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Draft Guidance on Foreign Ownership, Control, or Domination

**Comment On:** NRC-2016-0088-0005

Draft Standard Review Plan on Foreign Ownership, Control, or Domination; Revision 1; Extension of Comment Period

**Document:** NRC-2016-0088-DRAFT-0008

Comment on FR Doc # 2016-12545

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## Submitter Information

**Name:** Anne Cottingham

**Submitter's Representative:** Anne Cottingham

**Organization:** Nuclear Energy Institute

## General Comment

Comments of the Nuclear Energy Institute on the NRC "Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1," and the NRC "Draft Regulatory Guide on Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility" (DOCKET ID NRC-2016-0088)

## Attachments

NEI Comment Package as filed 07 25 16

SUNSI Review Complete  
 Template = ADM - 013  
 E-RIDS = ADM-03

Add= S. Harwell (SWH2)

**ELLEN C. GINSBERG**

*Vice President, General Counsel  
and Secretary*

1201 F Street, NW, Suite 1100  
Washington, DC 20004  
P: 202.739.8140  
ecg@nei.org  
nei.org



NUCLEAR ENERGY INSTITUTE

July 25, 2016

Ms. Cindy Bladey  
Office of Administration  
U.S. Nuclear Regulatory Commission  
Mail Stop: OWFN-12-H08  
Washington, DC 20555-0001

**Subject:** Comments of the Nuclear Energy Institute on the NRC "Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1" and the NRC's "Draft Regulatory Guide on Foreign Ownership, Control, or Domination of Nuclear Power, and Non-power Production or Utilization Facility"  
(Docket ID NRC-2016-0088)

Dear Ms. Bladey:

Please find herewith the comments of the Nuclear Energy Institute, Inc. (NEI)<sup>1</sup> in response to the request of the U.S. Nuclear Regulatory Commission for public comment on the "Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1" (Draft SRP) and "Draft Regulatory Guide on Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility" ("Draft RG"). See 81 Fed. Reg. 24,893 (Apr. 27, 2016), 81 Fed. Reg. 33,555 (May 26, 2016) and 81 Fed. Reg. 33,556 (May 26, 2016). The Draft SRP is intended to provide updated guidance for the NRC staff in determining whether an applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. The Draft RG is intended to provide new guidance for NRC applicants on methods acceptable to the NRC staff for compliance with foreign ownership, control, or domination (FOCD) requirements in Section 103.d. of the Atomic Energy Act of 1954 and NRC regulations.

The Draft SRP revising the NRC's 1999 FOCD Standard Review Plan and the new FOCD Draft RG were prepared in response to Commission direction in 2013 that the Staff "provide a fresh assessment" of FOCD issues, including recommendations on any modifications to guidance or practice that may be warranted. 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

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

LBP-12-19" (Mar. 11, 2013) ("2013 SRM"), and more recent Commission direction in the May 4, 2015 Staff Requirements Memorandum in response to SECY-14-0089 ("2015 SRM").

In that 2015 SRM, the Commission instructed NRC staff to revise the existing FOCD Standard Review Plan, develop a new FOCD regulatory guide, and "develop a technical basis" for the new and revised guidance documents. The Commission directed the Staff to include in the modified guidance "graded Negation Action Plan criteria" to mitigate the potential for control or domination of licensee decision-making by a foreign entity, to describe acceptable NAP criteria based upon the level of FOCD, and to provide for the use of site-specific criteria as necessary. The SRM also stated that the revised SRP and regulatory guide should affirm the use of license conditions to incorporate NAPs and the NRC staff's "case-by-case, totality-of-the-facts review approach."

As discussed in the enclosed comments, NEI continues to believe it is essential for the NRC to update its FOCD licensing review process and the guidance used in conducting FOCD reviews for new reactor license applications and license transfers. However, when the Draft SRP and the Draft RG are reviewed against Commission direction, and the course of NRC-industry interactions on FOCD issues over the last several years, we do not believe the revised FOCD guidance reflects the substantive re-evaluation of FOCD matters that the Commission ordered. While the Staff has included in the draft guidance most (though not all) of the elements listed in the 2015 SRM, the FOCD guidance clearly fails to satisfy the Commission's underlying intent or address many of the industry's concerns.

This draft FOCD guidance does not reflect the "fresh assessment" to FOCD compliance requested by the Commission. In some respects the guidance does little more than re-package the status quo and is thus a retrenchment in the agency's position. In other respects the guidance expands the scope and depth of FOCD reviews into an FOCD "investigation," without any basis. If adopted in its current form, the guidance would afford the Staff essentially unfettered discretion to seek information and impose conditions without demonstrating how the FOCD review will safeguard the national defense and security, or minimize inappropriate foreign control over, or access to, nuclear facilities, nuclear materials, or sensitive information.

To illustrate the industry's broad-based concerns about the FOCD draft guidance, NEI's comments highlight the following issues:

- From a policy perspective, the draft guidance does not acknowledge the realities of today's global nuclear energy market as those realities affect FOCD reviews. In today's market, it is difficult to contemplate any nuclear project that would not involve some foreign role. Thus, adoption of the guidance as drafted would unnecessarily hamper future U.S. nuclear projects while providing no policy basis for doing so.
- From a legal perspective, the draft guidance virtually ignores recent adjudicatory decisions of the NRC Atomic Safety and Licensing Board and the Commission on FOCD matters, in which both

the Board and the Commission clearly rejected NRC staff positions on FOCD issues. On a related point, the guidance inexplicably eliminates important provisions in the 1999 Standard Review Plan addressing Commission FOCD precedent and policy. In particular, the guidance ignores the “orientation toward the common defense and security” that has previously been a bedrock principle of NRC foreign control determinations.

- From a regulatory perspective, the NRC staff has failed to comply with explicit Commission direction to provide a “technical basis” for the Draft SRP and Draft RG. The absence of any supporting technical or regulatory basis makes meaningful review and comment on the proposed guidance impossible, and compels the need for the Staff to withdraw the draft guidance and re-issue another version along with a valid technical basis. We think it is essential that the Staff provide a rationale for its FOCD guidance, which reflects many new NRC positions that appear to be unjustified. For example:
- The guidance expands the types of information that may be required from applicants and otherwise considered for FOCD reviews. While the guidance does apply the concept of a “totality of the facts” FOCD review, that concept is used as a justification for far-ranging FOCD inquiries and review of materials not in the license application or provided by the applicant. The guidance also expands the scope of FOCD reviews to include license renewal applications without justification.
- The guidance on foreign financing reviews as part of FOCD reviews appears to condone an overly broad and unduly burdensome scope of review.
- The guidance does not endorse or provide other useful guidance on the use of FOCD license conditions as requested by the Commission.
- The guidance does not reflect a true “graded” approach to FOCD as directed by the Commission. The proposed Negation Action Plan criteria are unnecessarily stringent and appear to be inconsistent with previously-imposed NAP criteria.

Given these deficiencies, NEI respectfully requests that the NRC withdraw the draft revised FOCD SRP and the new draft FOCD regulatory guide. The NRC should then prepare another version of both FOCD guidance documents that is supported by a valid technical basis and that proposes an actual graded approach for FOCD and negation actions. This updated guidance should then be made available for public comment before being submitted for Commission approval.

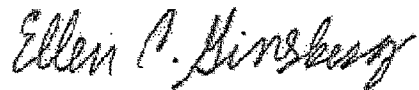
NEI Comments on FOCD Draft Guidance

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Thank you for your consideration of NEI's comments on behalf of the industry. If the Staff has questions or would like to discuss these or other FOCD issues, please do not hesitate to contact me ([ecg@nei.org](mailto:ecg@nei.org); 202.739.8140) or Anne Cottingham ([awc@nei.org](mailto:awc@nei.org); 202.739.8139).

Very truly yours,

A handwritten signature in cursive script that reads "Ellen C. Ginsberg".

Ellen C. Ginsberg

Enclosure

c:     The Honorable Stephen G. Burns, Chairman  
          The Honorable Jeff Baran, Commissioner  
          The Honorable Kristine L. Svinicki, Commissioner  
          Margaret M. Doane, Esq., General Counsel  
          William M. Dean, Director, NRC Office of Nuclear Reactor Regulation

## COMMENTS OF THE NUCLEAR ENERGY INSTITUTE

on

### **The NRC “Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1” and the NRC “Draft Regulatory Guide on Foreign Ownership, Control, or Domination of Nuclear Power, and Non-power Production or Utilization Facility” (Docket ID NRC-2016-0088)**

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#### **I. Overview**

On behalf of the commercial nuclear industry, the Nuclear Energy Institute, Inc. (NEI)<sup>1</sup> is pleased to comment on the U.S. Nuclear Regulatory Commission’s “Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1” (“Draft SRP”), which provides guidance and procedures for the NRC staff to use in evaluating whether an applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.<sup>2</sup> The NRC plans to use the Draft SRP in connection with NRC review of license applications for new facilities licensed under 10 CFR Parts 50 and 52, applications for the renewal of facility licenses, and applications for approval of direct or indirect transfers of facility licenses. When finalized, the Draft SRP would replace the existing NRC Standard Review Plan on Foreign Ownership, Control, or Domination published at 64 Fed. Reg. 52,355 (Sept. 28, 1999) (“1999 SRP”).

