

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

NRC-2019-0060

RIN 3150-AK30

Controlled Unclassified Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its regulations in connection with its implementation of the government-wide Controlled Unclassified Information program at the NRC. The final 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 Controlled Unclassified Information program. The amendment replaces those terms with other language intended to cover the same information, resulting in no substantive change to the regulations. The NRC is not soliciting public comment on this change because the change is limited to an agency rule of procedure and practice that does not affect the rights and responsibilities of outside parties.

DATES: Effective Date: **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].**

ADDRESSES: Please refer to Docket ID NRC-2019-0060 when contacting the NRC about the availability of information for this action. You may obtain publicly-available information related to this action by any of the following methods:

- **Federal Rulemaking Website:** Go to <https://www.regulations.gov> and search for Docket ID NRC-2019-0060. Address questions about NRC dockets to Dawn Forder; telephone: 301-415-3407; email: Dawn.Forder@nrc.gov. For technical questions, contact the individuals listed in the FOR FURTHER INFORMATION CONTACT section of this document.

- **NRC's Agencywide Documents Access and Management System (ADAMS):** You may obtain publicly-available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by email to pdresource@nrc.gov. The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in the SUPPLEMENTARY INFORMATION section.

- **NRC's PDR:** You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1-800-397-4209 or 301-415-4737, between 8:00 a.m. and 4:00 p.m. (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Solomon Sahle, Office of Nuclear Material

Safety and Safeguards; telephone: 301-415-3781; email: solomon.sahle@nrc.gov or Tanya Mensah, Office of the Chief Information Officer; telephone: 301-415-3610; email: tanya.mensah@nrc.gov. Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

SUPPLEMENTARY INFORMATION:

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I. 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 to controlling sensitive unclassified information 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 published a final rule in the *Federal Register* that added new part 2002 to title 32 of the *Code of Federal Regulations* (32

CFR) (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; its primary function is to define how the CUI program will be implemented within these agencies. The CUI Rule can also apply indirectly to non-Executive branch entities that are provided access to CUI through information-sharing agreements.

Controlled unclassified information does not include information that has been classified pursuant to Executive Order 13526, or any of its predecessor Orders, or the Atomic Energy Act of 1954, as amended, nor information a non-Executive branch entity (e.g., contractors, licensees, Agreement States, intervenors) 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.

Prior to implementing the CUI program at the NRC, the NRC relied on its own program, known as the Sensitive Unclassified Non-Safeguards Information (SUNSI) program, to ensure proper control of sensitive unclassified information that is not Safeguards Information. The SUNSI program is an NRC-specific unclassified information control program not established by law, regulation, or government-wide policy. The CUI program is designed to replace such programs. Accordingly, in connection with the NRC's implementation of the CUI program, the NRC is discontinuing its SUNSI program. Under the CUI program, most information that previously qualified as SUNSI will now be CUI. With respect to any former SUNSI that does not qualify as CUI, the NRC will not apply special safeguarding or dissemination controls to the information. The CUI Rule does not, however, specify that agencies disclose such information to the general public. Instead, where it addresses disclosure to the public,

the CUI Rule defers to existing applicable legal regimes, such as the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act of 1974 (5 U.S.C. 552a), as well as to agency policies on disclosure of information to the public. Therefore, the NRC's CUI program does not override any of the aforementioned legal regimes or NRC public release policy, regardless of whether the information is designated or marked as CUI.

II. Discussion

After reviewing its regulations in title 10 of the *Code of Federal Regulations* (10 CFR) in connection with implementation of the CUI program, the NRC determined that certain regulations regarding information-access procedures in NRC adjudications require minor updates. Therefore, the NRC is making nomenclature changes in §§ 2.307(c) and 2.311 by replacing the term "sensitive unclassified non-safeguards information" and its acronym "SUNSI" with "non-public unclassified information" or "other non-public unclassified information," as appropriate. This new language will allow the regulations to remain substantively unchanged, such that they continue to address unclassified NRC information that potential parties cannot yet access, while avoiding any potential confusion that could result from these regulations referencing a now-discontinued NRC program.

