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Ms. Cindy Bladey
Chief, Rules, Announcements, and Directives Branch (RADB)
Office of Administration
Mail Stop: TWB–05–B01M
U.S. Nuclear Regulatory Commission
Washington, DC 20555–0001

Subject: Comments of the Nuclear Energy Institute on Requirements Related to Foreign Ownership, Control, or Domination of Commercial Nuclear Power Plants (78 *Fed. Reg.* 33,121, June 3, 2013, Docket ID NRC-2013-0107)

Dear Ms. Bladey,

Please find herewith comments of the Nuclear Energy Institute, Inc. (NEI)[1] in response to the *Federal Register* announcement seeking stakeholder views on issues related to Nuclear Regulatory Commission (NRC) requirements, guidance, and policies on foreign ownership, control, or domination (FOCD) of commercial nuclear power plants. A revised FOCD Standard Review Plan (SRP) and a table explaining the changes we are proposing to the SRP are Attachments 1 and 2 to these comments.

The *Federal Register* notice cites the Commission's direction in the March 11, 2013 Staff Requirements Memorandum (SRM) to "propose a fresh assessment" of FOCD issues, including "recommendations on any proposed modifications to guidance or practice" on FOCD that may be warranted.[2] The Commission's SRM states that the staff's assessment should include, but not necessarily be limited to, the following issues:

> The limitation on foreign ownership contained in section 103d of the Atomic Energy Act and the potential to satisfy statutory objectives through an

[1] NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry.

[2] *See* "Staff Requirements—SECY–12–0168—Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Petition for Review of LBP–12–19," 78 *Fed. Reg.* 33,121 (June 3, 2013).

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> integrated review of foreign ownership, control, or domination issues involving up to and including 100 percent indirect foreign ownership; criteria for assessing proposed plans or actions to negate direct or indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent, and the adequacy of guidance on these criteria; the availability of alternative methods such as license conditions for resolving – following issuance of a combined license – foreign ownership, control or domination concerns; and the agency's interpretation of the statutory meaning of "ownership," and how that definition applies in various contexts, such as total or partial foreign ownership of a licensee's parent, co-owners, or owners who are licensed to own but not to possess or operate a facility.

As the Commission recognized in issuing the SRM, it is both timely and necessary for the agency to undertake a "fresh assessment" of FOCD issues. Recent NRC staff and Atomic Safety and Licensing Board (ASLB) interpretations of the Atomic Energy Act (AEA) prohibition on foreign ownership, control, or domination have had a significant impact on the regulated community, and in particular, on combined license (COL) applicants. For example, a recent NRC staff determination concluded that Toshiba's involvement in the South Texas Project (Units 3 & 4) is impermissible under the AEA's FOCD restrictions, despite Toshiba's subsidiary only owning about 10% of the project and the U.S. owner having a supermajority—a 90% voting right—on the COL applicant's Board of Directors. In another example, an ASLB ruled that applicants for a COL to construct and operate a third reactor at the Calvert Cliffs site were ineligible for the license due to EDF's 100% indirect ownership of the applicant. FOCD issues also recently resulted in the denial of a license renewal application for a research reactor because the licensee's ultimate parent is a Swedish company. As demonstrated by these examples of the NRC's recent disqualification of foreign entities, the current, more restrictive interpretation of FOCD limitations fundamentally and, in our view, unnecessarily, precludes substantial foreign participation in U.S. nuclear power plant development and reactor operations.

More specifically, we are concerned that the NRC staff and ASLB have departed significantly from the Commission's FOCD precedent and practice, reinterpreting or misapplying the SRP guidance in the process, and imposing unnecessary prohibitions and license conditions. The striking shift in agency position has eroded regulatory certainty to the point that foreign investors and U.S. participants can have little confidence about what ownership structures or negation measures will be acceptable (if allowed at all) to support investment in U.S. nuclear projects. The lack of certainty and predictability will unnecessarily chill foreign investment in domestic nuclear projects at a time when investment in critical U.S. infrastructure is vital.

Reform of the agency's assessment of FOCD matters is imperative, and should take into account the now-global nature of the commercial nuclear technology market. Unlike the time during which the AEA was enacted and commercial nuclear power generation was in the early stages of development, reactor technology is no longer limited to the United States and a few other countries. Even more to the point, nuclear generating technologies are now owned and

controlled by international companies. Many reactor vendors and nuclear service providers participating in the U.S. nuclear market are responsible and experienced foreign nuclear energy companies, such as AREVA, EDF, Toshiba, Mitsubishi, and Westinghouse (majority owned by Toshiba). Reactor technology for new-build projects in the United States is often of foreign origin, such as the AREVA U.S. EPR, the Toshiba ABWR, and the Mitsubishi U.S. APWR.

Indisputably, when there is substantial indirect foreign ownership or an opportunity for foreign control otherwise exists, whether direct or indirect, and whether exercised or not, mitigation measures under a Negation Action Plan (NAP) can serve to eliminate the possibility of FOCD. NRC policy should reflect the appropriate use of NAPs and, even more importantly, apply a graded approach to the measures required based on the specific facts of each case (*e.g.*, the degree of foreign ownership involved, the home country of the foreign interest, the voting and other rights that come with that ownership, whether the foreign owner would participate in management of operations in any way, and whether there is a separate operating company). Applying a sliding scale of negation measures would allow more robust plans to be required to address more significant FOCD concerns, less burdensome structures for situations involving lesser FOCD risks, or, in certain cases, no negation measures at all where no FOCD could exist.

We believe that when evaluating an applicant's NAP, regardless of the nature or level of foreign participation (*e.g.*, ownership, funding), the staff should fully embrace the notion that U.S. citizens (including independent directors) will not abandon their obligations to the U.S.-based licensee and to the U.S. Government due to "influence" from foreign participants. Regardless of ownership structure, licensed activities must be conducted in compliance with the NRC license, the quality assurance program, and the vast array of other regulatory requirements designed to protect public health and safety and common defense and security. Additionally, NRC-licensed operators control the plant, are subject to NRC oversight, and are charged with ensuring plant safety. Abrogation of any of these legal and regulatory obligations could, and likely would, lead to serious civil and criminal sanctions.

The SRP should be revised to make clear that foreign debt financing is not a factor of concern absent the foreign entity being given special control rights, or being from a country of concern. Financing or loans to licensees by a foreign entity are not, alone, determinative of FOCD. Rather, the FOCD determination will hinge on the rights (*e.g.*, veto rights) of the foreign lender under the relevant financial arrangements—particularly whether the foreign lender can exercise control over issues related to nuclear safety or security. In the case of loans to an applicant or licensee by a foreign participant, if the foreign lender has only normal creditor rights, the arrangement should not be considered to be indicative of foreign control. It is notable that the NRC's creditor regulations in 10 C.F.R. § 50.81 do not restrict a licensee from using foreign loans, so long as the creditor cannot foreclose and take possession of a facility before the NRC has approved any necessary license transfer.

Because achieving greater regulatory certainty regarding FOCD issues is absolutely critical to enabling domestic nuclear projects to attract foreign investment and participation, we are

proposing that the Commission direct the staff to revise the FOCD SRP to reflect the permissibility of foreign investment in the U.S. nuclear power industry, including new reactor projects, based on a fully supportable reading of the AEA and longstanding Commission precedent in *SEFOR*.[3] That precedent demonstrates the Commission's authority to interpret the words "owned, controlled, or dominated" in an integrated way, centered on the power to direct activities with national defense and security implications.[4]

The Commission directed the NRC staff to examine particular issues in its FOCD assessment, and to present recommendations to the Commission on proposed modifications. Although multiple options are available with respect to each of the issues identified in the SRM, NEI strongly encourages the staff to adopt and re-affirm the integrated approach to assessing potential FOCD. That approach is consistent with the goals of the statute as well as Commission precedent interpreting it, and would allow the agency to recognize the current global context of the nuclear industry. Thus, we recommend the following approach be adopted:

- With respect to the permissibility of foreign ownership, the Commission has held that the AEA prohibition should be read as an integrated whole, with a focus on the foreign interest's power to direct matters potentially affecting national defense and security. As such, it is legally supportable and appropriate from a policy perspective to conclude that 100% indirect ownership is not automatically prohibited. The statutory objective of preventing undue foreign control over nuclear security or special nuclear materials can be satisfied by implementing an effective NAP. Not only is such a reading of the statute consistent with seminal Commission precedent (*SEFOR*), but it is also consistent with the approach taken by many other federal agencies under the National Industrial Security Program Operating Manual (NISPOM).

- With respect to the question of how "ownership" should be interpreted, the staff should distinguish between direct and indirect foreign owners so that a foreign owner that is far removed, up the corporate chain from the licensee (*i.e.*, grandparent or above), is not treated the same as a foreign applicant or direct owner of a licensee. Factors such as voting control and control of operations are more relevant. Such an interpretation would be more consistent with prior cases where 100% indirect foreign ownership of non-operating licensees has been found to be acceptable. And, more generally, "ownership" should be interpreted within the context of FOCD, as only one of several potential indicia of control over licensed activities.

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[3] *General Elect. Co. & Southwest Atomic Energy Assoc.* (Southwest Experimental Fast Oxide Reactor), 3 AEC 99 (1966).

[4] NEI recognizes that legislative change is one avenue to address FOCD issues. While we would welcome Congressional action, our proposed approach is not precluded by the statute. It is wholly consistent with Commission precedent and provides a well-founded basis for guidance to both the NRC staff and industry.

- With respect to foreign financing of nuclear projects, the NRC should recognize that foreign lenders may not have any corporate governance rights or ability to control decisions affecting nuclear safety or security. Although foreign lenders may have the ability *not* to fund a project, that type of business or financial decision by itself does not implicate FOCD concerns under the AEA. To the extent that there is a legitimate concern that a foreign lender has the potential to control decisions affecting nuclear safety or security, an appropriate NAP should be sufficient to ensure that such decisions are in the hands of U.S. citizens.

- With respect to assessing NAPs, the staff should not propose to retain the status quo by continuing to rely on existing guidance in the SRP that is based on a flawed interpretation of the AEA. Instead, the staff should recommend revisions to the SRP that would implement a graded approach to assessing NAPs, with clearer criteria and guidance on the acceptability of more or less elaborate plans based on varying circumstances. Mitigation measures would be commensurate with the level and nature of foreign participation. Again, this approach is consistent with the NISPOM.

- With respect to using license conditions to make a positive FOCD finding at the time of licensing, the finding would be based on objectively verifiable license conditions requiring resolution of FOCD issues through implementation of the NAP on a schedule appropriate to address national defense or nuclear safety issues. The statutory objective of preventing foreign control over nuclear safety and security would be met, since the licensee would resolve FOCD issues before commencing licensed activities implicating nuclear safety or national defense. This approach also provides the certainty that potential investors require.

There is a clear basis to conclude that the global nature of the nuclear industry and the regime of international safety and safeguards protocols significantly reduce the security and proliferation risk from foreign participation in U.S. nuclear power plant projects. Thus, we encourage the staff to recommend – by the December 31, 2013 deadline established by the Commission in the SRM – that the SRP be updated expeditiously to permit appropriate foreign participation. We also encourage the Commission to review the staff's recommendations on an expedited schedule

and address the issues arising under the statutory FOCD restriction as quickly as possible to enable U.S. and foreign participants to engage in the long-term planning and make the long-term investments necessary for nuclear projects.

Please do not hesitate to contact me if you have questions or would like to discuss the positions expressed in NEI's comments.

Sincerely,

Ellen C. Ginsberg

Attachments

cc: Chairman Allison M. Macfarlane
Commissioner Kristine L. Svinicki
Commissioner George Apostolakis
Commissioner William D. Magwood, IV
Commissioner William C. Ostendorff
Margaret M. Doane, Esq.
Ho K. Nieh, Jr.

COMMENTS OF THE NUCLEAR ENERGY INSTITUTE

NRC Request for Comments on Requirements Related to Foreign Ownership, Control, or Domination of Commercial Nuclear Power Plants

Docket ID NRC-2013-0107

The Nuclear Energy Institute, Inc. (NEI)[1] hereby submits the following comments concerning Nuclear Regulatory Commission (NRC) requirements, guidance, and policies relating to foreign ownership, control, or domination (FOCD) of commercial nuclear power plants.[2] In a March 11, 2013 Staff Requirements Memorandum (SRM), the Commission directed the NRC staff to "propose a fresh assessment" of FOCD issues, including "recommendations on any proposed modifications to guidance or practice" on FOCD that may be warranted.

The Commission's March 11, 2013 SRM states that the NRC staff's FOCD assessment should include, but not necessarily be limited to, the following issues:

> The limitation on foreign ownership contained in section 103d of the Atomic Energy Act and the potential to satisfy statutory objectives through an integrated review of foreign ownership, control, or domination issues involving up to and including 100 percent indirect foreign ownership; criteria for assessing proposed plans or actions to negate direct or indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent, and the adequacy of guidance on these criteria; the availability of alternative methods such as license conditions for resolving – following issuance of a combined license – foreign ownership, control or domination concerns; and the agency's interpretation of the statutory meaning of "ownership," and how that definition applies in various contexts, such as total or partial foreign ownership of a licensee's parent, co-owners, or owners who are licensed to own but not to possess or operate a facility.[3]

This list of topics is also set forth in the NRC's June 3, 2013 *Federal Register* notice (78 *Fed. Reg.* 33,122 et seq.). NEI's comments and recommendations on the path forward address all of the topics identified by the Commission, as well as other relevant factors.

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[1] The Nuclear Energy Institute is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and entities involved in the nuclear energy industry.

[2] *See* "Staff Requirements—SECY–12–0168—Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), Petition for Review of LBP–12–19," 78 *Fed. Reg.* 33,121 (June 3, 2013).

[3] *See* "Staff Requirements Memorandum on SECY-12-0168 – *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), Docket No. 52-016-COL, Petition for Review of LBP-12-19" at 1 (March 11, 2013).

As the Commission recognized in the SRM, the time is ripe for a "fresh assessment" of FOCD issues. Since the FOCD Standard Review Plan (SRP) was first issued in 1999, there has been extensive NRC and industry experience with foreign investment in the U.S. nuclear power industry, including new reactor projects.[4] Foreign participation, which is important to the U.S. nuclear business, will be discouraged without clear NRC guidance. Updating and revising the FOCD SRP to codify and clarify practice and precedent would help restore regulatory certainty and predictability – recently undermined by NRC staff actions – to foreign-owned participants and their U.S. partners. Without greater regulatory certainty, foreign investment is likely to be chilled, resulting in a loss of knowledge, experience, and financial support for new construction projects from overseas.

Foreign investment in U.S. nuclear projects promotes the national interest. It creates American jobs and facilitates development of important domestic infrastructure for the future growth of this country. Additionally, foreign investment improves liquidity and enhances the value of U.S. nuclear assets. The dedication of foreign financial resources to U.S. nuclear plants should lead to additional safety enhancements and more efficient plant performance.

As discussed further below, FOCD issues currently impact at least two pending Combined License (COL) applications before the agency, and could delay completion of NRC staff reviews and prevent the issuance of licenses in those cases. And, FOCD issues very recently resulted in the denial of a license renewal application by Aerotest Operations, Inc., the licensee for the Aerotest Radiography and Research Reactor. Aerotest's ultimate parent company, Autoliv, Inc. is Swedish. The NRC staff concluded that Autoliv's ownership of Aerotest is prohibited by the FOCD restriction and ordered the licensee to decommission the facility.[5] The staff's conclusions appear to be inconsistent with Commission precedent, discussed below, which holds that the words in the FOCD prohibition should be read as an integrated whole with an orientation toward national security concerns.

In fairness to the investors who have supported the COL applications and other affect projects, a timely resolution of the issues is warranted. More broadly, as the U.S. economy faces a continuing slow recovery, the benefits of foreign investment in critical domestic infrastructure projects remain apparent. The Commission has recognized the need for timely action on FOCD issues and directed the NRC staff to complete its assessment, prepare a voting paper addressing these FOCD questions, and submit that paper to the Commission no later than December 31, 2013. The Commission, too, must also proceed expeditiously to implement revised FOCD policy and guidance.