NEI also offers comments on the NRC’s “Draft Regulatory Guide on Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility” (“Draft RG”),<sup>3</sup> which provides guidance for applicants on methods acceptable to the NRC staff for compliance with foreign ownership, control, or domination (“FOCD”) requirements for power reactor and non-power production or utilization facilities. This is a new guidance document: there is currently no regulatory guide on FOCD reviews. The Draft RG may be used

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<sup>1</sup> 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 involved in the nuclear energy industry.

<sup>2</sup> The NRC “Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1” was originally published for comment on April 27, 2016 (81 Fed. Reg. 24,893). The NRC later extended the public comment period on the Draft SRP until July 25, 2016; see 81 Fed. Reg. 33,555 (May 26, 2016).

<sup>3</sup> The NRC “Draft Regulatory Guide on Foreign Ownership, Control, or Domination of Nuclear Power, and Non-Power Production or Utilization Facility” was published for comment on May 26, 2016 (81 Fed. Reg. 33,556). While the Draft RG and the Draft SRP are intended to provide complementary guidance, they were made available to the public at different times. As the NRC points out, the Draft RG addresses topics that are not addressed in the Draft SRP but will be added before the SRP is finalized for Commission approval. 81 Fed. Reg. at 33,557. NEI’s comments do not focus on such potential differences as the NRC does not provide further detail.

in connection with license applications for new facilities, renewal of existing facilities, or applications for approval of direct or indirect transfers of facility licenses. 81 Fed. Reg. 33,556. To avoid duplicative discussion, these comments provide parallel citations to the Draft SRP and Draft RG as appropriate. Additionally, specific recommended changes to the language of the Draft RG are set forth in the Appendix to these comments.

### **Regulatory Context for this Opportunity to Comment on FOCD Guidance**

The Draft SRP and the new Draft RG reflect the NRC staff's partial response to Commission direction to update agency guidance and practice on addressing foreign ownership, control, or domination issues in NRC licensing reviews. See 81 Fed. Reg. at 33,556-57. That Commission direction, in turn, responds in part to sustained industry expressions of concern regarding the NRC's interpretation and application of FOCD issues.

- On March 11, 2013 the Commission denied a petition for review of an Atomic Safety and Licensing Board decision involving the Calvert Cliffs Nuclear Power Plant, Unit 3, where the Board ruled that 100% indirect foreign ownership was prohibited.<sup>4</sup> In response to the request that it provide FOCD guidance, the Commission directed the NRC staff, outside of the adjudicatory context, to review FOCD issues and recommend whether the Commission should consider modifications to agency guidance or practice. *Id.*, 77 NRC at 101-02, 105.
- Also on March 11, 2013, the Commission issued a Staff Requirements Memorandum (SRM) directing the NRC staff to "provide a fresh assessment" of FOCD issues, including "recommendations on any proposed modifications to guidance or practice" that may be warranted.<sup>5</sup> The SRM directed NRC staff to consider, *inter alia*, "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."

In doing so, the 2013 SRM addressed the applicant's objection to the restrictive NRC positions and practices related to FOCD reviews. The underlying purpose of the "fresh assessment" of the NRC's approach to foreign ownership, control, and domination requirements was to consider the statutory requirements anew and determine whether

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<sup>4</sup> See *Calvert Cliffs 3 Nuclear Project, LCC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101, 104-05 (2013). The Commission found that the applicants objected not to the Board's decision on the application before it, but rather to the Commission's policy on foreign ownership, control, and domination, and that reconsideration of agency guidance should not be resolved in an application-specific proceeding. The Commission also ruled that no substantial question was raised on appeal in that the applicants had acknowledged they would not proceed with their application but instead seek a U.S. partner to hold part of EDF's 100% ownership share.

<sup>5</sup> 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" (March 11, 2013) ("2013 SRM").

and, if so, how, the agency can provide greater flexibility for applicants to satisfy FOCD criteria while continuing to meet the statutory purpose of safeguarding the national defense and security. The Commission also inherently recognized the need to provide applicants guidance on FOCD issues in advance of lengthy licensing reviews.

- NEI, on behalf of the industry, submitted 2013 comments in response to the NRC's request for stakeholder views on this important issue.<sup>6</sup>
- In 2014 the NRC issued a "Fresh Assessment of Foreign Ownership, Control, or Domination of Utilization Facilities" (SECY-14-0089). NEI commented on the SECY in November 2014.<sup>7</sup>
- On May 4, 2015, the Commission issued an SRM in response to SECY-14-0089 ("2015 SRM"). The Commission declined to fundamentally change its interpretation of the Atomic Energy Act's FOCD provision (e.g., the meaning of "ownership"), but nonetheless recognized the need for a graded approach to FOCD issues and clear guidance on negation actions. The 2015 SRM states:

"The Commission has approved the staff's recommendation for Option 3 [in SECY-14-0089]. Under this option, the staff will revise the foreign ownership, control, or domination (FOCD) Standard Review Plan (SRP) and develop a new regulatory guide to include graded negation action plan (NAP) criteria that would mitigate the potential for control or domination of licensee decision-making by a foreign entity. The criteria will be graded based on the level of FOCD and will describe acceptable provisions of NAPs, and will provide for the use of site-specific criteria as necessary. The FOCD SRP and regulatory guide should affirm the use of license conditions to incorporate NAPs and the staff's case-by-case, totality of facts' review approach. The FOCD SRP and regulatory guide should provide additional guidance in analyzing foreign financing. The staff will develop a technical basis for revising the FOCD SRP and developing an FOCD regulatory guide. The revised FOCD SRP and FOCD regulatory guide will be published for notice and public comment to solicit stakeholder input. The staff should provide the final revised SRP and regulatory guide to the Commission for its approval.

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<sup>6</sup> Letter from E. Ginsberg, NEI, to C. Bladley, NRC, "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)" (Aug. 2, 2013).

<sup>7</sup> See Letter and Attachment from E. Ginsberg, NEI, to NRC Chairman Allison MacFarlane, "Comments of the Nuclear Energy Institute on SECY-14-0089, 'Fresh Assessment of Foreign Ownership, Control, or Domination (FOCD) of Utilization Facilities'" (Nov. 25, 2014).



The staff should provide a SECY paper to the Commission presenting options for developing a formalized method of performing inimicality reviews. This process should include procedures for consulting with the intelligence community.”<sup>8</sup>

- In April 2016, the NRC issued a draft revised FOCD Standard Review Plan for comment; in May 2016 the NRC issued a new draft FOCD Regulatory Guide for comment.

## **II. Recommendations relating to the NRC’s Draft FOCD Standard Review Plan and Draft Regulatory Guide**

NEI continues to believe it is essential for the NRC to update its FOCD licensing review process and the related guidance documents used in conducting FOCD reviews for new reactor license applications and license transfers. The Commission supported this industry perspective in both its 2013 and 2015 Staff Requirements Memoranda. After directing a “fresh assessment” of FOCD issues in the 2013 SRM, including development of “recommendations on any proposed modifications to guidance or practice,” the Commission prescribed an even more specific regulatory path forward in its 2015 SRM on SECY-14-0089, calling for development of new and revised FOCD regulatory guidance and a supporting technical basis for that guidance. Unfortunately, when reviewed against that Commission direction and the course of industry-NRC interaction on FOCD issues over the past several years, we believe that the Draft SRP and the Draft RG do little more than re-package the status quo, and are in some respects a step in the wrong direction. None of the FOCD guidance seems to offer meaningful change based on the experience of recent FOCD licensing reviews (e.g., Calvert Cliffs 3, South Texas Project 3-4). The guidance thus does not reflect the “fresh assessment” that the Commission sought at the outset of this process.

While it has complied with the Commission’s literal instruction in the 2015 SRM, the NRC staff has failed to satisfy the underlying *intent* of the 2015 SRM in developing the draft FOCD guidance documents. That intent was to have the NRC staff undertake a “fresh assessment” of FOCD guidance to facilitate a more flexible and contemporary NRC approach to meeting the Atomic Energy Act’s FOCD provision. Instead, without explanation the updated guidance expands the scope of the NRC’s FOCD review to the point of giving NRC staff largely

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<sup>8</sup> In May 2016 the NRC released SECY-16-0056, “Recommendations for a Process to Conduct Inimicality Reviews for the Licensing of Utilization Facilities” (April 27, 2016). This SECY is not referenced in the draft FOCD guidance, although the guidance does cite earlier discussion of inimicality reviews in SECY-14-0089 and in the 2015 SRM. The Federal Register notices seeking comment on the Draft SRP and Draft RG state that future inimicality reviews will be conducted separately from FOCD reviews. Although a discussion of how NRC will coordinate FOCD reviews and inimicality reviews is beyond the scope of these comments, the industry is clearly interested in the NRC’s providing an efficient, effective, non-duplicative process for both FOCD and inimicality reviews. Based on a preliminary review of SECY-16-0056, it is not clear that the proposed new inimicality review process will meet those objectives. We urge the Commission to provide appropriate direction to the Staff as it shapes a workable new inimicality review process that satisfies statutory requirements, and to provide an opportunity for public comment on the new inimicality review process.

unfettered discretion to seek information and impose conditions without demonstrating how those “requests” or conditions will safeguard the national defense and security, or minimize inappropriate foreign control over, or access to, nuclear facilities, materials, or sensitive information.

