have been made to the proposed rule that the Commission had published in October 2006 for public comment.

Under section 161A of the AEA, the NICS check requirement takes effect for classes of facilities, radioactive material, and other property only after the NRC designates that class to be covered by the provisions of section 161A. The revised proposed rule would require NICS checks only for security personnel at power reactor facilities and Category I strategic special nuclear material (SSNM) facilities as these are the only licensed facilities covered by the initial proposed rule issued in October 2006 for public comment. These checks would commence only after a final rule is promulgated. The NICS check requirement for security personnel at other classes of licensees or certificate holders would be addressed in the separate rulemaking discussed in SECY-08-0050 that would commence in FY 2010 or later.

To expedite issuance of the revised proposed rule, the NRC staff recommends that the EDO be given the authority to issue the revised proposed rule without further Commission review. The information contained in SECY-08-0050 and this paper provides the Commission with a description of the substance of the proposed rule. The changes to the NICS check requirements in the revised proposed rule will be consistent with the enclosed firearms guidelines. The staff would require periodic NICS checks every three years to be consistent with the recently revised criminal history records checks provisions for security personnel in 10 CFR 73.56. The staff would provide a final rule to the Commission for its review and approval after the staff evaluated and addressed public comments.

Staff has considered whether, after the guidelines have been published, the NRC should issue orders to licensees requiring them immediately to commence NICS checks for security personnel prior to publication of a final rule. For the reasons below, the staff is not recommending this approach.

As indicated above, 18 U.S.C. 922(g) contains a list of persons for whom it is unlawful to possess in or affecting commerce, or to receive, any firearm or ammunition which has been shipped or transported in interstate or foreign commerce. In addition, under 18 U.S.C. 922(d), any person, including a licensee or certificate holder, is prohibited from selling or disposing of any firearm or ammunition to any person who they know or have reasonable cause to believe to be under such a disability. Consequently, the firearms background checks will only inform a

licensee or certificate holder whether an individual is disqualified from possessing firearms and ammunition under Federal (or State) law; they will not establish a new disqualification standard for access to weapons.

Additionally, the staff recently issued a generic communication to industry on this subject (see RIS-2008-10, "Notice Regarding Forthcoming Federal Firearms Background Checks," dated May 13, 2008). The RIS provided advance planning information to licensees, certificate holders, and their security officers on the forthcoming firearms background checks, described how security officers can determine whether the FBI's NICS databases contain any incorrect information indicating they are prohibited from possessing firearms or ammunition, and reminded licensees and certificate holders of their current obligation under 18 U.S.C. 922(d) not to issue any firearms or ammunition to security officers they know or have a reason to believe are prohibited from possessing firearms or ammunition.

Under these circumstances, the issuance of immediately effective orders requiring power reactor licensees and Category I SSNM licensees to institute firearms background checks lacks the degree of urgency and necessity associated with the NRC's previous issuance of security orders. In fact, it is the staff's judgment that the issuance of orders mandating firearms background checks for designated classes of facilities prior to the promulgation of a final rule would not significantly increase the defensive capabilities of such licensees. The staff took into consideration the fact that a broad range of stakeholders, including both industry and a public interest organization, have strongly indicated to the NRC that rulemaking should be used to implement further security measures, absent a compelling need. Given the nature of the firearms background checks for armed security officers at these facilities, and the presence of other existing NRC background investigation programs, the staff does not consider that a compelling need exists for issuance of such orders.

The staff further notes that the development of the orders, additional security measures (ASMs), and associated guidance documents, and obtaining stakeholder input on the proposed ASMs would divert resources from the development of the revised proposed rule. Consequently, the development of these orders, ASMs, and any associated tasks would likely delay the issuance of a final rule on the subject. Additionally, Office of Management and Budget (OMB) approval of the new NRC Form 754 is required before security officers can be required to submit these forms to the NRC to accomplish any firearms background checks mandated under either regulations or orders. In a recent conversation with a representative of the Office of the General Counsel, OMB stated that it preferred to review the form as part of its review of a draft final rule. However, OGC was told that if the Commission provided a detailed justification for separating the OMB review of the form from its review of the final rule, OMB would consider an early review of the form.²

² OMB reviewed the proposed NRC Form 754 as part of its review of the proposed rule issued for public comment in October of 2006. It gave the NRC staff comments on the form, but did not give it a Paperwork Reduction Act clearance. OMB desires to review the final rule before giving us the clearance, giving it the opportunity to evaluate how the NRC addressed public comments on the information collection provisions.

Lastly, the staff believes that the NRC's use of rulemaking processes to impose the NICS check requirement, given the opportunity for public comment in rulemaking, provides greater transparency regarding the agency's actions and is consistent with the Commission's current approach to implementing new security requirements.

COMMITMENTS:

The staff identified commitments in SECY 08-0050, which we have modified below. No further commitments are required.

1. The General Counsel will forward the firearms guidelines to the AG upon the Commission's direction.
2. Publish the firearms guidelines in the *Federal Register* following the AG's approval.
3. Develop a revised proposed rule, which will be followed by a final rule after the comment period for the revised proposed rule has expired.
4. Provide a draft final rule to the Commission for its approval.
5. Issue draft regulatory guidance on the firearms guidelines (DG 5020) and regulatory guidance on event notifications (DG 5019) following publication of the proposed rule.
6. Develop an MOU with the FBI and an MOU with ATF to support implementation of the firearms guidelines.
7. Conduct a technical workshop, with support from FBI, ATF, and USACE, for stakeholders on the implementation of the firearms guidelines.
8. Develop a separate rulemaking designating additional classes of facilities and radioactive material for application of section 161A. authority.
9. Provide the proposed rule designating additional classes of licensees that could take advantage of section 161A. authorities to the Commission on a schedule developed in the staff's rulemaking common prioritization list. No rulemaking plan would be provided.

RESOURCES:

No changes have been made to the resources identified in SECY-08-0050.

RECOMMENDATIONS:

That the Commission:

1. Approve issuing the firearms guidelines and notice in the enclosure to this paper after obtaining the AG's approval, and publishing them in the *Federal Register*.
2. Delegate to the EDO the authority to publish the revised proposed rule. The rule will be signed by the EDO and provide for a 45-day comment period. The final rule would be submitted to the Commission for its approval.
3. Authorize the staff to develop a separate rulemaking expanding section 161A. authority to the additional classes of facilities and radioactive material specified in Enclosure 3 of SECY-08-0050.
4. Approve sending the letters to Governors that are in Enclosure 5 to SECY-08-0050 prior to the publication of the approved firearms guidelines in the *Federal Register*.

5. Approve SECY publicly releasing SECY-O8-0050, except for Enclosures 1 and 5, and all of this paper except for the Enclosures following publication of the approved firearms guidelines in the *Federal Register*. At that time, the final Guidelines would have been published and there is no compelling justification for disclosing the draft guidelines. Also, the Commission does not routinely release drafts of letters to Governors. The signed letters to Governors will have been public at that time.

COORDINATION:

No review of the Office of the Chief Financial Officer was required since no changes were made to the resources identified in SECY-08-0050.

/RA/

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- Enclosures:
1. Revised Federal Register Notice and Firearms Guidelines
 2. Comparison of Revised Guidelines with those Contained in SECY-08-0050