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RULEMAKING ISSUE (Notation Vote)

April 28, 2022

SECY-22-0033

FOR: The Commissioners

FROM: Daniel H. Dorman
Executive Director for Operations

SUBJECT: PROPOSED RULE: ALTERNATIVES TO THE USE OF CREDIT RATINGS (RIN 3150-AJ92; NRC-2017-0021)

PURPOSE:

The purpose of this paper is in response to the staff requirements memorandum (SRM) SRM-S20-0056, "Advance Notice of Proposed Rulemaking – Alternatives to the Use of Credit Ratings." This paper requests Commission approval to publish in the *Federal Register* for public comment the enclosed proposed rule (Enclosure 1) and draft implementation guidance. These documents are related to U.S. Nuclear Regulatory Commission (NRC) regulations for approved financial assurance mechanisms for decommissioning for applicants and licensees that use parent and self-company guarantees. The proposed rule would implement the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("the Dodd-Frank Act" or "Act"). The Dodd-Frank Act directed agencies to amend their regulations to remove any reference to or requirements of reliance on credit ratings and substitute an agency-specific standard of creditworthiness. The rule may impact applicants and licensees that are required to provide decommissioning financial assurance. This paper addresses no new commitments.

SUMMARY:

The staff recommends that the NRC amend its regulations for the financial assurance mechanisms for decommissioning for parent and self-company guarantees that require bond ratings issued by credit rating agencies. The proposed rule would remove bond rating requirements and rely instead on a new criterion: creditworthiness that demonstrates an

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adequate capacity to provide full and timely payment of the amount guaranteed. These changes are necessary to implement the Dodd-Frank Act, which directed agencies to amend their regulations to remove any reference to or requirements of reliance on credit ratings.

BACKGROUND:

In 2010, Congress passed the Dodd-Frank Act to “promote the financial stability of the United States by improving accountability and transparency in the financial system.” In section 931(5) of the Act, Congress found that “ratings on structured financial products have proven to be inaccurate” and that “[t]his inaccuracy contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy.” In section 939A of the Act, Congress directed each Federal agency to “review any regulation issued by such agency that requires the use of an assessment of the [creditworthiness] of a security or money market instrument and any references to or requirements in such regulations regarding credit ratings.” Section 939A further directed each such agency to “modify any such regulations identified by the review . . . to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of [creditworthiness] as each respective agency shall determine as appropriate for such regulations.”

As directed by section 939A of the Dodd-Frank Act, the NRC staff has reviewed its regulations for any references to or requirements regarding credit ratings. Appendices A, C, and E of Part 30 of Title 10 of the *Code of Federal Regulations* (10 CFR), “Rules of General Applicability to Domestic Licensing of Byproduct Material,” require specified bond ratings from Moody’s or Standard and Poor’s to satisfy certain decommissioning financial assurance requirements for materials, power reactor, and nonpower reactor applicants and licensees. In accordance with the Dodd-Frank Act, the NRC is proposing to amend these appendices by removing these requirements and relying instead on newly established standards of creditworthiness. The proposed rule also would impact other regulations that cite or reference these appendices, including 10 CFR 30.35(f)(2); 10 CFR 40.36(e)(2); 10 CFR 50.75(e)(1)(iii)(c); 10 CFR 70.25(f)(2); and 10 CFR 72.30(e)(2).

DISCUSSION:

Applicants and licensees must demonstrate reasonable assurance that funds will be available when needed for decommissioning in order to obtain and maintain a reactor license and certain materials licenses. Under the current regulations, this demonstration may be made by prepayment of funds; payment of funds into an external sinking fund; a surety method; insurance; or other guarantee method, including a letter of credit, a parent company guarantee, or a self-guarantee. The proposed rule would revise NRC regulations that address parent company and self-guarantees as only these financial assurance mechanisms rely, in part, on credit ratings.

