

April 2, 1997

SECY-97-071

FOR: The Commissioners

FROM: L. Joseph Callan /s/
Executive Director for Operations

SUBJECT: INFORMATION PAPER: PROCEDURES TO ENSURE THAT
CERTIFICATION OF PRIVATIZED U.S. ENRICHMENT
CORPORATION MEETS REQUIREMENTS OF THE USEC
PRIVATIZATION ACT

PURPOSE:

The Commission instructed the staff, in a staff requirements memorandum dated October 29, 1996, to formulate a process to address certain mandates of the U.S. Enrichment Corporation (USEC) Privatization Act (the Act), regarding certification of USEC, or its private corporation successor. This paper is to inform the Commission of the staff's proposed processes for making the required findings.

BACKGROUND:

The Act, signed into law by President Clinton on April 26, 1996, directs USEC to implement a privatization plan. USEC has plans for two alternative methods of privatizing: (1) a sale through an initial public offering, or (2) a merger and acquisition. 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 plants, and the development of the atomic vapor laser isotope separation process. The Act prohibits the issuance of a certificate of compliance to that entity if the Commission

determines that:

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- (1) The entity is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; or
- (2) Issuance of a certificate would be inimical to the common defense and security of the United States; or
- (3) Issuance of a certificate would be inimical to the maintenance of a reliable and economical domestic source of enrichment services.

Before issuance of the Act, foreign ownership, control, or influence (FOCI) in USEC or its private successor was restricted by the National Industrial Security Program Operating Manual (NISPOM), promulgated pursuant to Executive Order 12829. The NISPOM establishes requirements to safeguard classified information and governs its release to foreign interests by Federal government contractors, licensees, grantees, and certificate holders. The NISPOM provides that any entity requiring access to classified information, as does USEC or any privatized USEC successor, must be determined by the U.S. Government to be free from FOCI that could potentially result in a compromise of classified information. It also sets forth detailed procedures and criteria for making this determination. The NISPOM was concurred in by the Department of Defense, the Department of Energy (DOE), NRC, and the Director of Central Intelligence.

Also before promulgation of the Act, the Atomic Energy Act of 1954 (AEA), as amended, required that NRC establish standards to govern the gaseous diffusion plants in order to provide for the common defense and security. The staff developed and applied NRC regulations and implemented a process for the review of USEC's application for initial certification that met this requirement. This process included a review of USEC plans for physical security, the protection of classified matter, and fundamental nuclear material control. The issuance of the initial certificate of compliance was based on the determination that USEC met the NRC standards that were developed to protect the common defense and security.

The Act requires the Commission to withhold certification if it determines that issuance would be inimical to the maintenance of a reliable and economical domestic source of enrichment services. The Commission has not been previously asked to evaluate whether a proposed action is detrimental to the viability of an industry subject to NRC regulation. Information about the intent of the language is contained in a Senate Committee report on an earlier version of the legislation (S. Rpt. No. 104-173 on S.755,

November 17, 1995), which states that the intent of the provision is to "...guard against the possibility of a foreign enrichment company acquiring the Corporation with the intent of operating it in such a manner inconsistent with its maintenance as an ongoing concern." The Act states that no certificate or license should be issued:

...if in the opinion of the NRC the issuance of such a license or certificate of compliance would be inimical to the common defense and security of the United States or would be inimical to the maintenance of a reliable and economical domestic source of enrichment services because of the nature and extent of the ownership, control, or domination of the Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances.

DISCUSSION:

The staff submitted, for Commission approval, on December 19, 1996, SECY-96-258, "Direct and Final Rulemaking: USEC Privatization Act - Conforming Changes and Revision to the NRC Enforcement Policy (NUREG-1600)." With this paper, the staff proposed amendments to 10 CFR Parts 2, 40, 70, and 76 to bring them into conformance with the statutory requirements of the Act. The requirements for prohibition of issuance of a certificate, if the Commission makes any of the determinations described above, were proposed for incorporation as 10 CFR Part 76, Section 76.22, entitled "Ineligibility of Certain Applicants."

Any successor to USEC will require access to classified information and thus will be subject to a FOCI determination based on the NISPOM criteria. The NISPOM FOCI requirements (Attachment 1) are being incorporated into NRC regulations through a proposed rule (61 FR 40555), that amends the provisions of 10 CFR Part 95, which contain requirements for access to and protection of classified information. The proposed NISPOM FOCI requirements are more comprehensive and prescriptive than the statutory prohibition of foreign ownership under Section 193 of the AEA. Therefore, the FOCI information that is elicited, and which is sufficient to make a FOCI determination, should also be sufficient to enable NRC to satisfy its statutory responsibility to ensure that the USEC successor is not owned, controlled, or dominated by an alien, a foreign company, or a foreign government.

