

RULEMAKING ISSUE

Affirmation

March 30, 2017

SECY-17-0043

FOR: The Commissioners

FROM: Victor M. McCree
Executive Director for Operations

SUBJECT: FINAL RULE: MODIFIED SMALL QUANTITIES PROTOCOL
(RIN 3150-AJ70; NRC-2015-0263)

PURPOSE:

The purpose of this paper is to request Commission approval to publish a final rule in the *Federal Register* that amends Parts 34, 35, and 75 of Title 10 of the *Code of Federal Regulations* (10 CFR). The U.S. Nuclear Regulatory Commission (NRC) staff intends to publish guidance concurrently with the final rule and to notify the affected licensees when the rule takes effect. This paper does not address any other commitments or resource implications.

SUMMARY:

This final rule implements the provisions of “The Agreement Between the United States of America (U.S.) and the International Atomic Energy Agency (IAEA) for the Application of Safeguards in Connection with the Treaty for the Prohibition of Nuclear Weapons in Latin America” (U.S.–IAEA Caribbean Territories Safeguards Agreement or the Agreement) that apply to the U.S. Caribbean Territories pursuant to modifications to this Agreement’s Small Quantities Protocol (SQP). The modifications to the SQP became binding on the U.S. when the Department of State (State Department) notified the IAEA of the United States’ acceptance of the modified SQP on January 30, 2017. However, the IAEA agreed to suspend the effective date of the agreement between the U.S. and the IAEA to modify the SQP, until the State

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Department notified the IAEA that the internal legal requirements to implement the modified SQP, i.e., revisions to the NRC's regulations have been put into place. The State Department intends to notify the IAEA that the internal legal requirements of the U.S. for the modified SQP's entry into force have been met upon its receipt of notification from the NRC staff after promulgation of this final rule.

This final rule contains amendments to the NRC's regulations that are necessary to implement the modified SQP, including allowing for the collection of information on source and special nuclear material in the U.S. Caribbean Territories and allowing for IAEA inspection access.

BACKGROUND:

Communication with the Commission on the topic of modifying the SQP to the U.S.–IAEA Caribbean Territories Safeguards Agreement dates back to 2014. Those communications include:

- On June 13, 2014, the NRC staff submitted SECY-14-0060, "Notification of United States Government Deliberations on Whether to Implement a Modified Small Quantities Protocol" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML14125A419), to the Commission regarding U.S. Government interest in modifying its SQP associated with the U.S.–IAEA Caribbean Territories Safeguards Agreement. This information paper provided background on the issue, described staff activities to support U.S. Government discussions, and outlined potential outcomes of the ongoing deliberations.
- On March 19, 2015, the staff submitted a memorandum to the Commission providing an update on the staff's activities in support of the ongoing interagency deliberations regarding whether to adopt a modified SQP to the U.S.–IAEA Caribbean Territories Safeguards Agreement (ADAMS Accession No. ML15057A142).
- On June 5, 2015, the staff submitted SECY-15-0080, "Department of State Request for Authority To Amend the Small Quantities Protocol to the Safeguards Agreement Between the United States and the International Atomic Energy Agency" (ADAMS Accession No. ML15093A159). The staff requested Commission approval to clear a Circular 175 (C-175) memorandum authorizing the State Department to negotiate and conclude modifications to the SQP associated with the U.S.–IAEA Caribbean Territories Safeguards Agreement.
- July 21, 2015, the Commission approved staff's request to clear the State Department's request for authority to negotiate and conclude modifications to the SQP associated with the U.S.–IAEA Caribbean Territories Safeguards Agreement in the staff requirements memorandum (SRM) for SECY-15-0080 (ADAMS Accession No. ML15202A484). The NRC's clearance was provided to the State Department on July 21, 2015.
- On May 25, 2016, the staff requested Commission approval to initiate a rulemaking to implement the modified SQP in SECY-16-0066, "Rulemaking Plan for Implementing the Modified Small Quantities Protocol to the United States International Atomic Energy Agency Caribbean Territories Safeguards Agreement" (ADAMS Accession No. ML16097A449).

- On June 20, 2016, the C-175 memorandum was approved by the State Department.
- On July 18, 2016, the Commission approved the staff's rulemaking plan in the SRM for SECY-16-0066 (ADAMS Accession No. ML16200A159).

