



RULEMAKING ISSUE

(Affirmation)

December 10, 2021

SECY-21-0105

FOR: The Commissioners

FROM: Daniel H. Dorman
Executive Director for Operations

SUBJECT: FINAL RULE: CONTROLLED UNCLASSIFIED INFORMATION
(RIN 3150-AK30; NRC-2019-0060)

PURPOSE:

The purpose of this paper is to obtain approval to publish in the *Federal Register* the enclosed notice of final rule that amends Part 2 of Title 10 of the *Code of Federal Regulations* (10 CFR), "Agency Rules of Practice and Procedure," to account for the U.S. Nuclear Regulatory Commission's (NRC) implementation of Part 2002 of Title 32 of *Code of Federal Regulations* (32 CFR), "Controlled Unclassified Information (CUI)," and the associated discontinuance of the NRC's sensitive unclassified non-safeguards information (SUNSI) program. This final rule would make minor nomenclature revisions to 10 CFR Part 2 to remove references to SUNSI. If approved, the final rule would be published by September 2022, to support the NRC's transition from SUNSI to CUI which is currently expected to take place in October 2022.

SUMMARY:

On November 12, 2021, the NRC published a CUI Statement of Policy, which sets forth expectations regarding the treatment of CUI and describes how the NRC will comply with regulations in 32 CFR 2002. This rulemaking is one of several implementation tasks the NRC staff has prepared as part of the forthcoming transition to CUI. This rule removes references to "sensitive unclassified non-safeguards information" and its acronym in two sections of the regulations, because those terms refer to an NRC program that the NRC is terminating upon implementation of the CUI program.

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BACKGROUND:

On November 4, 2010, the President issued Executive Order 13556, “Controlled Unclassified Information,” to establish an “open and uniform program” across the executive branch for managing unclassified information that requires safeguarding or dissemination controls. This information is referred to as “controlled unclassified information,” or “CUI.” According to the executive order, agency-specific approaches have created an inefficient and confusing patchwork system, resulting in inconsistent marking and safeguarding of information and unnecessarily restricted information-sharing. On September 14, 2016 (81 FR 63323), the National Archives and Records Administration (NARA) published in the *Federal Register* a final rule creating a new 32 CFR Part 2002 (CUI Rule). The CUI Rule went into effect on November 14, 2016, and established requirements for CUI designation, safeguarding, dissemination, marking, decontrolling, destruction, incident management, self-inspection, and oversight across the executive branch.

The CUI Rule applies directly to Federal executive branch agencies, including the NRC, and its primary function is to define how the CUI program will be implemented within these agencies. The CUI Rule can also apply indirectly, through information-sharing agreements, to nonexecutive branch entities that are provided access to information that has been designated as CUI. The CUI rule does not include information that has been classified pursuant to Executive Order 13526 or any of its predecessor orders or the Atomic Energy Act (AEA) of 1954, as amended, nor information a nonexecutive branch entity (e.g., contractor, licensee, Agreement State, intervenor) possesses and maintains in its own systems that did not come from, or was not created or possessed by or for, an executive branch agency or an entity acting for such an agency.

This rulemaking is one of several implementation tasks the NRC staff has prepared as part of the forthcoming transition to CUI. In addition to this final rule the NRC staff has also been preparing internal CUI guidance and standards, as well as training for agency staff and contractors. On November 12, 2021, the NRC published a CUI Statement of Policy, which sets forth expectations regarding the treatment of CUI and describes how the NRC will comply with regulations in 32 CFR 2002.

DISCUSSION:

In COMSECY-18-0022, “Controlled Unclassified Information Rulemaking,” dated September 28, 2018, the NRC staff sought Commission authorization to develop a rulemaking as part of the agency’s transition to CUI. Two categories of potential revisions were identified: (1) nomenclature changes (i.e., replacing use of the phrase “sensitive unclassified non-safeguards information” or “SUNSI” with references to CUI), and (2) revisions to NRC regulations that “would appear to create substantive problems if not revised when the CUI Program is implemented.” As discussed below, the NRC staff is only proposing revisions in this final rule that fall within the first category (nomenclature changes). After further evaluation the NRC staff ultimately determined that substantive revisions previously described in the second category are undesirable or unnecessary for the CUI transition. Because this final rule only involves nomenclature changes, the NRC staff proposes issuance of this final rule without a period for notice and comment.