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[4] New reactor projects also include small modular reactors.

[5] *See* Letter from Eric Leeds, NRC, to Michael Anderson, Aerotest Operations, Inc., "Aerotest Operations, Inc. – Denial of License Renewal, Denial of License Transfer, and Issuance of Order to Modify License No. R-98 to Prohibit Operation of the Aerotest Radiography and Research Reactor, Facility Operating License No. R-98 (TAC Nos. ME8811 and MC9596)" July 24, 2013. Aerotest had attempted to resolve the FOCD concerns by means of an indirect license transfer to a U.S. corporation, but this, too, was denied by the NRC on financial qualification grounds.

I. The Global Nuclear Industry

A. Policy Considerations Affecting FOCD Have Evolved

When the Atomic Energy Act (AEA) FOCD provision was promulgated in 1954, the commercial development of nuclear energy was in its infancy. The Cold War was reaching its height and there was concern regarding the proliferation of power reactor technology, as well as disclosure of classified information. Reactor technology was generally limited to the United States and a few other countries, and domestic ownership and control of power reactor technology and special nuclear material were viewed as essential to protecting the national security.

In the six decades since the nuclear energy business has become a global enterprise in which nuclear generating technologies are owned and controlled by international companies. Nuclear fuel cycle activities are conducted as part of a worldwide market, subject to national and international oversight, with international companies participating in critical national security-related operations in the United States. In light of the global expansion of nuclear power, technology transfer concerns of the 1950s are significantly reduced.

Furthermore, since the AEA was enacted, a substantial body of restrictions on the use and transfer of nuclear material and technology has developed, such as the Nuclear Suppliers Group, the Treaty on the Non-Proliferation of Nuclear Weapons, the U.S. Department of Energy's nuclear export control regulations, the NRC's 10 C.F.R. Part 110 regulations, and bilateral agreements for nuclear cooperation between countries (referred to as "Section 123 Agreements"). Additionally, there are other means of ensuring that foreign investment in the U.S. does not raise any national defense or nuclear security concerns, most notably the Committee on Foreign Investment in the United States (CFIUS), an inter-agency committee authorized to review foreign investment in the U.S. in order to determine the effect of such transactions on national defense and nuclear security.[6]

Today, many reactor vendors and nuclear service providers participating in the U.S. nuclear market are responsible and experienced foreign nuclear energy companies, such as AREVA, EDF, Toshiba, Mitsubishi, and Westinghouse (majority owned by Toshiba). The reactor technology for new-build projects in the United States is often of foreign origin, such as the AREVA U.S. EPR, the Toshiba ABWR, and the Mitsubishi U.S. APWR.

To reflect changed circumstances, the NRC's FOCD evaluations should remain focused on safeguarding common defense and security, including preventing foreign participation by entities from countries that present legitimate national security concerns (*e.g.*, countries such as North Korea or Iran). In contrast, foreign participation from countries that are committed to non-

[6] A CFIUS review would most likely be connected to a foreign purchase of an existing nuclear asset, and therefore may be most relevant in the context of NRC license transfers (as opposed to initial licensing actions). However, the fact of a CFIUS review should be taken into account as appropriate, with due recognition that a CFIUS review will be focused on security and economic implications that do not completely overlap the NRC's interests in national defense and nuclear security. Any mitigation required by CFIUS should be taken into account as part of the NRC's FOCD review.

proliferation and controlled peaceful use of nuclear energy (*e.g.*, the member countries of the Nuclear Suppliers Group) should be acceptable with appropriate provisions to negate foreign control over security matters, because there is little or no risk of inappropriate diversion of nuclear technology or material.

B. FOCD Issues are Ripe for Review

The current FOCD SRP has served as a useful guide for potential foreign investors and their U.S. partners. Nonetheless, the SRP and recent precedent illustrate the bases for the industry's longstanding concerns about uncertainty and inconsistency in the treatment of indirect foreign ownership.

The current effort to re-examine the NRC's approach to FOCD is in part an outgrowth of a 2012 decision by the Atomic Safety and Licensing Board (ASLB) in the Calvert Cliffs 3 COL proceeding,[7] where the ASLB agreed with the NRC Staff that the applicant was ineligible for a license under the FOCD restrictions in AEA Section 103d. and 10 C.F.R. § 50.38. Specifically, the ASLB found that the applicant could not comply with the FOCD prohibition, regardless of its Negation Action Plan (NAP), because the applicant is indirectly 100% owned by a foreign corporation (a foreign "grandparent"). Although the Commission denied the applicant's Petition for Review of this ASLB decision, it directed the staff to undertake the ongoing re-evaluation.

In other cases, the NRC staff has departed significantly from the Commission's FOCD precedent and practice, reinterpreting or misapplying the SRP guidance in the process and imposing unnecessary prohibitions and license conditions.[8] This striking shift in agency position has eroded regulatory certainty to the point that foreign investors and U.S. participants can have little confidence about what ownership structures or negation measures will be acceptable to support investment in U.S. nuclear projects.[9] The agency's position on FOCD is so significant as to potentially stymie new plant development, or affect major strategic decisions regarding new

[7] *See Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Combined License Application for Calvert Cliffs Unit 3), LBP-12-19, 76 NRC __ (Aug. 30, 2012).

[8] In one significant departure from precedent, a recent NRC staff determination concluded that Toshiba's involvement in the South Texas Project (Units 3 & 4) is impermissible under the AEA's FOCD restrictions, despite Toshiba's subsidiary only owning about 10% of the project and the U.S. owner having a supermajority—that is a 90% voting right—on the COL applicant's Board of Directors. *See* Evaluation by the Office of Nuclear Reactor Regulation on Behalf of the Office of New Reactors, South Texas Project, Units 3 and 4, Docket Nos. 52-012 and 52-013 at 24 (Apr. 29, 2013).

[9] Another case involving the three decommissioned Yankee sites is another example in which the FOCD prohibition was stretched beyond any prior interpretation, with adverse practical impacts. The three Yankee sites involved are now home only to Independent Spent Fuel Storage Installations. The NRC issued violations to the licensees, and confirmatory orders requiring negation actions, related to FOCD issues, notwithstanding that (a) the sites are not power reactors within the meaning of the AEA prohibition; and (b) the foreign interests are only owners of shareholders of the licensees, with no one foreign interest holding a controlling share. The FOCD issues delayed NRC approval of a significant merger of two domestic shareholders of the licensees, that did not involve any changes with FOCD implications. Then, in July 2013, after a review of over two years, the NRC issued exemptions from the requirements of 10 C.F.R § 50.38.

plants.[10] The lack of certainty and predictability unnecessarily chills foreign investment in domestic nuclear projects at a time when investment in critical U.S. infrastructure is vital. The NRC should interpret and apply its statutory mandate in a reasonable and consistent manner so as not to discourage beneficial foreign investment.

C. Foreign Participation Enhances Safety

Facilitating beneficial foreign investment and participation in the U.S. nuclear industry through clear guidance enables foreign entities to bring their experience to the U.S., potentially enhancing safety. Many foreign participants are either major international nuclear suppliers who provide their foreign technology in the U.S. (*e.g.*, AREVA, Toshiba, Mitsubishi) or major international nuclear operators (*e.g.*, EDF) who bring their construction experience and operational insights to the U.S. Foreign reactor suppliers have significant experience with design, procurement of major components, and construction from new power reactor projects overseas during the past two decades. Additionally, "lessons learned" from overseas nuclear projects will be valuable in the deployment of the new AP1000 in this country. Thus, in addition to the benefits from financial investment, foreign participation in U.S. projects can bring significant operating experience and safety enhancements to the U.S.

D. Negation Action Plans Can Effectively Mitigate Foreign Control

When there is indirect foreign ownership of a nuclear power plant or the potential for foreign control of nuclear operations or nuclear materials otherwise exists, experience has shown that mitigation measures under a NAP can serve to eliminate the possibility that FOCD will adversely impact common defense and security. The FOCD SRP should be revised to reflect an appropriately flexible use of NAPs. The NRC staff has reviewed and approved mitigation measures under a NAP in multiple FOCD cases to date. The FOCD SRP should recognize that negation measures will depend on the specific facts of each case, including the degree of foreign ownership involved, the home country of the foreign interest, the voting and other rights that come with that ownership, whether the foreign owner would participate in management of operations in any way, and whether there is a separate operating company. The SRP can establish a sliding scale of negation measures is appropriate so that more robust plans may be necessary for more significant FOCD concerns. A one-size-fits-all approach can lead to unnecessarily burdensome plans in some cases, with no commensurate safety or security benefit. It is also possible to craft a NAP to negate any potential for foreign control, even in cases in 100% indirect foreign ownership (*e.g.*, UniStar Nuclear Operating Service, LLC (UniStar)) or substantial foreign loans (*e.g.*, Nuclear Innovation North America LLC (NINA)).

II. Interpretations of the FOCD Prohibition

In undertaking a re-assessment of FOCD matters, the NRC must avoid unreasonable interpretations of the applicable statutory language. The NRC should adopt the reading most

[10] The Commission's FOCD policies may also affect entities involved in other types of NRC licensing actions such as license transfer and license renewal proceedings.

consistent with the longstanding Commission precedent that, when assessing FOCD, the words "owned, controlled, or dominated" should be read in an integrated way, centered on the power of foreign interests to direct activities with national defense and security implications. Negation actions may be imposed by license condition, to the extent necessary, to prevent improper FOCD over the relevant activities, regardless of whether that derives from ownership, governance rights, or financial obligations.

A. The Commission's SEFOR Precedent

The Commission squarely addressed the context and appropriate reading of the AEA FOCD prohibition in *General Electric Company & Southwest Atomic Energy Associates* (*SEFOR*).[11] The Commission decided that case just twelve years after the AEA was enacted, and established the controlling principle with respect to the FOCD requirements:

> . . . the limitation [on foreign ownership, domination or control in the AEA] should be given an orientation toward safeguarding the national defense and security. We believe that the words "owned, controlled, or dominated" refer to relationships where the will of one party is subjugated to the will of another, and that the Congressional intent was to prohibit such relationships where an alien has the power to direct the actions of the licensee.[12]

It is important that the Commission read the three words – "owned, controlled, or dominated" – together, as one prohibition, rather than each word in isolation as three separate prohibitions. In *SEFOR*, the Commission emphasized the need to "take into consideration the many aspects of corporate existence and activity" where FOCD could be manifest, and that:

> . . . [t]he ability to restrict or inhibit compliance with the security and other regulations of AEC, and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance.[13]

In *SEFOR*, the foreign ownership/control issue arose due to participation in the experimental project by Gesellschaft fur Kernforschung, a nonprofit association formed under the laws of West Germany and owned in part by the Federal Republic and in part by the State of Baden-Wurttemberg. The foreign entity was not one of the proposed licensees, nor would it own a licensee. The factual focus of the Commission in that case, therefore, was on whether there were any other indicia of control in the relationship between the participants (in other words, the foreign company's "power to direct the actions of the licensee"). Under contract with one prospective joint licensee, Southwest Atomic Energy Associates, Gesellschaft would cooperate to have the facility designed and constructed and would cooperate in the research and

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[11] *General Elect. Co. & Southwest Atomic Energy Assoc.* (Southwest Experimental Fast Oxide Reactor), 3 AEC 99 (1966).

[12] *Id.* at 101.

[13] *Id.*

development program to be conducted at the completed facility. The facility was to be constructed and operated by the other prospective joint licensee, General Electric, and funding was to be provided by the Atomic Energy Commission (AEC).

The Commission in its decision specifically relied on the legislative history of AEA Section 104d., noting that the statutory language "owned, controlled, or dominated" was substituted for a provision in the original bill that would have established a percentage-based ownership threshold. The Commission reasoned that the substitution language was chosen, in part, to ensure "the denial of a license be prescribed when *actual control or domination* was in alien hands."[14] Removing the percentage-based ownership threshold gave the Commission the discretion to determine whether foreign ownership would constitute "actual control or domination." This reflected Congress's shift away from ownership alone, allowing the agency to consider ownership as only one of the potential indicia of control.

In its analysis, the Commission focused on the effectiveness of contract and governance controls to mitigate any ability of the foreign participant to control compliance with AEC regulations, or to control and use the nuclear fuel and to dispose of special nuclear material. The threshold question was not one of ownership, but one of influence and, ultimately, one of power to direct specific activities potentially affecting nuclear security. The AEC evaluated (1) the potential for the contract with the foreign entity to create current security problems, (2) the foreign entity's ability to control compliance with the AEC regulations, and (3) the foreign entity's capacity to control and use the nuclear fuel and to dispose of special nuclear material.[15] The Commission relied on the fact that the foreign participant in the project did not have any voice in the management of either of the joint licensees or in the "hiring, supervision or dismissal of their employees on the project."[16] Nor would it have any voice in designating individuals to work on design or construction of the project or in conduct of any other day-to-day project activities.[17] With respect to financing, the Commission found that the foreign participant would have no control over expenditures by General Electric and would be obligated to pay its share of the costs.[18]

Subsequent to *SEFOR*, in the 1969 *Zion* case, the Commission addressed the sufficiency of its regulatory requirement that an applicant state the citizenship of corporate directors and officers, and state whether it is owned, controlled, or dominated by an alien, foreign corporation, or foreign government.[19] The Commission concluded that the regulations were sufficient to detect the kind of foreign involvement that would prevent issuance of a license. In doing so, the

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[14] *Id., citing* Legislative History of the Atomic Energy Act of 1954, pp. 1698, 1861, 1961-62, 2098, 2239 (emphasis added).

[15] *SEFOR*, 3 AEC at 101.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 101-02.

[19] *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), 4 AEC 231 (1969).

Commission relied on the rationale in *SEFOR* – that the Congressional purpose behind the FOCD provision in the AEA "was to prohibit [the subject] relationships where an alien has the power to direct the actions of a licensee."[20] The Commission specifically reasoned that if an applicant were subject to foreign domination, it would expect manifestations of that to be apparent in the corporate organization and management.[21]

At bottom, in its *SEFOR* decision the Commission read and applied the AEA FOCD prohibition in an integrated way, to focus not on ownership in isolation, but rather on the power to direct licensed activities with implications for safeguarding national security. With respect to this issue the Commission recognized the importance of the nature of the foreign participation, the contractual relationships among the parties, and the governance rights with respect to the nuclear licensed activities. In *Zion*, the Commission further recognized that the FOCD review at the time of plant licensing is not the sole means by which the agency assures safety and security of nuclear operations and materials, and that ongoing agency oversight can be relied upon to identify and address actual issues of inappropriate FOCD, if and when they should arise.

B. Indirect Foreign Ownership

The Commission's SRM specifically raises the issue of the "potential to satisfy statutory objectives through an integrated review of foreign ownership, control, or domination issues involving up to and including 100 percent indirect foreign ownership." The NRC staff and an ASLB have most recently taken the position that, because the words in the FOCD restriction ("owned, controlled, or dominated") are connected by an "or" rather than an "and," no license may be issued "if any of the three prohibitions is violated."[22] In contrast, we believe that, consistent with *SEFOR*, FOCD is not "three prohibitions," it is one prohibition. The statutory objectives dictate that an integrated review of FOCD issues be conducted, and that foreign ownership up to and including 100% indirect foreign ownership can be permissible, with an appropriate NAP.

SEFOR is the Commission's seminal decision on FOCD – and the only Commission adjudicatory decision directly addressing the proper reading of the prohibition. Since that decision, FOCD issues have been considered a number of times in the non-adjudicatory context. The staff has appropriately adopted the concept of a NAP to address and mitigate any potential for FOCD, and imposed NAPs by license condition to assure ongoing compliance by the licensees (and to prevent changes without prior NRC approval). However, inconsistent NRC precedent and related analyses have introduced confusion into the issue of the appropriate treatment of foreign ownership.

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[20] *Id.* at 233, *citing SEFOR*, 3 AEC at 101.

[21] *Id.* As discussed further below, this is a particularly appropriate observation – one that is more true today than it was then, given the growth since that time in oversight programs and the increased transparency of nuclear operations.

