



DRAFT REGULATORY GUIDE

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REGULATORY GUIDE X.XX

FOREIGN OWNERSHIP, CONTROL, OR DOMINATION OF NUCLEAR POWER, AND NON-POWER PRODUCTION OR UTILIZATION FACILITY, DRAFT

A. INTRODUCTION

Purpose

This document provides guidance to applicants for, and licensees of, nuclear power reactors and non-power production or utilization facilities (NPUFs), regarding methods acceptable to the staff of the U.S. Nuclear Regulatory Commission (NRC, the Commission) for complying with foreign ownership, control, or domination (FOCD) requirements, including guidance on the subject of foreign financing.

Section 103a. of the Atomic Energy Act of 1954, as amended (AEA), states, in part, that:

The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to [AEA] section 123, utilization or production facilities for industrial or commercial purposes.

Section 103d. of the AEA, however, limits this authority by stating, in part, that:

No license may be issued to an alien or 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.

Section 104b. of the AEA states, in part, that:

As provided for in [AEA] subsection 102b., or 102c., or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes.

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Section 104c. of the AEA states, in part, that:

The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities useful in the conduct of research and development activities of the types specified in [AEA] section 31 and which are not facilities of the type specified in subsection 104b.

Similar to Section 103d., Section 104d. of the AEA limits this authority by stating, in 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.

The language quoted above from AEA Sections 103d. and 104d. is known as the FOCD prohibition. This prohibition is implemented through the Commission's regulations at Title 10 of the *Code of Federal Regulations* (10 CFR) 50.38, "Ineligibility of certain applicants," Subsection (a) of 10 CFR 52.75, "Filing of applications," and Subsection (b) of 10 CFR 54.17, "Filing of application." Consistent with these statutory and regulatory provisions, the NRC staff performs reviews of applications for nuclear power reactors and NPUFs to determine whether the applications reveal FOCD concerns that need to be addressed.

In addition to the FOCD limitation on issuing licenses, the AEA also limits this authority by stating, in both Sections 103d. and 104d., that:

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

This limitation is known as the inimicality prohibition and is implemented through the Commission's regulations at Subsection (a)(6) of 10 CFR 50.57, "Issuance of operating license," and Subsection (a)(1)(v) of 10 CFR 52.97, "Issuance of combined licenses." Consistent with these statutory and regulatory provisions, the NRC staff performs reviews of applications for nuclear power reactors and NPUFs to determine whether the applications reveal inimicality concerns that need to be addressed.

The provisions in the AEA for FOCD and inimicality, and the staff's reviews of these areas under NRC regulations, are derived from the same national security concerns, but appear in separate and distinct language in the AEA. As such, the FOCD determination is to be made with an orientation toward the common defense and security. The FOCD provisions in the AEA and NRC regulations are country-neutral, whereas the staff's inimicality review and its findings directly account for a license applicant's country of origin and any ties or interests that could result in a determination of inimicality. While FOCD and inimicality are complementary, this regulatory guide does not address the means for determining whether issuance of a license would be inimical to the common defense and security or to the health and safety of the public.

Applicability

This regulatory guide applies to nuclear power reactor and NPUF applicants and licensees subject to 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," and 10 CFR Part 54, "Requirements for Renewal of Operating Licenses for Nuclear Power Plants."

Applicable Regulations

- 10 CFR 50.33, “Contents of applications; general information,” requires applicants to submit certain identifying information related to the business of the applicant and financial information related to the construction and operation of a proposed reactor.
- 10 CFR 50.38, “Ineligibility of certain applicants,” describes which applicants are not eligible to apply for or obtain licenses based on FOCD.
- 10 CFR 52.75, “Filing of application,” describes which applicants are eligible to apply for a combined license for a nuclear power facility, the applicable filing requirements, and the fees associated with the filing and review of an application.
- 10 CFR 54.17, “Filing of application,” describes requirements and restrictions related to applications for a renewed license.