Nomenclature changes

The NRC has historically applied information security controls to three types of information: (1) information that is classified, either pursuant to an Executive order or the AEA, (2) Safeguards Information (SGI), as defined in Section 147 of the AEA and 10 CFR 73.2, “Definitions,” and (3) SUNSI, which encompasses information that is neither classified nor SGI but nonetheless is not publicly available. Examples of SUNSI include proprietary information submitted to the NRC, confidential allegation information or information relating to NRC investigations, personally identifiable information maintained by the NRC subject to the Privacy Act, certain security-related information, predecisional information determined to be sensitive enough to warrant nondisclosure to the public, and information submitted to the Commission that is marked as sensitive.

The CUI Rule, by definition, does not impact the designation or handling of classified information. And although SGI is considered a CUI category, it is considered a “CUI Specified” category, meaning that the NRC’s SGI regulations in 10 CFR Part 73 will continue to be used for protecting SGI, even after implementation of the CUI program at the NRC.

In contrast, the NRC’s SUNSI program is the sort of agency-specific program—one that is not specifically provided for in law, regulation, or Governmentwide policy—that the CUI program will supplant. Upon implementation of the CUI program at the NRC, most types of information currently protected under the SUNSI program will instead be marked as CUI and protected under the CUI program. The CUI program requirements for controlling information may also differ in some respects from current SUNSI program requirements. In addition, the CUI program currently does not cover certain types of SUNSI—notably, sensitive predecisional information, and information submitted to the Commission as “sensitive” that lacks some other, independent reason for qualifying as SUNSI. As a result, such information would no longer be eligible for special controls dictated by agency policy, although the CUI Rule stops short of requiring agencies to proactively release non-CUI information to the public and defers instead to agency policies on the public release of information to address that issue (see 32 CFR 2002.4(II), 32 CFR 2002.18(e) and (g), 32 CFR 2002.44(a)–(b), and 32 CFR 2002.46, “CUI and the Privacy Act”).¹

Because certain NRC regulations use SUNSI terminology, and because the SUNSI program will be supplanted by CUI, the NRC staff has considered whether, once the NRC shifts to the CUI program, to replace references to “sensitive unclassified non-safeguards information” and “SUNSI” in certain regulations with different language that would not refer, or at least would not appear to refer, to a (by then) defunct NRC program. The NRC staff is now proposing changes to these types of regulations in 10 CFR Part 2.

The first regulation, 10 CFR 2.307(c), provides the Secretary of the Commission with delegated authority to issue orders establishing procedures and timelines for potential parties in NRC adjudications to seek access to SGI or SUNSI if such persons believe access is necessary in order to meet Commission intervention requirements. The second regulation, 10 CFR 2.311,

¹ The CUI Rule also does not prohibit agencies from applying markings such as “predecisional,” “draft,” or “deliberative” on a document to provide information on the document’s status, so long as those markings are not used as control markings. Markings of that sort may still prove helpful in informing agency decisions about whether to release particular documents to the general public—an agency decision that, as discussed, the CUI Rule does not govern—but such markings could not be used to indicate that a document requires special controls when the information is being used, stored, or shared for Government purposes.

provides adjudicatory procedures for interlocutory review of orders granting or denying potential-party requests for access to SGI and SUNSI. The NRC staff proposes to update these regulations to remove the terms “sensitive unclassified non-safeguards information” and “SUNSI” and to refer instead to “non-public unclassified information” (or “other non-public unclassified information,” as appropriate given the context). The NRC staff intends no substantive changes through these revisions; potential parties may still seek access to the same types of nonpublic information they would currently be able to seek under 10 CFR 2.307(c) and 10 CFR 2.311 (including but not limited to proprietary, confidential, and commercial information; security-related information; and SGI).² The NRC staff also does not intend these amendments to affect any protective orders already in place when the rule is promulgated.

The NRC staff had alternatively considered replacing the terms “sensitive unclassified non-safeguards information” and “SUNSI” in these regulations with “controlled unclassified information” and “CUI.” However, because some types of SUNSI will not qualify as CUI but the NRC may still maintain the information as nonpublic even after CUI program implementation (something the CUI Rule, as noted above, does not prohibit), amending these regulations in that manner would narrow the scope of the provisions. Referring instead to “non-public unclassified information” will ensure, once the CUI program replaces the SUNSI program at the NRC, that the procedures in 10 CFR 2.307 and 10 CFR 2.311 remain applicable to any unclassified information the NRC withholds from public disclosure.