[22] *Calvert Cliffs*, LBP-12-19, 76 NRC __ (slip. op. at 13).

In 1973, the agency *approved* the transfer of six nuclear facilities and three TRIGA reactors from domestic entities to General Atomic Company (General Atomic), a California partnership with two equal partners, Gulf Oil Corporation and Scallop Nuclear, Inc. Scallop's ultimate parent was Royal Dutch/Shell, a Dutch and British joint venture. In approving the transfer, the agency imposed license conditions focusing on the power to direct nuclear activities and the security of materials, including the following:

- the president and officers of the partnership with responsibility for control of, and any employees with custody of special nuclear material, would be U.S. citizens;
- a separate department of General Atomic would be responsible for special nuclear material and would report to the president;
- the president would be charged with responsibility and exclusive authority for ensuring that the business and activities of the partnership would be conducted at all times in a manner consistent with the common defense and security of the United States.

In addition, agency documents suggest that the partnership agreement in that case limited the right of either partner to bind the partnership. This contractual provision assured that the foreign participant did not have the ability, on its own, to "restrict or inhibit compliance" with agency regulations. Consistent with the *SEFOR* precedent, the staff's use of license conditions in this case firmly established the practice of using a NAP to mitigate any potential for FOCD, even in cases involving indirect foreign ownership.

In the mid-1970s, the agency staff *rejected* the proposed purchase of a reactor in New Jersey used to produce radiopharmaceuticals. Hoffman-LaRoche Radiopharmaceutical, Inc. (HLRR) proposed "acquiring" the operating license for the facility in connection with its proposed purchase of 100% of the existing licensee's stock. Under the acquisition plan, the prior licensee (a domestic company) would continue as the licensee, but would become an indirect, wholly-owned subsidiary of HLRR. HLRR, a Delaware corporation, had as its ultimate parent Hoffman-LaRoche & Company, Ltd., a Swiss corporation. Although HLRR proposed license conditions insulating the domestic licensee from FOCD, the NRC staff determined that acquisition of the reactor by a wholly-owned subsidiary of a foreign company would violate the AEA. Thus, for the first time the Commission staff interpreted the FOCD statute to conclude that ultimate 100% "ownership" of a licensee was sufficient to violate the restriction.[23] As explained below, in making this determination the agency staff effectively adopted a reading of the AEA and an approach to FOCD that diverged from Commission precedent.

Later, in the early 1980s, the NRC *approved* an acquisition in which a reactor licensee was to become the wholly-owned subsidiary of a company that in turn would be wholly-owned by a

[23] *See* SECY-76-245, "Foreign Ownership of Production and Utilization Facilities," Enclosure A, at 11-13 (April 30, 1976).

Panamanian corporation. Licensee Babcock & Wilcox (B&W) was and would remain owned by its domestic parent McDermott, Inc. (McDermott). However, directly comparable to HLRR, McDermott was to reorganize and become wholly-owned by a Panamanian company. Subject to a license amendment to add conditions requiring negation actions similar to those in the General Atomic transfer, the agency concluded that B&W would continue, post-reorganization, to qualify for a facility license. Despite the agency's approach in HLRR, the NRC approved the McDermott acquisition even though the operating licensee was ultimately 100% owned by a foreign grandparent. An internal agency legal analysis of the McDermott case specifically found that "... the foreign incorporation of the parent of B&W is, at least at the outset, no bar to the continuation of the B&W facility license," and that this view would be a return to the Commission's approach in *SEFOR*, with a focus on safeguarding national security.[24] The analysis recognized that the result would be "difficult to distinguish from HLRR," but did so nonetheless – not only on the basis of *SEFOR*, but also on the basis of a finding that the stock of the proposed parent of B&W was "largely" owned by U.S. citizens.[25]

Also in the early 1980s, a subsidiary of Union Carbide sought to transfer a facility license for a research reactor to Cintichem, Inc., whose ultimate parent was Swiss-owned. As in the earlier cases, Cintichem agreed to a number of conditions to mitigate potential FOCD. Nonetheless, the NRC staff found an FOCD violation based only on ultimate foreign ownership of the domestic licensee, and concluded that the transfer was precluded by the AEA. Despite the approval in McDermott, the staff returned to the flawed logic of HLRR, and articulated a rationale to distinguish ownership from control and domination.

The staff's rationale in Cintichem is captured in another internal staff legal analysis.[26] That analysis stated that *SEFOR* did not apply to Cintichem because, in the *SEFOR* case, the foreign association involved had no ownership interest in the license applicants.[27] The new OELD Legal Analysis also distinguished Cintichem from McDermott, on the basis that in McDermott, B&W had provided the NRC with evidence that the majority of the stockholders of the proposed parent were U.S. citizens.[28] With respect to Cintichem, the OELD Legal Analysis concluded that "while license conditions might prevent foreign control, the conclusion that the ultimate ownership of the transferee, whether a corporate entity or the shareholders, is in foreign hands cannot be avoided."[29] Without any further elaboration, this singular legal analysis attempted to

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[24] SECY-82-479, "Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox," Enclosure B, at 8 (Nov. 26, 1982).

[25] *Id.* at 9.

[26] *See* Attachment to Letter from Chairman Palladino, NRC, to the Honorable Alan Simpson, Chairman, Subcommittee on Nuclear Regulation, United States Senate, dated September 22, 1983, Office of Executive Legal Director (OELD) Legal Analysis, "Legal Questions of Foreign Control and Domination Raised by Proposed Transfer of Facility Operating License No. R-81 from Union Carbide Subsidiary 'B' to Cintichem, Inc.," at 9 (OELD Legal Analysis).

[27] *Id.* at 9.

[28] *Id.* at 8.

[29] *Id.* at 9-10.

reconcile Cintichem with prior cases by applying a narrow reading of the FOCD provision focused on ownership. The OELD Legal Analysis ignored the legal and policy analysis of *SEFOR*, which was at least recognized in the legal analysis related to the McDermott case. That analysis, as noted above, supported an integrated reading of the FOCD restriction.[30]

As such, the staff's literal reading of the statute and narrow focus on ownership in Cintichem should be disregarded. Congress subsequently intervened in the Cintichem matter. Congress included a provision in the NRC's 1984 Authorization Bill[31] to allow the NRC to approve the Cintichem transfer, if the agency could find that it would not be inimical to the common defense and security, and if there were appropriate license conditions ensuring that the foreign corporation would not exercise control in a way that would be inimical to the common defense and security. In overruling the agency staff's HLRR/Cintichem approach, the Authorization Bill was an expression of Congressional intent regarding the AEA and directing the NRC to use the approach established by the AEC in *SEFOR*. Notably, the NRC subsequently approved the Cintichem transfer subject to license conditions.

Considering this body of precedent as a whole, the Cintichem and HLRR examples reveal a flawed legal analysis that is inconsistent with the Commission's position in *SEFOR*. The same flawed logic has been carried forward to some degree in the current FOCD SRP, and has re-surfaced in the recent COL cases. In HLRR and Cintichem, the staff chose to read "owned" in the FOCD statute in isolation — that is, divorced from the overriding concept of the power to direct matters with national defense or security implications.[32] That approach cannot be reconciled with *SEFOR*, under which the question of whether a prospective NRC licensee is "owned, controlled, or dominated" by a foreign entity must be evaluated by considering the *totality of the circumstances*. Following *SEFOR*, subjugation of the will of one party to the will of another is required for a finding of FOCD. And this subjugation of the will of the licensee must be viewed with an eye toward national defense and security risks.

C. Indirect Ownership Is Not Prohibited by the Meaning of "Ownership"

The narrow FOCD analysis that has been adopted at times, as discussed above, has focused on "ownership" segregated from the FOCD package, contrary to *SEFOR*. However, even if one reads "ownership" in isolation, the issue still turns on the meaning of "owned," which is not defined in the AEA. Contrary to the OELD Legal Analysis associated with the Cintichem matter, "owned" can be given its most natural reading to apply only to direct ownership of a licensee, or even to only direct majority ownership. Consistent with NRC decisions in the General Atomic and McDermott cases, "own" should not be read more broadly to also exclude any ownership interest that might occur further up the corporate chain, such as by a foreign grandparent.

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[30] The "determination" based on stock ownership that was made in McDermott was not necessary under a *SEFOR* analysis.

[31] *See* Pub. L. No. 98-553, § 109, 98 Stat. 2825, 2828 (1984) (Authorization Bill).

[32] In contrast, the NRC has never read any independent meaning — separate from "control" — in "domination."

In General Atomic, the partners of the licensee were U.S. entities, although one partner ultimately had foreign parents. In McDermott, the third tier owner of the licensee was also foreign. The NRC allowed 100% indirect foreign corporate ownership in both of these cases, with appropriate negation actions taken to mitigate FOCD concerns. Thus, under a literal reading of the statute, and as these cases demonstrate, the foreign ownership restriction applies only to *direct* corporate owners of the licensee.[33]

Applying ownership restrictions only to direct ownership recognizes that a layer of domestic ownership of a licensee (coupled with negation actions, if necessary) can insulate the licensee from foreign control of nuclear operations or nuclear materials and therefore comply with the AEA (subject to routine NRC oversight). A reading that indirect ownership is not automatically disqualified by the AEA is much more logical and consistent with NRC precedent than the out-of-context literal readings espoused by the NRC staff and the ASLB in the recent COL cases.

D. Indirect Foreign Ownership of Non-Operating Licensees

A conclusion that the AEA must be read as a *per se* prohibition on 100% indirect foreign ownership of a reactor licensee is also inconsistent with other NRC decisions.[34] The NRC has recognized that a license can in fact be issued to a domestic licensee wholly-owned (100%) by a foreign grandparent. In 1999, the NRC issued two orders allowing AEA Section 103 reactor licensees (minority owners of the nuclear plant) to become *wholly-owned subsidiaries of foreign companies*. In late 1999, the NRC issued an order approving an indirect license transfer for the Seabrook Station held by New England Power Company (NEP), a domestic entity and a subsidiary of New England Electric System (NEES). The indirect transfer of control was the result of a merger in which NEES was acquired by National Grid Group plc, a British public limited company.[35] After reviewing the applicant's NAP, the NRC correctly found that because

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[33] The Cintichem case is an outlier for its conclusion that even indirect foreign ownership was prohibited. For the reasons explained above, that approach was effectively overruled by legislation and a subsequent decision approving the transfer.

[34] The ASLB for the *Calvert Cliffs 3* COL proceeding mistakenly read the AEA to prohibit 100% indirect foreign ownership. (*See* LBP-12-19.) There, the ASLB concluded that the proposed ownership structure would violate the AEA because the applicant is wholly-owned by a U.S. company that itself is wholly owned by a foreign corporation. While initially recognizing the Commission's direction in *SEFOR* that the phrase "ownership, control, or domination" be read as an integrated concept oriented towards control over security matters, the ASLB nonetheless opted for a narrow reading of "ownership" in isolation – as an independent requirement – and then concluded that 100% foreign ownership would never be acceptable. The ASLB's reading was plainly inconsistent with cases (described below) where the NRC issued licenses to entities that are 100% foreign-owned, choosing instead to ignore the plain reading of the statute and to ignore the fact that any distinction between operating licensees and owner-only licensees has no textual basis in the statute. In its selectively literal approach, the ASLB failed to articulate an overarching philosophy such as the one in *SEFOR* that would be applicable in a range of circumstances.

[35] *See* "Order Approving Application Regarding Merger of New England Electric System and National Grid Group PLC," 64 Fed. Reg. 71,832 (Dec. 22, 1999). The "Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of New England Electric System and the National Grid Group PLC, Seabrook Station, Unit 1, Docket No. 50-443" is dated Dec. 10, 1999 (ADAMS Accession No. ML993540045) (NEP Safety Evaluation).

of that plan, "foreign interests will not be able to *control* NEP within the meaning of the AEA and NRC regulations," despite the fact that NEP would be 100% indirectly foreign owned.[36] The NAP was imposed by license conditions, which assured that the business and activities of NEP with respect to the Seabrook operating license would be conducted in a manner consistent with the public health and safety and the common defense and security.

Similarly, also in 1999, the NRC issued an order approving the indirect transfer of the license held by PacifiCorp for an interest in the Trojan Nuclear Plant.[37] The transfer approval involved a merger by which PacifiCorp, a domestic entity, remained the licensee but became an indirect wholly-owned subsidiary of Scottish Power plc, a public limited company incorporated under the laws of Scotland. The order resulted in the licensee being held by a company 100% owned by a foreign entity, and included license conditions to negate FOCD.

We recognize that both of these cases involved *licenses* issued to domestic entities that were *non-operating*, minority owners. The fact that the owner-licensees were not operators was relevant to the NRC staff's determination that the foreign participation was not a threat to domestic control or to national defense and security as required under *SEFOR*. Nonetheless, this precedent undercuts any reading of the AEA that divorces ownership from the other FOCD factors and allows ownership to be read in isolation. The AEA itself draws no distinction between operating and non-operating licenses; it states that a "license" may not be issued to an entity subject to FOCD. In these two cases, the NRC issued licenses to domestic entities with 100% foreign parents or grandparents. These approvals can only be read to mean that, even with 100% indirect foreign ownership, the NRC can find, based on the totality of the circumstances (including whether the licensee is an operating licensee), that the licensee is not subject to the will of a foreign entity with respect to national security or the ability to comply with NRC requirements. Were the statute to be read literally to focus on "ownership" at any level above the licensee, the licenses in these two cases could not have been issued.

The precedent can be reconciled by applying the *SEFOR* approach. The licenses were issued to *domestic* companies — ultimate foreign ownership of those companies (restricted by NAPs) did not subject the licensees (or licensed activities) to actual foreign control that would threaten national defense and security. These cases can also be reconciled by applying a distinction between direct and indirect foreign ownership of a licensee. The NRC's approval of the NEP and PacifiCorp license transfers is consistent with allowing indirect foreign ownership of a licensee.

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[36] NEP Safety Evaluation at 8 (emphasis added).

[37] *See* "PacifiCorp (Trojan Nuclear Plant); Order Approving Application Regarding Proposed Merger," 64 Fed. Reg. 63,060 (Nov. 18, 1999). The "Safety Evaluation by the Office of Nuclear Reactor Regulation" is dated Nov. 10, 1999 (ADAMS Accession No. ML993260013) (PacifiCorp Safety Evaluation).

E. Graded Approach to Negation Action Plans

The Commission's SRM to the NRC staff also specifically raised the issue of the "criteria for assessing proposed plans or actions to negate direct or indirect foreign ownership or foreign financing of more than 50 percent but less than 100 percent, and the adequacy of guidance on these criteria." The agency's precedent is important in evaluating this issue. Beginning with *SEFOR* and the General Atomic matter in 1973 — and including the NEP and PacifiCorp matters discussed above — the Commission and NRC staff have both recognized the importance of negation actions in varying scenarios involving indirect foreign ownership. Applying a graded approach, the agency has routinely recognized that NAPs can mitigate foreign power to direct activities implicating nuclear safety and security, and has required NAPs by license condition to approve licensing actions. The effectiveness of NAPs repeatedly has been demonstrated, even for cases with significant foreign participation. This graded approach can be extended to cases involving foreign ownership or foreign financing of more than 50 percent, up to and including 100 percent.

For example, the NRC staff approved a license transfer of Three Mile Island Unit 1 to AmerGen Energy Company, LLC, an American company that was owned in equal parts by British Energy, Inc. and PECO Energy Company. British Energy was a U.K. company, while PECO was an American company with a small percentage being Swiss-owned. Accordingly, AmerGen was slightly more than 50% foreign-owned. In its evaluation of the transfer, the NRC staff discussed the fact that British Energy's home country was a close ally of the United States, as well as a signatory to the Nuclear Non-Proliferation Treaty. To negate any foreign power over matters related to nuclear safety and security, certain FOCD conditions were imposed, including a requirement that the chairman of the Management Committee be a U.S. citizen appointed by PECO with the deciding vote on matters involving nuclear safety and security. The NRC approved the transfer subject to these FOCD conditions.

