

ATTACHMENT 1

16.0 DETERMINATION OF FOREIGN OWNERSHIP, CONTROL, OR DOMINATION, COMMON DEFENSE AND SECURITY, AND RELIABLE AND ECONOMICAL SOURCE OF DOMESTIC ENRICHMENT SERVICES

16.1 Responsibility for Review

16.1.1 Primary: As designated

16.1.2 Secondary: Facilities Security Specialist/Safeguards Technical Analyst

16.1.3 Supporting: Material Control and Accounting Inspector/Resident Inspector

16.2 Purpose of Review

The purpose of this review is to determine that an applicant for certification is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; that issuance of a certificate would not be inimical to the common defense and security of the United States; and that issuance of a certificate would not be inimical to the maintenance of a reliable and economical domestic source of enrichment services.¹

16.3 Areas of Review

General

An application to transfer certificates will be reviewed to examine the changes proposed in the application for the transfer from that which is currently approved or permitted under the existing certificates.

Foreign Ownership, Control, or Domination

Information submitted by the applicant, as specified in "Foreign Ownership, Control, or Influence Guidance Documents for the Privatization of the United States Enrichment Corporation," will be reviewed. This information includes, but is not limited to:

1. Portions of securities held by foreign entities or held by means that prevent the identification of the beneficial owner

¹ Note: the procedures in this SRP for a statutory determination of foreign ownership, control, or domination, are not to be used to determine foreign ownership, control, or influence (FOCI) for granting access to classified material. The NISPOM is the governing document for determining FOCI and the granting of access to classified material.

Determination of Foreign Ownership

2. Management positions held by non-U.S. citizens
3. Ability of foreign entities to control the appointment of management positions
4. Contracts and other agreements with foreign entities
5. Finance and revenue sources involving foreign entities

Common Defense and Security

The following items will be reviewed for compliance with NRC regulatory requirements to protect the common defense and security:

1. Physical Security Plan
2. Security Plan for the Protection of Classified Matter
3. Fundamental Nuclear Material Control Plan
4. Inspection, event, and resident inspector reports dealing with facility and transportation physical protection, material control and accounting, information security programs, and control of classified material
5. Information regarding the impact of the Russian HEU Agreement, and any related contracts, on the financial viability of the applicant
6. An assessment of the performance of the applicant as the executive agent of the U.S. for the Russian HEU Agreement in consultation with members of the HEU Oversight Committee

Reliable and Economical Source of Domestic Enrichment Services

Assessments of the financial viability of the applicant will be reviewed. The assessments will be based on the actual or estimated credit rating of the applicant, a standard used by the financial community to objectively measure an entity's financial condition, and its ability to meet its obligations, and other economic, financial and business characteristics. The current public credit rating of the applicant, published by a recognized credit rating agency (e.g., Standard & Poor's, Moody's Investor Service, Duff & Phelps, or Fitch), will be reviewed. If (i) the applicant does not have a current public credit rating, or (ii) in the case of a transfer of the certificates, a public credit rating would not apply to the applicant after the transfer, then an assessment of the financial viability of the applicant, based upon an estimate of the applicant's credit rating, will be reviewed. This estimated credit rating will be based on quantitative and qualitative analyses of the financial and business risks of the applicant.

16.4 Review Procedures

Determination of Foreign Ownership

The reviewer should determine whether the applicant is subject to any of the criteria set forth in 10 CFR Part 76.22, "Ineligibility of Certain Applicants."

16.4.1 Foreign Ownership, Control, or Domination

An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable, through the ownership of the applicant's securities, by contractual arrangements, or other means, to direct or decide matters affecting the management or operations of the applicant.

A foreign interest is defined as any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the U.S. or its possessions and trust territories; any person who is not a citizen or national of the U.S.; and any U.S. interest effectively controlled by one of the above foreign entities.

