



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

January 9, 2017

PLEASE RESPOND BY:
January 27, 2017

COMSECY-17-0002

MEMORANDUM TO: The Commissioners

FROM: Victor M. McCree */RA/*
Executive Director for Operations

SUBJECT: RULEMAKINGS MANDATED BY STATUTE OR IMPLEMENTING
U.S. GOVERNMENT POLICY ON EXPORT LICENSING
CONTROLS

This paper seeks Commission approval to conduct rulemaking without first developing and receiving Commission approval of a rulemaking plan when the rulemaking either is mandated by new statutory provisions or implements U.S. government policy on export licensing controls.

The process for streamlined rulemaking plans was described in SECY-15-0129, "Commission Involvement in Early Stages of Rulemaking," dated October 19, 2015 (Package Accession No. ML15267A759 in the U.S. Nuclear Regulatory Commission's (NRC's) Agencywide Documents Access and Management System (ADAMS)), and approved by the Commission in the February 3, 2016, staff requirements memorandum (SRM) for SECY-15-0129 (ADAMS Accession No. ML16034A441). The SRM directed that the new rulemaking plan requirements apply to "all rulemaking that is not already explicitly delegated to the staff as a staff delegated rulemaking (the modifier 'nonroutine' should not be used)." The SRM stated that the Commission's direction in the SRM is consistent with the Joint Explanatory Statement accompanying the Consolidated Appropriations Act, 2016 (Public Law 114-113), stipulating that a rulemaking plan be prepared for "all rulemakings except those exempted by the Commission." A rulemaking explicitly delegated to the staff ("staff-delegated rulemaking") is exempt from the rulemaking plan requirement and may be initiated and issued without preparing a rulemaking plan and without seeking Commission approval, unless a significant policy issue is raised.

In SECY-15-0129, the staff noted that routine rulemakings fall under (1) the Commission-delegated authority to the Executive Director for Operations (EDO) to issue rules of a minor, corrective, or non-policy nature that do not substantially modify existing precedent; and (2) the Commission delegated authority to the Chief Financial Officer (CFO) to develop and issue a rule that is necessary to carry out the CFO's responsibilities.

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Routine rulemakings include rules that make corrections or administrative changes, add and amend certificates of compliance, update 10 CFR 50.55a ASME Code usage, and revise the license fees under parts 170 and 171.

The staff's listing of types of rules that could fall under the EDO's delegated authority was not all-inclusive, and therefore did not extend to rulemakings mandated by new statutory provisions (either entirely new statutes, or new statutes amending or supplementing existing statutes), including statutes mandating updates to the NRC's regulations on a statutorily-defined basis with no significant discretion afforded to the NRC. Examples of statutorily-mandated rulemakings include inflation adjustments to the NRC's financial protection regulations made pursuant to the Price-Anderson Amendments Act of 2005, and the annual civil penalty inflation adjustments made pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.¹ The staff's listing of types of rules that could fall under the EDO's delegated authority also did not extend to rulemakings implementing U.S. government policy on export licensing controls with no significant discretion afforded to the NRC, *viz.*, revisions to the list of embargoed or restricted destinations, obligations in new or renegotiated Agreements for Peaceful Nuclear Cooperation (123 Agreements), and incorporation of revisions to the Nuclear Suppliers Group guidelines or control lists that impact 10 CFR Part 110. Inasmuch as the SRM for SECY-15-0129 did not directly address statutorily-mandated rulemakings or rulemakings implementing U.S. government policy on export licensing controls, the staff requests explicit Commission approval to permit EDO-initiation of statutorily-mandated rulemakings and rulemakings implementing U.S. government policy on export licensing controls without development and approval of a rulemaking plan.

The staff believes that the most effective way of ensuring Commission involvement in both types of rulemakings, consistent with efficient and timely conduct of such rulemakings, is for the Commission to continue to review and approve a rulemaking plan for any statutorily-mandated rulemaking or rulemaking implementing U.S. government policy on export licensing controls involving either: (1) substantial discretion to the NRC in implementing the statutory mandate or the U.S. government policy on export licensing controls;² or (2) significant policy or regulatory issues in selecting the regulatory approach to be adopted by rulemaking for implementing a statutory mandate. A historical example of a statutorily-mandated rulemaking affording both substantial discretion to the NRC and raising significant policy or regulatory issues in selecting the regulatory approach to be adopted by rulemaking for implementing the statutory mandate is Section 206 of the Energy Reorganization Act of 1974, as amended, which became law in 1977. Section 206(a)(2) of the statute required notification of "a defect which could create a substantial safety hazard, as defined by *regulations which the Commission shall promulgate....*" Section 206 was the basis for the NRC's adoption of the original regulations in 10 CFR Part 21, "Reports of Defects and Noncompliance," in 1977 (42 FR 28891; June 6, 1977).

¹ In the SRM for SECY-16-0180, "Revised Delegation of Authority to the Executive Director for Operations to Initiate and Sign Rules Amending Civil Penalties for Inflation," dated October 19, 2016 (non-public), the Commission delegated to the Executive Director for Operations "the authority to initiate and sign annual rules amending civil penalties to account for inflation without first obtaining the concurrence of the Office of Commission Appellate Adjudication and the Atomic Safety Licensing Board Panel."

² Due to the nature of U.S. government export controls, the staff expects that there will be virtually no rulemakings that would involve substantial discretion to the NRC in implementing the U.S. government policy. However, for completeness, the staff has included this unlikely circumstance.

In all other cases, efficiency and effectiveness suggest that Commission involvement through review and approval of a rulemaking plan is not warranted (these considerations are particularly applicable when the statute or U.S. government policy sets forth a very short time period for completion of the rulemaking³). Instead, the staff believes that notice to the Commission of the staff's initiation of rulemaking is sufficient to ensure the Commission's involvement in such rulemakings as the Commission determines is needed or prudent.

For the reasons set forth above, the staff recommends that the Commission approve the following:

1. Rulemaking plans do not need to be prepared for a rulemaking mandated by statute or implementing U.S. government policy on export licensing controls: (1) directing prescribed changes with little or no discretion on the part of the NRC or (2) that otherwise do not involve a significant policy issue requiring NRC resolution in the rulemaking. The staff will inform the Commission via a Commissioner Assistant's note each time the staff initiates a rulemaking falling in this category, and as required by MD 9.3, "Organization and Functions, Office of the Executive Director for Operations, the EDO will notify the Commission before submitting a final rule to the Federal Register.

Rulemaking plans will continue to be prepared and submitted for Commission review and approval, consistent with the SRM for SECY-15-0129, for all other rulemakings not explicitly delegated to the staff.

The Office of the General Counsel has reviewed this memorandum and has no legal objection.

SECY, please track.

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³ Some statutorily-mandated deadlines may not be enforceable by third parties against the NRC in Federal court, depending upon the statutory language.

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ADAMS Accession Number: ML16320A194

***via e-mail concurrence**

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