Another case study is the NRC's approval of indirect license transfers of five reactor units following the acquisition of 49.99% of Constellation Energy Nuclear Group, LLC (CENG) by EDF Inc. (f/k/a EDF Development, Inc.) (EDF), a subsidiary of French company Électricité de France SA. The 50.01% remainder of CENG is owned by American company Exelon Corporation (Exelon). To address FOCD issues, the governance structure was set up much like that in the AmerGen case: Exelon appoints five U.S. citizen Board Directors and EDF appoints five French citizen Board Directors. However, Exelon appoints the Chairman, a U.S. citizen with the deciding vote on nuclear safety, security, and reliability matters. In addition, day-to-day operating authority resides with a Chief Executive Officer and/or Chief Nuclear Officer, who also must be U.S. citizens. An independent Nuclear Advisory Committee consisting of U.S. citizens also reports on FOCD matters annually. The NRC approved the license transfers subject to these FOCD conditions.

Even in cases of 100% indirect foreign ownership or substantial foreign loans, an effective NAP can mitigate FOCD concerns. In the case of the Calvert Cliffs 3 COL application, the applicants (UniStar and the owner, Calvert Cliffs 3 Nuclear Project, LLC) created a NAP with mitigation provisions similar to the AmerGen and CENG cases. But, because there is no domestic

grandparent, the NAP also creates a Security Subcommittee under the UniStar Board of Directors, which is comprised of the U.S. citizen Board Chairman, as well as two independent U.S. citizen Directors. The Security Subcommittee has exclusive authority to vote on and decide for the Board matters relating to nuclear safety, security, or reliability. The broad authority given to the Security Subcommittee includes matters involving issues that must be decided under U.S. control. Day-to-day operating authority resides with a Chief Executive Officer and/or Chief Nuclear Officer, who also must be U.S. citizens. These measures in a NAP effectively resolve concerns regarding foreign power over nuclear safety and security activities. Similarly, in the case of NINA, the applicants established a NAP to ensure that decisions affecting nuclear safety, security, or reliability are under the control of U.S. citizens (*i.e.*, the Chief Executive Officer has control of such decisions prior to commencement of construction, and a Security Committee of the Board has control of such decisions thereafter).

At bottom, a NAP can address any form of foreign participation, including 100% indirect foreign ownership or 100% foreign funding, if it effectively eliminates foreign control over relevant NRC-licensed activities. The statutory prohibition runs to issues of "control" or "domination," not to mere foreign "influence" and not to foreign participation with respect to commercial or business matters. The issue of control turns on matters of corporate governance, such as voting control of the domestic licensee and the decision-making authority related to nuclear operations, nuclear security, and access to nuclear materials.

When evaluating an applicant's NAP, regardless of the nature or level of foreign participation (*e.g.*, ownership, funding), there is no basis for the staff to assume that U.S. citizens (including independent directors) will abandon their obligations to a U.S.-based corporate entity (the NRC licensee) and to the U.S. Government due to "influence" from foreign participants. NAPs do not change the day-to-day operations of a licensee or a plant, which are left to the control and direction of the Chief Executive Officer or Chief Nuclear Officer. These officers remain responsible for ensuring that licensed activities are conducted in compliance with the NRC license, Quality Assurance program, and the vast array of other NRC requirements designed to protect public health and safety and common defense and security. Abrogation of these obligations would involve a breach of fiduciary duty and, potentially, regulatory violations that could lead to civil and criminal sanctions. Additionally, NRC-licensed operators control the plant, are subject to NRC oversight, and are responsible for protecting public health and safety.

Further, as implicitly recognized by the Commission in the *Zion* decision, robust defense-in-depth measures in place at nuclear plants assure that any inappropriate influence that could compromise safety or security (whether foreign or domestic) would be identified, elevated, and addressed by the licensee and/or the NRC. Even funding or financing from foreign sources would not, absent a case-specific basis, suggest that the licensee will not be able to control operational or security decisions. Mechanisms such as licensee advisory committees (where necessary) can also assure oversight, transparency, and reporting of FOCD issues to the NRC.

III. Lessons from the NISPOM

The approach to FOCD advocated by the industry is consistent with the National Industrial Security Program Operating Manual (NISPOM), which governs the treatment of classified contracts and programs across the U.S. Government. The NISPOM uses a similar framework to ensure that U.S. companies holding a facility security clearance (FCL) are not subject to undue Foreign Ownership, Control, or Influence (FOCI). The NISPOM's focus is the prevention of unauthorized disclosure of classified information.[38] But even with this significant security objective, the NISPOM looks at FOCI indicators *holistically* and allows FOCI to be addressed through a range of mitigation and negation action measures, graded to the potential for national defense or security concerns. As such, the graded approach supported by NEI to address FOCD under the AEA is well-established in the NISPOM, and is not a new or novel way of tackling foreign ownership concerns. Indeed, the alternative reading of the AEA, focusing on ownership to the exclusion of other factors, is out of step with the NISPOM and national policy.

Importantly, *there is no automatic prohibition on foreign ownership* under the NISPOM, even though the FOCI standard, like the AEA FOCD language, is written in the disjunctive (*i.e.*, "Foreign Ownership, Control, OR Influence"). In fact, the NISPOM expressly recognizes the importance of foreign investment to the vitality of the U.S. industrial base, and specifically states that "it is the policy of the U.S. Government to allow foreign investment consistent with the national security interests of the United States."[39] FOCI reviews under the NISPOM are actually *intended to facilitate foreign investment* by focusing on measures that can be implemented to ensure that foreign firms that invest in cleared companies cannot undermine U.S. security and export controls to gain unauthorized access to critical technology and classified information. For this reason, a U.S. company determined to be under FOCI may still hold an FCL if proper security measures have been put in place to negate or mitigate FOCI.[40]

While clearly not a perfect analogy, the NISPOM is nonetheless relevant to the NRC's fresh assessment of FOCD issues – because it demonstrates several points. First, it supports NEI's position that the AEA prohibition on FOCD should be read, consistent with *SEFOR*, in an integrated fashion and consistent with national policy on foreign investment. Simply stated, there should be no automatic bar to foreign ownership. Under the NISPOM, although mitigation may be required even in the *absence* of ownership (arguably a lower threshold than FOCD), no one factor is controlling and foreign ownership alone is not sufficient to establish undue FOCI. A U.S. company is considered to be under FOCI only when ". . . a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the 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*

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[38] DoD 5220.22-M, Feb. 28, 2006 at 1-100.

[39] *Id.* at 2-300.

[40] *Id.* at 2-300(c).

which may result in unauthorized access to classified information..."[41] Thus, the NISPOM focuses on the power of the foreign interest to affect the safeguarding of classified information. In this regard, the NISPOM is consistent with the integrated approach to FOCD taken in *SEFOR*. Therefore, to be consistent with U.S. national policy on foreign investment in cleared U.S. companies, the term "ownership" in the AEA must be read in the context of the overall statutory provision, not in isolation. And NRC FOCD reviews should be conducted with a focus on protecting national defense and security.

The second relevant point from the NISPOM is how, in its integrated approach to FOCI, factors relevant to determining the existence of FOCI are considered. The NISPOM lists a number of factors considered, none of which is controlling.[42] Importantly, the factors are considered "*in the aggregate* to determine whether an applicant company is under FOCI, its eligibility for an FCL, and the protective measures required..."[43] Therefore, FOCI reviews under the NISPOM assess issues of control, risk, vulnerability, and proper mitigation as part of a comprehensive analysis that addresses these factors as part of an integrated whole. Again, this is similar to the *SEFOR* standard adopted by the Commission.

Third, the NISPOM makes clear that even where FOCI is found, appropriate mitigation measures can be implemented to resolve the concerns. Because FOCI reviews are conducted on a case-by-case basis, mitigation plans are tailored according to the specific risks and vulnerabilities presented by each individual case. Decades of experience under the NISPOM demonstrates that FOCI can be effectively mitigated even for 100% foreign-owned companies doing Top Secret work. The Department of Defense oversees more than 300 mitigation regimes with foreign-controlled companies, including agreements with some of the Defense Department's largest and most highly-valued contractors. Many of these contractors hold Top Secret clearances. Assuming ownership from countries that do not pose security or proliferation concerns, mitigation plans are regularly accepted by the defense and intelligence agencies to negate or mitigate FOCI for contractors that possess highly-classified information. Given similar circumstances, an appropriately-tailored NAP should be sufficient to mitigate FOCD for issues under the NRC's purview, even in cases of 100% indirect foreign ownership.

Also inherent in the NISPOM approach is the idea that there are a range of potential mitigation measures that can be employed to address the circumstances of each situation – ranging from

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[41] *Id.* at 2-300 (emphasis added).

[42] These factors are: (a) Record of economic and government espionage against U.S. targets; (b) Record of enforcement and/or engagement in unauthorized technology transfer; (c) The type and sensitivity of the information that shall be accessed; (d) The source, nature and extent of FOCI, including whether foreign interests hold a majority or substantial minority position in the company, taking into consideration the immediate, intermediate, and ultimate parent companies. A minority position is deemed substantial if it consists of greater than 5 percent of the ownership interests or greater than 10 percent of the voting interest; (e) Record of compliance with pertinent U.S. laws, regulations and contracts; (f) The nature of any bilateral and multilateral security and information exchange agreements that may pertain; (g) Ownership or control, in whole or in part, by a foreign government. *Id.* at 2-301. The NRC could consider similar factors, in the aggregate, in its FOCD reviews.

[43] *Id.* at 2-301 (emphasis added.)

simple Board of Directors resolutions to exclude foreign directors from classified matters to more complex governance structures to assure domestic control of classified information and *cleared U.S. citizen oversight* of decision-making regarding classified matters. Certainly not all of the NISPOM measures are appropriate in the context of nuclear power operations. But the NISPOM is consistent with the Commission's historic practice of utilizing graded NAPs to mitigate FOCD. For the NRC, following the approach articulated in the NISPOM, the measures imposed to address a non-operating minority owner licensee with a foreign grandparent need not be the same as the measures required for a domestic operating licensee with an indirect foreign owner.

Finally, elements of the NISPOM may be seen in the NRC's approach to facility security clearances under 10 C.F.R. Part 95, which assesses whether a foreign owner has the power to direct or decide matters that could adversely affect the performance of classified contracts or result in unauthorized access to classified information. Part 95 reflects the NISPOM's focus on an integrated concept of "ownership," and contains no automatic prohibition on foreign ownership. Additionally, Section 95.5 defines "foreign ownership, control or interest" as it is also defined under the NISPOM, with a focus on the ability to control matters related to the safeguarding of classified information.[44] Thus, the NRC already applies the NISPOM concepts through its Part 95 FCL process.

In sum, there is value in looking to the NISPOM for guiding principles relevant to FOCD. The NISPOM is a well-established program implemented by many Federal agencies, including the defense and intelligence agencies. At its core, the NISPOM demonstrates that foreign ownership alone is not the determining factor in FOCI reviews. The NISPOM's approach is consistent with *SEFOR* in that the elements of FOCI are assessed in an integrated manner, with a focus on control over national security matters. And when a U.S. company is subject to FOCI – including a company wholly-owned by a foreign parent – effective mitigation plans can ensure that classified information is properly safeguarded and national security is protected. For all of these reasons, we believe that the NISPOM is a useful model for the NRC. At a minimum, in assessing its approach to FOCD, the NRC should consider the practical effect of adopting an approach that deviates significantly from the U.S. national policy that is incorporated in the NISPOM. It would be difficult (at best) to justify NRC policies that would block issuance of a license to a foreign-owned company solely because of its foreign ownership, when the same company could hold a security clearance and access highly-classified information under the NISPOM.

IV. Recommendations to Update and Refocus the FOCD SRP

Attachment 1 to these comments sets forth the industry's proposed revisions to the SRP. Key proposed revisions are described below.

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[44] *See also* 10 C.F.R. § 95.17(a)(1), which provides that: "An NRC finding of foreign ownership, control or influence is based on factors concerning the foreign intelligence threat, risk of unauthorized technology transfer, type and sensitivity of the information that requires protection, the extent of foreign influence, record of compliance with pertinent laws, and the nature of international security and information exchange agreements."

A. Reflecting the SEFOR Standard

Under the current SRP, 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." Despite the SRP's affirmation of *SEFOR's* focus on the power to direct management or nuclear operations, the SRP should be clarified to direct that FOCD analyses be based on the totality of the circumstances, with an orientation toward national defense and security concerns.[45] Consistent with the *SEFOR* principle, the SRP should support an integrated approach to FOCD in which the focus is on the indicia of control of nuclear operations, security, and special nuclear material, and control of classified information. The SRP should clarify that ownership alone does not confer the power to direct nuclear safety and security matters. This integrated concept also applies in cases of 100% indirect foreign ownership. (This concept would not, however, permit issuance of a license to an alien.)

B. 100% Indirect Foreign Ownership is Permissible

The current SRP illogically allows the staff to consider negation measures, and the ultimate objective of "safeguarding the national defense and security" under *SEFOR*, for any application involving less than 100% ultimate foreign ownership (*e.g.*, 99% indirect foreign ownership), but not for a domestic entity wholly-owned by a foreign entity (often, but not always, several levels in the corporate organization removed from the licensee). The SRP acknowledges one example (the McDermott case) of specific circumstances where 100% indirect foreign ownership is acceptable – namely, where the foreign parent's stock is largely owned by U.S. citizens. But this does not preclude other circumstances, such as where an appropriate NAP is in place to assure domestic control over nuclear technology, nuclear operations, and nuclear materials. The McDermott case (as recognized in the NRC's internal legal analysis prepared at the time of that matter and in the current SRP's reference to it as an *example*), was not intended to overturn the Commission's longstanding national defense and security-focused, totality-of-the-circumstances FOCD analysis adopted in *SEFOR*.

Portions of the current SRP on this issue specifically appear to be derived from the staff's legal approach in Cintichem, isolating "ownership" from the operative statutory phrase "owned, controlled, or dominated." But Cintichem is inconsistent with *SEFOR*, was overruled by Congress, and should not be relied upon as valid precedent. Furthermore, as evidenced by the NEP and PacifiCorp cases described above, the NRC has held that statutory objectives can be satisfied even when there is considerable foreign ownership of a licensee, up to and including 100% indirect foreign ownership. The SRP should be revised to reflect this point.

[45] As explained in Section III, above, this interpretation is consistent with how other Federal government agencies have interpreted similar restrictions on foreign ownership, control, and influence (FOCI).

C. Criteria for Assessing Negation Action Plans: A Graded Approach

The SRP should be revised to directly recognize the context for applying FOCD limitations by adding statements acknowledging the global nature of the nuclear industry, as well as the protection of nuclear technology information by international safeguards. The SRP should establish a graded approach under which the home country of the ultimate parent would be heavily considered in determining NAP requirements.

A graded approach to assessing the effectiveness of a NAP is consistent with agency precedent. Specific mitigation measures in NRC-approved NAPs have varied depending on the extent of FOCD concerns. The SRP should reflect this practice by making clear that mitigation measures required in NAPs must be commensurate with the nuclear safety and security risk posed by the potential FOCD issues in that particular case. The NRC's goal should not be to compel the most onerous negation measures possible in all cases, but to require only those measures that, under the circumstances of each case, are determined to be necessary to prevent an FOCD violation.

Under a graded approach, the SRP should take advantage of existing regulations, such as 10 C.F.R. §§ 110.28 and 110.29, which list embargoed and restricted destination countries for the purpose of exporting nuclear equipment or material. In contrast, foreign parents from nations that already have nuclear technology and who support international safety and safeguards protocols pose little (or no) risk to national security. Similarly, 10 C.F.R. § 110.30 sets forth the member countries of the Nuclear Suppliers Group. Foreign interests engaged in nuclear activities from countries that support the Nuclear Suppliers Group protocols ordinarily would not raise significant safety or security concerns.

Reduced scrutiny also is appropriate where the foreign participant owns the nuclear technology to be deployed. The NRC has recently issued licenses for enrichment facilities (which arguably present a greater proliferation risk than power plants) to entities wholly-owned by foreign parents, and who own the technology involved, by applying the AEA's non-inimicality standard for common defense and security. A similar approach to FOCD would be reasonable, would provide applicants with regulatory certainty, and would be protective of national security interests, including nuclear non-proliferation.