The reviewer should assess the following items to determine if the applicant is foreign owned, controlled, or dominated:

1. The applicant should provide answers to the following questions. If any of the answers are affirmative, the applicant should furnish detailed information that describes all conditions that exist. The information will be considered in the aggregate and the fact that some of the below listed conditions may apply does not necessarily render the applicant company ineligible for certification.
 - a. Does a foreign interest own or have beneficial ownership in 5% or more of your organization's voting securities?
 - b. Does your organization own 10% or more of any foreign interest?
 - c. Do any foreign interests have management positions such as directors, officers, or executive personnel in your organization?
 - d. Does any foreign interest control or influence, or is any foreign interest in a position to control or influence the election, appointment, or tenure of any of your directors, officers, or executive personnel?
 - e. Does your organization have any contracts, binding agreements, understandings, or arrangements with a foreign interest(s) that cumulatively represent 10% or more of your organization's gross income?
 - f. Is your organization indebted to foreign interests?
 - g. During your last fiscal year, did your organization derive 5 percent or more of its total revenues or net income from any single foreign interest or in the aggregate 30 percent or

Determination of Foreign Ownership

more of its revenues or net income from foreign interests?

- h. Is 5% or more of any class of your organization's securities held in "nominee shares", in "street names", or in some other method which does not disclose beneficial owner of equitable title?
 - i. Does your organization have interlocking directors/officers with foreign interests?
 - j. Are there any citizens of foreign countries employed by, or who may visit, your offices or facilities in a capacity which may permit them to have access to classified information or a significant quantity of special nuclear material?
 - k. Does your organization have foreign involvement not otherwise covered in your answers to the above questions?
2. The reviewer should obtain a foreign intelligence threat assessment. This assessment will be conducted through the Intelligence Community and others, and will be coordinated by the Department of Energy. The reviewer may obtain the assessment by contacting the DOE representative to the HEU Oversight Committee.
3. If the applicant submits any affirmative information listed in section 16.5.1, steps 1.a through 1.k above, or the foreign intelligence threat assessment contains information, that the applicant may be foreign owned, controlled, or dominated, the reviewer shall determine:
- a. the nature and extent of foreign ownership, control, or domination, to include whether a foreign interest occupies a controlling or dominant minority position;
 - b. the source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations; and
 - c. the type of actions, if any, that would be necessary to negate the effects of foreign ownership, control, or domination to an acceptable level.
4. If it is determined that an applicant company may be considered to be foreign owned, controlled, or dominated, or that additional action would be necessary to negate the foreign ownership, control, or domination, the applicant shall be promptly advised and requested to submit a negation action plan. In cases that involve foreign ownership, a plan may consist of one of the methods described in Chapter 2, Section 2-306, of the NISPOM. When factors not related to ownership are present, the plan shall provide positive measures that assure that the foreign interest can be effectively denied control or domination. Examples of such measures include: modification or termination of loan agreements, contracts and other understandings with foreign interests; diversification or reduction of foreign source income; demonstration of financial viability independent of foreign interests; elimination or resolution of problem debt; assignment of specific oversight duties and responsibilities to board members; adoption of special board resolutions; and other actions that negate foreign control or domination.

Determination of Foreign Ownership

5. The reviewer shall arrange to meet with, or otherwise communicate these findings to, the principal members of the HEU Oversight Committee and obtain their comments.
6. The reviewer shall ensure that NRC remains informed regarding foreign ownership, control, or domination by preparing certificate conditions of the following types:

If, at any time after the privatization date, the Corporation obtains information reasonably indicating changes described in the National Industrial Security Program Operating Manual, DOD 5520.22-M, January 1995 (NISPOM), Chapter 1, Section 3, 1-302(h), to the information previously submitted to NRC, described in the NISPOM, Chapter 2, Section 3, 2-302 b. (1) through (11), the Corporation shall notify NRC in writing within 15 days.

If the Corporation enters into negotiations for the proposed merger, acquisition, or takeover by a foreign person, the Corporation shall submit notification to NRC, in writing, within 15 days of the commencement of such negotiations. The submission shall include the type of transaction under negotiation (stock purchase, asset purchase, etc.), the identity of the potential foreign person investor, a plan to negate foreign ownership, control, or domination, and copies of any related loan, purchase and shareholder agreements, annual reports, bylaws, articles of incorporation, partnership agreements, and reports filed with other federal agencies.

