

POLICY ISSUE **(Information)**

February 6, 2015

SECY-15-0022

FOR: The Commissioners

FROM: William M. Dean, Director
Office of Nuclear Reactor Regulation

SUBJECT: CONSIDERATION OF GOVERNMENT ACCOUNTABILITY OFFICE
RECOMMENDATION TO REVIEW SAMPLES OF LICENSEES'
DECOMMISSIONING TRUST FUNDS FOR COMPLIANCE WITH
INVESTMENT FUND RULES

PURPOSE:

To discuss the staff's consideration of alternative methods for verifying licensee decommissioning trust fund compliance with the U.S. Nuclear Regulatory Commission's (NRC's) regulations relating to investment restrictions. This review was undertaken in response to a U.S. Government Accountability Office (GAO) report on NRC oversight of decommissioning funds and correspondence between the Commission and Congress related to the strengths and weaknesses of the NRC's regulations related to investment restrictions. This paper does not address any new commitments or resource implications.

BACKGROUND:

The regulation under Title 10 of the *Code of Federal Regulations* (10 CFR) Section 50.75(h)(1)(i)(A) provides investment terms and standards for trustees of non-electric utility licensees.¹ The regulation states that the trustee:²

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¹ An electric utility as defined in 10 CFR 50.2, "Definitions," means any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Approximately two-thirds of licensees are electric utilities.

² Per 10 CFR 50.75(e)(1), investments into a decommissioning trust fund must be managed by a third-party outside the control of the licensee. A trustee is the manager, investment advisor, or other person directing investment of the trust funds.

Is prohibited from investing the funds in securities or other obligations of the licensee or any other owner or operator of any nuclear power reactor or their affiliates, subsidiaries, successors or assigns, or in a mutual fund in which at least 50 percent of the fund is invested in the securities of a licensee or parent company whose subsidiary is an owner or operator of a foreign or domestic nuclear power plant. However, the funds may be invested in securities tied to market indices or other non-nuclear sector collective, commingled, or mutual funds, provided that this subsection shall not operate in such a way as to require the sale or transfer either in whole or in part, or other disposition of any such prohibited investment was made before the publication date of this rule, and provided further that no more than 10 percent of trust assets may be indirectly invested in securities of any entity owning or operating one or more nuclear power plants.

Trustees, as required in 10 CFR 50.75(h)(1)(i)(B), are:

...obligated at all times to adhere to a standard of care set forth in the trust, which either shall be the standard of care, whether in investing or otherwise, required by State or Federal law or one or more State or Federal regulatory agencies with jurisdiction over the trust funds, or, in the absence of any such standard of care, whether in investing or otherwise, that a prudent investor would use in the same circumstances. The term "prudent investor," shall have the same meaning as set forth in the Federal Energy Regulatory Commission's [FERC] "Regulations Governing Nuclear Plant Decommissioning Trust Funds" at 18 CFR 35.32(a)(3), or any successor regulation.

These investment restrictions are incorporated as part of the trust agreement between the licensee and the trustee. The restrictions in 10 CFR 50.75(h)(1)(i)(A)-(B) do not apply to electric utility licensees because State regulatory authorities or the Federal Energy Regulatory Commission (FERC) oversee such licensees' decommissioning trust funds.

The GAO, in its April 5, 2012, report, GAO-12-258, "Nuclear Regulation: NRC's Oversight of Nuclear Power Reactors' Decommissioning Funds Could Be Further Strengthened," (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12129A204) identified a potential weakness related to NRC oversight of licensees' compliance with investment standards. The GAO stated that the NRC had not reviewed licensees' compliance with investment standards, cannot confirm licensees are avoiding conditions in the investment standards, and as a result, NRC cannot determine whether enforcement action is needed.

The GAO recommended that the staff sample licensees' trust fund investments to determine if licensees are complying with the standards. The NRC responded to GAO's recommendations on July 11, 2012 (ADAMS Accession No. ML12164A192), in accordance with statutory requirements.³ Specifically, with respect to investment restrictions, the NRC stated:

NRC regulations restrict investments in the nuclear sector, specify the standard of care for investments, and restrict the licensee's involvement in day-to-day

³ 31 U.S.C. Sec. 720.

management of investments. The NRC will consider whether additional information is needed to better understand the current methods used by licensees, investment managers, and trustees to assure compliance with the NRC's regulations. Based on that determination, the NRC will consider as appropriate alternative methods for reviewing licensee compliance with the regulations.