Additionally, the SRP should be revised to make clear that foreign debt financing is not a factor of concern absent the foreign entity being given special control rights, or being from a country of concern. Financial participation by a foreign entity is not, by itself, determinative of FOCD. Rather, the FOCD determination will hinge on the rights (*e.g.* veto rights) of the foreign lender under the relevant financial arrangements—particularly whether the foreign lender can exercise control over issues related to nuclear safety or security. In the case of project financing or other loans to an applicant or licensee by a foreign participant, if the foreign lender has only normal creditor rights, the arrangement should not be considered to be indicative of foreign control. In this regard, the NRC's creditor regulations in 10 C.F.R. § 50.81 do not restrict a licensee from using foreign loans, so long as the creditor cannot foreclose and take possession of a facility before the NRC has approved any necessary license transfer.

Consistent with the principles described above, the SRP should establish at the low end of the graded scale a presumption of "no control" in the following circumstances:

- The foreign interest provides only financing for the nuclear project (including up to 100% of the costs), absent any special control rights and assuming the foreign interest is not from an embargoed or restricted destination country as set forth in 10 C.F.R. §§ 110.28 and 110.29.

- There is *de minimis* foreign ownership, such as where a foreign entity has less than 10% of the voting control of an operating licensee.

- The foreign interest owns less than 20%, files a Schedule 13G with the Securities and Exchange Commission, and is not from an embargoed or restricted destination country as set forth in 10 C.F.R. §§ 110.28 and 110.29.[46]

- Where a foreign interest holds less than 50% voting control of an owner-licensee that does not have operating authority, provided that the foreign interest is from a Nuclear Suppliers Group country.

Where a "no control" presumption applies, there should be no need to impose mitigation measures through a NAP, because there is no corresponding concern regarding national security or control over special nuclear material.

The Appendix to the proposed SRP sets forth examples of graded negation actions based on the extent of FOCD in a particular case and recognizes the totality of the circumstances. The Appendix shows various ownership scenarios and considers whether the foreign interest is from a Nuclear Suppliers Group country. In many scenarios, given the nature of the participation and the domicile of the foreign interest, only a limited NAP may be necessary. In situations involving more extensive FOCD concerns, additional governance controls would be required.

The key principle in assessing the effectiveness of any NAP is whether the negation actions are appropriately tailored to meet the specific facts of the case. As FOCD concerns become more significant, so too do the mitigating measures. Requiring an extremely robust NAP in a case with minimal FOCD is unduly burdensome and leads to no additional value in terms of ensuring nuclear safety or protecting national security. Additionally, the SRP should continue to recognize that a NAP is not intended to negate foreign participation in business or financial decisions. As the current SRP states, a foreign entity may participate in project review and be consulted on policy and cost issues, provided, for example, that officers and employees responsible for special nuclear material are U.S. citizens. The adequacy of a NAP should be judged in relation to the purpose of the AEA, which is to protect the public health and safety and common defense and security, and to assure that foreign entities cannot inhibit the licensee's compliance with matters within the NRC's jurisdiction.

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[46] A Schedule 13G filing is made when investors beneficially own less than 20% and do not hold the securities for the purpose or effect of changing or influencing the control of the issuer of the securities.

D. FOCD License Conditions

The SRP should also be revised to reflect and endorse the use of license conditions (or conditions of transfer orders) as an acceptable approach to resolving FOCD concerns at the time of licensing actions, such as COLs and license transfers. Longstanding precedent confirms that a license condition can be used to require implementation of a NAP. In such cases, the NRC would make a positive FOCD finding at the time of license issuance or transfer that FOCD is negated by a license condition requiring mitigation measures to be undertaken. The license condition will assure that the elements of the NAP required by the condition cannot be amended without NRC approval.

License conditions imposing a NAP need not require that all negation actions be in effect before the licensee begins licensed activities. Before that point, there is no nuclear safety or security risk. For example, in a COL case a license condition can be used to negate FOCD by requiring that a licensee complete specified actions prior to commencing licensed construction or operation activities. This approach would allow applicants to obtain the finality and certainty of a COL (or Early Site Permit), while still recognizing that certain types of FOCD issues would be resolved before engaging in specific licensed activities. The FOCD findings in the Part 52 process would be made at the time of issuance of the COL, based on the adequacy of the NAP, and the recognition that pre-construction activities would not present safety or security issues. This use of FOCD license conditions could be crucial to entities proposing new plants. Recent examples demonstrate the difficulty of attracting domestic partners without the certainty of a COL. Moreover, financing and commercial arrangements may also change during the licensing and pre-construction phase of a new reactor project.

In any scenario, FOCD license conditions would be fashioned to adopt objective, verifiable criteria for determining that FOCD concerns are appropriately negated. The conditions need not involve the exercise of staff discretion, thereby promoting consistency and fairness in the licensing process. This approach is consistent with the AEA and Commission precedent, and is protective of public health and safety and common defense and security. Following the Commission's Principles of Good Regulation, it would provide applicants with the clarity regarding the NRC licensing process that is essential to attracting future investors.

V. Options and Conclusions

The Commission directed the staff to examine particular issues in its FOCD assessment, and to present recommendations to the Commission on proposed modifications. NEI has reviewed and evaluated those issues, and provides its perspectives here.

Satisfying Statutory Objectives through an Integrated Review of FOCD Up To and Including 100% Indirect Foreign Ownership

- One option is to find 100% indirect foreign ownership outright impermissible. This viewpoint is based on a purely literal, out-of-context reading of the statute, where the FOCD prohibition focuses on "ownership" in isolation. This option should not be adopted. It is not necessary under a plain reading of the AEA, which refers to ownership

of the licensee (not ownership of a licensee's grandparents). Additionally, a prohibition on 100% indirect ownership is inconsistent with *SEFOR*, where the Commission held that the prohibition should be read as an integrated whole, with a focus on the foreign interest's power to direct matters with the potential to affect national defense and security. It is also unnecessary to achieve the objectives of the statute.

- The better option is to fully recognize the *SEFOR* approach, and that indirect foreign ownership, up to and including 100% ownership, is not automatically prohibited. The statutory objective of preventing undue foreign control over nuclear security or special nuclear materials can be satisfied under this approach, by implementing an effective NAP. This reading of the statute is not only consistent with *SEFOR*, but also with the approach to FOCI taken by many federal agencies under the NISPOM.

- Similar questions arise with respect to foreign financing of nuclear projects. One approach is to treat foreign financing the same as foreign control. This approach would not recognize that foreign lenders may not have any corporate governance rights or ability to control decisions affecting nuclear safety or security.

- The better approach is to recognize that foreign lenders may not have any corporate governance rights or ability to direct decisions affecting nuclear safety or security. Although foreign lenders may have the ability *not* to fund a project, that type of business or financial decision by itself does not implicate FOCD concerns under the AEA. To the extent that there is a legitimate concern that a foreign lender has the potential to direct decisions affecting nuclear safety or security, an appropriate NAP should be sufficient to ensure that such decisions are in the hands of U.S. citizens.

Criteria for Assessing Negation Action Plans

- One approach to assessing NAPs is to keep the status quo; that is, to use the existing guidance in the SRP. However, as explained above, portions of the SRP appear based on the flawed logic in Cintichem, which should not be relied upon since it was effectively rendered invalid by subsequent legislation. Moreover, the existing SRP has been interpreted to compel a "one size fits all" approach to NAPs, leading to unnecessary negation actions in many cases.

- The better option is to revise the SRP to adopt a graded approach to assessing NAPs, as described above, with more clear criteria and guidance as to acceptable actions in varying circumstances. NAPs would be tailored case-by-case, with mitigation measures commensurate with the level and nature of participation. Again, this approach is consistent with the NISPOM.

License Conditions for Resolving FOCD Issues

- One option is to summarily conclude that license conditions are not appropriate for resolving FOCD issues prior to license issuance. This conclusion is inconsistent with

past practice applying FOCD license conditions, and considering those conditions as part of a predictive licensing finding. This conclusion is also unnecessarily restrictive for COLs to the point that it could unnecessarily deter foreign investment in new reactor projects.

- The better approach is to allow the use of objectively verifiable license conditions to make a positive FOCD finding at the time of licensing. The finding would be based on a license condition requiring resolution of FOCD issues through implementation of the NAP on a schedule appropriate to address national defense or nuclear safety issues. The statutory objective of preventing foreign control over nuclear safety and security would be met, since the licensee would resolve FOCD issues before commencing licensed activities implicating nuclear safety or national defense. This approach also provides the certainty that potential investors require.

Meaning of Ownership

- One interpretation of "ownership" encompasses both 100% direct and indirect foreign owners, and makes no distinction between owners of operators versus owners of non-operators. Under this reading, a foreign owner that is far removed, up the corporate chain from the licensee, would be treated the same as a foreign applicant or direct owner of a licensee. This interpretation is also not consistent with prior cases where 100% indirect foreign ownership of non-operating licensees has been found to be acceptable.

- The more reasonable interpretation of "ownership" is to interpret the term within the context of FOCD, as one potential source of power to direct the activities of the licensee potentially implicating national defense and security. In this respect, indirect "ownership" of licensees would be treated differently than direct ownership, and other factors such as voting control and control of operations will be considered.

In conclusion, as the Commission recognized in issuing its SRM, the time is ripe to review the NRC's approach to FOCD. The global nature of the nuclear industry and the regime of international safety and safeguards protocols significantly reduce the possible security and proliferation risks from foreign participation in U.S. nuclear power plant projects. Foreign investment and participation bring safety enhancements to the U.S. nuclear industry. Decades of practice demonstrate that foreign participation can be mitigated through appropriate NAP measures tailored to the circumstances of particular cases.

By updating and clarifying the SRP, the NRC can recognize the global nature of the industry, reinforce the key FOCD principles developed through Commission precedent and practice, and further articulate the review criteria for a NAP, providing necessary guidance to both the NRC staff and prospective applicants.

Final Standard Review Plan on Foreign Ownership, Control and Domination

1 AREAS OF REVIEW

1.1 General

The NRC is issuing this revised Standard Review Plan (SRP) to describe the process it uses to review the issue of whether an applicant for a nuclear facility license under Sections 103 or 104 of the Atomic Energy Act of 1954, as amended (AEA or Act), is owned, controlled, or dominated by an alien, a foreign corporation or a foreign government. This SRP will be used as the basis for such reviews in connection with license applications for new facilities, or applications for approval of direct or indirect transfers of facility licenses.

Where there are co-applicants, each intending to own an interest in a new facility as co-licensees, each applicant must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government. If a co-licensee of an existing facility owns a partial interest in the facility and is transferring that interest, the acquirer must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government.

The foreign control determination is to be made with an orientation toward the common defense and security. However, this SRP does not address all matters relating to the determination of whether issuance of a license to a person would be inimical to the common defense and security.

This SRP reflects current NRC regulations and policy.

1.2 Relevant Statutory And Regulatory Provisions

Sections 103d and 104d of the Act provide, in relevant part, that no license may be issued to:

> Any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

(Section 103d also states that no license may be issued to an alien.)

Section 184 of the Act provides, in relevant part:

> No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing

full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

10 CFR 50.33(d), in relevant part, provides:

Each application shall state:

(d)(1) If applicant is an individual, state citizenship.

(2) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.

(3) If applicant is a corporation or an unincorporated association, state:

(i) The state where it is incorporated or organized and the principal location where it does business;

(ii) The names, addresses and citizenship of its directors and of its principal officers;

(iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and, if so, give details.

(4) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this paragraph with respect to such principal.

10 CFR 50.38 provides:

Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

10 CFR 50.80 provides, in pertinent part:

(a) No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing.

* * * * *

(c) * * * [T]he Commission will approve an application for the transfer of a license, if the Commission determines:

* * * * *

(2) That the transfer of the license is otherwise consistent with applicable provisions of the law, regulations, and orders issued by the Commission pursuant thereto.

2 INFORMATION TO BE SUBMITTED BY APPLICANT

2.1 Information Required By Regulation

At the time the applicant submits its application for a license or for approval of the transfer of a license, the applicant must submit information sufficient to comply with 10 CFR 50.33(d).

2.2 Additional Information

If the reviewer, based on the information required to be submitted by 10 CFR 50.33(d), has reason to believe that the applicant may be owned, controlled, or dominated by foreign interests, the reviewer should request and obtain the following additional information:

1. If the applicant's equity securities are of a class which is registered pursuant to the Securities Exchange Act of 1934, copies of all current Securities and Exchange Commission Schedules 13D and 13G, which are required to be filed by owners of more than 5% of such a class with the Securities and Exchange Commission, the security issuer (applicant), and the exchange on which the issuer's securities are traded.

2. Management positions held by non-U.S. citizens.

3. Operating agreements or other contracts between or among owners addressing management and operations of the plant, specifying information such as the ability of foreign entities to control the appointment of management personnel.

2.3 Negation Action Plan

If applicable under Section 4.3 infra, the applicant should also submit a Negation Action Plan, which is described in detail in Section 4.3.

3 ACCEPTANCE CRITERIA

3.1 Basic Statutory and Regulatory Limitations

License applications for new facilities or applications for approval of transfers of licenses required in the case of proposed new ownership of existing facilities may involve foreign entities proposing to own all or part of a reactor facility. Sections 103d and 104d of the AEA prohibit the NRC from issuing a license to an applicant if the NRC knows or has reason to believe that the applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government (or is an alien, in the case of Section 103d).

Likewise, under 10 CFR 50.38,

> Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

3.2 Guidance On Applying Basic Limitations

The nuclear industry is global, with responsible participants from many nations engaged in the markets for reactor technology, nuclear fuel supply, and nuclear operations. Nuclear technology information is protected by international safeguards such as the Nuclear Suppliers Group (NSG) Guidelines, as well as treaties such as the Treaty on the Non-Proliferation of Nuclear Weapons. Participation in the U.S. nuclear industry by foreign investors, vendors, and experienced operators, from countries that are parties to such international treaties and protocols, can provide significant benefits to domestic applicants or licensees with respect to safe and secure nuclear development, construction, procurement, and operations. Foreign capital and experience also provide direct benefits to the U.S. domestic economy. Accordingly, it is the policy of the Commission to allow foreign investment in licensed activities, consistent with the AEA, the Commission's regulations, and the national security interests of the United States.

3.2.1 Integrated Assessment of Foreign Participation

The Commission has long held that 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. *General Elect. Co. & Southwest Atomic Energy Assoc.*, 3 AEC 99, 101 (1966). 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. *Id.* The Commission has long emphasized the need to "take into consideration the many aspects of corporate existence and activity," and that:

> . . . [t]he ability to restrict or inhibit compliance with security and other regulations of the [Commission], and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance.

Id.[1] Consistent with the statutory objectives and legislative history, the Commission has also held that the foreign ownership, control, or domination provision "should be given an orientation

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[1] *See also* Letter from AEC Director of Regulation to the General Atomic Company (Dec. 14, 1973), described in Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox, SECY-82-469 (Nov. 26, 1982), where the NRC imposed conditions on a license transfer designed to negate foreign legal control rights over the conduct of the licensed activity bearing on common defense and security matters, such as control over special nuclear material.

toward safeguarding the national defense and security." *Id.* Accordingly, for applicants with direct or indirect owners, or investors that are foreign interests, the AEA requires an integrated review of the "foreign ownership, control, or domination" issue – focusing on all indicia of control of nuclear operations by the foreign interests.

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.

Ownership may be one indicator of foreign power, but is not dispositive. There is no specific ownership threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of a domestic applicant's stock. Ownership of outstanding shares of an applicant 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. Ownership or funding alone do not necessarily confer power to direct or decide nuclear safety and security matters; ownership rights, or other investor or creditor rights, of foreign participants may be mitigated through negation action plans.

