

**POLICY ISSUE
INFORMATION**

November 10, 2010

SECY-10-0148

FOR: The Commissioners

FROM: R. W. Borchardt
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SUBJECT: PATH FORWARD FOR ADDRESSING THE VARIANCES BETWEEN
TITLE 10 OF THE CODE OF FEDERAL REGULATIONS SECTION
73.21, SAFEGUARDS INFORMATION PROTECTION REQUIREMENTS
AND NUCLEAR REGULATORY COMMISSION SECURITY ORDERS

PURPOSE:

The purpose of this paper is to inform the Commission of the staff's efforts to address the variances that exist between Title 10 of the *Code of Federal Regulations* (10 CFR) Section 73.21, "Protection of Safeguards Information: Performance Requirements" (Published in the *Federal Register* (FR) on October 24, 2008, (73 FR 63545)), and the requirements in the U.S. Nuclear Regulatory Commission's (NRC's) previously-issued security orders.

BACKGROUND:

SECY-07-0131, "Final Rule -10 CFR Part 73, 'Safeguards Information Protection Requirements'" (ML072190625), sought Commission approval to publish the final rule. In that SECY, the staff informed the Commission that the NRC had issued to certain licensees security orders requiring fingerprinting and a Federal Bureau of Investigation criminal history records check for individuals seeking access to Safeguards Information (SGI). The staff also informed

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The Commission that several security issues relating to the scope and implementation of the NRC's requirements for the protection of SGI had been identified. Those security issues were not being addressed in the final rule because they were not within the scope of the proposed rule that the public had commented on.

In Staff Requirements Memorandum (SRM) M090317, "Briefing on State of Nuclear Reactor Safety Programs," dated March 31, 2009 (ML090900599), the Commission directed the staff to report on whether variances existed between the final rule on the protection of SGI and the requirements imposed by the previously issued security orders.

In response, on May 18, 2009, the Director of the Office of Nuclear Security and Incident Response (NSIR) submitted a memorandum to the Commission (ML091190456) acknowledging that variances existed between the rule and the security orders. In some cases, the security orders contained provisions that were more restrictive than the rule. However, nothing in the security orders contradicted any of the requirements set forth in the rule. The Office of the General Counsel (OGC) advised NSIR that where variances existed between the security orders and the new SGI rule, licensees must follow the more stringent provision. As a result, licensees are required to comply with both the rule and the more stringent requirements set forth in the security orders.

In that May 18, 2009, memorandum to the Commission, NSIR stated that it would continue its consultations with OGC to determine appropriate long-term approaches to resolving issues related to variances between the rule and security orders and to the SGI-related issues deemed outside the scope of the rulemaking. Additionally, NSIR committed to analyzing each of the stated variances, lessons learned from industry's implementation of the rule, and the inspections of those entities with SGI programs.

DISCUSSION:

Both the SGI rule and the relevant security orders remain in effect. Affected licensees (i.e., research and test reactors, manufacturers and distributors, and panoramic and underwater irradiator licensees) and new reactor design vendors must currently comply with a combination of requirements for the protection of SGI set forth in both the rule and the applicable security orders. The more restrictive requirements contained in the security orders applicable to these licensees include the following: (1) the nomination of a reviewing official who is seeking access to SGI and the NRC's approval of that reviewing official¹ (applicable to research and test reactors, manufacturers and distributors, panoramic and underwater irradiator licensees, and new reactor design vendors); (2) the creation of additional personnel security screening procedures for foreign nationals and other individuals whose fingerprints would not yield sufficient criminal history information to form the basis of an informed decision on granting access to SGI (applicable to new reactor design vendors); (3) an NRC inspection of an SGI program before the agency shares SGI (only applicable to aircraft impact assessment information deemed SGI) with that entity (applicable to new reactor design vendors); and (4) NRC approval for a request to store SGI at a location other than the location that the NRC inspected (applicable to new reactor design vendors).

¹ Agreement States will adjudicate results from background check and approve their reviewing officials.

Since publication of the SGI rule, the staff has engaged industry representatives in discussions to identify lessons learned from implementation of the rule. As a direct result of those discussions, NSIR has revised its draft SGI Regulatory Guide and posted subject matter questions and answers on the NRC public webpage. The staff has not detected an increase in the number or severity level of SGI-related findings that can be attributed to variances that exist between the rule and the security orders. Licensees continue to comply with the requirements of both the SGI rule and the applicable security orders. Compliance with both the rule and the security orders does not place SGI at greater risk for unauthorized disclosure. Furthermore, compliance with the SGI rule and the security orders does not place an undue burden on licensees. The more stringent requirements are not based upon competing requirements between the rule and the security orders and the additional steps that are required of licensees and design vendors are minor in nature and in keeping with basic information security requirements for the safekeeping and storage of sensitive information.