It appears that the Staff also has ignored key Commission direction to provide a “technical basis” for the revisions to the FOCD SRP and the new FOCD regulatory guide. The absence of any accompanying basis for the draft FOCD guidance complicates stakeholder efforts to understand the underlying legal and regulatory predicate and to comment meaningfully on the guidance. As discussed below, NEI urges the NRC to withdraw the current versions of the draft FOCD guidance, prepare another iteration of the guidance that reflects a valid technical basis, and re-issue the guidance for additional public comment.

As discussed in more detail in Section III, below, the Draft SRP focuses heavily on assessing FOCD based upon the “totality of the facts.” This is certainly an appropriate consideration, for example, to determine whether FOCD actually exists in a particular case involving some foreign interest or participation. But the draft guidance seems to use the phrase “totality of the facts” only as a justification for far-ranging FOCD-related reviews of materials not in the license application or provided by the applicant. The draft guidance would allow NRC reviewers to require additional information, analyses, or justifications from the applicant in search of the elusive “totality of the facts.” (In that regard, the Draft SRP mentions “totality of the facts” in no less than ten places as a justification for the imposition of additional requirements or reviews.) By allowing the application of a “totality of the facts” standard in this manner, the guidance appears to promote fishing expeditions based on subjective judgment, with essentially no restrictions.<sup>9</sup> This opportunity for regulatory over-reach is unnecessary and unreasonable.

Moreover, the scope of the FOCD reviews conducted in recent years and that would be contemplated under the draft guidance would require substantive expertise in matters of corporate governance, project finance, and global capital markets. Such over-reach seems likely to increase, not bound, NRC FOCD reviews, and lead to unpredictable and potentially inconsistent results. We believe that such a result is contrary to the Commission’s intent in directing a fresh assessment of the agency’s FOCD criteria – most fairly construed as direction to

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<sup>9</sup> See Draft SRP, Sec. 2.3, p. 2-1, which states: “as part of their ‘totality of the facts’ due diligence analysis of the application, [the reviewer] should consider any 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.” In addition to inserting a new “totality of the facts” standard, the Draft SRP adds a definition of “other relevant information:” “*Other relevant information* regarding the application can be gleaned from a variety of sources available to the reviewer, including relevant open-source information (e.g., internet search engines and media reports), consultation with NRC Offices . . . or consultation with other Federal agencies, as appropriate.” The Draft RG lists the types of information the applicant should provide and states that the NRC staff will consider the totality of the facts surrounding the licensing action in making an FOCD determination.

the Staff to focus on relevant data that is genuinely probative in making objective FOCD determinations.

From a policy perspective, the draft FOCD guidance also raises concerns because, despite repeated Commission attention to this point, the Staff does not appear to acknowledge the realities of today's global nuclear energy market as those realities affect NRC FOCD issues.<sup>10</sup> In short, in today's market it is very difficult to contemplate any nuclear power project that would not involve some foreign role, whether as a technology provider, participant, or financial services provider. For that reason, adoption of the FOCD guidance as currently drafted unnecessarily hampers future U.S. nuclear projects with no policy basis whatsoever.

As the Commission has recognized, nuclear technology is no longer limited to the United States and a few select other nations; power reactor technology is now owned and controlled by international companies. Foreign vendors and nuclear service providers in the U.S. market are responsible, and experienced energy and technology companies (*e.g.*, AREVA, EDF, Toshiba, Mitsubishi) that have participated in the U.S. market for decades. Reactor designs such as the AREVA U.S. EPR, Toshiba ABWR and Mitsubishi U.S. APWR have been considered for new nuclear construction in the U.S. GE Hitachi and Westinghouse technologies are now owned, at least in part, by foreign companies. Continuing an overly-restrictive interpretation of FOCD limitations in NRC regulatory guidance could chill substantial future foreign participation in U.S. nuclear power plant development and reactor operations. As the industry looks to future applications for small modular reactors (SMRs) and non-light water reactor (non-LWR) advanced reactors, it is imperative that the Commission remove unnecessary roadblocks.

The positions underlying the draft FOCD guidance are inconsistent with the U.S. national policy of encouraging foreign investment to help grow the domestic economy. A 2013 report by the Department of Commerce and the President's Council of Economic Advisors stated that the U.S. must "continue to nurture and build upon the underlying strengths of the U.S. economy that make [foreign] firms want to invest here; including an open investment regime . . . predictable and stable regulatory regime...and new energy sources."<sup>11</sup> As put plainly by the White House,

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<sup>10</sup> In seeming contrast to the draft guidance, SECY-14-0089 states (pp. 8-9): "Today, the landscape is dramatically different than it was in the early stages of the Cold War. Nuclear power reactor technology is no longer limited to the U.S. and a few other countries, international companies now develop and own nuclear power technologies, reactor technology for new projects in the U.S. is sometimes of foreign origin, and many nuclear reactor vendors and nuclear service providers are foreign companies. Accordingly, today, foreign ownership of power reactors has little impact on the availability of existing technologies."

<sup>11</sup> "Foreign Direct Investment in the United States" (Oct. 2013), available at [http://www.whitehouse.gov/sites/default/files/2013fdi\\_report\\_-\\_final\\_for\\_web.pdf](http://www.whitehouse.gov/sites/default/files/2013fdi_report_-_final_for_web.pdf).

“[w]e can make it easier for businesses to invest in America – or we can make it harder.”<sup>12</sup> The Commission can advance the government’s objectives by revising the NRC approach to FOCD in a legally defensible manner to make investment easier rather than harder, while still protecting national security and nuclear safety.

From a legal perspective, the Draft SRP and Draft RG ignore recent, relevant adjudicatory decisions of the NRC Atomic Safety and Licensing Board and the Commission on FOCD matters — in which both the Board and the Commission squarely rejected NRC staff positions on FOCD issues. In our view, this discrepancy is inexplicable and unacceptable. As a practical matter, finalizing the Draft SRP and Draft RG as written will simply exacerbate an FOCD review process that is unacceptably slow, opaque, unpredictable, and in conflict with the NRC Principles of Good Regulation. The draft guidance does little to ameliorate the need for applicants to guess whether any degree of foreign involvement in their project will be viewed by the NRC as violating the FOCD prohibition.<sup>13</sup>

On a similar point, we question why the Draft SRP eliminates the existing discussion in the 1999 SRP entitled “Guidance on Applying Basic Limitations,” which addresses key Commission policies and precedent relating to what constitutes foreign “control.” In our view, that discussion in the 1999 SRP provides useful context for both applicants and the NRC staff, and should be retained in the final revised SRP. The deletion of this text contributes to the impression that the agency chooses to ignore (or read out) existing Commission guidance that an applicant is considered to be foreign owned, controlled, or dominated when 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, and, further, that the words “owned, controlled, or dominated” mean *relationships where the will of one party is subjugated to the will of another.*” 1999 FOCD Standard Review Plan, 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999), quoted in SECY-14-0089, at 5-6 (emphasis added).

With regard to Negation Action Plans (NAP), NEI agrees that when there is substantial indirect foreign ownership or where an opportunity for foreign control otherwise exists, whether direct or

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<sup>12</sup> “White House Fact Sheet and Report: On White House Roundtable on Investing in America” (May 20, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/05/20/fact-sheet-report-white-house-roundtable-investing-america>.

<sup>13</sup> This result is particularly troubling because (as demonstrated in the January 2015 Commission briefing on FOCD), the NRC staff’s position on FOCD issues is a clear outlier. Continuing confusion and inconsistency in the NRC’s FOCD review process is untenable because foreign-owned and foreign-controlled companies have been authorized to hold U.S. security clearances – up to and including Top Secret clearances – for decades, and are numbered among the most highly valued U.S. defense contractors (e.g., Rolls-Royce North America, Inc.; BAE Systems, Inc.). A core value of the National Industrial Security Program Operating Manual DoD 5220.22-M 1-104 (“NISPOM”) is the acknowledgement that “[f]oreign investment can play an important role in maintaining the vitality of the U.S. industrial base. Therefore, it is the policy of the U.S. Government to allow foreign investment consistent with the national security interests of the United States.” NISPOM 2-300 (emphasis added).

indirect, and whether exercised or not, negation measures under a NAP can serve to eliminate the possibility of FOCD. We continue to believe that NRC FOCD guidance should reflect the appropriate use of NAPs, and should apply a graded approach to the measures required (see the 2015 SRM) based on the facts of each case. At one end of a spectrum, foreign participation alone should not mandate a negation action plan where that participation allows no actual FOCD. At the other end, substantial ownership would require negation actions to eliminate foreign control. Everywhere in between, in accord with longstanding Commission precedent, there must be an orientation to actual security and safety implications. 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, even with foreign participation, no FOCD could exist.