A foreign interest may not be a licensee, either as an owner or operator. However, a domestic applicant that is ultimately owned (including up to 100%) by a foreign interest may still be eligible for a license in circumstances such as:

1. The Commission knows that the foreign parent's stock is "largely" owned by U.S. citizens. If the foreign parent's stock is owned by U.S. citizens, and certain conditions are imposed, such as requiring that only U.S. citizens within the applicant organization be responsible for special nuclear material, the applicant may still be eligible for a license; or

2. License conditions or conditions of a license transfer order are imposed requiring negation actions, such as a requirement that officers and employees of the applicant responsible for nuclear operations and/or special nuclear material must be U.S. citizens. *See* Section 4.3.

In circumstances where the foreign interest (1) owns 10% or less of the licensee (absent special voting rights conferring control), or (2) owns less than 20% and files a Securities and Exchange Commission Schedule 13G, the NRC typically would have no regulatory concern because the situation would not present one of foreign control. Therefore, the NRC would not find foreign "ownership, control, or domination," and would not require any negation actions. This presumption does not apply to foreign interests from embargoed or restricted destination countries as defined in 10 CFR 110.28 and 110.29.

Additionally, even though a foreign entity contributes 50%, or more, of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign-controlled applicant, these facts alone do not require a finding that the

domestic applicant is under foreign control. A foreign entity may contribute or may finance up to 100% of the costs of a reactor (*see* Section 3.2.3).

Personnel working for a domestic licensee will ultimately be responsible for safe and secure operations, as well as the control of sensitive information and the security of special nuclear material. The NRC does not presume that U.S. citizens engaged in NRC-licensed activities – including managers, officers, and directors of the licensee – will abandon their responsibilities and their fiduciary duties. A licensee's oversight programs, employee concerns programs, or other advisory committees also serve to assure transparency and reporting of concerns regarding potential foreign control. Additional NRC reporting obligations can be required, and additional NRC oversight can be conducted, if appropriate in special cases.

In general, the NRC will conduct an integrated review of foreign ownership, control, or domination considerations, including: (1) the extent of the proposed foreign ownership of the reactor or the domestic applicant; (2) whether the applicant is seeking authority to operate the reactor; (3) whether the applicant has interlocking directors or officers with a foreign entity; (4) whether the foreign entity would have any access to restricted data (typically not the case for commercial power reactors); (5) the governance of the domestic applicant and role of the foreign interest; (6) the applicant's control over operations, security, access, and oversight programs; and (7) the domicile of the foreign entity and its own historic involvement in nuclear activities. A potential for foreign influence on the decision-making of the applicant does not equate to power to direct or decide safety, security, or proliferation matters. As explained further in Section 4.3, if the governance of the domestic applicant includes or is subject to negation measures that assure control of nuclear safety and security matters by U.S. citizens, the applicant will generally be found not to be owned, controlled, or dominated by a foreign interest within the meaning of Sections 103d or 104d of the AEA.

3.2.2 Orientation Toward National Security

The foreign interest's home country will be considered when determining national security implications of foreign participation or ownership in a nuclear project. Foreign entities engaged in the global nuclear market from nations that support international safety and safeguards protocols pose little or no risk to national security, and the eligibility of applicants owned by such entities should be considered in that light.[2] For example, where the same foreign entity that

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[2] As a general matter, countries that are members of the Nuclear Suppliers Group (listed in 10 CFR 110.30) would not ordinarily raise significant safety or security concerns. It is presumed that countries listed as embargoed destinations under 10 CFR 110.28 would present proliferation or other national security concerns, and foreign interests from those countries would not be eligible for participation in U.S. reactor projects. Although countries on the restricted destination list in 10 CFR 110.29 are also presumed to present national security concerns, cases involving foreign interests from those countries must be considered on a case-by-case basis. Generally, if participation by a foreign interest from a restricted destination country is permitted, a significant NAP would be required. In addition, the NRC will presume a national security concern is involved with respect to any entity or person identified in the "Specially Designated Nationals and Blocked

owns a nuclear power plant is also the reactor vendor (presumptively from a Nuclear Suppliers Group country), the situation would not raise substantial national security concerns. Conversely, an applicant that poses a risk to national security by reason of even limited foreign ownership or control would be ineligible for a license.[3]

A key consideration is always whether the applicant is seeking authority to operate the reactor. Given the orientation of the foreign control analysis on national defense and nuclear security, if the applicant would not have authority to operate the reactor – for example, where a separate domestic entity serves as an operating company or another owner is the lead licensee with sole authority and responsibility for operating the reactor – the foreign control implications are greatly diminished, since the applicant would not have authority over licensed activities involving safety and security or control over nuclear materials. Where a foreign interest owns less than 50% of a non-operating licensee (and holds less than 50% voting control), and is from a Nuclear Suppliers Group country, the NRC would typically have no FOCD concern.

If an applicant is seeking a license under Part 50 or Part 52 to construct a power plant, certain pre-construction and construction activities do not pose nuclear safety, security, or proliferation risks. Accordingly, a license may be issued with a finding that FOCD is negated based on conditions establishing objectively verifiable criteria that will be implemented to address potential foreign ownership, control, or domination issues prior to activities with safety, security, or proliferation implications (*e.g.*, certain construction activities, receipt of special nuclear material, initial plant operation).

3.2.3 Foreign Financing/Loans

Financing of a nuclear project or loans to an applicant or licensee by a foreign financial institution (no equity participation in the project) is not normally an issue to be addressed under an FOCD review, absent special control rights (*e.g.*, veto rights) held by the lender under the relevant financial arrangements. The NRC will specifically focus on whether any such rights apply to matters with nuclear safety or security implications. In this regard, the NRC's creditor regulations in 10 CFR 50.81 do not restrict applicants or licensees from using foreign loans, so long as the creditor cannot foreclose and take possession of a licensed facility before the NRC has approved a license transfer.

Persons List" maintained by the U.S. Department of Treasury's Office of Foreign Asset Control.

[3] A license could not be issued to any person if the Commission found that issuance would be inimical to the common defense and security or to the health and safety of the public. *See, e.g.*, Sections 103d and 104d of the AEA. Pursuant to this provision, the Commission has the authority to reject a license application that raises a clear proliferation threat, terrorist threat, or other threat to the common defense and security of the United States.

4 REVIEW PROCEDURES

4.1 Threshold Review and Determination

The reviewer should first analyze all of the information submitted by the applicant sufficient to comply with 10 CFR 50.33(d), as well as other relevant information of which the reviewer is aware, to determine whether there is any reason to believe that the applicant is an alien or citizen, national, or agent of a foreign country, or an entity that is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government. If there is no such reason to believe based on the foregoing information, no further review is required and the reviewer should proceed to make a recommendation regarding whether there is any foreign control obstacle to granting the application.

Consistent with the guidance above, in the following situations the NRC would typically presume no FOCD obstacle to licensing, and would not require negation actions:

1. The foreign interest provides only financing for the nuclear project (including up to 100% of the costs), absent any special control rights and assuming the foreign interest is not from an embargoed or restricted destination country as set forth in 10 CFR 110.28 and 110.29.

2. There is *de minimis* foreign ownership, such as where a foreign entity has less than 10% of the voting control of an operating licensee.[4]

3. The foreign interest owns less than 20%, files a Schedule 13G with the Securities and Exchange Commission, and is not from an embargoed or restricted destination country as set forth in 10 CFR 110.28 and 110.29.

4. Where a foreign interest holds less than 50% voting control of an owner-licensee that does not have operating authority, provided that the foreign interest is from a Nuclear Suppliers Group country.

If, based on the totality of the circumstances, the reviewer believes there is evidence of foreign control, the additional information specified in Section 2.2 and 2.3 for a Supplementary Review should be requested.

4.2 Supplementary Review

If further review is necessary, the reviewer should consider the acceptance criteria and general guidance above, and consult with the Office of the General Counsel on Commission precedent.

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[4] Similarly, FERC has established a rebuttable presumption that ownership or operation of less than 10% of a jurisdictional facility or the voting securities of an entity that owns a jurisdictional facility does not constitute control. *See FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 53 (2007).

Whenever possible, Commission precedent should be followed by the staff as applicants reasonably rely on precedent in preparing applications. Information related to the items listed below may be sought and may be taken into consideration in determining whether the applicant is foreign owned, controlled, or dominated. The fact that some of the below listed conditions may apply does not necessarily render the applicant ineligible for a license.

1. Whether the nature and extent of foreign ownership, control, or domination gives a foreign interest a controlling or dominant position with respect to management of NRC-licensed activities involving safety or security (including operations, security, access, and oversight).

2. Whether any foreign interests control management positions such as directors, officers, or executive personnel in the applicant's organization with management or oversight responsibilities for licensed activities involving nuclear safety or security.

3. Whether any foreign interest controls, or is in a position to control, the election, appointment, or tenure of any of the applicant's directors, officers, or executive personnel. If the reviewer knows that a domestic corporation applicant is held in part by foreign stockholders, the percentage of outstanding voting stock so held should be quantified. However, recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the licensees' voting stock. The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests.

4. Whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that involve control of the applicant. As an example, if a foreign interest is lending funds to the applicant for a portion of development or licensing costs and has traditional creditor rights under the credit agreement, this arrangement alone would not ordinarily provide foreign control. In addition, a standard Engineering, Procurement and Construction contract with a foreign-owned reactor vendor would not ordinarily be indicative of foreign control over the applicant.

5. Whether the applicant has interlocking directors or officers with foreign corporations, if the foreign director(s) or officer(s) presents proliferation or other national security concerns or are from a country that presents proliferation or other national security concerns, or if the foreign director(s) have voting control that is not mitigated by negation measures to assure U.S. control over nuclear safety and security matters.

6. Whether the licensed activities in which the applicant will be engaged involve plant management and operations, or only pre-construction or construction.

7. Whether the foreign entity is not from a nation that is a member of the Nuclear Suppliers Group or a signatory to the Nuclear Non-Proliferation Treaty.

8. Whether the applicant has foreign involvement not otherwise covered by the items above, where the foreign control involves a person, entity, or country that presents proliferation or other national security concerns.

The Appendix to this SRP illustrates application of these considerations to a number of possible scenarios involving foreign participation in a licensed project or direct or indirect ownership of an applicant or licensee.

If, after reviewing the additional information specified in Section 2.2 as well as the relevant considerations outlined above and in the Appendix, the reviewer determines that there is no further reason to believe that the applicant is an alien, or otherwise owned, controlled, or dominated by a foreign person or entity, no additional review is necessary.

On the other hand, if the reviewer continues to conclude that the applicant may be an alien or owned, controlled, or dominated by foreign interests, or has some reason to believe that may be the case, the reviewer shall determine the type of actions, if any, that would be necessary to negate the effects of foreign ownership, control, or domination to a level consistent with the Atomic Energy Act and NRC regulations. *See* Section 4.3.

4.3 Negation Action Plan

If the reviewer continues to conclude following the Supplementary Review that an applicant 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. A negation action plan shall provide positive measures that assure that the foreign interest does not control or dominate licensed activities. Examples of such measures that may be sufficient to negate foreign control or domination include:

1. Governance provisions that assure the domestic applicant's control of nuclear safety and security matters through U.S. citizens, such as:

    a. Adoption of special board resolutions related to exclusion of foreign citizens or representatives of a foreign interest from nuclear safety or security matters.

    b. Special voting arrangements, such as casting (deciding) vote authority in a U.S. citizen chairman, over any matters involving nuclear safety or security. The fact that a foreign owner participates in board decisions or management of the applicant does not equate to foreign control if such participation is subject to appropriate governance restrictions.

c. Assignment of specific responsibilities and/or oversight duties to board members, a special security committee of the board, or oversight committees comprised of U.S. citizens independent of the foreign interest.

2. Provisions that negate financial control by a foreign entity, such as:

   a. Modification or termination of loan agreements, contracts, and other understandings with foreign interests that provide control rights to such interests.

   b. Demonstration of financial viability independent of foreign interests or, alternatively where funds from foreign interests are required or used, demonstration of contractual obligations, other sources of funding, or governance controls that negate foreign control.

   c. Elimination or resolution of problem debt that conveys control rights.

   d. Establishing governance provisions that assure the domestic applicant's control of nuclear safety and security matters through U.S. citizens.

3. Additional oversight programs or committees to assure transparency and reporting (including to the NRC) of issues and concerns involving potential foreign control of safety, security, or access to special nuclear material.

Not all of the above negation actions are necessarily required in every case. The intent is to apply an orientation toward nuclear safety and security, and to require only those actions needed to assure that a foreign entity does not have the power, direct or indirect, to decide relevant matters affecting nuclear plant safety, security, or control over nuclear materials. The Appendix to this SRP illustrates a graded approach to requirements for negation actions.

5 EVALUATION FINDINGS

The reviewer should verify that sufficient information has been provided to satisfy the regulations and this Standard Review Plan. In consideration of the guidance of this Standard Review Plan, the reviewer should then draft an analysis and recommendation, based on the applicable information specified in Sections 2 and 4 above, concerning (a) whether the reviewer knows, or has reason to believe that the applicant is an alien, or (b) is a corporation or other entity that is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and whether there are conditions that should be imposed before granting the application so as to effectively deny foreign control of the applicant.

6 REFERENCES

1. Sections 103, 104, and 184 of the Atomic Energy Act of 1954, as amended (42 USC 2133, 2134, and 2234).

2. Part 50 "Domestic Licensing of Production and Utilization Facilities" of Title 10 of the Code of Federal Regulations (10 CFR Part 50).

3. General Electric Co. and Southwest Atomic Energy Associates, Docket No. 50-231, 3 AEC 99 (1966).

Appendix

GRADED APPROACH TO NEGATION ACTIONS

Foreign Interest	I Presumption of No Control: No Negation Action Plan	II Limited NAP: Exclusions of Foreign Representatives	III Governance Controls to Assure U.S. Citizen Control	IV Enhanced Governance Controls to Assure U.S. Citizen Control	V Prohibited by AEA FOCD Restriction	Additional NRC Reporting or Oversight
Foreign licensee					X	N/A
Foreign interest from embargoed country under 10 C.F.R. § 110.28 [A]					X	N/A
Foreign financing only (absent any special creditor rights) [B]	X					N/A
De minimis ownership: owner with < 10% of voting control of operating licensee (absent special voting rights) [C]	X					N/A
Owner of < 20% of any licensee and files SEC Schedule 13G [D]	X					N/A
Foreign Interest from Nuclear Suppliers Group Country and Not from Embargoed or Restricted Destinations (*see* 10 C.F.R. §§ 110.28 and 110.29)						
Owner with < 50% of voting control of non-operating licensee [E]	X					N/A
Owner with ≥ 50% of voting control (up to and including 100%) of non-operating licensee [F]		X				N/A

GRADED APPROACH TO NEGATION ACTIONS

Foreign Interest	I Presumption of No Control: No Negation Action Plan	II Limited NAP: Exclusions of Foreign Representatives	III Governance Controls to Assure U.S. Citizen Control	IV Enhanced Governance Controls to Assure U.S. Citizen Control	V Prohibited by AEA FOCD Restriction	Additional NRC Reporting or Oversight
Owner with ≥ 10% of voting control (up to and including 100%) of nuclear project, and is the reactor vendor for the project		X				1
Indirect owner with > 10% but < 50% of voting control of operating licensee [G]		X				1
Indirect owner with 50% of voting control of operating licensee [H]			X			1
Indirect owner with > 50% (up to and including 100%) of voting control of operating licensee [J]				X		2
Foreign Interest Not from Nuclear Suppliers Group Country and Not from Embargoed or Restricted Destinations (*see* 10 C.F.R. §§ 110.28 and 110.29)						
Owner with < 50% of voting control of non-operating licensee		X				1
Owner with ≥ 50% of voting control of non-operating licensee			X			1

GRADED APPROACH TO NEGATION ACTIONS

Foreign Interest	I Presumption of No Control: No Negation Action Plan	II Limited NAP: Exclusions of Foreign Representatives	III Governance Controls to Assure U.S. Citizen Control	IV Enhanced Governance Controls to Assure U.S. Citizen Control	V Prohibited by AEA FOCD Restriction	Additional NRC Reporting or Oversight
Indirect owner with ≥ 10% but ≤ 50% of voting control of operating licensee				X		2
Indirect owner with > 50% of voting control of operating licensee [K]					X	N/A

Graded Negation Action Plans

I Presumption of No Control: Apply presumption that negation actions are not required due to the foreign interest's lack of control over licensed activities with nuclear safety or national security implications.

