

Backfitting: "Changed" versus "New" Guidance

A Presentation for the 2011 RIC
**NRC Compliance with the Backfit Rule
when Issuing Interpretive Guidance**
Geary S. Mizuno
NRC Office of the General Counsel

Relevant regulatory language addressing
NRC Staff guidance is in
10 CFR 50.109(a)(1):

***...imposition of a regulatory Staff position
interpreting the Commission's regulations
that is either new or different from a
previously applicable Staff position...***

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Changed Guidance

***...imposition of a regulatory Staff position interpreting the Commission's
regulations that is either new or different from a previously applicable Staff
position...***

NRC Staff "guidance" is a "Staff position" for purposes of the Backfit Rule's
definition of backfitting.

A "Staff position" can be contained in many different NRC documents:

Regulatory Guides	Branch Technical Positions
Interim Staff Guidance (ISGs)	Generic Letters
NRC inspection reports	Safety Evaluations

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Changed Guidance (continued)

...imposition of a regulatory Staff position interpreting the Commission's regulations that is either new or different from a previously applicable Staff position...

To be considered backfitting, "changed" staff position in guidance must be "different from a previously applicable Staff position."

Changed staff position must be on the same subject matter/topic as the previously applicable Staff position.

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Changed Guidance (continued)

...imposition of a regulatory Staff position interpreting the Commission's regulations that is either new or different from a previously applicable Staff position...

A Staff position - for the most part - must be written, and must be intended by the NRC Staff to constitute a position to be relied upon by external stakeholders.

SRP is, ordinarily, not a Staff position for purposes of Backfit Rule, unless Staff specifically publishes something indicating it is Staff guidance for external stakeholders (e.g., in materials area).

Silence ("tacit acceptance") is, with few exceptions, **not** a Staff position.

Licensee should not be able to "force" the NRC to issue a position where there is no legal obligation for the NRC to do so. Interferes with NRC's authority to direct the conduct of its business.

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New Guidance

...imposition of a regulatory Staff position interpreting the Commission's regulations that is either new or different from a previously applicable Staff position...

The phrase, "from a previously applicable Staff position" only modifies the word, "different." It does not modify "new."

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New Guidance (continued)

...imposition of a regulatory Staff position interpreting the Commission's regulations that is either new or different from a previously applicable Staff position...

Generic new guidance is a Staff position on a subject area not covered by NRC regulations at the time of issuance of the new position.

Plant-specific new guidance is a Staff position on a subject area that is not part of the licensing basis for that unit or facility, e.g., a subject area not covered by applicable regulations, license conditions and exemptions, orders applicable to that licensee, and technical specifications, and guidance documents specifically approved or used by the Staff in a licensing action for that plant.

New Guidance (continued)

...imposition of a regulatory Staff position interpreting the Commission's regulations that is either new or different from a previously applicable Staff position...

The first time that the Staff issues a position or guidance on a *newly-adopted* NRC rule (including an amended rule) is **not** "new" guidance for purposes of the Backfit Rule.

Rationale: Backfitting concerns should have been addressed in the rulemaking for which guidance is now being issued for the first time. It makes little sense to re-perform the analysis, or to repeat the analysis to support issuance of guidance on the underlying rulemaking inasmuch as the NRC has already addressed backfitting for the rulemaking. Backfitting issues, such as cost, should be enveloped by (or determined to not be required to be addressed) in the underlying rulemaking.

New Guidance (continued)

...imposition of a regulatory Staff position interpreting the Commission's regulations that is either new or different from a previously applicable Staff position...

The first time that the Staff issues a position or guidance on a **specific** rule provision or issue is **not new guidance**, even if: (i) general Staff guidance on the rule exists; (ii) specific guidance on other rule provisions exists; or (iii) specific guidance on other issues relevant to implementation of the rule exists.

Rationale: Treating an "extension" of existing Staff guidance to address a new issue in implementing an existing regulatory requirement as backfitting would place an inordinate burden on the Staff to address any and all aspects of a new rule the first time guidance is issued. Lessons-learned and unanticipated circumstances or issues would all be considered new positions.