16.4.2 Common Defense and Security

1. The reviewer should determine that the applicant's Physical Security Plan and Fundamental Nuclear Material Control Plan have been reviewed and approved by the appropriate NMSS personnel.
2. The reviewer should consult with the Division of Facilities and Security to determine that the applicant's Security Plan for the Protection of Classified Matter has been reviewed and approved.
3. If the applicant has previously been issued a certificate of compliance, the reviewer should ensure that NRC inspection reports and resident inspector reports do not indicate a general failure to protect the common defense and security interests of the United States.
4. The reviewer should consider the impact of executing contracts associated with the Russian HEU agreement on the financial viability of the applicant. The analysis of the applicant's financial viability, described below, should include information concerning the cost of procuring Russian material, the amount of material the applicant has contracted to procure, the costs of enrichment services provided by the applicant, and current market prices. This information should allow the reviewer to gauge whether executing such contracts might be a significant economic disadvantage, or favorable to an extent that would motivate the applicant to reduce the production of domestic enrichment services.
5. The reviewer should arrange to meet with, or otherwise consult with, the principal members of the HEU Oversight Committee to obtain the committee's assessment of the applicant's

Determination of Foreign Ownership

performance as the U.S. Agent for the Russian HEU Agreement.

6. The reviewer shall ensure that NRC remains informed regarding the applicant's performance as the U.S. agent for the Russian HEU Agreement by preparing a certificate condition of the following type:

USEC, or its successors, as the Executive Agent for the United States for implementing the Russian HEU Agreement, shall notify NRC in writing within 15 days, if at any time and for any reason, including actions of third parties, USEC or its successors become aware of, or anticipate, any change in the provisions of, or in the implementation of, the terms of the "Memorandum of Agreement Between the United States Acting By and Through the United States Department of State, and the United States Department of Energy and the United States Enrichment Corporation, for USEC to Serve as the United States Government's Executive Agent Under the Agreement Between the United States and the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons," entered into as of April 18, 1997.

16.4.3 Reliable and Economical Source of Domestic Enrichment Services

Issuance of a certificate of compliance should be considered inimical to the maintenance of a reliable and economical source of domestic enrichment services if the applicant does not have a sufficiently strong financial condition to allow the expectation that it can remain viable for at least five years.

The review should consist of the following procedures. (If the staff elects to have a contractor conduct these procedures, the staff should review the contractor's analysis and findings and either concur with the findings or specify the staff's basis for taking a different position.)

1. If the applicant has one or more current credit ratings issued by a recognized rating agency (e.g., Standard & Poor's Corp., Moody's, Investors Service, Duff & Phelps Credit Rating Co., or Fitch Investors Services, L.P.), the reviewer should determine whether the lowest such rating is of investment grade (e.g., AAA, AA, A, or BBB as rated by Standard & Poor's, or Aaa, Aa, A, or Baa as rated by Moody's) or below investment grade (e.g., BB, B, CCC or lower as rated by Standard & Poor's, or Ba, B, Caa or lower as rated by Moody's).
2. If the applicant does not have a current credit rating issued by a recognized rating agency, the reviewer should conduct an independent analysis to estimate a credit rating and determine whether the estimated credit rating is of investment grade. The estimated credit rating should be based on quantitative and qualitative analysis of information provided by the applicant, including information regarding the applicant's parent company or companies, to the extent that they might affect the financial condition of the applicant.
 - a. The reviewer should ensure that NRC has received the following information from the applicant:

Determination of Foreign Ownership

- (1) The types, amounts, and holders of debt and the types and amounts of equity of the applicant. In the case of the privatization of USEC, the method of financing to be used to purchase USEC (if applicable), and the types, amounts, and holders of any debt and the types and amounts of equity of the privatized entity;
 - (2) A five-year business plan addressing the applicant's enrichment business line as well as other anticipated business lines, including alternative enrichment technologies such as AVLIS, that will require investments of capital (including working capital) by the applicant, and the portion of projected revenue, for each of the five years, covered by contracts in existence at the time of the application;
 - (3) All significant business and economic assumptions underlying the plan;
 - (4) Pro forma financial statements for the applicant for each of the next five years;
 - (5) Current financial statements (if applicable) for the applicant, and in the case of privatization, for USEC, along with an independent certified public accountant's opinion on the financial statements;
 - (6) Identification of the applicant's proposed directors and officers and a discussion of their qualifications to provide financial and business management;
 - (7) The organizational structure of the applicant and its relationship to corporate parents and other affiliates; and
 - (8) Information on the financial condition of the applicant's corporate parents, including credit ratings, profiles prepared by the investment industry, and/or audited financial statements reflecting the three most recently completed fiscal years.
- b. The reviewer should ensure the items specified above are consistent, and that they provide a comprehensive and reasonable picture of the applicant. If pro forma financial statements are based on inconsistent or unrealistic assumptions, it may be necessary to discuss with the applicant the basis of the projections.
- c. The reviewer should quantitatively assess the financial characteristics of the applicant relative to available historical benchmarks. Some corporate financial analysis expertise will be necessary to complete this step. The reviewer may wish to obtain one or more financial texts for reference, such as Standard & Poor's "Corporate Ratings Criteria." The reviewer's analysis should include the following measures:
- (1) Size Measures
 - Net sales
 - Net income
 - Total assets
 - Net worth

Determination of Foreign Ownership

(2) Capital Structure Ratios

- Total debt ÷ capitalization
- Total debt ÷ equity
- Long-term debt ÷ capitalization

(3) Coverage Ratios

- Net income plus depreciation and other noncash items ÷ total debt
- Pretax income plus interest expense ÷ gross interest
- Pretax income plus depreciation and other noncash items plus interest expense ÷ gross interest

(4) Profitability Ratios

- Net income ÷ total assets
- Pretax income plus interest ÷ total assets
- Net income ÷ equity
- Operating income ÷ sales

Other ratios and measures, addressing the above categories or other financial characteristics may be used if they provide a measure of the applicant's financial condition (e.g., see "Corporate Ratings Criteria").

- d. The reviewer should also consider qualitative factors in light of the financial analysis. Factors to be assessed include the applicant's competitive position, market environment, quality of management, and financial and business risks. These factors should be considered in proportion to their potential impacts on the applicant.
- e. The reviewer should evaluate the financial condition of the applicant's corporate parents and affiliates to the extent that they might affect the applicant's financial condition. The financial condition of corporate parents or affiliates should be should be considered in proportion to the potential impact on the applicant.
- f. Based on the preceding steps, the reviewer should establish an estimated credit rating of the applicant. In establishing the estimated rating, the reviewer should first determine what the estimated rating would be if it were based solely on an analysis of the applicant's financial ratios and size measures relative to available benchmarks. The reviewer should then adjust the estimated credit rating based on other considerations identified above. Adjustments should be proportional to each factor's potential impacts on the applicant. Assignment of a specific estimated rating (e.g., AA versus A) is not necessary if the reviewer is able to determine that the estimated credit rating is investment grade. Assignment of a specific rating may be necessary if the estimated rating is below investment grade.

3. If the actual or estimated credit rating is of investment grade, the reviewer should find that

Determination of Foreign Ownership

the applicant has sufficiently strong financial condition to allow it to remain viable for at least five years, and that issuance of a certificate of compliance would not be inimical to the maintenance of a reliable and economical source of domestic enrichment services. If the actual or estimated credit rating is below investment grade, the reviewer should consider whether any other economic, financial, or business characteristics (e.g., contracts adequate to support the applicant's operations over a five-year time period, financial guarantees provided by a parent company, compelling business prospects) exist that provide reasonable assurance of the applicant's viability for at least five years. If the reviewer finds that such factors exist, and that the applicant is expected to remain viable for at least five years, then the reviewer should find that issuance of a certificate of compliance would not be inimical to the maintenance of a reliable and economical source of domestic enrichment services. However, if the reviewer finds that such factors do not exist, then the reviewer should find that issuance of a certificate of compliance to the applicant may be inimical to the maintenance of a reliable and economical source of domestic enrichment services.