Purpose of Regulatory Guides

The NRC issues regulatory guides to describe to the public methods that the staff considers acceptable for use in implementing specific parts of the agency’s regulations, to explain techniques that the staff uses in evaluating specific problems or postulated accidents, and to provide guidance to applicants. Regulatory guides are not substitutes for regulations and compliance with them is not required. Methods and solutions that differ from those set forth in regulatory guides will be deemed acceptable if they provide a basis for the findings required for the issuance or continuance of a permit or license by the Commission.

Paperwork Reduction Act

This regulatory guide contains and references information collections covered by 10 CFR Parts 50, 52, and 54 that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). These information collections were approved by the Office of Management and Budget (OMB), control numbers 3150-0011, 3150-0151, and 3150-0155.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

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B. DISCUSSION

An applicant is considered to be foreign owned, controlled, or dominated whenever a foreign interest has the “power” to direct or decide matters affecting the management or operations of the applicant. This power to influence matters, whether exercised or not, may be direct or indirect. 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.¹

The three areas of ownership, control, and domination can be further described as follows:

Ownership (Indirect)²

- Minority – less than 50% ownership/investment
- Majority – 50% to less than 100% ownership/investment

Control

Examples of potential foreign control include the following:

- Controlling entity is foreign, e.g.,
 - General partner
 - Manager or managing member
- Foreign or foreign-appointed board members exist; or,
- U.S. board members with ties to foreign entities exist; or,
- Foreign ownership is sufficient to elect board members; or,
- Foreign owner has the rights, whether or not exercised, to appoint board members; or,
- Foreign or foreign-appointed key management personnel (KMP) exist or may exist, e.g.,
 - Chairman of the Board of Directors (BOD) or similar governing board
 - Chief Executive Officer (or equivalent)
 - Chief Nuclear Officer (or equivalent)

Control may be negated through the use of negation action measures as deemed appropriate by the NRC.

Domination

The level of domination is determined by analyzing factors other than ownership and control, including factors related to financing, and may be negated through the use of negation action measures as deemed appropriate by the NRC.

As demonstrated above, ownership is not the sole determinant of FOCD. The NRC staff considers a number of other factors, such as corporate governance structures, citizenship of key employees, and contractual and financial arrangements, to determine whether a foreign interest owns, controls, or dominates the applicant/licensee. The NRC does not recognize a “safe harbor” exception (i.e., there is no lower limit of foreign ownership that permits the NRC to presumptively find that FOCD

¹ See Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52355, 52358 (Sept. 28, 1999).

² For the purposes of this regulatory guide, “indirect” ownership refers to a situation in which the entity in question is the NRC licensee’s (or applicant’s) parent company or owns other companies in the ownership hierarchy, while “direct” ownership means that the entity in question holds the NRC license or is the licensee/applicant.

does not exist). Additionally, the only absolute prohibitions regarding FOCD are direct foreign ownership at any percentage or 100 percent indirect foreign ownership (e.g., where an applicant that is seeking to acquire a 100 percent interest in the facility is wholly owned by a U.S. company that is wholly owned by a foreign entity, the applicant will not be eligible for a license).³ As of the date of issuance of this regulatory guide, no applicant has requested direct foreign ownership at any percentage.

Therefore, if the NRC staff knows or has reason to believe that an applicant may be owned, controlled, or dominated by a foreign entity, it does not necessarily mean that the application will be denied. The Commission can implement certain provisions to effectively negate FOCD. This is achieved through the implementation of a negation action plan (NAP), which is comprised of one or more measures, incorporated as individual license conditions, and included in the recommendation to the Commission regarding whether there is any FOCD concern with approving the application.

Ultimately, the Commission's decision whether to grant an application is based on the staff's FOCD determination and recommendation, and whether there are conditions that will be imposed on the license that will effectively negate the FOCD of the licensee.

C. STAFF REGULATORY GUIDANCE

This section describes a methodology for implementing the general requirements for making an FOCD determination for applicants who must comply with 10 CFR Parts 50, 52, and 54. The analysis, determination, recommendation, and subsequent Commission decision is driven, in no small part, by the accuracy and completeness of the information provided by an applicant.