For each entity (a company; a parent company; or a nonprofit college, university, or hospital) from which the NRC accepts a guarantee to provide decommissioning funding assurance, financial tests currently exist in 10 CFR Part 30, Appendices A, C, D, and E, for entities with and without credit ratings. The proposed rule would revise the NRC regulations for the financial tests that rely in part on credit ratings. Under the revised regulations, licensees or applicants seeking to initiate use of a guarantee mechanism would submit information that demonstrates creditworthiness consistent with the proposed regulation. Licensees currently using a guarantee mechanism would submit information that demonstrates creditworthiness consistent with the final rule when each licensee submits its annual documentation required to maintain its

eligibility to use a guarantee mechanism. The NRC would review the submissions and determine each licensee's creditworthiness by conducting an independent review to evaluate the licensee's risk of default based on a review of financial data. This review could include evaluation of financial data available from the licensee, open sources, and third parties, which may include credit ratings. The proposed rule would make conforming changes to the reporting requirement in paragraph III.E.(1) of Appendices C and E to 10 CFR Part 30 from 20 to 90 days. The 20-day reporting requirement was based on bond ratings, which would be removed as a result of the proposed rule, and the 90-day requirement conforms to existing reporting requirements in Appendices A and D to 10 CFR Part 30.

Overview of Proposed Changes

The staff is proposing to amend NRC regulations as follows:

- For use of parent company guarantees, revise paragraph II.A.2(i) in Appendix A to 10 CFR Part 30 to remove bond rating requirements and rely instead on a new criterion: creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed.
- For use of self-guarantees for commercial companies, revise paragraph II.A.3 in Appendix C to 10 CFR Part 30 to remove bond rating requirements and rely instead on a new criterion: creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed.
- For use of self-guarantees for nonprofit colleges, universities, and hospitals, revise paragraphs II.A.1 and II.B.1 in Appendix E to 10 CFR Part 30 to remove bond rating requirements and rely instead on a new criterion: creditworthiness that demonstrates an adequate capacity to provide full and timely payment of the amount guaranteed.
- Change the title of Appendix D to 10 CFR Part 30 to read "Alternative Criteria Relating to Use of Financial Tests and Self-Guarantee for Providing Reasonable Assurance of Funds for Decommissioning by Commercial Companies." This title change removes the term "That Have no Outstanding Rated Bonds" and provides alternative criteria to Appendix C for commercial companies.
- Revise the reporting requirement in paragraph III.E.(1) in Appendix C to 10 CFR Part 30 from 20 to 90 days, that, at any time the licensee becomes aware of information that is material to its capacity to provide full and timely payment of the amount guaranteed, the licensee will notify the Commission in writing.
- Revise the reporting requirement in paragraph III.E.(1) in Appendix E to 10 CFR Part 30 from 20 to 90 days, that, at any time the licensee becomes aware of information that is material to its capacity to provide full and timely payment of the amount guaranteed, the licensee will notify the Commission in writing.

Regulatory Analysis

The staff prepared a draft regulatory analysis (Enclosure 2) to determine anticipated costs and benefits associated with implementing the new requirements and the development of, or modifications to, NRC guidance. Although the regulatory analysis indicates the proposed rule is not cost beneficial, the NRC plans to proceed with the proposed rule because it is required by statute. The analysis determines that the proposed rule alternative and associated guidance would result in a total net overall cost of \$1.15 million. Of that amount, the NRC is expected to incur a cost of \$630,000, licensees would incur a cost of \$515,000, and the Agreement States would incur no cost \$0¹.

Cumulative Effects of Regulation

The staff considered the cumulative effects of regulation by engaging with external stakeholders throughout the development of the proposed rule and related regulatory activities. The NRC held a public meeting on October 30, 2019 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML19276F107), where the staff presented an analysis of the Dodd-Frank Act and its impact on NRC regulations and its initial rulemaking approach. In that initial approach, the provisions in 10 CFR Part 30, Appendices A, C, and E that relied on bond/credit ratings would be removed. The existing financial ratio metrics would have been relied on exclusively for parent company guarantees and self-guarantees. At the October 30, 2019, meeting, industry participants stated that the staff's initial rulemaking approach would have had a substantial negative impact on the availability of parent company guarantees and self-guarantees.² Participants suggested that the NRC examine approaches taken by other Federal agencies for implementing the Dodd-Frank Act requirements, which could help identify alternative approaches for assessing a licensee's creditworthiness to determine a licensee's ability to rely on a guarantee mechanism for decommissioning. In evaluating alternative approaches, the NRC staff determined that it would be beneficial to solicit stakeholders' views on the approaches when developing the proposed rule.

