



UNITED STATES  
**NUCLEAR REGULATORY COMMISSION**  
WASHINGTON, D.C. 20555-0001


**PLEASE RESPOND BY:**  
**August 1, 2018**

July 18, 2018

COMSECY-18-0012

GENERAL COUNSEL

**MEMORANDUM TO:** Chairman Svinicki  
Commissioner Baran  
Commissioner Burns  
Commissioner Caputo  
Commissioner Wright

**FROM:** Marian L. Zabler   
Acting General Counsel

**SUBJECT:** PROPOSED REVISION TO THE FIREARMS GUIDELINES

The purpose of this paper is to request Commission approval of the Office of the General Counsel's (OGC) proposed revision to the Firearms Guidelines. If the Commission approves the proposed revision, OGC also requests approval to submit the revised Firearms Guidelines to the U.S. Department of Justice (DOJ) to obtain the required concurrence of the United States Attorney General.

On August 8, 2005, President George W. Bush signed into law the Energy Policy Act of 2005 (EPA). Pub. L. 109-58, 119 Stat. 594 (2005). Section 653 of the EPA amended the Atomic Energy Act of 1954, as amended, (AEA) by adding a new Section 161A, "Use of Firearms by Security Personnel." 42 U.S.C. § 2201a. Section 161A of the AEA provides the NRC with the authority to permit a licensee's or certificate holder's security personnel to transfer, receive, possess, transport, import, and use weapons, devices, ammunition, or other firearms, notwithstanding State, local, and certain Federal firearms laws (and implementing regulations) that may prohibit or restrict these actions.

Consistent with Section 161A.d of the AEA, the Commission developed and issued guidelines to implement its Section 161A authority. The Firearms Guidelines, first published in 2009 with the approval of the Attorney General, state that a licensee's security personnel "must file a request to appeal a 'denied' National Instant Criminal Background Check System (NICS) response to the Federal Bureau of Investigation (FBI), or a request to resolve a 'delayed' NICS response within 45 calendar days after the date the licensee . . . notifies the individual of the adverse response." 79 FR 36103. The Firearms Guidelines further state that licensee security personnel must seek an extension of the 45-day appeal or resolution process deadline from the licensee if one is needed. Similar language was included in the "Enhanced Weapons, Firearms Background Checks, and Security Event Notifications; Proposed Rule" published in the *Federal Register* on February 3, 2011. 76 FR 6200.

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The Firearms Guidelines contain a 45-day appeal deadline and a process for requesting an extension of that deadline. These appeal provisions are imposed not on a licensee but on the private individuals that compose the licensee's security personnel. The NRC cannot exercise regulatory authority over private individuals or over activities that do not have a nexus to radiological health and safety or the common defense and security.<sup>1</sup>

The NRC staff has informed OGC that elimination of the 45-day appeal deadline and the extension request process would have no impact on a licensee's ability to implement its protective strategy to adequately protect against radiological sabotage or otherwise protect the public health and safety or the common defense and security of a designated facility, radioactive material, or other property. Removal of these provisions from the Firearms Guidelines would simply eliminate a procedural requirement that serves no identified safety or security purpose and is not required by the FBI's existing appeals process, which does not contain a deadline. Based on the NRC staff's determination that the 45-day appeal deadline and extension request process in the Firearms Guidelines does not have a nexus to radiological health and safety or the common defense and security, OGC concludes that the NRC lacks the regulatory authority to impose that deadline and extension request process on licensee security personnel.

The FBI's Criminal Justice Information Service, which administers background check appeals through its NICS program, has indicated to the NRC staff that removal of the 45-day appeal deadline and extension request process from the Firearms Guidelines would have no impact on its processing of NICS background checks. Furthermore, removal of the appeal deadline and extension request process would not adversely impact licensee security personnel since their appeal rights under the FBI's appeal process would be unaffected by the elimination of the deadline and extension request process.

OGC therefore recommends that the Commission approve removing the 45-day appeal deadline as well as the process for requesting an extension of the deadline from the Firearms Guidelines. OGC further recommends the Commission approve minor editorial and conforming changes to the Firearms Guidelines. These minor changes serve to eliminate any confusion regarding the appeals process; the guidelines will continue to include a reference to the FBI's appeals process. No other changes to the previously approved Firearms Guidelines are proposed.

As discussed in SECY-18-0058, "Draft Final Rule—Enhanced Weapons, Firearms, Background Checks, and Security Event Notifications," (ML16264A002) OGC engaged in informal working level discussions with staff in DOJ's Office of Legal Policy (OLP) to address the issue raised by the 45-day appeal deadline provisions. Based on these informal discussions, it is OGC's understanding that DOJ leadership has no objection to the NRC's proposed revisions to the Firearms Guidelines.

Accordingly, the draft revision to the Firearms Guidelines is being submitted to the Commission for review and approval. Enclosures 1 and 2 contain a clean copy and a redline/strikeout copy of the draft revised guidelines. If the Commission approves the draft revised Firearms Guidelines, OGC recommends that the Commission also approve the formal submittal of the guidelines to DOJ for the Attorney General's approval. OLP staff has indicated that they expect the Attorney General's review and approval of this narrowly focused revision to the Firearms

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<sup>1</sup> The Commission explicitly acknowledged this limitation when it stated in the "Limited Work Authorization" final rule that "the NRC does not possess the statutory authority to regulate activities that do not have an impact on radiological health and safety or the common defense and security...." 72 FR 57416, 57420 (October 9, 2007).

Guidelines to take approximately 1–2 months. If the Attorney General approves the revised Firearms Guidelines with no significant changes, then OGC will inform the Commission that DOJ approval has been received and submit the revised Firearms Guidelines for publication in the *Federal Register* in accordance with agency procedures. Enclosure 3 contains a draft of the *Federal Register* notice. Should the Attorney General make any significant changes to the revised Firearms Guidelines, those changes will be submitted to the Commission for review and approval, and OGC will seek further direction on publishing the guidelines in the *Federal Register*.

OGC recommends that the Commission approve the following recommendations:

1. Approve the draft revision to the Firearms Guidelines removing the 45-day appeal deadline and extension request provisions.
2. Approve the staff submitting the revised Firearms Guidelines to DOJ for the Attorney General's approval.
3. Approve the publication of the revised Firearms Guidelines in the *Federal Register* upon approval, with no significant changes, by the Attorney General.

There are no resource impacts.

The Office of Nuclear Security and Incident Response, the Office of Nuclear Reactor Regulation, and the Division of Rulemaking in the Office of Nuclear Material Safety and Safeguards have reviewed this paper and their comments have been addressed.

SECY, please track.

Enclosures:

1. Clean Copy of Draft Revised Firearms Guidelines (45-Day appeal deadline and extension request provisions removed; non-publicly available)
2. Redline/strikeout of Draft Revised Firearms Guidelines (showing removal of 45-Day appeal deadline and extension request provisions; non-publicly available)
3. Federal Register Notice announcing publication of Revision 2 of the Firearms Guidelines

PROPOSED REVISION TO THE FIREARMS GUIDELINES DATED \_\_\_\_\_

**Document Location:** G:\HLWFS\Firearms Guidelines

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