Regulatory Position 1 provides guidance to applicants on providing information related to FOCD, including foreign financing, as required by the regulations. Regulatory Position 2 provides guidance on NAP development, as necessary.

1. FOCD and Foreign Financing

1.1 Reporting of Information Related to FOCD

1.1.1 *All Power Reactor and NPUF Applicants*

For all applicants, the information to be provided is based on 10 CFR 50.33(d), as applicable. This represents the minimum information required for the NRC staff to make a determination on whether the applicant is owned, controlled, or dominated by a foreign entity.

All applicants,⁴ whether subject to FOCD, known or unknown, should provide the following information, as applicable, pursuant to 10 CFR 50.33(d):

- Information regarding the name(s), address(es), and citizenship(s) of either individual applicants, partners, directors and principal officers, or the principal (if the applicant is acting as agent or representative of another person);
- Principal location of business or State of incorporation or organization, and,

³ There is an exception to this prohibition when the foreign parent's stock is largely owned by U.S. citizens. This exception stems from a case in which a U.S. corporation, owned largely by U.S. citizens, moved offshore. The movement offshore rendered the corporation a foreign corporation, but the ultimate ownership remained largely domestic. See SECY-82-469, "Planned Reorganization of McDermott Incorporated, Parent of Babcock & Wilcox" (Nov. 25, 1982) (ADAMS Accession No. ML13325B135).

⁴ U.S. Federal Government, State, and local government entities are assumed not to have FOCD issues.

- Statement whether the applicant is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government, and, if so, relevant details.

1.1.2 Power Reactor and NPUF Applicants with Known FOCD

For applicants that know or have reason to believe that they may be owned, controlled, or dominated by a foreign entity, the following additional information should be submitted with the application for review:

- If the applicant's securities are of a class that is registered pursuant to the Securities Exchange Act of 1934, as amended, provide copies of current Securities and Exchange Commission (SEC) Form DEF14A and subsequent Schedules 13D and 13G. These are required to be filed by owners of more than, or equal to, 5 percent of such a class with the SEC, the security issuer (applicant), and the exchange on which the issuer's securities are traded. Identification of ownership of less than 5 percent should be included if the holder is entitled to control the appointment or tenure of any management position or is affiliated with other entities holding securities of the applicant.
- Information on key management personnel (KMP) positions and board of directors (BOD) or similar governing body memberships held by non-U.S. citizens or foreign-appointed U.S. citizens, including information regarding whether any of the applicant's directors, officers, executive personnel, general partners, regents, trustees, or senior management officials hold any positions with, or serve as consultants for, any foreign entities. If not provided with the application, copies of applicable by-laws, articles of incorporation, or other governance documents that describe the affected position(s) should also be provided.
- Discussion regarding the ability, direct or indirect, of a foreign entity to control the election, appointment, or tenure of KMP or members of the applicant's BOD (or similar governing body), or to control or cause the direction of other decisions or activities concerning nuclear safety or security.
- Discussion regarding any other factor(s) that disclose a capability on the part of foreign entities to control or influence the operations or management of the applicant.

If, during its review, the NRC staff finds or has reason to believe that the applicant may be owned, controlled, or dominated by a foreign entity, the staff may request the above information if not already present in the application.

The fact that any of the following conditions may apply does not necessarily render the applicant ineligible for a license:

- Whether any foreign entities have management positions such as directors, officers, or executive personnel in the applicant's organization.
- Whether any foreign entities control, or are in a position to control, the election, appointment, or tenure of any of the applicant's directors, officers, or executive personnel.
- Whether the applicant is indebted or has contractual or other agreements with foreign entities that may influence control of the applicant.
- Whether the applicant has interlocking directors or officers with foreign corporations.

- Whether the applicant has foreign involvement not otherwise covered by the above items.