In two letters to then U.S. Representative Edward Markey, the Commission agreed with GAO's recommendations and informed Congress that alternative methods of verifying the financial instruments, and their compliance with the NRC's regulations, may be necessary.⁴ The Commission stated that it would make a determination of alternative methods to reviewing licensee compliance with the regulations after the 2013 decommissioning funding status reports.⁵ Following GAO's report, NRC response dated July 11, 2014, and correspondence with then U.S. Representative Edward Markey, the NRC staff undertook a thorough review of its methods of overseeing investment restrictions and found them to be sound.

DISCUSSION:

Over the past decade, the staff and the Office of the Inspector General (OIG) have reviewed the NRC's process for overseeing investment restrictions for decommissioning trust funds. Following the 2012 GAO audit, the staff once again reviewed the assumptions made previously to determine if they are still applicable and appropriate.

On February 6, 2006, OIG issued an audit report entitled, "Follow-up Audit of the Nuclear Regulatory Commission's Decommissioning Trust Fund Program" (OIG-06-A-07; ADAMS Accession No. ML060370376). The audit identified, among other items, opportunities for improvement in the NRC's decommissioning funding assurance program for operating power reactors. The OIG's audit recommended that the NRC should "require specific prudent investor restrictions for decommissioning trust funds." OIG argued that, without such restrictions, all of the accumulated trust funds were at risk.

In SECY-06-0065, "Office of the Inspector General Recommendations on Decommissioning Funding Assurance," dated March 23, 2006 (ADAMS Accession No. ML060590524), the staff disagreed with OIG's assertion for two reasons. First, the NRC historically declined to insert itself into the financial management details of decommissioning funding assurance. Second, all States (including the District of Columbia) except one have adopted the Uniform Prudent Investor Act (UPIA) or a similar requirement. The UPIA provides for the duties and responsibilities of trustees, including those responsibilities related to investment portfolios. On May 17, 2006, in a staff requirements memorandum to SECY-06-0065 (ADAMS Accession No. ML061370418), the Commission agreed with the staff's recommendation. However, the Commission also directed the staff to perform outreach to FERC, State Public Utility Commissions, and other organizations, and provide back to the Commission "[A] discussion of oversight activities along with recommendations for further Commission action, if appropriate."

⁴ Letter to Representative Edward Markey from Chairman Macfarlane re: GAO Report-NRC's Oversight of Nuclear Power Reactors' Decommissioning Funds. ADAMS Accession No. ML12172A068.

⁵ Letter to Representative Edward Markey from Chairman Macfarlane re: Reforms to the Methodology and Reporting Process by which it determines Licensees' Financial Wherewithal to Meet Future Decommissioning Obligations. ADAMS Accession No. ML13135A198.

In response, on November 7, 2007, the staff issued SECY-07-0197, "Reactor Decommissioning Trust Fund Oversight by Other Agencies and Recommendations Regarding Further Action." The staff noted that Federal banking regulatory agencies examine trust departments every two to three years.⁶ During these examinations, these Federal banking regulatory agencies analyze the trustee's compliance with its fiduciary obligations and principles by ensuring that the trustee is meeting the requirements established in the trust agreement. The trustee's adherence to investment restrictions and applicable laws are within scope of the fiduciary obligations of the trustee, and can be examined by a Federal banking regulator. The staff, therefore, concluded this process provides reasonable assurance that the risk of fraud is minimized.

In the drafting of this paper, the NRC staff confirmed the assumptions that were made in both SECY-06-0065 and SECY-07-0197. The UPIA, or similar requirements, has now expanded to all States, including the District of Columbia. Also, the discussion in SECY-07-0197 related to Federal banking regulatory agencies auditing practices is still applicable today. Because decommissioning trust fund investments are managed by third parties who are regulated by Federal banking regulators with the statutory obligation and expertise to audit such investments, the staff does not believe there would be additional value added in conducting an additional independent review of decommissioning trust fund investments.

CONCLUSION:

The staff does not intend to change to the NRC's process for overseeing investment restrictions, as the staff believes the current oversight discussed above provides reasonable assurance that the risk of fraud is minimized.

RESOURCES:

Continued oversight of investment restrictions requires no change in NRC procedures; therefore, there will be no impact on resources.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objection.

/RA/

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⁶ The three agencies performing these examinations are the Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and the Federal Reserve Board.

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ADAMS Accession No: ML14310A458; * - Concurrence via e-mail

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