In early August 2016 staff from the Office of Nuclear Material Safety and Safeguards and Region I conducted outreach with licensees possessing source material in Puerto Rico and the U.S. Virgin Islands. Based on this outreach and a detailed review of licensing documents, staff determined that 25 NRC licensees (all possessing source material) will have to comply with the modified SQP requirements. All licensees visited are possessors of "nuclear material outside facilities" as defined in the proposed change to 10 CFR 75.4, "Definitions." Currently, there are no NRC licensees in the U.S. Caribbean Territories possessing special nuclear material. During the licensee visits, staff reviewed the upcoming reporting and IAEA access requirements and provided outreach guides created by the IAEA (<http://www-pub.iaea.org/books/IAEABooks/10493/Safeguards-Implementation-Guide-for-States-with-Small-Quantities-Protocols>).

In August 2016 the State Department negotiated modifications to the SQP associated with the U.S.–IAEA Caribbean Territories Safeguards Agreement on behalf of the U.S. Government. These modifications will bring the SQP into conformity with the IAEA's 2005 revised model SQP agreement and are consistent with U.S. nonproliferation policy.

In January 2017 the staff submitted a Commissioners' Assistants Note (ADAMS Accession No. ML16357A328) providing a status update on the negotiations with the IAEA and outreach conducted in Puerto Rico and the U.S. Virgin Islands.

On January 30, 2017, the United States Mission to International Organizations in Vienna, Austria, sent a letter to the IAEA, which constituted an agreement between the U.S. and the IAEA to modify the SQP to the U.S.–IAEA Caribbean Territories Safeguards Agreement. This letter stated that the modified SQP shall enter into force on the date on which the IAEA receives further written communication from the U.S. that the "internal legal requirements of the United States" have been met. These legal requirements pertain to completing the NRC rulemaking effort. This communication is expected to occur in calendar year 2017 via an exchange of diplomatic notes between the State Department and the IAEA.

By modifying the SQP, several articles in Part II of the U.S.–IAEA Caribbean Territories Safeguards Agreement will no longer be held in abeyance. Significant new requirements include the need to submit an initial inventory report on all source and special nuclear material and to allow for IAEA inspections based on inventory declarations. The provisions of Part I of the U.S.–IAEA Caribbean Territories Safeguards Agreement will remain in force and unchanged by the modification to the SQP.

DISCUSSION:

The scope and requirements of 10 CFR Part 75 need to be expanded to include the applicable requirements under the U.S.–IAEA Caribbean Territories Safeguards Agreement, which will impact all current and future entities that possess source and special nuclear material within the U.S. Caribbean territories.

This final rule expands the scope of 10 CFR Part 75 and clarifies existing requirements to ensure that NRC licensees provide the necessary information and access rights to ensure

compliance with the U.S.–IAEA Caribbean Territories Safeguards Agreement. Conforming changes are also made to 10 CFR Parts 34 and 35, as requirements under 10 CFR Part 75, may become newly applicable to licensees subject to these parts. This final rule also clearly delineates that the U.S.–IAEA Caribbean Territories Safeguards Agreement constitutes a separate safeguards agreement from the U.S.–IAEA Safeguards Agreement (INFCIRC/288) and the Protocol Additional to the Agreement between the U.S. and the IAEA for the Application of Safeguards in the U.S. (also known as the Additional Protocol or AP); and that those subject to the provisions of the U.S.–IAEA Caribbean Territories Safeguards Agreement are not subject to the provisions under the U.S.–IAEA Safeguards Agreement.

This final rule imposes additional reporting and access requirements on entities affected by the U.S.–IAEA Caribbean Territories Safeguards Agreement. This final rule requires affected entities to:

- Provide basic information about the user (e.g., user's name and address), including organizational structure, geographic location, use of the nuclear material, and other relevant information requested pursuant to the safeguards agreement.
- Provide an initial inventory report of all source and special nuclear material possessed, and an annual inventory report thereafter. This report will also include source material that is contained in non-nuclear end use applications (e.g., depleted uranium shielding).
- Provide annual material-status reports for nuclear materials covered by the applicable provisions of the U.S.–IAEA Caribbean Territories Safeguards Agreement.
- Provide an inventory-change report when possessors import or export nuclear material (including shipments between U.S. Territories as well as to and from the 50 states) and advance notification, as specified in §§ 75.43, 75.44, and 75.45, of such an import or export exceeding one effective kilogram, as defined in § 75.4.
- Provide access for IAEA inspections. These inspections are expected to occur on an infrequent basis. The scope of IAEA inspections may include several activities, such as examination of records; verifying the functioning and calibration of instruments; and utilizing IAEA equipment for independent measurement, containment (such as a seal), and surveillance.