II Limited NAP: Apply presumption that the foreign interest does not have control over nuclear safety or security matters. Measures may be necessary to assure foreign interest has no veto or blocking powers related to nuclear safety or security decisions. Board Directors of owner and/or operator who are foreign citizens or representatives of the foreign interest may need to be excluded from specific matters involving nuclear safety or security and/or from access to nuclear material.

III Governance Controls: NAP to be determined case-by-case, considering factors such as whether the foreign interest is the reactor vendor, from countries that are members of the Nuclear Suppliers Group, and foreign voting control or blocking powers. In general, NAP would be based upon the AmerGen or CENG models, in which the domestic co-owner appoints U.S. citizens to the Board of Directors (including the Chairman) and maintains the casting vote on matters affecting nuclear safety or security. NAP may include U.S. citizenship requirements for key directors and officers, and may specify individual certifications of special duties to be signed by key officers. Additional measures, such as nuclear advisory committees (NAC), may be considered case-by-case, but should not be assumed to be necessary.

IV Enhanced Governance Controls: NAP to be determined case-by-case, considering factors such as whether the foreign interest is the reactor vendor, from countries that are members of Nuclear Suppliers Group, and independence of the U.S. licensee from the foreign interest. In general, NAP would be based on the UniStar model and will require that key directors and officers (*e.g.*, Board Chairman, CEO, CNO) must be U.S. citizens, must sign certification of special duties, and must control nuclear and safety decisions. Licensee Board of Directors may be required to include a Security Subcommittee, comprised of U.S. citizens and including independent directors, with exclusive responsibility and ultimate authority for nuclear safety and security matters. Additional measures, such as nuclear advisory committees, may be considered case-by-case to increase oversight and transparency. NAP will be imposed by license condition or condition of order granting license transfer.

GRADED APPROACH TO NEGATION ACTIONS

Additional NRC Reporting Requirements or Oversight

1 This could include an annual letter from the licensee to the NRC under oath regarding NRC FOCD issues.

2 Where warranted, a targeted NRC inspection related to FOCD issues would be planned. The inspection could assess implementation of the NAP, Board minutes with respect to NRC-licensed activities, oversight of NAC issues, and an assessment of other issues germane to FOCD (*e.g.*, QA audits, allegations raising FOCD concerns).

Notes on Ownership Scenarios

A This scenario is presumed to be prohibited by the intent of the AEA FOCD restriction, applying the integrated reading of the statute and the orientation to national security concerns, as adopted by the Commission in *SEFOR*. Scenarios involving foreign interests from restricted destination countries (*see* 10 C.F.R. § 110.29) must be considered on a case-by-case basis. Presumption is that such foreign participation will be prohibited; but if allowed, would require a significant NAP.

B Presumption of No Control does not apply to financing by foreign interests from embargoed or restricted destination countries (*see* 10 C.F.R. §§ 110.28 and 110.29). Scenarios involving financing by foreign interests from restricted destination countries must be considered on a case-by-case basis.

C Presumption of No Control does not apply to foreign owners from embargoed or restricted destination countries (*see* 10 C.F.R. §§ 110.28 and 110.29).

D Securities and Exchange Commission Schedule 13G filing is made when investors beneficially own less than 20 percent of outstanding stock and do not hold the securities for the purpose or effect of changing or influencing the control of the issuer of the securities. In these scenarios, the Presumption of No Control does not apply to foreign interests from embargoed or restricted destination countries (*see* 10 C.F.R. §§ 110.28 and 110.29). Scenarios involving foreign interests from restricted destination countries must be considered on a case-by-case basis. Note that historically the NRC staff has routinely reviewed Schedule 13D and 13G filings in connection with license transfer reviews even for domestic entities.

E This ownership scenario would apply regardless of the percentage of ownership of the asset held by the non-operating licensee. In addition to scenarios involving operating plants, this scenario would apply to foreign shareholders in licensees such as the Yankee Companies with decommissioned reactor sites and spent fuel facilities only.

F This scenario would apply regardless of the percentage of ownership of the asset held by the non-operating licensee. Examples of this scenario include the New England Power and PacifiCorp license transfer cases. This matrix imposes a less restrictive NAP than was required in those cases, in recognition of the lack of the non-operating licensee's control over nuclear safety and security matters. In general, where the non-operating owner holds only a *de minimis* ownership interest in the nuclear asset, the need for any NAP should be considered.

G "Indirect" owner means corporate ownership of the licensee at the "grandparent" level or above.

H Examples of this ownership scenario include the AmerGen and Constellation Energy Nuclear Group license transfer cases, previously approved by the NRC. Under the graded approach, the NAP required would be similar to the NAPs approved in those cases. The General Atomic case also falls in this category.

J An example of this ownership scenario is the UniStar Calvert Cliffs 3 combined license application. Under the graded approach, the NAP required would be similar to the NAP proposed in that case.

K This scenario is presumed to be prohibited by the intent of the AEA FOCD restriction, applying the integrated reading of the statute and the orientation to national security concerns, as adopted by the Commission in *SEFOR*.

Revised Standard Review Plan	Explanation of Changes
Final Standard Review Plan on Foreign Ownership, Control and Domination AREAS OF REVIEW General The NRC is issuing this revised Standard Review Plan (SRP) to describe the process it uses to review the issue of whether an applicant for a nuclear facility license under Sections 103 or 104 of the Atomic Energy Act of 1954, as amended (AEA or Act), is owned, controlled, or dominated by an alien, a foreign corporation or a foreign government. This SRP will be used as the basis for such reviews in connection with license applications for new facilities, or applications for approval of direct or indirect transfers of facility licenses. Where there are co-applicants, each intending to own an interest in a new facility as co-licensees, each applicant must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government. If a co-licensee of an existing facility owns a partial interest in the facility and is transferring that interest, the acquirer must be reviewed to determine whether it is owned, controlled, or dominated by an alien, foreign corporation or foreign government. The foreign control determination is to be made with an orientation toward the common defense and security. However, this SRP does not address all matters relating to the determination of whether issuance of a license to a person would be inimical to the common defense and security. This SRP reflects current NRC regulations and policy. Relevant Statutory And Regulatory Provisions Sections 103d and 104d of the Act provide, in relevant part, that -no license may be issued to: > Any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the	

health and safety of the public.

(Section 103d also states that no license may be issued to an alien.)

Section 184 of the Act provides, in relevant part:

> No license granted hereunder and no right to utilize or produce special nuclear material granted hereby shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

10 CFR 50.33(d), in relevant part, provides:

> Each application shall state:
>
> (d)(1) If applicant is an individual, state citizenship.
>
> (2) If applicant is a partnership, state name, citizenship and address of each partner and the principal location where the partnership does business.
>
> (3) If applicant is a corporation or an unincorporated association,
> state:
>
> (i) The state where it is incorporated or organized and the principal location where it does business;
>
> (ii) The names, addresses and citizenship of its directors and of its principal officers;
>
> (iii) Whether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and, if so, give details.
>
> (4) If the applicant is acting as agent or representative of another person in filing the application, identify the principal and furnish information required under this paragraph with respect to such principal.

10 CFR 50.38 provides:

> Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to

believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

10 CFR 50.80 provides, in pertinent part:

> (a) No license for a production or utilization facility, or any right thereunder, shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall give its consent in writing.
>
> * * * * *
>
> (c) * * * [T]he Commission will approve an application for the transfer of a license, if the Commission determines:
>
> * * * * *
>
> (2) That the transfer of the license is otherwise consistent with applicable provisions of the law, regulations, and orders issued by the Commission pursuant thereto.

INFORMATION TO BE SUBMITTED BY APPLICANT

Information Required By Regulation

At the time the applicant submits its application for a license or for approval of the transfer of a license, the applicant must submit information sufficient to comply with 10 CFR 50.33(d).

Additional Information

If the reviewer, based on the information required to be submitted by 10 CFR 50.33(d), has reason to believe that the applicant may be owned, controlled, or dominated by foreign interests, the reviewer should request and obtain the following additional information:

1. If the applicant's equity securities are of a class which is registered pursuant to the Securities Exchange Act of 1934, copies of all current Securities and Exchange Commission Schedules 13D and 13G, which are required to be filed by owners of more than 5% of such a class with the Securities and Exchange Commission, the security issuer (applicant), and the exchange on which the issuer's securities are traded.

2. Management positions held by non-U.S.

citizens.

3. ~~The~~Operating agreements or other contracts between or among owners addressing management and operations of the plant, specifying information such as the ability of foreign entities to control the appointment of management personnel.

Provides greater specificity in guidance; clarifies that information regarding control over general plant operations and management (not just citizenship of management personnel) should be considered. *See Commonwealth Edison Co.* (Zion Station, Units 1 and 2), 4 AEC 231 (1969) (holding that if an applicant were subject to foreign domination, manifestations of that would be apparent in the corporate organization and management). *See also* p. 8 of NEI comments.

Negation Action Plan

If applicable under Section 4.43 infra, the applicant should also submit a Negation Action Plan, which is described in detail in Section 4.43.

ACCEPTANCE CRITERIA

Basic Statutory and Regulatory Limitations

License applications for new facilities or applications for approval of transfers of licenses required in the case of proposed new ownership of existing facilities may involve foreign entities proposing to own all or part of a reactor facility. Sections 103d and 104d of the AEA prohibit the NRC from issuing a license to an applicant if the NRC knows or has reason to believe that the applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government (or is an alien, in the case of Section 103d).

Likewise, under 10 CFR 50.38,

> Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.

Guidance On Applying Basic Limitations

~~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~~The nuclear industry is global, with responsible participants from many nations engaged in the markets for reactor technology, nuclear fuel supply, and nuclear operations. Nuclear technology information

Recognizes realities of global nuclear market and the range of international safety and safeguards protocols that have come into existence since the AEA was enacted.

is protected by international safeguards such as the Nuclear Suppliers Group (NSG) Guidelines, as well as treaties such as the Treaty on the Non-Proliferation of Nuclear Weapons. Participation in the U.S. nuclear industry by foreign investors, vendors, and experienced operators, from countries that are parties to such international treaties and protocols, can provide significant benefits to domestic applicants or licensees with respect to safe and secure nuclear development, construction, procurement, and operations. Foreign capital and experience also provide direct benefits to the U.S. domestic economy. Accordingly, it is the policy of the Commission to allow foreign investment in licensed activities, consistent with the AEA, the Commission's regulations, and the national security interests of the United States.

3.2.1 Integrated Assessment of Foreign Participation

The Commission has long held that 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. *General Elect. Co. & Southwest Atomic Energy Assoc.*, 3 AEC 99, 101 (1966). 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.~~*Id.* The Commission has long emphasized the need to "take into consideration the many aspects of corporate existence and activity," and that:

> . . . [t]he ability to restrict or inhibit compliance with security and other regulations of the [Commission], and the capacity to control the use of nuclear fuel and to dispose of special nuclear material generated in the reactor, would be of greatest significance.

Id.[1] Consistent with the statutory objectives and legislative history, the Commission has also held that the foreign ownership, control, or domination provision "should be given an orientation toward safeguarding the national defense and security." *Id.* Accordingly, for applicants with direct or indirect owners, or investors that are foreign interests, the AEA requires an integrated review of the "foreign ownership, control, or domination" issue – focusing on all indicia of control of nuclear operations by the foreign interests.

Incorporates *SEFOR* precedent and the overriding Commission interpretation of the AEA FOCD prohibition.

[1] *See also* Letter from AEC Director of Regulation to the General Atomic Company (Dec. 14, 1973), described in Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox, SECY-82-469 (Nov. 26, 1982), where the NRC imposed conditions on a license transfer designed to negate foreign legal control rights over the conduct of the licensed activity bearing on common defense and security matters, such as control over special nuclear material.

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 ~~that~~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 Commission has stated that in context with the other provisions of Section 104d, the foreign control limitation should be given an orientation toward safeguarding the national defense and security. Thus, an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license.~~[2] ~~Even though a foreign entity contributes 50%, or more, of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-~~Ownership may be one indicator of foreign power, but is not dispositive. There is no specific ownership threshold above which it would be conclusive that an applicant is controlled by foreign interests through ownership of a percentage of a domestic applicant's stock. Ownership of outstanding shares of an applicant 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. Ownership or funding alone do not necessarily confer power to direct or decide nuclear safety and security matters; ownership rights, or other investor or creditor rights, of foreign participants may be mitigated through negation action plans.	Specifically discusses the *SEFOR* principle that the FOCD prohibition should be read as an integrated whole, with a focus on the power to direct and decide matters affect nuclear safety and security, rather than with a focus on "ownership" as an isolated prohibition.
A foreign ~~applicant, these facts alone do not require a finding that the applicant is under foreign control.~~ ~~An~~interest may not be a licensee, either as an owner or operator. However, a domestic applicant that is ~~partially~~ultimately owned (including up to 100%) by a foreign ~~entity, for example, partial ownership of 50% or greater,~~interest may still be eligible for a license ~~if certain conditions are imposed, such as requiring that officers and employees of the applicant responsible for special nuclear material must be U.S. citizens.~~in circumstances such as:	Clarifies that a license may not be issued to an alien.

[2] ~~In any event, a license would not be issued to any person if the Commission found that issuance would be inimical to the common defense and security or to the health and safety of the public. *See, e.g.*, Sections 103d and 104d of the AEA. Pursuant to this provision, the Commission has the authority to reject a license application that raises a clear proliferation threat, terrorist threat, or other threat to the common defense and security of the United States~~

1. ~~Where an applicant that is seeking to acquire a 100% interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign corporation, the applicant will not be eligible for a license, unless the Commission knows that the foreign parent's~~The Commission knows that the foreign parent's stock is "largely" owned by U.S. citizens. If the foreign parent's stock is owned by U.S. citizens, and certain conditions are imposed, such as requiring that only U.S. citizens within the applicant organization be responsible for special nuclear material, the applicant may still be eligible for a license~~, notwithstanding the foreign control limitation.~~; or	Clarifies that foreign ownership of a licensee is not automatically prohibited regardless of the percentage of ownership, if certain conditions are met to establish that there will not be foreign power to direct or decide matters involving nuclear safety or security.
2. ~~If the~~ License conditions or conditions of a license transfer order are imposed requiring negation actions, such as a requirement that officers and employees of the applicant ~~is seeking to acquire~~responsible for nuclear operations and/or special nuclear material must be U.S. citizens. *See* Section 4.3.	
In circumstances where the foreign interest (1) owns 10% or less of the licensee (absent special voting rights conferring control), or (2) owns less than ~~a~~ 20% and files a Securities and Exchange Commission Schedule 13G, the NRC typically would have no regulatory concern because the situation would not present one of foreign control. Therefore, the NRC would not find foreign "ownership, control, or domination," and would not require any negation actions. This presumption does not apply to foreign interests from embargoed or restricted destination countries as defined in 10 CFR 110.28 and 110.29.	Provides for presumption of no control (thus, no Negation Action Plan) for (1) *de minimis* ownership and (2) ownership < 20% where an SEC Schedule 13G is also filed.
Additionally, even though a foreign entity contributes 50%, or more, of the costs of constructing a reactor, participates in the project review, is consulted on policy and cost issues, and is entitled to designate personnel to design and construct the reactor, subject to the approval and direction of the non-foreign-controlled applicant, these facts alone do not require a finding that the domestic applicant is under foreign control. A foreign entity may contribute or may finance up to 100% ~~interest, further consideration is~~ of the costs of a reactor (*see* Section 3.2.3).	Clarifies that foreign entities may participate in certain activities with respect to reactor projects without amounting to improper power to direct licensed activities. Clarifies that foreign financing up to 100% is permissible.
Personnel working for a domestic licensee will ultimately be responsible for safe and secure operations, as well as the control of sensitive information and the security of special nuclear material.	Clarifies that there is no reason to presume U.S. citizen

The NRC does not presume that U.S. citizens engaged in NRC-licensed activities – including managers, officers, and directors of the licensee – will abandon their responsibilities and their fiduciary duties. A licensee's oversight programs, employee concerns programs, or other advisory committees also serve to assure transparency and reporting of concerns regarding potential foreign control. Additional NRC reporting obligations can be required. ~~Further consideration will be given to~~, and additional NRC oversight can be conducted, if appropriate in special cases.	employees will violate NRC requirements. Licensee and NRC oversight provide ongoing assurance.
In general, the NRC will conduct an integrated review of foreign ownership, control, or domination considerations, including: (1) the extent of the proposed ~~partial~~foreign ownership of the reactor or the domestic applicant; (2) whether the applicant is seeking authority to operate the reactor; (3) whether the applicant has interlocking directors or officers ~~and details concerning the relevant companies~~with a foreign entity; (4) whether the ~~applicant~~foreign entity would have any access to restricted data~~; and (5) details concerning~~ (typically not the case for commercial power reactors); (5) the governance of the domestic applicant and role of the foreign interest; (6) the applicant's control over operations, security, access, and oversight programs; and (7) the domicile of the foreign entity and its own historic involvement in nuclear activities. A potential for foreign influence on the decision-making of the applicant does not equate to power to direct or decide safety, security, or proliferation matters. As explained further in Section 4.3, if the governance of the domestic applicant includes or is subject to negation measures that assure control of nuclear safety and security matters by U.S. citizens, the applicant will generally be found not to be owned, controlled, or dominated by a foreign interest within the meaning of Sections 103d or 104d of the AEA. ~~ownership of the foreign parent company.~~	Incorporates *SEFOR* principle of an integrated review of FOCD. Adds factors relevant to determining whether there will be FOCD over nuclear safety and security. Recognizes that effective Negation Action Plans can eliminate FOCD concerns, regardless of foreign ownership.
3.2.2 Orientation Toward National Security The foreign interest's home country will be considered when determining national security implications of foreign participation or ownership in a nuclear project. Foreign entities engaged in the global nuclear market from nations that support international safety and safeguards protocols pose little or no risk to national security, and the eligibility of applicants owned by such entities should be considered in that light.[3] For example, where the same foreign entity that owns a	Incorporates guidance that the foreign interest's home country, and whether the foreign interest is already engaged in nuclear activities, should be considered as part of a graded approach to the FOCD review.