There are currently two on-going rulemakings that have the potential to eliminate some of the variances between the SGI rule and the applicable security orders for affected licensees. These rulemakings include the creation of a new 10 CFR Part 37, "Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material" (75 FR 33901) and a revision to portions of 10 CFR Part 73 "Physical Protection of Plants and Materials" (75 FR 42000). When finalized, these proposed rules will codify the more stringent requirements set forth in security orders issued to those licensees affected by these rulemakings. In essence, except for reactor design vendors, completion of these rulemakings will eliminate the variances that exist between the current SGI rule and the security orders.

Finalization of the relevant Part 37 and Part 73 rulemakings will enable the NRC to rescind some of the security orders or relax some of the provisions in those orders. This will eliminate many of the variances that currently exist between the rule and the security orders. Accordingly, the staff believes that a reasonable path forward for addressing the variances between the current SGI rule and security orders rests with the publication of 10 CFR Part 37 and 10 CFR Part 73, as final rules, and the subsequent rescission or relaxation of the applicable security orders issued to licensees affected by those rulemakings.

However, promulgation of these new rules will not eliminate the variances between the SGI rule and the more restrictive security requirements set forth in the security orders issued to new reactor design vendors. The NRC considers the type of SGI forwarded to the new reactor design vendors to be a special class of SGI (aircraft impact characteristics). It has, therefore, afforded that information enhanced security measures as a condition for NRC-approved access and storage for that type of SGI. New reactor design vendors in receipt of aircraft impact SGI must, by order, implement more restrictive security requirements than those set forth in the current SGI rule. These requirements include the following:

- Nomination of an NRC-approved reviewing official who is seeking access to SGI;
- Creation of additional personnel security screening procedures for foreign nationals and other individuals whose fingerprints would not yield sufficient criminal history information to form the basis of an informed decision on granting access to SGI;
- NRC inspection of the SGI program before the agency shares SGI with the design vendor; and

- NRC approval to store SGI at a location other than the location inspected by the NRC

New reactor design vendors that possess or have requested access to aircraft impact characteristics data will have to comply with both the current SGI rule and the more restrictive requirements set forth in the orders issued to them for the protection of aircraft impact characteristics SGI.

Ultimately, the issues related to new reactor design vendors can best be addressed through rulemaking. Such a rulemaking would be of, limited scope and would impact only a few licensees and reactor design vendors. As noted above, the staff does not believe that compliance with both the security orders and the current SGI rule places SGI at greater risk for unauthorized disclosure or impose an undue burden on licensees. Accordingly, the staff plans to address this rulemaking as part of the actions described below.

There remain other outstanding SGI security issues, some of which were previously identified in NSIR's May 18, 2009, memorandum to the Commission. The outstanding SGI security issues that were identified in NSIR's memorandum to the Commission, do not constitute a variance between the current SGI rule and the security orders. These issues include:

- Relief from the background check requirement for those that have satisfied the requirement (including Federal fingerprinting as part of the criminal history records check) by documented proof of alternate means, such as having an active Federal security clearance;
- Policy and procedures governing removal of SGI from the United States;
- Policy governing a periodic reinvestigation for continued access to SGI;
- Policy and procedures for SGI access during non-NRC litigation, i.e., Federal and State court litigation;
- Relief, by rule, for additional categories of individuals beyond those in 10 CFR 73.59, i.e., local and tribal government entities and presiding judges in civil and criminal cases in Federal and State courts;
- Whether and how the NRC should review and approve non-licensee SGI programs; and
- Access to SGI by foreign nationals not already covered by the exemptions of 10 CFR 73.59

Other issues related to the spirit and intent of information sharing requirements prescribed by Executive Order 13549 "Classified National Security Information Program for State, Local, Tribal, and Private Sector Entities" (75 FR 51609) will also be addressed. NSIR is continuing its consultations with OGC and other offices to determine the best way to deal with these outstanding issues. The staff is exploring the possibility of a new rulemaking modifying 10 CFR 73.21 as the best way to address all of these outstanding SGI issues, including those related to new reactor design vendors. The staff intends to complete consultations and

analysis prior to initiating a new rulemaking. Accordingly, the staff is not seeking Commission approval to commence a rulemaking to address these outstanding SGI issues at this time.

COORDINATION:

OGC reviewed this paper and has no legal objections. The Chief Financial Officer has reviewed this paper and concluded that the commitment for exploration of a new rulemaking for 10 CFR 73.21 has no current resource implications. The required funding in the future years will be addressed during the Planning, Budgeting and Performance Management process, once placement on the common prioritization of rulemaking has occurred.

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