Table 1 and Appendix A to the Draft SRP and Draft RG (Graded Generic Negation Action Plan Criteria) do not meet the objectives of a truly graded approach. Rather, Table 1 and Appendix A would establish NAP elements that are vague and over-restrictive, without demonstrating that such stringent provisions will in fact better safeguard the safety and national security aspects of reactor operations — which is the purpose of NRC FOCD reviews.<sup>14</sup> As discussed below, some of the proposed NAP criteria are more limiting than those in the 1999 SRP, and/or NRC past practice. This result seems squarely at odds with Commission direction to NRC staff to conduct a “fresh assessment” of FOCD guidance and practice.

Moreover, when evaluating an applicant’s NAP, regardless of the nature or level of foreign participation (e.g., ownership, funding), we urge the NRC staff to fully embrace the proven 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. Nuclear plant staff are well aware that abrogation of any of these legal and regulatory obligations could, and likely would, lead to serious civil and criminal sanctions.<sup>15</sup>

Additionally, the new provisions in the Draft SRP and Draft RG for evaluating foreign financing as part of the FOCD review are unnecessarily stringent and appear to equate any foreign financing with foreign financial *control*. If the reviewer determines that there is *any* foreign financing for the construction or operation of the proposed facility, this triggers an extremely broad (and surely time-consuming) supplemental FOCD review—regardless of the nationality of

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<sup>14</sup> See, e.g., 64 Fed. Reg. at 52,358.

<sup>15</sup> As the NRC has acknowledged in the nonproliferation context, other Executive Branch agencies (the U.S. State, Energy, Defense, and Commerce Departments) assess the international threat environment and have the responsibility and expertise to work through diplomatic and other channels to deter applications that raise foreign policy and inimicality concerns. See SECY-14-0089 at p. 8, n 7.

the foreign financier. These requirements entrench the unfounded assumption that the mere existence of applicant indebtedness to a foreign entity gives rise to a presumption of foreign control. That assumption is baseless and demonstrates a lack of appreciation for the global financial markets.

In light of these deficiencies, NEI respectfully requests that the NRC staff withdraw the Draft FOCD SRP and the Draft FOCD RG and prepare another revision of both guidance documents that is supported by a valid technical basis and that proposes a truly graded approach to FOCD and negation actions. We respectfully request another opportunity for public comment before the FOCD guidance is provided to the Commission for its approval (see the 2015 SRM) and issued in final form.

### **III. Specific Comments and Concerns relating to the Draft FOCD Standard Review Plan and Draft FOCD Regulatory Guide**

NEI's detailed comments and concerns relating to the draft FOCD SRP and Draft RG, which underlie the industry recommendations in Section II, are discussed below. In drafting these comments we have, as a starting point, compared the 2016 Draft SRP to the 1999 FOCD Standard Review Plan. We provide parallel citations to the 2016 Draft RG, as appropriate.

#### **The Draft Guidance Unreasonably Expands the Scope of FOCD Reviews**

The Draft SRP, Section 1.0 (Areas of Review), differs from the 1999 SRP in stating that the NRC will apply this guidance to reviews of applications for the renewal of facility licenses as well as applications for new nuclear facility licenses and for approval of direct or indirect transfers of facility licenses.<sup>16</sup> See also Draft RG, p. 2. No explanation is provided for this change. Simply stated, a license renewal application does not entail any direct or indirect changes in ownership of licensees. An NRC license renewal review is limited to discrete issues related to equipment aging during the period of extended operation; that review does not re-visit the current licensing basis of the plant. Absent some change in ownership, there is no need for a FOCD review for a license renewal application. If a transfer of ownership or operating authority were to occur upon issuance of the renewed license (or at any other time), the NRC staff would require a separate licensing action for the transfer of ownership. We therefore request that the NRC remove this reference to the applicability of this FOCD guidance to routine license renewal application reviews.

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<sup>16</sup> The 1999 SRP does not refer to FOCD reviews for NRC license renewal applications, but 10 CFR 54.17(b) provides: "Any person who is a citizen, national, or agent of a foreign country, or any corporation or other entity that the Commission knows or has reason to know is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government is ineligible to apply for and obtain a renewal license." See also 10 CFR 54.19(a), which states that license renewal applications "must include the information specified in 10 CFR 50.33(a) through (e) (which includes the FOCD information in Section 50.33(d)(iii)), as well as 50.33(h) and (i).

### **The Draft Guidance Unreasonably Expands the Information Required for FOCD Reviews and the Scope of Material Considered in Initial FOCD Reviews**

The 1999 SRP, Section 2.1, directs applicants to submit information “sufficient to comply with 10 CFR 50.33(d).” The scope of the FOCD review described in the Draft SRP is more expansive in that the NRC staff is to review information provided by the applicant under both 10 CFR 50.33(d) and 50.33(f). See also Draft RG, pp. 6, 8.

Another difference is that the scope of the initial FOCD review and determination under the draft SRP is noticeably broader than under the 1999 SRP:

The reviewer should first analyze all of the information submitted by the applicant to determine compliance with 10 CFR 50.33(d). Additionally, the reviewer, as part of their ‘totality of the facts’ due diligence analysis of the application, should consider any 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. (*Other relevant information* regarding the application can be gleaned from a variety of sources available to the reviewer, including relevant open-source information (e.g., internet search engines and media reports), consultation with other NRC Offices (e.g., Office of Nuclear Security and Incident Response (NSIR)), or consultation with other Federal agencies, as appropriate.)

Draft SRP, sec. 2.3.1 (emphasis in original).

Language authorizing the NRC reviewer to analyze “other relevant information of which the reviewer is aware” is found in both versions of the SRP. The Draft SRP differs in that the Staff has inserted a “totality of the facts” standard for NRC FOCD reviews—at least for the scope of information required. Additionally, the 2016 Draft SRP adds new text defining “other relevant information” quite broadly to include internet searches, review of media reports, and consultation with other federal agencies. This exceptionally broad scope of review seems likely to increase overall review time as well as the burden on both the NRC reviewer and the applicant (who may be asked to provide the material or respond to questions about the material). A review of the “totality of the facts” would justify the issuance of requests for additional information (RAIs) for virtually any data, with or without FOCD implications. When the NRC revises the existing draft FOCD guidance and includes the technical basis document requested, we urge the Staff to limit the scope of the FOCD review in a meaningful way—one that actually guides the NRC reviewer as to what information is relevant and what is not.

For example, a review of foreign ownership, control, and domination issues should be tied to the Atomic Energy Act; the NRC reviewer should not be permitted to pursue an unbounded inquiry into any foreign policy matter that might be of interest to the United States government. That is, absent an appropriate basis for doing so, it is not appropriate for an NRC reviewer to make

inquiries and require information and assurances from a foreign investor that is the subject of an FOCD review, based upon allegations of potential non-compliance with the Iran Sanctions Act by an affiliate of the foreign investor. Rather, the review should be bounded by the specific mandate of the NRC under the Atomic Energy Act to consider FOCD.

Both the 1999 SRP and the 2016 Draft SRP also contain provisions relating to *additional* levels of review. The Draft SRP contains a new section 2.3.2 that outlines the supplemental FOCD review to be conducted if the reviewer concludes the applicant may be owned, controlled, or dominated by a foreign entity. Some aspects of this supplemental review are derived from those in the 1999 SRP (see 1999 SRP, section 2.2), but are more expansive. For example:

- The Draft SRP directs the NRC reviewer to consider not only SEC information required to be filed by owners of more than 5% of a class registered under the Securities and Exchange Act (as directed by sec. 2.2.1. of the 1999 SRP), but also states: “Identification of ownership of less than 5% should be included if the holder is entitled to control the appointment or tenure of any management position.” See also Draft RG, pp.6, 7.
- The 1999 SRP directs the NRC to obtain information on “management positions held by non-U.S. citizens.” (Sec. 2.2.1.2.) The Draft SRP expands that guidance to include information on “key management personnel positions” and board of director 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 or articles of incorporation that describe the affected positions should also be requested.”<sup>17</sup> See also Draft RG, p. 7.
- The 1999 SRP directs the NRC to obtain information on “the ability of foreign entities to control the appointment of management personnel.” (Sec. 2.2.1.3.) The draft SRP goes further by directing NRC staff to obtain additional information concerning: “The ability, direct or indirect, of a foreign entity(s) to control the election, appointment, or tenure of members of the applicant’s BOD (or similar governing body), or other management positions, or have the power to control or cause the direction of other decisions or activities concerning nuclear safety or security of the applicant.” See also Draft RG, p. 7.