The NRC staff will consider the totality of the facts surrounding the licensing action and consult, as necessary, with the NRC Office of General Counsel (OGC) on Commission precedent, applicable statutes, and regulations prior to making a determination. The NRC staff will also consider any proposed NAPs, as discussed below. Clarifying information provided in the application or subsequent requests for additional information (RAIs) will promote a more thorough and efficient review process.

1.2 Reporting of Information Related to Foreign Financing

1.2.1 *All Power Reactor and NPUF Applicants*

For all applicants, the information to be provided is based on 10 CFR 50.33(f), as applicable. This represents the minimum information required for the NRC staff to make a determination on whether the applicant has foreign financing that may constitute ownership, control, or domination by a foreign entity.

All applicants (except for an electric utility applicant for a license to operate a utilization facility), regardless of whether they have foreign financing, should provide the following information, as applicable, pursuant to 10 CFR 50.33(f):

- Information related to the source(s) and level(s) of financing for the construction costs, related fuel cycle costs, and operational costs of the referenced facility.
- Information related to the Legal and financial relationships of the applicant with its stockholders or owners.

1.2.2 *Power Reactor and NPUF Applicants with Known Foreign Financing*

For applicants that know or have reason to believe they may be subject to foreign financing, the following information should be submitted with the application for review:

- Information regarding any contracts, agreements, understandings, or arrangements with a foreign entity.
- Information regarding any indebtedness, liabilities, or obligations, whether as borrower, surety, guarantor or otherwise, to a foreign entity or if the debt is with a U.S. entity that is owned or controlled either directly or indirectly by a foreign entity. If unknown, the applicant should so state. Information includes, as applicable:
 - Overall debt-to-equity ratio (in percentage).
 - With respect to indebtedness or liability to a foreign entity, identity of entity to whom applicant is indebted or liable, what has been furnished or pledged, and any conditions or covenants of the loan agreement.
 - If stock or assets have been furnished or pledged as collateral, provide a copy of the loan agreement with pertinent sections highlighted (to include procedures to be followed in the event of default).

- If any debentures are convertible, provide specifics.
- If loan payments are in default, provide details.

If, during its review, the NRC staff finds or has reason to believe that the applicant may be owned, controlled, or dominated by a foreign entity, the staff may request the above information if not already present in the application.

While the additional information related to foreign financing may be sought and considered in determining whether FOCD is present, the fact that an applicant is indebted to, or has contractual or other agreements with, a foreign entity does not necessarily render the applicant ineligible for a license. In its review, the NRC staff will consider the totality of the facts surrounding the licensing action and consult, as necessary, with the NRC OGC on Commission precedent, applicable statutes, and regulations prior to making a determination. The NRC staff will also consider any proposed NAPs, as discussed below. Clarifying information provided in the application or subsequent RAIs, will promote a more thorough and efficient review process.

2. Negation Action Plans (NAPs)

2.1 NAP Development

If the applicant knows or has reason to believe that it is subject to FOCD, a NAP that would effectively deny foreign control or domination of the applicant should be proposed in the application. The proposed NAP should be commensurate with the level of FOCD presented in the application, consistent with Table 1 and Appendix A of this document. The NRC staff will evaluate the proposed NAP and will recommend that the Commission approve it if the staff finds that it effectively negates any foreign control or domination of the applicant. Depending on the totality of the facts of each specific case and as deemed appropriate by the staff and approved by the Commission, a proposed NAP could be enhanced with additional negation measures not included in Table 1 and Appendix A.

D. IMPLEMENTATION

The purpose of this section is to provide information to applicants and licensees regarding the NRC's plans for using this regulatory guide.

Methods or solutions that differ from those described in this regulatory guide may be deemed acceptable if they provide sufficient basis and information for the NRC staff to verify that the proposed alternative demonstrates compliance with the appropriate NRC regulations. Current licensees may continue to use guidance the NRC found acceptable for complying with the identified regulations as long as their current licensing basis remains unchanged. The matter covered in this regulatory guide are not within the purview of the Backfit Rule, 10 CFR 50.109, or the issue finality provisions in 10 CFR Part 52.