The NRC staff also considered replacing references to “sensitive unclassified non-safeguards information” that appear in design certification rules codified as appendices in 10 CFR Part 52, “Licenses, certifications, and approvals for nuclear power plants.” The NRC staff was concerned, however, that revising existing design certification rules could cause unintended consequences, given the reliance by license applicants and licensees on the already codified versions of design certification rules. The term “sensitive unclassified non-safeguards information” also carries a plain meaning that still makes sense, and that can cover the same ground, even if the NRC no longer has a program by that specific name. Therefore, while perhaps not ideal, the continued presence of SUNSI language in these design certification rules even after the NRC discontinues the SUNSI program should not raise insurmountable difficulties in the rules’ implementation. Although the NRC staff would consider proposing use of different terminology in lieu of “sensitive unclassified non-safeguards information” in future design certification rulemakings once the CUI program is implemented, the NRC staff, for the reasons discussed, is not proposing to change any terminology in already promulgated design certification rules.

Changes not made

In addition to nomenclature changes, COMSECY-18-0022 contemplated potential revisions to NRC regulations “that would appear to create substantive problems if not revised when the CUI Program is implemented.” One example of such a regulation offered in the COMSECY was 10 CFR 2.390, “Public inspections, exemptions, requests for withholding.” This regulation instructs persons submitting documents to the NRC to mark them in a certain manner (inconsistent with

² Amendment of these regulations will also warrant similar future nomenclature changes to the detailed procedures the agency issues in the Federal Register for implementing the information-request processes associated with these regulations (e.g., 84 FR 1801, 1805–06 (February 5, 2019), which imposes procedures for potential-party access to SUNSI in three NRC proceedings). Even absent amendments to the regulations themselves, the SUNSI program’s elimination upon CUI program implementation may, in and of itself, provide sufficient reason to reassess the use of SUNSI language in those procedures.

the marking scheme developed for CUI) when requesting that the agency withhold those documents from public disclosure. Accordingly, the regulation currently directs submitters to apply a control marking that the NRC, once the CUI program is implemented, could not utilize internally, even if the NRC agreed that the information merited withholding from public disclosure. The NRC staff was therefore considering amending 10 CFR 2.390 to require submitters to apply the appropriate CUI-compliant marking in the first instance when submitting an allegedly sensitive document, to avoid the need for the NRC staff to apply a different marking upon receiving it.

The NRC staff has since concluded, however, that requiring submitters to apply CUI-compliant markings themselves could create confusion and, in any event, is not necessary to implement an effective CUI program at the NRC. First, sensitive unclassified information is typically not yet CUI when still in a submitter's possession, or even when in transit to the Government. Accordingly, the contemplated amendment to 10 CFR 2.390 would have resulted in information being marked as CUI—thus giving the impression that the Government had already officially designated it as such—even though it was not yet officially CUI. This could prove confusing for both the NRC and submitters—particularly submitters operating under an obligation to protect, pursuant to a CUI information-sharing agreement, other information that actually is CUI. Second, the CUI Rule itself, at 32 CFR 2002.20(b)(2)(iii), contemplates that markings other than CUI-compliant markings may permissibly be present on a CUI document where the marking is applied pursuant to a law, regulation, or Governmentwide policy. While such markings are prohibited from being incorporated into the CUI marking (i.e., as part of the same banner marking), the CUI Rule does not prohibit such markings from appearing on the document when separate from the CUI marking, as would be the case if submitters apply their own markings under 10 CFR 2.390 and the NRC subsequently adds a CUI banner marking after receipt.³

For similar reasons, the NRC staff also has decided not to propose changes to the marking requirements for SGI in 10 CFR Part 73, "Physical protection of plants and materials." Currently, 10 CFR 73.22(d) requires SGI to be marked with the words "safeguards information." The CUI Registry maintained by NARA also has a CUI category for SGI. The CUI marking for SGI, as specified in the CUI Registry, would include "SGI" (e.g., "CUI//SP-SGI"), but it would not include the words "safeguards information." Therefore, without any amendment to 10 CFR Part 73, SGI that qualifies as CUI may require two separate markings. As discussed above, however, the CUI Rule specifically allows for this possibility, and permits regulations (like Part 73) to independently require some marking on a document different from that required by the CUI Rule so long as the markings remain separate. In addition, the CUI Rule applies only to SGI that fits within the definition of CUI. That is significant, because much SGI is licensee-generated information in the possession of those licensees that would not qualify as CUI.⁴ Further, nothing in 10 CFR Part 73 in its current form would prohibit CUI markings from appearing on SGI documents, so long as the required "safeguards information" markings are also present. As a result, 10 CFR Part 73 in its current form would not prohibit the application of