Notably, the Draft SRP also contains an additional catch-all provision in Section 2.3.2(a) 4 that directs the NRC reviewer to obtain and review “any other factor(s) that indicates or demonstrates a capability on the part of foreign entities to control or influence the operations or management

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<sup>17</sup> This new guidance appears to incorporate inquiries relating to foreign ownership, control, or influence (FOCI) under 10 CFR Part 95 as well as FOCD inquiries. The Staff provides no explanation for incorporation of FOCI requirements in an FOCD review. As the Draft SRP would appear to impose or imply duplicative reviews, and, in any event, is confusing, we request that the final FOCD SRP eliminate this provision.



of the applicant.” See also Draft RG, p. 7. This essentially unbounded provision provides no guidance to the reviewer and could lead to more protracted and costly FOCD reviews without any concomitant increase in national defense or security. This new Section 2.3.2(a) 4. should therefore be deleted.

The Draft SRP directs NRC staff to coordinate with NSIR staff to ensure a concurrent inimicality review on the proposed licensing action, to share inimicality and FOCD information, and to coordinate regarding recommended negation measures—to ensure that Negation Action Plans developed by staff consider ‘the totality of facts’ of a particular licensing action. See Draft SRP, sec. 2.3.2.b). However, the Draft SRP is silent on how the information from NSIR should be taken into account in the FOCD review. In our view, if the NSIR review does not identify any information that is inimical to the national defense and security, the minimum NAP provisions should be reduced. The Draft SRP should be revised accordingly.

Interestingly, the 1999 SRP lists three issues to be discussed in the NRC staff’s determination (1999 SRP, sec. 4.3). The Draft SRP retains two of these issues but eliminates the third. See Draft SRP, sec. 2.3.3. We urge the NRC to re-insert this third provision, which directs the NRC staff to address in its FOCD determination “[T]he source of foreign ownership, control, or domination, to include identification of immediate, intermediate, and ultimate parent organizations.” (See 1999 SRP, sec. 4.3.2.). Without this provision, the Draft SRP could be interpreted as dropping the requirement that the NRC reviewer document the bases for an FOCD finding. Such a result would be counter-productive to effective FOCD reviews.

#### **The Draft SRP Eliminates Important Guidance on NRC FOCD Acceptance Criteria and Commission Precedent**

The 1999 SRP, Sec. 3.2 (Guidance on Applying Basic Limitations) contains useful and important discussions of NRC FOCD policy and precedent. See 64 Fed. Reg. at 52,358; see also the Supplementary Information at 64 Fed. Reg. 52,355-52,357. For example, one of the sections omitted highlights the following concepts relating to “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. (Several examples discussing this concept also are deleted.)
- In evaluating possible FOCD concerns, percentages of outstanding shares held “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.”
- Whether “a foreign interest has the ‘power,’ direct or indirect, whether or not exercise[d], to direct or decide matters affecting the management or operations of the applicant,” determines the presence of foreign ownership, control, or domination. Similarly, “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.”

The Draft SRP provides no rationale for deleting the discussion of NRC FOCD precedent and other “lessons learned” from more than sixty years of NRC reviews of FOCD issues. We request that the NRC re-insert this Commission guidance in the final SRP. Without it, many provisions in the Draft SRP lack context. The absence of this discussion also highlights that the Draft SRP is silent with respect to some lessons learned from recent FOCD reviews and simply inconsistent with other lessons learned. These principles are essential considerations in determining whether a Negation Action Plan is even required in a given case, in addition to the degree of negation necessary.

For example, we request that the discussion of the *General Electric* case<sup>18</sup> be re-inserted in the final SRP. In that case, the Commission stated that the FOCD restriction “should be given an orientation toward safeguarding the national defense and security.” 3 AEC 99, 101. While the Draft SRP points to this important principle in one or two sentences, the guidance is otherwise silent on this point. With little or no guidance in the Draft SRP on how the NRC’s FOCD determination is oriented to safeguarding the national defense and security, it appears the NRC has decided to afford that critical principle no weight in its FOCD reviews.

In addition, the Draft SRP ignores the most recent NRC Atomic Safety and Licensing Board and Commission decisions on FOCD, which were issued in the 10 CFR Part 52 combined license (COL) proceeding for South Texas Project (STP) Units 3 and 4.<sup>19</sup> In that proceeding, both the Licensing Board and the Commission ruled against the NRC staff’s position on FOCD issues. Inexplicably, the revised guidance does not acknowledge, let alone incorporate, that NRC precedent. Indeed, the Draft SRP is in some respects inconsistent with the Licensing Board and Commission decisions in the South Texas Project COL proceeding, which involved large financial investments in a reactor by a foreign minority owner. Most notably, the Licensing Board in the *STP* proceeding rejected the NRC staff position on whether foreign investment equates to foreign control. Contrary to the Staff’s position, the Board found that foreign investment did not provide foreign control, because there were no corporate or contractual rights of the investor to control decisions related to safety or security.<sup>20</sup> While that decision is clearly relevant to matters covered in the Draft SRP, it is not mentioned: instead, the Draft SRP appears to adopt the NRC staff’s theory rejected in the *STP* proceeding. We request that the NRC revise the Draft SRP to incorporate the important principle adopted by the Licensing Board and reviewed by the Commission in the *STP* case.

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<sup>18</sup> *General Electric Company and Southwest Atomic Energy Associates*, 3 AEC 99 (1966).

<sup>19</sup> *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-14-03, 79 NRC 267 (2014), petition for review denied CLI-15-07, 81 NRC 481 (2015).

<sup>20</sup> *STP*, 79 NRC at 303-04.

The Draft SRP also fails to discuss relevant cases involving the permissible levels of foreign ownership of a licensee with a minority ownership share in a nuclear power plant. In past cases such as those involving New England Power<sup>21</sup> and PacifiCorp<sup>22</sup> in 1999, the NRC concluded that a foreign entity could indirectly own 100% of a non-operating licensee with a minority ownership of a nuclear power plant, subject to a negation action plan. The absence of any discussion of these cases in the Draft SRP could be interpreted as prohibiting 100% indirect ownership of a licensee with a minority share of a nuclear plant. Of note, the Draft RG contains a seemingly contrary statement (p. 6) that “the only absolute prohibitions regarding FOCD are direct foreign ownership at any percentage or 100 percent indirect foreign ownership.” The NRC has clearly allowed 100% foreign ownership of non-operating licensees. The final FOCD guidance should clarify this discussion.

Additionally, as explained below, some provisions in Table 1 and Appendix A in the Draft SRP and Draft RG are inconsistent with precedents related to the content of negation action plans. In particular, several proposed NAP provisions are *more restrictive than what the NRC has approved in the past*. No explanation is offered for this discrepancy. At a minimum, it is inappropriate for NRC staff to seek to impose more restrictive NAP provisions going forward than those it has previously accepted. These sections of the Draft SRP and Draft RG should be corrected in the final FOCD guidance documents. And, as discussed further below, the graded approach to negation actions should be thoroughly reconsidered to assure that negation actions are truly aligned with FOCD issues rather than a rote formula that applies negation based on degree of foreign participation rather than the degree or likelihood of foreign control.

### **The New FOCD Guidance on Evaluating Foreign Financing Is Unduly Burdensome**

The Commission’s 2015 SRM states that the revised FOCD SRP and regulatory guide “should provide additional guidance in analyzing foreign financing.” To that end, the Draft SRP contains a new section 3.0 on evaluating foreign financing. As drafted, the scope of NRC review of foreign financing provisions would include information provided by the applicant pursuant to 10 CFR 50.33(d) and 10 CFR 50.33(f); the latter is to include information relating to the source(s) and level(s) of financing for the construction and operation of the referenced facility sufficient to demonstrate that there is not an FOCD concern with the facility. See also Draft RG, p. 8.

In our view, the Draft SRP establishes an unnecessarily broad and burdensome scope of review relating to foreign financing, particularly considering that this is conducted in the context of an FOCD review, not a review to determine the applicant’s financial qualifications:

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<sup>21</sup> See *In the Matter of North Atlantic Energy Service Corporation, et al.* (Seabrook Station, Unit 1); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 71,832 (Dec. 22, 1999); *Northeast Nuclear Energy Company, et al.* (Millstone Nuclear Power Station, Unit 3); Order Approving Application Regarding Merger of New England Electric System and the National Grid Group PLC, 64 Fed. Reg. 72,367 (Dec. 27, 1999).

<sup>22</sup> See Safety Evaluation by the Office of Nuclear Reactor Regulation, Proposed Merger of PacifiCorp and ScottishPower PLC, Trojan Nuclear Power Plant, Docket No. 50-344 (Nov. 10, 1999).

“The reviewer should first analyze all of the information submitted by the applicant to determine if there is any foreign financing present. Additionally, the reviewer should consider all other relevant information of which the reviewer is aware, to determine whether there is any reason to believe that the applicant has foreign financing for the construction or operation of the referenced facility. (*Other relevant information* regarding the application can be gleaned from a variety of sources available to the reviewer, including relevant open-source information (e.g., internet search engines and media reports), consultation with other NRC Offices (e.g., NSIR, or consultation with other Federal agencies, as appropriate.)” Draft SRP, sec. 3.3.1.

