

PDR
AF 56-2

From: Catherine Holze
To: TWD2.TWP6(JKE)
Date: 10/31/96 5:33pm
Subject: FOCI COMMISSION PAPER -Reply

I have just received word from Kathryn Winsberg that, in light of a recent SRM requiring the staff to address the mysterious certificate procedures, Stuart Treby believes that the Commission paper should go beyond just the FOCI aspects and capture this part of the process too. Kathryn indicated that you are generally aware of this, as well.

As a result of the SRM, Marty Malsch intends to hold an OGC meeting in the near future, to attempt to determine a direction and plan of action. This will have a significant impact on the paper and certainly will affect our comments on the paper.

Kathryn will keep me advised but we think there seems to be little point in coming at you with piecemeal comments. We will let you know when we have a better idea what the precise effect will be on the paper, in terms of content and timeframe, but for the moment, please be aware that the comment process has been interrupted.

CC: RJB2, DFH, JXR, KLW

Don / JCS

DRAFT #4 - OCTOBER 10, 1996

FOR: The Commissioners

FROM: James M. Taylor, Executive Director for Operations

SUBJECT: INFORMATION PAPER: RESTRICTING FOREIGN INVOLVEMENT IN
THE PRIVATIZATION OF THE U.S. ENRICHMENT CORPORATION

PURPOSE:

To inform the Commission of NRC's proposed process for making the finding under the Privatization Act that USEC is not owned, controlled, or dominated by an alien, a foreign corporation or a foreign government. Two separate sources of restrictions apply to foreign ownership and involvement in the acquisition of the U.S. Enrichment Corporation (USEC). First, Title IX of the Energy Policy Act of 1992 and the USEC Privatization Act (Public Law 104-134) contain statutory requirements, and second, the National Industrial Security Program (NISP) contains requirements restricting foreign involvement in entities that require access to classified information.

ISSUE:

Public Law 104-134, by amending the Atomic Energy Act of 1954, mandates that the Commission not issue a certificate of compliance to USEC or its successor private corporation if the Commission determines that the corporation is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. It must be noted, however, that a privatized USEC or its successor will continue to require access to classified information. In accordance with the NISP, in order to acquire and maintain such access to classified information, a privatized USEC or its successor must be subject to a determination by the U.S. Government that it is free from foreign ownership, control, or influence (FOCI) which could result in a compromise of classified information. ✓

BACKGROUND:

The USEC Privatization Act, signed into law by President Clinton on April 26, 1996 (Public Law 104-134), directs USEC to implement a privatization plan. USEC has plans for two alternative paths for transferring the company to private ownership: (1) a sale through an initial public offering and (2) a merger and acquisition transaction. USEC, with the approval of the Secretary of the Treasury, will select the alternative that best satisfies the requirements of the Act. The private sector entity that purchases the

assets of USEC will be responsible for the operation of the two gaseous diffusion facilities and the development of the atomic vapor laser isotope separation (AVLIS) process. The Privatization Act amended Section 193 of the Atomic Energy Act to ensure, among other requirements, that the NRC not issue a certificate of compliance to USEC or its successor if the Commission determines that the corporation is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.

In addition to this statutory requirement, the transfer of ownership will be governed by the provisions of Executive Order 12829, "National Industrial Security Program," which establishes a program to safeguard Federal Government classified information that is released to contractors, licensees, grantees, and certificate holders of the U.S. Government. An integral part of the NISP provides criteria for determining whether U.S. companies handling classified material are under FOCI. A privatized USEC or its successor will continue to require access to classified information. Therefore, in accordance with the NISP, that entity is required to submit information to the U.S. Government to aid in the Government's determination as to whether the entity is owned, controlled, or influenced by a foreign person and whether, as a result, it could be financially or politically coerced or induced into providing classified information to the foreign interest.

DISCUSSION

The NISP FOCI requirements are being incorporated into NRC's regulations through a proposed rule (61 FR 40555) that amends the provisions of 10 CFR Parts 25 and 95 containing requirements for access to and protection of classified information. These FOCI requirements are more detailed and restrictive than any criteria that may have been used by the NRC under 10 CFR Part 50.38 to determine whether an entity was owned, controlled, or dominated by a foreign interest.

Since any successor to USEC will require access to classified national security information and will require a FOCI determination based on the NISP criteria, the NRC will use this process to satisfy that portion of the Commission mandate under the Act to ensure USEC's successor is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. NRC (ADM and OGC), the Department of Energy (DOE), and USEC have coordinated this process and USEC has incorporated the NISP FOCI requirements in its advance public information package for prospective bidders. All FOCI information received from prospective bidders will be forwarded to both DOE and NRC for review.

The NRC or DOE will make the FOCI determinations for this transaction, depending on when the initial certificates of compliance for USEC become effective. NRC will make the determinations when the certificates become effective and will make the final FOCI determination in order for the appropriate security clearances to be issued. The Federal Government reserves the right and has the obligation to impose security

methods, safeguards, or restrictions it believes are necessary to ensure that unauthorized access to classified information is effectively precluded and that performance of work under a license, certificate or contract is not adversely affected.

In the past, the NRC placed limited interest on FOCI with respect to Part 95 facilities and cleared NRC contractors because these entities resided at shared Federal Government facilities that already had FOCI programs in place. However, with the advent of USEC and the requirements of the NISP that pertain to those entities having access to classified information, the NRC will need to make FOCI determinations on all licensees, certificate holders, or contractors that are doing classified work associated with Commission activities.

COORDINATION

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