

# **POLICY ISSUE NOTATION VOTE**

April 24, 2013

SECY-13-0045

FOR: The Commissioners

FROM: R. W. Borchardt  
Executive Director for Operations

SUBJECT: DIRECT FINAL RULE: SAFEGUARDS INFORMATION -  
MODIFIED HANDLING CATEGORIZATION CHANGE FOR  
MATERIALS FACILITIES (RIN 3150-AJ18)

## PURPOSE:

To request Commission approval to publish a direct final rule and companion proposed rule in the *Federal Register* that removes the Safeguards Information – Modified Handling (SGI-M) designation of the security-related information for panoramic and underwater irradiator licensees that possess more than 370 Terabequerels (TBq) (10,000 curies (Ci)) of radioactive material (large irradiators), manufacturer and distributor (M&D) licensees, and any licensee that transports category 1 quantities of radioactive material or transports small quantities of irradiated reactor fuel that weighs 100 grams or less in net weight of irradiated fuel. The information will be protected under the requirements of the new Part 37 of Title 10 of the *Code of Federal Regulations* (10 CFR) entitled, “Physical Protection of Category 1 and Category 2 Quantities of Radioactive Material.”

## BACKGROUND:

In SECY-11-0170, “Final Rule: Physical Protection of Byproduct Material (RIN 3150-AI12)” (Agencywide Documents Access and Management System (ADAMS) accession number ML112920083), the staff recommended conducting a rulemaking to remove the SGI-M requirements for certain licensees (Enclosure 3 to SECY-11-0170 (ADAMS accession number ML112920106)).

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In the Staff Requirements Memorandum for the final rule (ADAMS accession number ML120760457), the Commission approved the staff's recommendation to conduct a rulemaking to remove the SGI-M requirement for certain licensees. The direct final rule (Enclosure 1) and the companion proposed rule (Enclosure 2) are provided for Commission approval.

#### DISCUSSION:

The U.S. Nuclear Regulatory Commission (NRC) staff is proposing that the Commission approve the direct final rule and companion proposed rule to remove the SGI-M designation of the security-related information for large irradiators, M&D licensees, and for any licensee that transports category 1 quantities of radioactive material or transports small quantities of irradiated reactor fuel that weighs 100 grams or less in net weight of irradiated fuel. The security-related information for these facilities and the transportation of the above mentioned materials would no longer be designated as SGI-M and would be protected under the information protection requirements that apply to other materials licensees that possess category 1 and category 2 quantities of radioactive material, *i.e.* the new 10 CFR Part 37. The direct final rule will result in a revision to 10 CFR 73.21, "Protection of Safeguards Information: Performance requirements" and 10 CFR 73.23, "Protection of Safeguards Information-Modified Handling: Specific requirements," as well as conforming changes to 10 CFR Part 30, 10 CFR Part 37, 10 CFR Part 73, and 10 CFR Part 150.

Protection of the information at a level less than SGI-M allows licensees to communicate more easily with regulators regarding implementation of 10 CFR Part 37 requirements, but still requires licensees to control access to specific security plans and implementing procedures to those individuals who have established a valid need to know and have met the requirements for access to such information. With this change, the information protection requirements would be the same for all licensees implementing the new 10 CFR Part 37. The NRC staff has concluded that adequate protection of the information is provided under 10 CFR Part 37. Additional information is provided in the direct final rule.

The NRC staff is proposing to use a direct final rule approach instead of the traditional notice and comment rulemaking process (*i.e.*, proposed rule and final rule process) because the staff considers this rulemaking to be non-controversial and does not expect to receive significant adverse comments. In addition, by using the direct final rule approach, the NRC staff anticipates that the rule will be effective at the same time that licensees begin implementing 10 CFR Part 37. If the NRC receives significant adverse comments, the NRC would withdraw the direct final rule and proceed with a final rule that addresses the comments received on the companion proposed rule.

#### Strategic Goals and Objectives

The direct final rule is consistent with the NRC's strategic objectives and performance goals. The rule will continue to ensure the protection of public health and safety and the promotion of common defense and security.

AGREEMENT STATE ISSUES:

A copy of the draft *Federal Register* notice was provided to the Agreement States so they could have an early opportunity for review. Comments were received from Virginia, Illinois and the Organization of Agreement States (OAS). Virginia and OAS noted that the definition for “quantities of concern” and Appendix I to 10 CFR Part 73 should also be removed from the regulations. The NRC agrees and has included those changes in the direct final rule. Suggested editorial changes were made as appropriate.

