

### Questions for the Nuclear Regulatory Commission Regarding Sovereign Wealth Fund (SWF) Investment

1. Are there legal limitations on ability of foreign investors to purchase some of or all of a company that is involved in the production of nuclear materials or nuclear power generation? What does the Atomic Energy Act of 1954 specify? How is the law different for source materials, produced materials, and utilization/production facilities? Are there other statutes that limit foreign investment in nuclear related activities?

Yes, there are certain legal limitations. Sections 103d. and 104d. of the Atomic Energy Act of 1954, as amended (AEA), and 10 CFR 50.38, prohibit the NRC from issuing a license under sections 103 and 104 for a production or utilization facility to an entity that the Commission “knows or has reason to believe” is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.

Section 193(f) of the AEA somewhat similarly prohibits the issuance of a license or certificate of compliance to the U.S. Enrichment Corporation if the Commission “determines” that USEC is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. **In this regard, Congress amended the AEA in 1996 (the USEC Privatization Act) in order to prevent USEC from later being owned or controlled by foreign interests. The NRC implemented this provision in a 1997 direct final rule, adding new sections 40.38, 70.40 and 76.22 to its 10 CFR regulations. 62 Fed.Reg. 6664 (Feb. 12, 1997). There are no similar investment restrictions on other NRC materials (i.e., non-reactor) licensees, although applications for special nuclear materials licenses must include information “concerning the control or ownership, if any, exercised over the applicant by any alien, foreign corporation, or any foreign government.” 10 CFR 70.22(a)(1) (on the books since 1956).**

2. How is foreign ownership or control defined? Even though there is a prohibition on ownership or control by a foreign company or government, when and at what level is foreign involvement acceptable?

The Final Standard Review Plan on Foreign Ownership, Control, or Domination, found at 64 Fed. Reg. 52355 et seq. (Sept. 28, 1999), in section 3.2, provides as follows:

“The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of the applicant’s stock. Percentages held of outstanding shares must be interpreted in light of all the information that bears on who in the corporate structure exercises control over what issues and what rights may be associated with certain types of shares.

“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, to direct or decide matters affecting the management or operations of the applicant. The Commission has stated that the words ‘owned, controlled, or dominated’ mean relationships where the will of one party is subjugated to the will of another. *General Electric Co.*, 3 AEC at 101.”

Foreign involvement, i.e., some limited foreign ownership, has been found to be acceptable in several cases. For example, in the reactor area, a 50% indirect ownership of a licensee by a foreign interest coupled with a negation action plan was found acceptable in the context of three license transfers (AmerGen Energy Co. LLC – Three Mile Island Unit 1, Clinton, Oyster Creek). Also, 100% ownership of one of several co-licensees for a plant by a foreign interest coupled with a negation action plan has been found acceptable in connection with several license transfers (e.g., PacifiCorp/Scottish Power, owning 2.5% of Trojan; New England Power Co./National Grid Group plc, owning 9.9% of Seabrook and 12.2% of Millstone 3).

Under the Standard Review Plan, an entity that is 100% owned by a foreign parent company seeking to acquire a 100% interest in a plant is not eligible for a license, unless the Commission knows that the stock of the foreign parent company is “largely” owned by U.S. citizens. The case that provided the basis for this criteria occurred in 1982 and involved the Commission being provided with detailed stockholder information and representations that the parent company, which was incorporated in Panama, had all U.S. citizens on its board of directors and filling principal officer positions. Where a foreign-controlled applicant is seeking to acquire less than a 100% interest in a facility, the Commission may give the proposal further consideration, taking into account factors listed in section 3.2 of the Standard Review Plan.

**Additionally, in the context of regulating access to classified information, 10 CFR 95.5 provides the following definition of “foreign ownership, control , or influence” (FOCI):**

**A foreign interest that has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of a U.S. Company’s securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may affect adversely the performance of classified contracts.**

3. Are there acceptable mitigation agreements or arrangements that foreign companies can follow or mimic so that their interest in investment can be satisfied? Are these called negative action plans?

Yes. These are **sometimes** referred to as “negation action plans.” Examples may be found in the NRC orders and safety evaluations for the license transfers mentioned earlier. **Regarding access to classified information, FOCI reviews are performed on applicants/licensees. The DOE performs FOCI reviews under contract to NRC. Mitigating agreements and special arrangements have been made for licensees. When the classified information originates in a foreign country, FOCI requirements can be waived for licensees. As indicated above, because USEC by law cannot be foreign-owned, it cannot have mitigation agreements for protecting classified information from foreign owners. Other enrichment facilities can have foreign ownership but must protect classified information in accordance with NRC requirements in 10 CFR parts 25 and 95.**

4. How does one determine whether or not a license application is inimical to the common defense and security or health and safety of the public? How do you apply such a rule? Do you seek input from other federal agencies?

The NRC makes a determination regarding the health and safety of the public based on compliance with its statutes, regulations, orders, and licenses. An assessment of the common defense and security is made on a case-by-case basis, taking into account any proliferation or other relevant issues. Input has not been sought from other federal agencies regarding domestic reactor licensing, but the NRC has considered a statement of views filed by the State Department in at least one case in 1966. (The NRC does consult with and defer to the Executive Branch on common defense and security issues in the export licensing context.)