Based on this initial review, if the reviewer has reason to believe the applicant has foreign financing, the reviewer is advised to obtain, “at a minimum,” additional information regarding any “contracts, agreements, understandings, or arrangements with a foreign entity(s)”; and “Information regarding any indebtedness, liabilities, or obligations, whether as borrower, surety, guarantor, or otherwise, to a foreign entity(s) 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 should include:

- 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 or pertinent extracts thereto (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. (Draft SRP, sec. 3.3.2.a).

Since project financing may not be fully arranged at the time of initial licensing, it is likely that many new plant applicants will be unable to provide the listed information. The Draft SRP should clearly state that the absence of such information is not a bar to approval of the application.

As noted previously, the Draft SRP also requires coordination with NRC NSIR staff (draft SRP, sec. 3.3.2.b), and instructions for preparing a supplemental FOCD determination if the reviewer continues to conclude that, *based on the source or level of foreign financing*, the applicant may be owned, controlled, or dominated by foreign interests, or the reviewer “has some reason to believe that may be the case.” Draft SRP, sec. 3.3.3.

This provision ignores the existence of global markets for finance, and the fact that nuclear projects in the future may routinely have some level of financing from foreign entities such as foreign financial institutions or foreign technology vendors. We suggest that this new section of the Draft SRP be amended to ensure that foreign financing reviews performed in the context of an FOCD review be more limited and more disciplined in the first instance. The Draft SRP states (p. 3-2) that the fact “the applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant does not necessarily render the applicant ineligible for a license.” See also Draft RG, p. 9. At the same time, this provision appears to assume that evidence of foreign financing is equivalent to foreign control (there is no *de minimis* level). If the initial staff review finds “any foreign financing,” a supplemental foreign financing review is performed; see Draft SRP, sec. 3.3.2. – 3.3.3.

As discussed above, the Licensing Board’s decision in *STP* explicitly rejected the NRC staff’s theory that foreign financial investment alone equates to foreign control. On this point, the NOTE on p. 3-2 of the Draft SRP recognizes that “the fact that an applicant is indebted to foreign interests or has contractual or other agreements with foreign entities that may affect control of the applicant does not necessarily render the applicant ineligible for a license.” In such a case, the NRC reviewer is advised to consult with NRC OGC. Regardless of the editorial note, the clear thrust of the guidance is that foreign financing increases vulnerability to foreign control or domination, and thus merits review of “all relevant information of which the reviewer is aware” to determine if there is reason to believe the applicant has foreign financing. The insinuation that foreign financial investment is equivalent to foreign control (or FOCD) is unsupported. The Draft SRP should be revised to adopt the agency position confirmed in the 2015 *STP* decision: absent some corporate or contractual rights of the investor to control decisions related to safety or security, foreign investment does not indicate that there is foreign control.

As a practical matter, the new provision on foreign financing, if not corrected, also could require both the applicant and the NRC staff to expend substantial time and resources collecting and evaluating data on foreign financing, without any indication that the licensee’s financial condition has made it more susceptible to foreign ownership, control, or domination. Among other things, these NRC reviews will have license application fee implications. Further, this new area of focus raises the possibility of unwarranted delays in licensing activities or approvals that may be triggered by such financial qualification reviews in the context of FOCD.

Moreover, in most cases, foreign investment does not raise concerns regarding proliferation of nuclear technology. Other NRC (10 CFR Part 110) and U.S. Department of Energy (DOE) (10 CFR Part 810) regulations, as well as NRC rules in 10 CFR Part 95, provide more than sufficient barriers to the proliferation of nuclear technology; there is no need to add unduly broad FOCD provisions. Raising barriers against foreign investment in U.S. commercial nuclear projects absent any discernible nuclear proliferation or nuclear safety concern, is contrary to the U.S. government’s policy of encouraging foreign investment.

### **The Draft Guidance Should Endorse the Use of FOCD License Conditions**

The Commission's 2013 SRM on SECY-12-0168 stated that the NRC staff's reassessment of FOCD issues should include a review of "the availability of alternative methods such as license conditions for resolving—following issuance of a combined license—foreign ownership, control, or domination concerns." Similarly, the Commission's 2015 FOCD SRM stated that the "FOCD SRP and regulatory guide should *affirm* the use of license conditions to incorporate NAPs and the staff's case-by-case, totality of facts review approach." The Draft SRP and Draft RG do not adequately address this clear Commission direction to provide guidance regarding FOCD license conditions.

The Draft RG mentions the use of license conditions at p. 6. Reciting the SRM language, the Abstract (p. iii) and Section 1.0 of the Draft SRP state that the revised SRP "allows for the use of license conditions to incorporate NAPs and the staff's 'totality of the facts' review approach . . . ." Additionally, SRP Section 4.3 states that the Staff reviewer "should incorporate each individual negation action measure in the form of a proposed license condition in the recommendation regarding whether there is any FOCD concern in approving the application." Table 1 and Appendix A in the Draft SRP and Draft RG include a "license condition for notification of change to Negation Action Plan" as a NAP criterion, without further detail.<sup>23</sup>

We thus request that the NRC revise the Draft SRP and Draft RG to include a more fulsome discussion that affirmatively reflects and endorses the use of license conditions as an acceptable approach to resolving FOCD concerns at the time of the licensing action. Stating the ability to impose a NAP by license condition is in itself unremarkable guidance. Longstanding precedent confirms that a license condition can be used to require implementation of a NAP. It is also important to clarify that 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 NAP elements required by the condition cannot be amended absent NRC approval.

In addition, 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 combined license 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 10 CFR 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 is crucial to entities proposing new plants. Recent examples demonstrate the difficulty of attracting domestic partners

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<sup>23</sup> In SECY-14-0089, the NRC staff addressed subject of FOCD license conditions on pp. 12-13, 18, and Enclosure 3, p. 10-14.

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 Atomic Energy Act 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.

### **The Draft Guidance Imposes Unduly Stringent Standards for Negation Action Plan Assessment and Does not Reflect a True Graded Approach to FOCD**

The 1999 SRP discussion of Negation Action Plans (Sec. 4.4.) provides that if the NRC reviewer continues to conclude following the Supplementary Determination 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, it shall "promptly" advise the applicant of that determination, and request that the applicant submit a Negation Action Plan. The 1999 SRP further directs that "when factors not related to ownership are present, the plan shall provide positive measures that assure that the foreign interest can be effectively denied control or domination," and provides examples of such measures that may be sufficient to negate foreign control or domination. These measures include:

- Modification or termination of loan agreements, contracts, and other understandings with foreign interests.
- Diversification or reduction of foreign source income.
- Demonstration of financial viability independent of foreign interests.
- Elimination or resolution of problem debt.
- Assignment of specific oversight duties and responsibilities to board members.
- Adoption of special board resolutions.

This guidance in the 1999 SRP was unobjectionable in concept. The primary issue with the 1999 SRP was the absence of any guidance as to how to apply these measures in particular situations, as opposed to a "one size fits all" approach. The treatment of Negation Action Plans in the Draft SRP (see Section 4, Table 1, and Appendix A), and the Draft RG (see Table 1 and Appendix A) is an attempt to fill that void.<sup>24</sup> The discussion of NAPs in the Draft SRP (Sec. 4.0.) is organized

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<sup>24</sup> The Commission's 2015 SRM directs the NRC staff to include in the revised FOCD Standard Review Plan and new regulatory guide "graded negation action plan (NAP) criteria that would mitigate the potential for control or domination of licensee decision-making by a foreign entity." The SRM further provides that NAP criteria "will be graded based on the level of FOCD and will describe acceptable provisions of NAPs, and will provide for the use of site-specific criteria as necessary."

differently than the 1999 SRP in that examples of measures that may be sufficient to negate foreign control or domination have been deleted and some factors have been moved to Appendix A. The NRC reviewer is to compare the NAP provided by the applicant to Table 1, "Graded Generic Negation Action Plan Criteria – Country Neutral," and Appendix A, "Graded Generic Negation Action Plan Criteria – Country Neutral: Grading Level of Foreign Ownership, Control, or Domination." See also Draft RG.

In both the Draft SRP and the Draft RG, Table 1 sets forth three Negation Action Plan configurations based on three corresponding levels of FOCD:

- Minority (less than 50%) indirect foreign ownership, no foreign "control" identified, and an insufficient percent of foreign ownership to elect board members;<sup>25</sup>
- Minority (less than 50%) indirect foreign ownership, potential foreign "control" identified, and the percent of foreign ownership is sufficient to elect board members;
- Majority (50 to 99%) indirect foreign ownership.