16.5 Acceptance Criteria

16.5.1 Regulatory Requirements

10 CFR § 76.22 addresses the ineligibility of applicants for certification if the Commission determines that:

1. The Corporation is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; or
2. The issuance of such a certificate of compliance would be inimical to:
 - a. The common defense and security of the United States; or
 - b. The maintenance of a reliable and economical domestic source of enrichment services.

10 CFR § 76.33 provides for NRC to require the applicant to supply additional information as necessary.

10 CFR § 95.15 addresses the collection of information necessary to determine that the applicant is not owned, controlled, or dominated by an alien, foreign corporation, or foreign government.

10 CFR Parts 76 and 95 contain and reference applicable regulatory requirements necessary to protect the common defense and security.

16.5.2 Regulatory Guidance

Regulatory guidance applicable to the areas of review in this chapter are:

1. U.S. Nuclear Regulatory Commission, NUREG/CR-5734, "Recommendations to the NRC on

Determination of Foreign Ownership

Acceptable Standard Format and Content for the Fundamental Nuclear Material Control (FNMC) Plan Required for Low-Enriched Uranium Enrichment Facilities," Nov. 1991

2. U.S. Nuclear Regulatory Commission, Reg Guide 5.67, "Material Control and Accounting for Uranium Enrichment Facilities Authorized to Produce Special Nuclear Material of Low Strategic Significance," Dec. 1993
3. U.S. Nuclear Regulatory Commission, "Security Plan Format and Content Guide for NRC Licensees, Certificate Holders, and Related Organizations," March 1994

16.5.3 Regulatory Review Criteria

The application is acceptable if the following criteria are met:

Foreign Ownership, Control, or Domination

After a review of the potential foreign involvement information in accordance with the Review Procedures, section 16.5.1, the reviewer determines that no foreign interest has the ability, direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the applicant.

The following additional criteria are applicable in the case of privatization of USEC:

1. Foreign competitors of USEC are precluded from participating in any acquisition of USEC.
2. Entities with a substantial commercial relationship with foreign enrichment providers, with respect to uranium and uranium products, are precluded from participating in any acquisition of USEC.
3. Foreign interests own no more than 10 percent of the outstanding voting securities of the applicant.
4. Foreign sourced financing of an acquisition of USEC is no more than 10 percent of the purchase price.

Common Defense and Security

1. The applicant's Physical Security Plan has been reviewed and approved.
2. The applicant's Security Plan for the Protection of Classified Matter has been reviewed and approved.
3. The applicant's Fundamental Nuclear Material Control Plan has been reviewed and approved.
4. If the applicant has previously been issued a certificate of compliance, a review of NRC

Determination of Foreign Ownership

inspection reports and resident inspector reports does not indicate a general failure, by the applicant, to protect the common defense and security interests of the United States.

5. Consultation with the principal members of the HEU Oversight Committee indicates that the applicant's performance as the U.S. Agent for the Russian HEU Agreement is acceptable.

Reliable and Economical Source of Domestic Enrichment Services

1. The applicant's current actual or estimated public credit rating is investment grade (e.g. Standard & Poor's AAA to BBB, Moody's Aaa to Baa); or
2. The applicant's current actual or estimated public credit rating is not investment grade, but other economic, financial, or business characteristics exist that strongly indicate the entity's viability for at least five years.

16.6 Evaluation Findings

After evaluating the application and the supporting information, and determining the information to be adequate and the acceptance criteria to be met, the reviewer will prepare a statement, similar to the following, for inclusion in the Certificate Evaluation Reports:

On the basis of the staff's review and evaluation of the application for certification, the staff has found no cause to determine that:

1. the applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; or
2. issuance of a certificate of compliance would be inimical to the common defense and security of the United States; or
3. issuance of a certificate of compliance would be inimical to the maintenance of a reliable and economical domestic source of enrichment services.

16.7 References

U.S. Department of Defense, "National Industrial Security Program Operating Manual (NISPOM)," DOD 5520.22-M, Jan. 1995.

U.S. Department of Energy, U.S. Nuclear Regulatory Commission, U.S. Enrichment Corporation, "Foreign Ownership, Control, or Influence Guidance Documents for the Privatization of the United States Enrichment Corporation."