**As indicated in Response 1 above, Congress did not want USEC to be owned or controlled by foreign interests. As discussed in the rulemaking establishing 10 CFR 76.22, the USEC Privatization Act's legislative history indicates that the "inimical to the common defense and security" standard is linked in USEC's case to preventing a foreign uranium enrichment company from buying USEC and thereafter impairing its ability to provide uranium enrichment services here. See 62 Fed.Reg. at 6665 (which also discusses the relationship between 10 CFR 76.22 and 10 CFR parts 25 and 95 controlling access to and protection of classified information).**

5. What was and is the rationale for having such a limitation? Are there rationales beyond national security and concerns about nuclear proliferation? What is the competitive effect of such a restriction? Are such restrictions contradictory to the tendency of capital markets to become global? What interest groups are supportive of and oppose the current legal restrictions on foreign investment? Is foreign investment capital helpful to the nuclear energy sector of the economy?

The Commission has concluded that the limitations on foreign ownership and control should be given an orientation towards safeguarding the common defense and security. NRC staff has not done an analysis of competitive effects or whether the restrictions have had any material effect on foreign investment. NRC staff has not canvassed stakeholders to determine what groups support/oppose the current restrictions, and has not studied whether foreign investment is helpful to the nuclear power industry. (The NRC staff notes that the NRC's regulatory mission does not include promoting the nuclear power industry.)

6. Could you give us examples of how the Atomic Energy Act of 1954 is applied to foreign investors? How are applications for licenses for the production of nuclear materials or nuclear power generation by companies with some or significant foreign ownership reviewed? Have you ever denied an application due because of foreign ownership issues? Is the country of origin of the license application an issue?

See the response to Question 2 above. Applications for production or utilization facility licenses under sections 103 and 104 of the AEA are reviewed against the Standard Review Plan for foreign ownership and control issues that may arise. An application was denied in 1983 involving Union Carbide/Cintichem, but the application was later approved after Congress enacted legislation authorizing the NRC to approve the application. The country of origin of the foreign interest is not an issue in the interpretation of the specific foreign ownership prohibition in the AEA. However, it may be considered in connection with findings regarding the common defense and security.

**Regarding applications for licenses for the production of nuclear materials, to date no such applications have been denied based on foreign ownership concerns.**

7. What are the penalties for violating the Atomic Energy Act of 1954? Have you take any enforcement actions against foreign investors? Have any of these foreign investors been associated with the government of another country such as a state owned enterprise? Have any enforcement actions been taken against a SWF?

There are criminal sanctions for violations of the AEA, found at section 223 of the AEA. In addition, injunctions may be issued as described in section 232, and civil monetary penalties may be assessed as described in section 234. Under NRC regulations, a license may be modified, suspended, or revoked for a violation of the AEA. The NRC is presently engaged in an enforcement action against a licensee, which has not been resolved. Otherwise, the NRC staff is not aware of any enforcement action that was taken to address a violation of the foreign ownership prohibition in the AEA.

8. Could you characterize the challenges of enforcement of the restrictions of foreign ownership in the Atomic Energy Act of 1954? How important are the complaints of competitors in identifying violations?

Thus far, the NRC staff has not received complaints from competitors regarding possible violations. The most significant challenge is assessing whether a licensee may become subject to foreign control following the receipt of an application and issuance of a license. In particular, it is conceivable that a foreign interest could acquire control of a licensee through non-transparent means, such as acquiring voting stock through nominees.

9. Does the NRC take any position regarding the wisdom of the current law and restrictions on foreign investment? Should such restrictions be removed if there are no national security implications? Or is the current rule flexible enough to allow greater foreign ownership stakes?

The NRC submitted draft legislation to Congress in 1999 that would have removed the foreign ownership restrictions from the AEA but allowed the NRC to continue to consider foreign ownership in making its required common defense and security findings. The proposal was not considered by Congress following the terrorist attacks of 2001. The Standard Review Plan does provide a fairly high degree of flexibility in evaluating foreign ownership stakes.

10. How much foreign investment is there in U.S. energy markets? How much foreign investment is there in nuclear energy market? What kinds of countries is such investment coming from? Do you know of any SWFs that are significant investors in U.S. energy markets?

The NRC staff does not have figures on total foreign investment in U.S. energy markets. With respect to nuclear power reactors, original foreign investment in the 3 units held by AmerGen has been sold; the Trojan facility, which had a 2.5% foreign investment, is now decommissioned; and the co-licensee for Seabrook and Millstone Unit 3 that had been foreign-controlled sold its interests. Currently, about 9.5% of the shares of Constellation Energy Group, Inc., which indirectly owns 5 reactor units, is held by EDF, a French company. There may be other smaller interests directly or indirectly held in a few licensees by foreign companies. The NRC staff does not know of any SWFs that are significant investors in the U.S. energy markets.

**With respect to fuel cycle facilities: GE is partnered with Hitachi [Hitachi owns 40%, GE owns 60%]. Westinghouse is majority-owned by Toshiba [>51%].**

**AREVA (French) owns 2 US facilities [66% French (Societe de Participations du Commissariat a L'Energie Atomique), 34% German (Siemens)]. LES is owned by URENCO, a British, Netherlands, and German conglomerate. USEC, B&W, NFS, and Honeywell are US-owned.**

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