The staff held a second public meeting on February 8, 2021 (ADAMS Package Accession No. ML21028A334), to help facilitate comments for the advance notice of proposed rulemaking (ANPR) that published in the *Federal Register* on December 21, 2020 (85 FR 82950). The ANPR identified alternative approaches for assessing a licensee's creditworthiness and requested public comment on them. The staff presented background on section 939A of the Dodd-Frank Act, its impact on NRC regulations, and the staff's approach for compliance. Participants asked clarifying questions on the staff's approach and how to submit their comments.

The NRC received six comments (Docket NRC 2017-0021) on the ANPR, including comments from the State of New York, members of the public, and industry. Four comments (Nuclear Energy Institute, Entergy, Florida Power and Light, and Decommissioning Plant Coalition) supported the use of modified or new financial metrics for standards of creditworthiness. The

¹ Because the proposed changes to the regulations are Compatibility D or reserved to the NRC, the Agreement States are not required to implement these changes to maintain adequacy and compatibility. As such, the Agreement States would not incur any cost.

² A summary of the public meeting is available at ADAMS Accession No. ML19322A692.

other two comments were out of scope. The staff will conduct another public meeting during the comment period for the proposed rule.

Implementing Guidance

The staff plans to issue interim staff guidance, “Draft Interim Staff Guidance on Removal of Bond Ratings from Parent and Self-Guarantees, Decommissioning Financial Assurance” (ADAMS Accession No. ML21306A361), for implementing the proposed requirements in this rulemaking. The staff will solicit comments on the interim staff guidance in the *Federal Register* notice with the proposed rule.

Backfitting and Issue Finality Considerations

The NRC has not prepared a backfit analysis for the proposed rule because the proposed requirements are mandated by Congress and are, therefore, exempt from the NRC’s provisions in 10 CFR 50.109, 70.76, 72.62, and 76.76 (all titled “Backfitting”) and issue finality regulations in 10 CFR Part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants.” In developing this determination, the staff followed guidance in Management Directive 8.4, “Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests,” dated September 20, 2019 (ADAMS Accession No. ML18093B087), and NUREG-1409, Revision 1, “Backfitting Guidelines, Draft Report for Comment,” issued for comment in March 2020 (ADAMS Accession No. ML18109A498).

RECOMMENDATIONS:

The staff recommends that the Commission approve the enclosed proposed rule for publication in the *Federal Register*.

If the Commission approves publication of the proposed rule, the staff will complete the following six activities:

- (1) The staff will publish in the *Federal Register* the proposed rule, including notice of guidance, and provide a 75-day public comment period for the proposed rule and guidance.
- (2) The staff will make publicly available the draft regulatory analysis for the proposed rule.
- (3) The staff will submit information collection requirements to the Office of Management and Budget for its review and approval on or immediately after the date of publication of the proposed rule in the *Federal Register*.
- (4) The Office of Congressional Affairs will inform the appropriate congressional committees.
- (5) The staff will work with the Office of Public Affairs on an appropriate public communication when the NRC publishes the proposed rule in the *Federal Register*.
- (6) The staff will hold a public meeting during the comment period for the proposed rule.

RESOURCES:

The decommissioning and low-level waste business line includes resources for the rulemaking for fiscal years 2022 and 2023. Enclosure 3 includes an estimate of the NRC resources needed to complete this rulemaking. The resource estimates are not publicly available.

COORDINATION:

The Office of the General Counsel has no legal objection to the publication of the proposed rule. The Office of the Chief Financial Officer reviewed this package and has no concerns with the estimated resources in Enclosure 3.



Haney, Cathy signing on behalf
of Dorman, Dan
on 04/28/22

Daniel H. Dorman
Executive Director
for Operations

Enclosures:

1. Proposed Rule FRN
2. Draft Regulatory Analysis
3. Estimated Rulemaking Resources
(not publicly available)

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(RIN 3150-AJ92; NRC-2017-0021) DATED: April 28, 2022

SRM-S20-0056-2

ADAMS Accession Nos.: ML21306A353 (SECY paper); ML21306A348 (package)

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