The regulations being amended address access by prospective intervenors (referred to in the regulations as "potential parties") to: 1) Safeguards Information (SGI) and 2) other sensitive unclassified NRC information. These regulations have referred to the latter type of information as "sensitive unclassified non-safeguards information," or "SUNSI," in accordance with the NRC's longstanding unclassified-information control program by that same name. Access to information under these regulations serves to

support potential party requests to intervene in NRC adjudications. Specifically, § 2.307(c) currently authorizes the Secretary of the Commission to issue orders that establish procedures and timelines for potential parties to file, and obtain resolution of, requests for access to SGI and “sensitive unclassified non-safeguards information” in connection with potential parties’ efforts to intervene in NRC adjudications. Relatedly, § 2.311 addresses procedures for obtaining interlocutory Commission review of decisions granting or denying potential party access to such information. Together, these regulations establish a basic, high-level framework to support consideration, through the NRC adjudicatory process, of potential-party requests for access to unclassified NRC information that the NRC has not made public.

To ensure that these regulations continue to provide the same coverage that they currently do with respect to potential-party information requests, while also accounting for the SUNSI program’s elimination, the NRC is replacing references to “sensitive unclassified non-safeguards information” and “SUNSI” in these regulations with references to “non-public unclassified information” (or “other non-public unclassified information,” when necessary given the structure of the sentence being amended). Thus, the amended regulations continue to address potential-party access to SGI and also will continue to address potential-party access to other types of non-public unclassified information. The NRC does not intend these amendments to substantively change the meaning of, or the scope of information covered by, § 2.307(c) or § 2.311. The NRC also does not intend for these amendments to affect the validity, meaning, or scope of any protective order already in effect that addresses access to non-public information.

III. Rulemaking Procedure

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.

The final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

IV. Section by Section Analysis

The following paragraphs describe the specific changes in this final rule.

Section 2.307 Extension and reduction of time limits; delegated authority to order use of procedures for access by potential parties to certain sensitive unclassified information.

This final rule revises the title of this section to reference safeguards information and other non-public unclassified information instead of certain sensitive unclassified information. This final rule also revises paragraph (c) to reference other non-public unclassified information instead of sensitive unclassified non-safeguards information.

Section 2.311 Interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to sensitive unclassified non-safeguards information and safeguards information.

This final rule revises the title of this section to reference safeguards information and other non-public unclassified information instead of safeguards information and sensitive unclassified non-safeguards information. This final rule also revises paragraphs (a)(3) and (d)(2) to reference other non-public unclassified information instead of sensitive unclassified non-safeguards information and its acronym SUNSI.

V. Backfitting and Issue Finality

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

VI. Cumulative Effects of Regulation

The NRC is following its Cumulative Effects of Regulation process by engaging with external stakeholders throughout this rulemaking and related regulatory activities. Public involvement has included the publication of a policy statement in the *Federal Register* (FR citation) and multiple public meetings to afford external stakeholders an opportunity to ask clarifying questions regarding the CUI program and requirements.

VII. Plain Writing

The Plain Writing Act of 2010 (Pub. L. 111-274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written

this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, “Plain Language in Government Writing,” published June 10, 1998 (63 FR 31885).

VIII. National Environmental Policy Act

The NRC has determined that this final rule is the type of action described in § 51.22(c)(1) and (2). Therefore, neither an environmental impact statement nor environmental assessment has been prepared for this final rule.

IX. Paperwork Reduction Act

This final rule does not contain a collection of information as defined in the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995.

X. Congressional Review Act

This action is not a rule as defined in the Congressional Review Act (5 U.S.C. 801-808).

XI. Compatibility of Agreement State Regulations

Under the “Agreement State Program Policy Statement” approved by the Commission on October 2, 2017, and published in the *Federal Register* on October 18, 2017 (82 FR 48535), NRC program elements (including regulations) are placed into

compatibility categories A, B, C, D, NRC, or adequacy category Health and Safety (H&S). Compatibility Category A program elements are those program elements that are basic radiation protection standards and scientific terms and definitions that are necessary to understand radiation protection concepts. An Agreement State should adopt Category A program elements in an essentially identical manner in order to provide uniformity in the regulation of agreement material on a nationwide basis.