For each of these 3 scenarios, the *minimum required elements* for a NAP would include a board of directors (BOD) resolution, U.S. citizenship for all key management personnel for the applicant, inclusion of a license condition for notification of changes to the NAP, and NRC oversight. Additional requirements relating to BOD citizenship and creation of a Special Nuclear Committee and/or Nuclear Advisory Committee may also apply when potential foreign control is identified or when there is majority indirect foreign ownership. Appendix A contains additional NAP criteria, defines terms relevant to the "grading level" of FOCD (e.g., "ownership," "control," "domination"), and provides additional detail relating to the concepts presented in Table 1, e.g., what is a "board resolution," who are "key management personnel," what is a "majority U.S. BOD, a "special nuclear committee, a "nuclear advisory committee." It also lists factors relevant to the selection of site-specific Negation Action measures.

Although Table 1 is labeled as "graded generic NAP criteria," it does not reflect a true "graded" approach to FOCD. First, the gradation is intended to be "country neutral." The NRC staff appears to believe that FOCD does not contemplate any consideration of the country of origin of the foreign participant (perhaps leaving this consideration to be only a possible negative consideration in an inimicality review). But this approach rejects one of the most important considerations in assessing the "totality of the facts." Foreign participants from nations well-integrated into the international nuclear market are subject to safety, security, and non-proliferation conventions and oversight. An application of the FOCD statute with an orientation toward safety and security could not ignore country of origin – particularly where the country is

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<sup>25</sup> Under Table 1, a NAP would be required even when the applicant has minority (less than 50%) indirect foreign ownership, no foreign "control" has been identified, and the percentage of foreign ownership is insufficient to elect board members.



not being used to find no foreign participation, but only to determine the level of negation required in a particular case.

Second, Table 1 reflects an approach to negation based on level of foreign participation – not a level of actual or potential FOCD. The first level involves minority (less than 50%) indirect foreign ownership and “no control” identified. In this scenario, it is not clear what FOCD issue is being negated. No control or domination is assumed, only minority indirect ownership implicitly conferring no control. Yet the minimum negation actions under this scenario involve unspecified “board resolutions” and various citizenship restrictions unrelated to the minority owners. No technical or regulatory basis is provided for this approach. Access of the minority owners to classified information and special nuclear material would ordinarily already be addressed by 10 CFR Part 95 requirements as well as normal access authorization requirements. Additionally, it is not clear why a non-U.S. citizen in a key management position, with no apparent relationship to the minority owner, would be an FOCD concern. For cases involving less than 50% foreign ownership, presumptively there should be no NAP or at the least, very targeted conditions, absent some unusual factors (e.g., participation by representatives of hostile foreign powers).

Third, Table 1’s “minimum” negation actions at each level appear to be formulaic, divorced from the “totality of facts.” The Staff apparently intends every NAP element for each of the 3 levels of FOCD to contain, at a minimum, all of the elements in the corresponding right-hand column. Although these NAP elements may have been used before, imposing *all* of them in every case may not be necessary to mitigate the specific FOCD concerns presented in a particular case. For example, in the second level involving minority ownership but some governance rights, a Special Nuclear Committee (SNC) is specified. The role of the SNC is unclear. The need for such a committee also is subject to question in a situation in which the foreign participant has limited, non-controlling board representation. Governance restrictions alone may be sufficient to assure that indirect, minority foreign ownership does not lead to improper foreign control or domination.<sup>26</sup> Again, one-size-fits-all negation actions largely premised on degree of foreign ownership do not have a policy or legal basis—and do not reflect a true graded approach to FOCD. Table 1 does not appear to distinguish between the many possible levels of minority indirect foreign ownership between zero and 49 percent; in every instance the components of the Negation Action Plan would be the same.

Accordingly, we recommend that Table 1 be modified to clarify that not all of the actions in the right-hand column will be needed in every case.<sup>27</sup> We further request that the NRC adopt the additional specific revisions to the Draft RG included in the Appendix to these comments.

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<sup>26</sup> Ownership itself may not be able to be negated. But NRC precedent clearly shows that foreign ownership alone, short of 100%, does not violate the statute. Foreign control and foreign domination are the issues ultimately to be addressed.

<sup>27</sup> In contrast, see NEI’s proposed Graded Approach to Negation Actions, submitted as an Exhibit to the Nov. 25, 2014, NEI comments to the Commission on SECY-14-0089, “Fresh Assessment of Foreign Ownership, Control, or Domination (FOCD) of Utilization Facilities.”

**The Proposed NAP Criteria in Table 1 and Appendix A Are Overly-Restrictive, Inconsistent with NRC Precedent, and Should Be Revised**

As discussed above, many of the NAP criteria in Table 1 and Appendix A of the guidance are vague and/or overly-restrictive. In some cases, the criteria are actually *more restrictive* than (and thus inconsistent with) current NRC practice and the criteria in the existing 1999 SRP. As a result, the Draft SRP appears inconsistent with prior NRC precedent and the spirit of the Commission's direction that the NRC staff undertake a "fresh assessment" of the NRC's FOCD processes and guidance.

The following examples illustrate our concerns:

1. Footnote 3 to Appendix A states that the applicant's key management personnel (KMP) "shall provide evidence that they have been examined to the appropriate level that provides high assurance they are 'trustworthy and reliable,' such that they do not constitute an unreasonable risk to 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." This criterion should be deleted from the Draft SRP and Draft RG. There is no basis for establishing such criteria in negation action plans, and this provision is inconsistent with past NRC staff practice. Furthermore, Table 1 states that the KMP should be U.S. citizens, which is not consistent with past NRC practice. For example, the NRC staff approved the FOCD negation measures for AmerGen, which allowed a foreign citizen to serve as the President of the company, responsible for financial issues and business development, provided that ultimate management control over nuclear safety and security issues was retained by U.S. line management.<sup>28</sup>
2. Appendix A states (p. 1, Negation Action Measures) that the applicant shall issue a Board Resolution including a certification that foreign shareholders and their representatives "will be effectively excluded from NRC licensed activities, and will not be permitted to occupy positions that may enable them to influence the organization's nuclear policies and practices." Read literally, this provision would appear to prohibit foreign contractors and vendors from participating in a nuclear power plant project. More importantly, it would unnecessarily prevent a significant foreign investor from participating in, and even influencing, important operational decisions affecting its investment. This would be a substantial disincentive from investment in a U.S. project. This provision should be rewritten so that it focuses, like the FOCD statutory provision itself, not on participation and influence, but on *control of the ultimate safety or security decision* for a project. As

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<sup>28</sup> See Safety Evaluation by the NRC Office of NRR, Transfer of Facility Operating License from General Public Utilities Nuclear, Inc., et al. to AmerGen Energy Company, LLC and Approval of Conforming Amendment, Three Mile Island Nuclear Station, Docket No. 50-289 (April 12, 1999).

the Commission stated in the *SEFOR* decision,<sup>29</sup> and as is reiterated in the current FOCD SRP,<sup>30</sup> foreign entities may participate in project planning and review of program execution, as long as they are subject to U.S. direction. Prohibiting foreign participation in licensed activities is inconsistent with industry practices that enhance safety, such as in the example of AmerGen, where British Energy personnel held line management positions and shared “best practices” from the United Kingdom. We recommend that this provision in Appendix A (p. 1) be rewritten to state as follows: “Board Resolution – a resolution of the BOD that identifies the foreign shareholders and their representatives and includes a certification that the foreign representatives shall not be permitted to occupy positions that have ultimate decision-making responsibility for issues related to nuclear safety or security.”

3. Table 1 and Appendix A state that potential foreign control exists if there are foreign or foreign-appointed Board members, if a U.S. Board member has ties with a foreign entity, or if foreign ownership is sufficient to elect Board members. This provision is unduly restrictive. As discussed above, Board representation or ties to foreign interests do not equate to control. Additionally, this provision is inconsistent with NRC precedent. For example, the NRC staff approved the FOCD negation measures for AmerGen, where a foreign company appointed 50% of the Board members, but control over nuclear safety and security issues was retained by the U.S. directors and the “casting vote” of the U.S. Chairman of the Board.<sup>31</sup> Therefore, this provision in Appendix A should be rewritten to allow foreign Board members to serve, provided that ultimate control over nuclear safety and security issues is exercised by the U.S. directors.
4. Appendix A states that additional negation action measures may be needed to address levels of financing, sources of financing, and terms of financing arrangements, but provides no guidance on the degree to which financing may indicate control. In that regard, the Draft SRP inappropriately deletes the provision in the 1999 SRP stating that: “Even though a foreign entity contributes 50%, or more, of the costs of constructing a reactor . . . [this fact alone does] not require a finding that the applicant is under foreign control.” The final FOCD SRP and regulatory guide should provide some criteria on the level of foreign financing that equates to foreign control. Such guidance should take into

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<sup>29</sup> *General Electric Co.*, 3 AEC 99, 101.

<sup>30</sup> 1999 FOCD SRP, 64 Fed. Reg. 52,355, 52,358 (1999).