Although Illinois encouraged the NRC’s pursuit of the rulemaking, the State expressed concern over the resources to implement and enforce the rulemaking. Illinois expressed concern over the fragmented implementation of the provisions that could result in significant transboundary issues, i.e., the fact that licensees in Agreement States would continue to treat the information as SGI-M until the Agreement State adopted the provisions which will result in some licensees treating the same information differently. Illinois suggested that NRC modify the orders for Agreement State licensees so that all licensees would be implementing the provisions at the same time. Illinois also noted that radioactive material is most vulnerable while in transit and that without protecting this information, the routes and the specified times with locations could easily be intercepted. The NRC understands the State’s concern on fragmented implementation; however, this rulemaking is no different than any other rulemaking that the Agreement States must adopt. Agreement State licensees implement the provisions as their Agreement State adopts the rule requirements. The only transboundary issue that may occur is with the transmittal of route and time information for the shipments of category 1 quantities of radioactive material. For licensees implementing 10 CFR Part 37, the route and time information would not be considered SGI-M and would be protected under the provisions of 10 CFR Part 37. For licensees in Agreement States that have not adopted 10 CFR Part 37, the route and time information would continue to be protected under the SGI-M protection provisions in the orders. It is possible that shipping and receiving licensees may be under different requirements for the protection of the information. The NRC staff does not expect this to be a problem. Licensees that receive shipment information that is not designated as SGI-M can protect the information as SGI-M. Licensees that receive SGI-M shipment information from a licensee still subject to the orders could protect the information as SGI-M in accordance with the requirements in 10 CFR Part 73 or could initiate the process to decontrol the information such that it could be protected under the requirements of 10 CFR Part 37. The NRC would treat any issues that arise on a case-by-case basis. From a practical standpoint, the information is not currently transmitted as SGI-M. Licensees may use regular phone and facsimile lines to transmit the information; therefore, there is no additional risk that someone might intercept the information. Licensees are still required to protect the information before and after receipt from unauthorized access. Illinois expressed concern over resources to implement and enforce the rule. Although additional information would be protected under 10 CFR Part 37 when this rule becomes effective, the Agreement States would be inspecting the information protection program under 10 CFR Part 37 even without this rulemaking. With the change in designation, the inspection would be easier and consistent, because all of the security related information at a facility would be protected in the same manner instead of some protected as SGI-M and some protected under the requirements of 10 CFR Part 37.

The Standing Committee on Compatibility (Committee) reviewed the direct final rule and agreed that a portion of these amendments to the NRC regulations are a matter of compatibility between the NRC and the Agreement States. The Committee and the NRC staff have reached agreement on the compatibility designations that are reflected in the direct final rule.

#### COMMITMENTS:

The NRC staff will issue errata sheets to the 10 CFR Part 37 implementation guidance document before the direct final rule is effective. No changes are needed to Regulatory Guide 5.79, "Protection of Safeguards Information."

#### RECOMMENDATIONS:

That the Commission:

1. Approve for publication in the *Federal Register* the direct final rule and companion proposed rule (Enclosures 1 and 2).
2. Certify that this rule, if promulgated, will not have significant impact on a substantial number of small entities to satisfy the requirement of the Regulatory Flexibility Act, 5 U.S.C. 605(b). This certification is included in the enclosed direct final rule.
3. Note:
  - a. That 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);
  - b. A final Regulatory Analysis has been prepared for this rule (Enclosure 3);
  - c. An Environmental Assessment has been prepared for this rule (Enclosure 4);
  - d. The Office of Management and Budget (OMB) has determined that this action is not a "major rule" as defined in the Congressional Review Act of 1996 (5 U.S.C. 804(2)). The appropriate Congressional and Government Accountability Office contacts will be informed;
  - e. The appropriate Congressional committees will be informed;
  - f. A press release will be issued by the Office of Public Affairs when the direct final rule is filed with the Office of the Federal Register; and
  - g. The direct 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 direct final rule in the *Federal Register*.

RESOURCES:

The estimated resources to complete the rule and revise the implementation guidance are estimated to be less than 0.1 full time equivalent.

COORDINATION:

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

***/RA by Michael F. Weber for/***

R. W. Borchardt  
Executive Director  
for Operations

Enclosures:

1. Direct Final Rule
2. Companion Proposed Rule
3. Regulatory Analysis
4. Environmental Assessment

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