REFERENCES⁵

1. Sections 103 and 104 of the Atomic Energy Act of 1954, as amended (42 USC 2133 and 2134).
2. Parts 50, “Domestic Licensing of Production and Utilization Facilities,” 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants,” and 54, “Requirements for Renewal of Operating Licenses for Nuclear Power Plants,” of Title 10 of the *Code of Federal Regulations*.
3. NUREG-XXXX, “Standard Review Plan for Foreign Ownership, Control, or Domination,” Month 2016.

⁵ Publicly available NRC published documents are available electronically through the NRC Library on the NRC’s public Web site at: <http://www.nrc.gov/reading-rm/doc-collections/> and through the NRC’s Agencywide Documents Access and Management System (ADAMS) at <http://www.nrc.gov/reading-rm/adams.html>. The documents can also be viewed online or printed for a fee in the NRC’s Public Document Room (PDR) at 11555 Rockville Pike, Rockville, MD. For problems with ADAMS, contact the PDR staff at (301) 415-4737 or (800) 397-4209; fax (301) 415-3548; or e-mail pdr.resource@nrc.gov.

TABLE 1
GRADED GENERIC NEGATION ACTION PLAN CRITERIA – COUNTRY NEUTRAL

Level of FOCD ⁶	Minimum Negation Action Plan Criteria ⁷
<ul style="list-style-type: none"> • Minority (< 50%) indirect foreign ownership; and • No control identified: <ul style="list-style-type: none"> ○ no foreign or foreign-appointed board members or U.S. board members with existing ties to foreign entities have been identified; and ○ the percent of foreign ownership is <u>insufficient</u> to elect board members or to grant the right to appoint board members 	<ul style="list-style-type: none"> • Board Resolution • U.S. KMP <ul style="list-style-type: none"> ○ Chairman of the BOD or similar governing body ○ Chief Executive Officer (or equivalent) ○ Chief Nuclear Officer (or equivalent) • License Condition for Notification of Change to Negation Action Plan • NRC Oversight
<ul style="list-style-type: none"> • Minority (< 50%) indirect foreign ownership; and • Potential control identified: <ul style="list-style-type: none"> ○ foreign or foreign-appointed board members or U.S. board members with existing ties to foreign entities have been identified; or ○ the percent of foreign ownership is <u>sufficient</u> to elect board members or to grant the right to appoint board members 	<ul style="list-style-type: none"> • Board Resolution • U.S. KMP • Majority U.S. BOD • Special Nuclear Committee (SNC) <ul style="list-style-type: none"> ○ Quarterly report to BOD ○ Annual Report to the NRC • License Condition for Notification of Change to Negation Action Plan • NRC Oversight
<ul style="list-style-type: none"> • Majority (50% to < 100%) indirect foreign ownership 	<ul style="list-style-type: none"> • Board Resolution • U.S. KMP • Majority U.S. BOD • Special Nuclear Committee (SNC) • Nuclear Advisory Committee (NAC) <ul style="list-style-type: none"> ○ Annual Report to the NRC • License Condition for Notification of Change to Negation Action Plan • NRC Oversight

⁶ Generic grading aligns with the Defense Security Service foreign ownership, control, or influence (FOCI) analysis and mitigation.

⁷ Additional information on Minimum Negation Action Plan Criteria can be found in Appendix A. This information includes membership requirements for the Special Nuclear and Nuclear Advisory Committees, and clearance requirements for U.S. Citizens.