Compatibility Category B program elements are those program elements that apply to activities that have direct and significant effects in multiple jurisdictions. An Agreement State should adopt Category B program elements in an essentially identical manner.

Compatibility Category C program elements are those program elements that do not meet the criteria of Category A or B, but contain the essential objectives that an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a national basis. An Agreement State should adopt the essential objectives of the Category C program elements.

Compatibility Category D program elements are those program elements that do not meet any of the criteria of Category A, B, or C and, therefore, do not need to be adopted by Agreement States for purposes of compatibility.

Compatibility Category NRC program elements are those program elements that address areas of regulation that cannot be relinquished to the Agreement States under the Atomic Energy Act of 1954, as amended, or provisions of 10 CFR. These program elements should not be adopted by the Agreement States.

Adequacy category H&S program elements are program elements that are required because of a particular health and safety role in the regulation of agreement material within the State and should be adopted in a manner that embodies the essential objectives of the NRC program.

This final rule is classified as Category NRC. Compatibility is not required for Category NRC regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the AEA or the provisions of title 10 of the *Code of Federal Regulations*. Although an Agreement State may not adopt program elements reserved to the NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with a particular State's administrative procedure laws, but does not confer regulatory authority on the State.

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Classified information, Confidential business information, Environmental protection, Freedom of information, Hazardous waste, Nuclear energy, Nuclear materials, Nuclear power plants and reactors, Penalties, Reporting and recordkeeping requirements, Sex discrimination, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 2:

PART 2 – AGENCY RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 2 continues to read as follows:

Authority: Atomic Energy Act of 1954, secs. 29, 53, 62, 63, 81, 102, 103, 104, 105, 161, 181, 182, 183, 184, 186, 189, 191, 234 (42 U.S.C. 2039, 2073, 2092, 2093, 2111, 2132, 2133, 2134, 2135, 2201, 2231, 2232, 2233, 2234, 2236, 2239, 2241, 2282);

Energy Reorganization Act of 1974, secs. 201, 206 (42 U.S.C. 5841, 5846); Nuclear Waste Policy Act of 1982, secs. 114(f), 134, 135, 141 (42 U.S.C. 10134(f), 10154, 10155, 10161); Administrative Procedure Act (5 U.S.C. 552, 553, 554, 557, 558); National Environmental Policy Act of 1969 (42 U.S.C. 4332); 44 U.S.C. 3504 note. Section 2.205(j) also issued under 28 U.S.C. 2461 note.

2. In § 2.307, revise the section heading and paragraph (c) to read as follows:

§ 2.307 Extension and reduction of time limits; delegated authority to order use of procedures for access by potential parties to certain non-public unclassified information.

* * * * *

(c) In circumstances where, in order to meet Commission requirements for intervention, potential parties may deem it necessary to obtain access to non-public unclassified information, including safeguards information (as defined in § 73.2 of this chapter), the Secretary is delegated authority to issue orders establishing procedures and timelines for submitting and resolving requests for this information.

3. In § 2.311, revise the section heading and paragraphs (a)(3) and (d)(2) to read as follows:

§ 2.311 Interlocutory review of rulings on requests for hearings/petitions to intervene, selection of hearing procedures, and requests by potential parties for access to non-public unclassified information, including safeguards information.

(a) * * *

(3) A request for access to non-public unclassified information, including, but not limited to, proprietary, confidential commercial, security-related information, and Safeguards Information (SGI). An appeal to the Commission may also be taken from an order of an officer designated to rule on information access issues.

* * * * *

(d) * * *

(2) Whether the request for access to the information described in paragraph (a)(3) of this section should have been denied in whole or in part. However, such a question with respect to SGI may only be appealed by the NRC staff, and such a question with respect to other non-public unclassified information may be appealed only by the NRC staff or by a party whose interest independent of the proceeding would be harmed by the release of the information.

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Dated: XXXX XX, 20XX.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,
Secretary of the Commission.