[3] As a general matter, countries that are members of the Nuclear Suppliers Group (listed in 10 CFR 110.30) would not ordinarily raise significant safety or security concerns. It is presumed that countries listed as embargoed destinations under 10 CFR 110.28 would present proliferation or other national security concerns, and foreign interests from those countries would not be eligible for participation in U.S. reactor projects. Although countries on the restricted destination list in 10 CFR 110.29 are also presumed to present

nuclear power plant is also the reactor vendor (presumptively from a Nuclear Suppliers Group country), the situation would not raise substantial national security concerns. Conversely, an applicant that poses a risk to national security by reason of even limited foreign ownership or control would be ineligible for a license.[4] A key consideration is always whether the applicant is seeking authority to operate the reactor. Given the orientation of the foreign control analysis on national defense and nuclear security, if the applicant would not have authority to operate the reactor – for example, where a separate domestic entity serves as an operating company or another owner is the lead licensee with sole authority and responsibility for operating the reactor – the foreign control implications are greatly diminished, since the applicant would not have authority over licensed activities involving safety and security or control over nuclear materials. Where a foreign interest owns less than 50% of a non-operating licensee (and holds less than 50% voting control), and is from a Nuclear Suppliers Group country, the NRC would typically have no FOCD concern. If an applicant is seeking a license under Part 50 or Part 52 to construct a power plant, certain pre-construction and construction activities do not pose nuclear safety, security, or proliferation risks. Accordingly, a license may be issued with a finding that FOCD is negated based on conditions establishing objectively verifiable criteria that will be implemented to address potential foreign ownership, control, or domination issues prior to activities with safety, security, or proliferation implications (*e.g.*, certain construction activities, receipt of special nuclear material, initial plant operation). 3.2.3 Foreign Financing/Loans Financing of a nuclear project or loans to an applicant or licensee by a	Distinguishes between operating and non-operating authority for the purpose of determining control over security-related matters. Provides for presumption of no control when foreign interest holds < 50% voting control of non-operating licensee and is from Nuclear Suppliers Group country. Allows use of license condition as one method of resolving FOCD concerns. This would encourage beneficial foreign investment in nuclear projects by allowing applicants to obtain the finality and certainty of a COL by resolving FOCD issues through a license condition. *See* pp. 21-22 of NEI comments.

national security concerns, cases involving foreign interests from those countries must be considered on a case-by-case basis. Generally, if participation by a foreign interest from a restricted destination country is permitted, a significant NAP would be required. In addition, the NRC will presume a national security concern is involved with respect to any entity or person identified in the "Specially Designated Nationals and Blocked Persons List" maintained by the U.S. Department of Treasury's Office of Foreign Asset Control.

[4] A license could not be issued to any person if the Commission found that issuance would be inimical to the common defense and security or to the health and safety of the public. *See, e.g.*, Sections 103d and 104d of the AEA. Pursuant to this provision, the Commission has the authority to reject a license application that raises a clear proliferation threat, terrorist threat, or other threat to the common defense and security of the United States.

foreign financial institution (no equity participation in the project) is not normally an issue to be addressed under an FOCD review, absent special control rights (*e.g.*, veto rights) held by the lender under the relevant financial arrangements. The NRC will specifically focus on whether any such rights apply to matters with nuclear safety or security implications. In this regard, the NRC's creditor regulations in 10 CFR 50.81 do not restrict applicants or licensees from using foreign loans, so long as the creditor cannot foreclose and take possession of a licensed facility before the NRC has approved a license transfer.	Provides for presumption of no control when foreign interest provides financing only, absent special creditor rights.
REVIEW PROCEDURES Threshold Review and Determination The reviewer should first analyze all of the information submitted by the applicant sufficient to comply with 10 CFR 50.33(d), as well as other relevant information of which the reviewer is aware, to determine whether there is any reason to believe that the applicant is an alien or citizen, national, or agent of a foreign country, or an entity that is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government. If there is no such reason to believe based on the foregoing information, no further review is required and the reviewer should proceed to make a recommendation regarding whether there is any foreign control obstacle to granting the application. ~~On the other hand, if there is any reason to believe that the applicant may be owned, controlled, or dominated by foreign interests, the reviewer should request and obtain the additional information specified in Section 2.2.~~	
~~Supplementary Review~~ ~~If it is necessary~~Consistent with the guidance above, in the following situations the NRC would typically presume no FOCD obstacle to ~~obtain~~licensing, and would not require negation actions: 1. The foreign interest provides only financing for the nuclear project (including up to 100% of the costs), absent any special control rights and assuming the foreign interest is not from an embargoed or restricted destination country as set forth in 10 CFR 110.28 and 110.29. 2. There is *de minimis* foreign ownership, such as where a foreign entity has less than 10% of the voting control of an operating licensee.[5]	Incorporates presumption that there is no power to direct or decide activities with nuclear safety or security implications and therefore, no need for a Negation Action Plan, into initial FOCD review.

[5] Similarly, FERC has established a rebuttable presumption that ownership or operation of less than 10% of a jurisdictional facility or the voting securities of an entity that owns a

3. The foreign interest owns less than 20%, files a Schedule 13G with the Securities and Exchange Commission, and is not from an embargoed or restricted destination country as set forth in 10 CFR 110.28 and 110.29. 4. Where a foreign interest holds less than 50% voting control of an owner-licensee that does not have operating authority, provided that the foreign interest is from a Nuclear Suppliers Group country. If, based on the totality of the circumstances, the reviewer believes there is evidence of foreign control, the additional information specified in Section 2.2 and 2.3 for a Supplementary Review should be requested. Supplementary Review If further review is necessary, the reviewer should consider the acceptance criteria and general guidance above, and consult with the Office of the General Counsel on Commission precedent. Whenever possible, Commission precedent should be followed by the staff as applicants reasonably rely on precedent in preparing applications. Information related to the items listed below may be sought and may be taken into consideration in determining whether the applicant is foreign owned, controlled, or dominated. The fact that some of the below listed conditions may apply does not necessarily render the applicant ineligible for a license. 1. ~~1.~~ Whether the nature and extent of foreign ownership, control, or domination gives a foreign interest a controlling or dominant position with respect to management of NRC-licensed activities involving safety or security (including operations, security, access, and oversight). ~~1.~~2. Whether any foreign interests ~~have~~control management positions such as directors, officers, or executive personnel in the ~~applicant's~~applicant's organization with management or oversight responsibilities for licensed activities involving nuclear safety or security. ~~2.~~3. ~~2.~~ Whether any foreign interest controls, or is in a position to control, the election, appointment, or	Reflects *SEFOR* principle that FOCD reviews are to be conducted in an integrated fashion, considering the totality of the circumstances. Focuses supplemental review on power to direct or decide nuclear safety and security matters. Focuses supplemental review on power to direct or decide nuclear safety and security matters.

jurisdictional facility does not constitute control. *See FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 53 (2007).

	tenure of any of the ~~applicant's~~applicant's directors, officers, or executive personnel. If the reviewer knows that a domestic corporation applicant is held in part by foreign stockholders, the percentage of outstanding voting stock so held should be quantified. However, recognizing that shares change hands rapidly in the international equity markets, the staff usually does not evaluate power reactor licensees to determine the degree to which foreign entities or individuals own relatively small numbers of shares of the ~~licensees'~~licensees' voting stock. The Commission has not determined a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests.	
~~3.~~4.	~~3.~~ Whether the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that ~~may affect control of the applicant.~~involve control of the applicant. As an example, if a foreign interest is lending funds to the applicant for a portion of development or licensing costs and has traditional creditor rights under the credit agreement, this arrangement alone would not ordinarily provide foreign control. In addition, a standard Engineering, Procurement and Construction contract with a foreign-owned reactor vendor would not ordinarily be indicative of foreign control over the applicant.	Provides concrete examples of situations that do not constitute impermissible FOCD over nuclear safety or security.
~~4.~~5.	~~4.~~ Whether the applicant has interlocking directors or officers with foreign corporations, if the foreign director(s) or officer(s) presents proliferation or other national security concerns or are from a country that presents proliferation or other national security concerns, or if the foreign director(s) have voting control that is not mitigated by negation measures to assure U.S. control over nuclear safety and security matters.	Focuses supplemental review on power to direct or decide nuclear safety and security matters.
6.	~~5.~~ Whether the licensed activities in which the applicant will be engaged involve plant management and operations, or only pre-construction or construction.	Focuses supplemental review on power to direct or decide nuclear safety and security matters.
7.	Whether the foreign entity is not from a nation that is a member of the Nuclear Suppliers Group or a signatory to the Nuclear Non-Proliferation Treaty.	Incorporates international safety and safeguards protocols as a consideration germane to whether foreign participation will have nuclear safety or security implications.
~~5.~~8.	Whether the applicant has foreign involvement not otherwise covered by the items ~~1-4~~ above, where the foreign control involves a person, entity, or country	Reflects consideration of foreign

that presents proliferation or other national security concerns. ~~Supplementary Determination~~ ~~After~~The Appendix to this SRP illustrates application of these considerations to a number of possible scenarios involving foreign participation in a licensed project or direct or indirect ownership of an applicant or licensee. If, after reviewing the additional information specified in Section 2.2 as well as the relevant considerations outlined above and in the Appendix, the reviewer determines that there is no further reason to believe that the applicant is an alien, or otherwise owned, controlled, or dominated by a foreign person or entity, no additional review is necessary. On the other hand, if the reviewer continues to conclude that the applicant may be an alien or owned, controlled, or dominated by foreign interests, or has some reason to believe that may be the case, the reviewer shall determine~~:~~ ~~1. The nature and extent of foreign ownership, control, or domination, to include whether a foreign interest has a controlling or dominant minority position.~~ ~~2. The source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations.~~ ~~3. The~~ the type of actions, if any, that would be necessary to negate the effects of foreign ownership, control, or domination to a level consistent with the Atomic Energy Act and NRC regulations. *See* Section 4.3. ~~On the other hand, if the reviewer determines after reviewing the additional information specified in Section 2.2 that there is no further reason to believe that the applicant is an alien or owned, controlled, or dominated by a foreign person or entity, no additional review is necessary.~~ Negation Action Plan If the reviewer continues to conclude following the Supplementary ~~Determination~~Review that an applicant 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. ~~When factors not related to ownership are present, the~~A negation action plan shall provide positive measures	entity's home country in determining FOCD. The revisions to this section set forth examples of specific mitigation measures that have been previously approved to negate FOCD. Each measure focuses on negating control specifically with respect to

that assure that the foreign interest ~~can be effectively denied~~ does not control or ~~domination~~dominate licensed activities. Examples of such measures that may be sufficient to negate foreign control or domination include: 1. ~~1.~~ Governance provisions that assure the domestic applicant's control of nuclear safety and security matters through U.S. citizens, such as: a. Adoption of special board resolutions related to exclusion of foreign citizens or representatives of a foreign interest from nuclear safety or security matters. b. Special voting arrangements, such as casting (deciding) vote authority in a U.S. citizen chairman, over any matters involving nuclear safety or security. The fact that a foreign owner participates in board decisions or management of the applicant does not equate to foreign control if such participation is subject to appropriate governance restrictions. c. Assignment of specific responsibilities and/or oversight duties to board members, a special security committee of the board, or oversight committees comprised of U.S. citizens independent of the foreign interest. 2. Provisions that negate financial control by a foreign entity, such as: a. Modification or termination of loan agreements, contracts, and other understandings with foreign interests~~.~~ that provide control	decision-making that could implicate nuclear safety and security.

rights to such interests.

~~2. Diversification or reduction of foreign source income.~~

b. ~~3.~~ Demonstration of financial viability independent of foreign interests or, alternatively where funds from foreign interests are required or used, demonstration of contractual obligations, other sources of funding, or governance controls that negate foreign control.

c. ~~4.~~ Elimination or resolution of problem debt that conveys control rights.

~~5. Assignment of specific oversight duties and responsibilities to board members.~~

~~6. Adoption of special board resolutions.~~

d. Establishing governance provisions that assure the domestic applicant's control of nuclear safety and security matters through U.S. citizens.

3. Additional oversight programs or committees to assure transparency and reporting (including to the NRC) of issues and concerns involving potential foreign control of safety, security, or access to special nuclear material.

Not all of the above negation actions are necessarily required in every case. The intent is to apply an orientation toward nuclear safety and security, and to require only those actions needed to assure that a foreign entity does not have the power, direct or indirect, to decide relevant matters affecting nuclear plant safety, security, or control over nuclear materials. The Appendix to this SRP illustrates a graded approach to requirements for negation actions.

EVALUATION FINDINGS

Recognizes that negation measures should be tailored to the specific facts of each case. A "one-size-fits-all" approach is not necessary or appropriate.

The reviewer should verify that sufficient information has been provided to satisfy the regulations and this Standard Review Plan. In consideration of the guidance of this Standard Review Plan, the reviewer should then draft an analysis and recommendation, based on the applicable information specified in Sections 2 and 4 above, concerning (a) whether the reviewer knows, or has reason to believe that the applicant is an alien, or (b) is a corporation or other entity that is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and whether there are conditions that should be imposed before granting the application so as to effectively deny foreign control of the applicant.

REFERENCES

1. Sections 103, 104, and 184 of the Atomic Energy Act of 1954, as amended (42 USC 2133, 2134, and 2234).

2. Part 50 "Domestic Licensing of Production and Utilization Facilities" of Title 10 of the Code of Federal Regulations (10 CFR Part 50).

3. General Electric Co. and Southwest Atomic Energy Associates, Docket No. 50-231, 3 AEC 99 (1966).

~~4. Letter from W. Direks to J. MacMillan (Dec. 17, 1982) (Re: Babcock & Wilcox/McDermott) (attached).~~

~~5. Letter from N. Palladino to A. Simpson (Sept. 22, 1983) w/attachment (Re: Union Carbide/Cintichem) (attached).~~