APPENDIX A

GRADED GENERIC NEGATION ACTION PLAN CRITERIA – COUNTRY NEUTRAL

GRADING LEVEL OF FOREIGN OWNERSHIP, CONTROL, OR DOMINATION (FOCD)

Ownership (Indirect)

- Minority – less than 50% ownership/investment
- Majority – 50% to less than 100% ownership/investment

Control

Examples of potential foreign control include the following:

- Controlling entity is foreign, e.g.,
 - General partner
 - Manager or managing member
- Foreign or foreign-appointed board members exist; **or**
- U.S. board members with ties to foreign entities exist; **or**
- Foreign ownership is sufficient to elect board members; **or**
- Foreign owner has the rights, whether or not exercised, to appoint board members; **or**
- Foreign or foreign-appointed key management personnel (KMP) exist or may exist, e.g.,
 - Chairman of the Board of Directors (BOD) or similar governing body
 - Chief Executive Officer (or equivalent)
 - Chief Nuclear Officer (or equivalent)

Control may be negated through the use of negation action measures as deemed appropriate by the NRC

Domination

The level of domination is determined by analyzing factors other than ownership and control, including factors related to financing, and may be negated through the use of negation action measures as deemed appropriate by the NRC.

NEGATION ACTION MEASURES⁸

Minimum Negation Action Measures Imposed via License Condition

- Board Resolution – a resolution of the BOD that identifies the foreign shareholders and their representatives and includes a certification that the foreign shareholders and their representatives will be effectively excluded from control over NRC licensed activities, and will not be permitted to occupy positions that may enable them to influence the organization's nuclear policies and practices. Copies of such resolutions shall be furnished to the NRC, all board members, and principal management officials.

⁸ Referenced U.S. citizens, including KMP, shall provide evidence that they have been examined to the appropriate level that provides high assurance that they are "trustworthy and reliable," such that they do not constitute an unreasonable risk to the public health and safety, or the common defense and security. This would be, at a minimum, equivalent to the personnel access authorization requirements for nuclear power plants under 10 CFR 73.56.

- U.S. KMP – the Chairman of the BOD or similar governing body, the Chief Executive Officer or equivalent, and the Chief Nuclear Officer or equivalent must be citizens of the United States.
- License Condition for Notification of Change to Negation Action Plan – a condition placed on the license requiring that any changes to the existing NAP be noticed to and approved by the NRC.
- NRC Oversight – monitoring to ensure compliance with the NAP.

Additional Generic Negation Action Measures Based on Level of FOCD

- Majority U.S. BOD – the BOD must be made up of a majority of U.S. citizens, none of whom are foreign-appointed or have existing ties to foreign entities.
- Special Nuclear Committee (SNC) – composed of outside directors, who must be U.S. citizens and have the authority to vote for the BOD, as necessary, on matters related to nuclear safety, security, or reliability. The SNC is required to report to the BOD on a quarterly basis for informational purposes only. The SNC is required to file an annual report to the BOD and the NRC for review regarding any identified FOCD issues and a summary of how such issues were resolved.
- Nuclear Advisory Committee (NAC) – composed of U.S. citizens who are not officers, directors, or employees of any parties or affiliates of those involved in the licensing action. The NAC will report on an annual basis and provide transparency to the NRC and other U.S. Federal agencies, as required, regarding foreign ownership and control of nuclear operations.

Site-Specific Negation Action Measures

The use of additional negation action measures could be implemented on a case-by-case basis to negate specific instances of foreign ownership, control, or domination that are not sufficiently addressed by the *Graded Generic Negation Action Plan Criteria*. The decision to implement additional negation action measures would be driven by the totality of the facts surrounding the licensing action and the resulting NRC staff analysis. Such facts may include, but are not limited to:

- Level of financing
- Source of financing
- Terms of financing arrangements
- FOCD review analysis and findings

Additional negation action measures available include tools utilized in past negation action plans, mitigation tools utilized in the Defense Security Service foreign ownership, control, or influence (FOCI) process, or any other measures deemed necessary and appropriate by the NRC. Examples of potential additional negation action measures include:

- Modification or termination of loan agreements, contracts, and other understandings with foreign entities
- Diversification or reduction of foreign source income
- Demonstration of financial viability independent of foreign entity
- Elimination or resolution of foreign debt
- Technology Control Plan
- Electronic Communications Plan
- Affiliated Operations Plan

- Security Control Agreement
- Special Security Agreement
- Facilities Location Plan
- Divestiture from foreign parent company, as appropriate