The NRC staff is revising two guidance documents for the relevant reporting requirements of the U.S.–IAEA Caribbean Territories Safeguards Agreement: NUREG/BR-0006, "Instructions for Completing Material Transaction Reports (U.S. Department of Energy (DOE)/NRC Form 741 and 740M)" (ADAMS Accession No. ML17026A069); and NUREG/BR-0007, "Instructions for the Preparation and Distribution of Material Status Report (DOE/NRC Form 742 and 742C)" (ADAMS Accession No. ML17026A076), concurrently with the publication of this final rule. A new appendix is being added to both NUREGs to reflect the changes relevant to this final rule. This rulemaking is being issued as a final rule, without notice and comment, pursuant to the foreign affairs exemption to the Administrative Procedure Act, 5 U.S.C. 553(a)(1). Similarly, the two NUREGs that are being revised to accompany the rulemaking, will not be subject to notice and comment. An opportunity for public comment will be provided during the next revisions of NUREG/BR-0006 and NUREG/BR-0007 (separate from this rulemaking), anticipated in calendar year 2017.

Under the Regulatory Flexibility Act (5 U.S.C. 605(b)), the NRC staff concludes that this rule does not have a significant economic impact on a substantial number of small entities. This final rule affects approximately two "small entities" as defined by the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

This final rule contains amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.) that must be submitted to the Office of Management and Budget (OMB) for its review and approval before publication of the final rule in the *Federal Register*. Existing DOE/NRC Forms 740M, 741, 742, and 742C were submitted to OMB for the 60 day publication period.

The staff-proposed *Federal Register* notice (FRN) (Enclosure 1) and letters to inform the appropriate Congressional Committees of this final rule (Enclosure 2) are enclosed.

COMMITMENTS:

The NRC staff will publish guidance concurrently with the final rule, NUREG/BR-0006 and NUREG/BR-0007.

The staff will notify affected licensees in the U.S. Caribbean Territories that IAEA safeguards are in effect.

CONCLUSIONS:

1. The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b);
2. This final rule is a rule as defined in the Congressional Review Act (5 U.S.C. §§ 801-808). However, OMB has not found it to be a major rule as defined in the Congressional Review Act. The appropriate Congressional and Government Accountability Office contacts will be informed (Enclosure 2);
3. The Office of Public Affairs will issue a press release when the final rule is filed with the Office of the Federal Register; and
4. The final rule contains amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.) that must be submitted to the OMB for its review and approval before publication of the final rule in the *Federal Register*.

RECOMMENDATIONS:

1. Approve the recommended publication in the *Federal Register* the attached final rule (Enclosure 1).
2. To satisfy the requirement of the Regulatory Flexibility Act, 5 U.S.C 605(b) certify that this rule, if promulgated, will not have significant impact on a substantial number of small entities. This certification is included in the enclosed FRN.

RESOURCES:

This rulemaking required 0.5 Full Time Equivalents in Fiscal Years 2016 and 2017 under the Nuclear Materials Users Business Line/Rulemaking Product Line/Rulemaking Product. The resources needed to complete this rulemaking are included in existing budget allocations.

COORDINATION:

The Office of the General Counsel has no legal objection to the final rulemaking. The Office of the Chief Financial Officer has reviewed this Commission Paper for resource implications and has no objections.

/RA by Frederick D. Brown for/

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Enclosures:

1. FRN
2. Congressional Letters

FINAL RULE: MODIFIED SMALL QUANTITIES PROTOCOL TO THE UNITED STATES
INTERNATIONAL ATOMIC ENERGY AGENCY CARIBBEAN TERRITORIES SAFEGUARDS
AGREEMENT (10 CFR PARTS 34, 35, AND 75) (RIN 3150-AJ70) DATE _____

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