³ To illustrate, the CUI Rule would allow a proprietary document submitted to the NRC to contain a marking consistent with 10 CFR 2.390 (e.g., "withhold under 10 CFR 2.390"), and a separate CUI marking in accordance with NARA's CUI Registry (e.g., "CUI//PROPIN"), but the two markings could not be combined into one (e.g., "CUI//PROPIN//withhold under 10 CFR 2.390").

⁴ This is because the focus of the CUI program, and NARA's CUI Rule, is on the protection of the Government's information, including when the Government shares information, rather than on the protection of information that the Government merely regulates (such as a licensee's own SGI addressing the licensee's own facility, which the licensee must protect according to NRC regulatory requirements for SGI in 10 CFR Part 73).

CUI markings to SGI when needed to comply with CUI requirements. Based on these considerations, the NRC staff is not making amendments to the SGI marking requirements in 10 CFR Part 73.⁵

Public comment

In COMSECY-18-0022, the NRC staff proposed to perform this update of its regulations “via a standard notice and comment rulemaking.” However, as previously explained, the NRC staff at the time was contemplating potential substantive revisions to its regulations, including marking requirements for documents submitted to the NRC and SGI, that would have directly affected NRC stakeholders. Under the Administrative Procedure Act (5 U.S.C. 553(b)(A)), notice and comment requirements do not apply “to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.” Because this revision affects the NRC’s rules of agency procedure and practice, the notice and comment provisions of the Administrative Procedure Act do not apply. Moreover, the final rule does not change the substantive responsibilities of any person or entity regulated by the NRC. Thus, the NRC staff is now of the view that these minor nomenclature revisions do not warrant prior notice and comment.

Backfitting and Issue Finality Considerations

The NRC has determined that this final rule does not constitute a backfit as defined in the backfit rule (10 CFR 50.109, “Backfitting”) and it is not inconsistent with any applicable issue finality provision in 10 CFR Part 52. Therefore, the staff prepared neither a backfit analysis nor a discussion addressing the issue finality provisions in 10 CFR Part 52 for this rule.

RESOURCES:

This rulemaking is designated as a medium-priority rulemaking in accordance with the common prioritization of rulemaking. This is a final rule; therefore, minimal resources are needed to complete this rulemaking activity.

RECOMMENDATIONS:

The NRC staff recommends that the Commission approve the enclosed final rule for publication in the FR.

After approval, the NRC staff would take the following actions:

- (1) The NRC staff will ensure the final rule is published in the FR at an appropriate later date, coinciding its effectiveness with the agency’s transition from SUNSI to CUI. The rule will be published in advance of this transition, currently expected in October 2022, and will become effective 30 days after publication.

⁵ In addition, consistent with the discussion above on 10 CFR 2.390, where SGI is being submitted to the NRC but does not qualify as CUI until it reaches the NRC (e.g., because it is the submitter’s own SGI on the submitter’s own facility), the NRC staff would apply a CUI-compliant marking after receiving the SGI, rather than requiring the submitter to apply the CUI marking when submitting the SGI to the NRC. At all times, however, the SGI would still need to contain the “Safeguards Information” markings required by 10 CFR 73.22(d).

- (2) The Office of Congressional Affairs will keep the appropriate congressional committees informed.
- (3) The staff will work with the Office of Public Affairs on an appropriate public communication when the NRC publishes the final rule in the *Federal Register*.

COORDINATION:

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



Signed by Dorman, Dan
on 12/10/21

Daniel H. Dorman
Executive Director for Operations

Enclosure:
Final Rule – Federal Register Notice –
Controlled Unclassified Information Rule

SUBJECT: FINAL RULE: CONTROLLED UNCLASSIFIED INFORMATION
 DATED: December 10, 2021

ADAMS Accession Nos.: ML19239A092 (Pkg), ML19239A097 (SECY), ML19239A100 (Encl)

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