<sup>31</sup> See Safety Evaluation, NRC Office of NRR, Transfer of Facility Operating License from General Public Utilities Nuclear, Inc., et al. to AmerGen Energy Company, LLC and Approval of Conforming Amendment, Three Mile Island Nuclear Station, Docket No. 50-289 (April 12, 1999). See also Revised Safety Evaluation, NRC Office of NRR, Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring of Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2; and R.E. Ginna Nuclear Power Plant Docket Nos. 50-317, 50-318, 72-8, 50-220, 50-410, and 50-244 (Oct. 30, 2009), at 24.

account the recent decisions by the Commission and Licensing Board in the *STP* proceeding.<sup>32</sup> In particular, the guidance should establish a presumption that foreign financing does not equate to foreign control, absent any special rights of the foreign entity to control decisions related to safety or security.

5. Appendix A states that the Special Nuclear Committee (SNC) shall be comprised of outside directors. That provision is unduly prescriptive and no basis is provided for it. The final SRP and regulatory guide should allow inside directors to be on a special nuclear committee (when an SNC is needed), provided that they are U.S. citizens. In that regard, for the South Texas Project combined licenses the NRC approved a special nuclear committee that is allowed to have inside directors, provided they do not constitute a majority of the SNC.<sup>33</sup> Moreover, in instances where the licensee does not have outside directors, the SNC should be allowed to be comprised entirely of inside directors.
6. Table 1 and Appendix A state that the Board of Directors must be comprised of a majority of U.S. citizens. This provision is unnecessarily restrictive and inconsistent with precedent. For example, the NRC recently approved the STP combined licenses, where the Board for the lead applicant was comprised of an equal number of foreign and U.S. citizens, with U.S. citizens holding a majority of the voting rights of the Board.<sup>34</sup> The Draft SRP and regulatory guide should be rewritten to focus on *control of a majority of the voting rights on the Board in matters of safety and security*, not the majority of membership on the Board.
7. Table 1 and Appendix A would provide for a license condition requiring NRC approval for any change to the NAP. That provision is unduly restrictive and is inconsistent with NRC practice. For example, Section 2.D(14)(1) of the STP combined licenses states that a change in the NAP requires NRC approval only if it would result in a "decrease in the effectiveness of the Negation Action Plan." A similar provision should be included in the final SRP and regulatory guide.
8. Appendix A identifies various examples of additional negation measures, such as a Technology Control Plan, Electronic Communications Plan, Affiliated Operations Plan, Security Control Agreement, Special Security Agreement, and Facilities Location Plan.

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<sup>32</sup> *Nuclear Innovation North America LLC* (South Texas Project Units 3 and 4), LBP-14-03, 79 NRC 267 (2014), *petition for review denied* CLI-15-07, 81 NRC 481 (2015).

<sup>33</sup> *See, e.g.*, Final Safety Analysis Report, Section 1D.2.2, for STP Units 3 and 4.

<sup>34</sup> *See, e.g.*, *STP*, 79 NRC at 286-87. *See also*, Revised Safety Evaluation by the NRC Office of NRR, Direct and Indirect Transfers of Control of Renewed Facility Operating Licenses Due to the Proposed Corporate Restructuring of Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation, Nine Mile Point Nuclear Station, Unit Nos. 1 and 2; and R.E. Ginna Nuclear Power Plant Docket Nos. 50-317, 50-318, 72-8, 50-220, 50-410, and 50-244, (Oct. 30, 2009), at 24.

None of these terms is defined or explained. The final SRP, regulatory guide, and other revised FOCD guidance should define these terms and explain the limited circumstances under which they may be needed.

9. Table 1 and Appendix A identify the “minimum” content of a NAP with respect to three broad categories of foreign involvement in a project. However, Table 1 and Appendix A make no allowance for project-specific factors that might justify a reduction in the content of a NAP. For example, if the licensee in question is a minority owner of the nuclear plant and has no responsibility for construction or operation, the indirect foreign ownership of the licensee is substantially less than 50%, there is only one foreign member of the Board and that individual is from a friendly country, and there is no other indicia of foreign control, it should not be necessary to have a Special Nuclear Committee or a Board Resolution. The final SRP and regulatory guide should discuss such factors and should replace the term “minimum” with “acceptable.” See also the additional specific revisions to the Draft RG included in the Appendix to these comments.
10. We also note that Table 1 identifies “NRC Oversight” as an element of a NAP. However, since a NAP is established by an applicant or licensee, it is not appropriate for the NAP to direct the activities of the NRC, and the applicant and licensee cannot require NRC oversight. Therefore, reference to “NRC Oversight” can always be presumed and should be deleted in the description of the contents of a NAP.

**The NRC Should Revise Table 1 and Appendix A To Be Less Burdensome for Passive Investors in a Small Percent of a Nuclear Facility**

For indirect foreign ownership of less than 50% of a nuclear facility, Table 1 and Appendix A in the Draft SRP and Draft RG impose a single set of requirements regardless of the amount of indirect ownership. Such provisions are unnecessarily burdensome with respect to passive investment by a foreign entity in a small percent of a nuclear facility.

For future nuclear power plants (especially small, advanced reactors), it may be expected that there will be passive foreign investors. Such foreign investment may be necessary for many projects to proceed. However, foreign entities may be reluctant to make such investments, if they realize that they may be subject to extensive NRC scrutiny and unnecessary constraints on their oversight of their investments and business activities.

To reduce this burden and facilitate the types of passive foreign investment that will likely be needed for new facilities and advanced reactors in particular, Table 1 and Appendix A should be expanded to include a new category applicable to passive foreign investment of a small percent of a new facility. In that regard, we suggest that the following row be added to Table 1, as an acceptable (but not necessarily “minimum”) negation action:

Level of FOCD	Acceptable Negation Action Plan
<ul style="list-style-type: none"><li>• Each foreign entity has <math>\leq 25\%</math> indirect foreign ownership; and</li><li>• No directors or officers appointed by the indirect foreign owner.<sup>35</sup></li></ul>	<ul style="list-style-type: none"><li>• License condition prohibiting the minority foreign owner[s] from appointing a director or officer</li></ul>

Such a provision would be simple to implement. It would require minimal effort to draft the appropriate provisions in the license application, and would require no research and no evaluation of the “totality of the facts” by the NRC. Such a provision would minimize the nuclear regulatory burden associated with passive foreign investment of a small percent of a nuclear facility, and would result in greater regulatory certainty and stability for such passive investors.

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<sup>35</sup> If the foreign entity does not meet or does not want to meet this criterion, then the foreign entity would be subject to the provisions in the next row.

## APPENDIX

### Specific Comments on NRC Draft Regulatory Guide re “Foreign Ownership, Control, or Domination of Nuclear Power and Non-Power Production for Utilization Facility”

Reg Guide Citation	Reg Guide Language	Comment
p. 7, Section 1.1.2, 2 <sup>nd</sup> bullet	<p>"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. <i>If not provided with the application, copies of applicable bylaws, articles of incorporation, or other governance documents that describe the affected position(s) should also be provided.</i>" (emphasis added).</p>	<p>In the italicized sentence, it is not clear whose governance documents must be provided – the applicant's, or those of the foreign entity with which the KMP hold a position. If the latter, the condition is unduly burdensome and a listing of any such interlocking positions should be sufficient.</p>
p. 7, Section 1.1.2, 5 <sup>th</sup> bullet	<p>"Whether any foreign <i>entities</i> have management positions such as directors, officers, or executive personnel in the applicant's organization." (emphasis added)</p>	<p>"Entities" do not hold management positions. "Foreign entities" should be replaced with "non-U.S. citizens."</p>
p. 7, Section 1.1.2, 7 <sup>th</sup> bullet	<p>"Whether the applicant is indebted or has contractual or other agreements with foreign entities that may influence control of the applicant."</p>	<p>The Draft RG states that this factor is not disqualifying per se. However, we suggest that the language be revised to read as follows: "Whether the applicant is indebted or has <u>similar</u> contractual or other agreements with foreign entities that may influence control of the applicant."</p> <p>Per the NRC license transfer order</p>

		requirements, some NRC licensees have support agreements with foreign companies and/or other contracts with foreign entities for equipment and fuel cycle components, for instance.
p. 8, Section 1.2.2	"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."	It is not entirely clear what "foreign financing" is intended to mean in this context. NRC should clarify that this phrase is intended to apply to a loan for new construction, and is not intended to cover a support agreement with a foreign company.
p. 8, Section 1.2.2, 1 <sup>st</sup> bullet	"Information regarding any contracts, agreements, understandings, or arrangements with a foreign entity."	Clarify that the referenced "foreign entity" is the "foreign entity providing financing."
p. 9, Section D, "Implementation"	"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."	This language is vague and should be clarified. The RG text appears to mean that any previously-approved scenarios will remain valid, even if the 2016 Draft SRP and Draft RG would require other measures. But the separate statement in the RG that the backfit rule does not apply to this guidance seems to undercut that position. The Staff also should clarify that the reference to the "current licensing basis remains unchanged" refers to the licensing basis of the FOCD license conditions.