NRC, DOE, and USEC coordinated closely during the development of the privatization process and USEC has incorporated the NISPOM FOCI requirements in its advance public information package for prospective bidders. DOE and NRC have agreed that DOE will be responsible for performing the FOCI investigations and NRC will be the cognizant security agency responsible for making the final FOCI determination. All FOCI information received from prospective bidders will be forwarded to both DOE and NRC for a preliminary determination allowing such bidders access to information regarding USEC operations. The time required to make the final FOCI determination for access to classified information will depend on the number and complexity of bidder information packages received from USEC. The same FOCI information will then be used to make the statutory determination regarding foreign ownership, control, or domination. The statutory determination must be made prior to certification of the USEC successor.

As noted above, the issuance of the initial USEC certification was based upon a finding of compliance with NRC standards to protect the common defense and security. Subsequent recertification of USEC, or certification of a USEC successor, will be based on the submission of changes to the initial application and a similar review process. This review will include the Safety Analysis Report, the Physical Security Plan, the Security Plan for the Protection of Classified Matter, and the Fundamental Nuclear Material Control Plan. Additional considerations will include the Commission's determination on FOCI, USEC's implementation of the Compliance Plans, accumulated regulatory experience, resident inspector reports, NRC inspection programs and reports dealing with physical protection, transportation protection, material control and accounting, and control of classified information.

The Commission determination regarding the maintenance of a reliable and economical domestic source of enrichment services will be based on a review of the following:

- (1) Information required under 10 CFR §76.33 "information known to the applicant concerning the control or ownership, if any, exercised over the applicant by any alien, foreign company, or foreign government," and FOCI information received pursuant to the NISPOM;
- (2) Information provided to NRC by the applicant or certificate holder to support its application for a certificate of compliance;

- (3) Information provided by the applicant or certificate holder to other Federal agencies necessary for their administration and enforcement of uranium delivery limitations, which is made available to NRC;
- (4) Information provided by DOE to the President for his annual report to the Congress on the effect of the low-enriched uranium deliveries under the Russian High Enriched Uranium Agreement on the domestic uranium mining, conversion, and enrichment industries, and the operations of the gaseous diffusion plants;
- (5) Reports, projections, and views on the economic effects of privatization solicited from appropriate industry, private, and government sources;

The staff is preparing a standard review plan for recertification of the gaseous diffusion plants. A chapter has been drafted (Attachment 2) to ensure consistency in, and to formally document, the processes that will be used to make these determinations. Historically, the staff's interest in the financial status of license holders has been of a narrow and specific scope. This interest has been limited to factors relevant to the ability of licensees to operate facilities safely and in accordance with NRC regulations and license/certificate commitments, and to properly perform decontamination and decommissioning activities. The expertise of the staff in matters of finance and economic analysis are correspondingly limited. Therefore, the staff may explore agreements with other government agencies that possess the appropriate expertise and knowledge in these areas. Further, the volume and type of information that is obtained concerning this matter may necessitate the procurement of a contract with an external organization that possesses the appropriate expertise and resources.

It is expected that the review of the information necessary to make these determinations could require a period of time that ranges from weeks to months. The determination regarding the maintenance of a reliable and economical domestic source of enrichment services, in particular, may require a lengthy period of review. However, the staff is aware that the process USEC plans to pursue for the privatization decision, upon the advice of their investment advisors, contains some very short deadlines for requesting NRC input on "preliminary" and "final" statutory determinations. In order to achieve the highest financial return to the U.S. Government from this transaction, there may be pressure for NRC to make these determinations in a much shorter time period than that discussed above. Under these

circumstances, it may be desirable to seek advance agreements with other government agencies to get a quick review and response concerning the "reliable and economical domestic supply of enrichment services" and other statutory criteria. Similarly, the NRC staff may need to consult with the Commission concerning these NRC determinations under more pressured deadlines than are normally imposed.

COORDINATION:

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

This paper was not coordinated with the Offices of the Chief Financial Officer and Chief Information Officer because the paper does not involve budget, resource impacts, financial management, or information management.

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for Operations

Attachments:

- 1) DOD, National Industrial Security Program Operating Manual, Chapter 2, Section 3, "Foreign Ownership, Control, or Influence (FOCI)," DOD 5520.22-M, January 1995.
- 2) Draft GDP Certification SRP, Chapter 1, Section 4, "Determination of Foreign Ownership and Control, Common Defense and Security, and Ensured Domestic Supply of Enrichment Services."

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U.S. NUCLEAR REGULATORY COMMISSION STANDARD REVIEW PLAN OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

1.4 DETERMINATION OF FOREIGN OWNERSHIP AND CONTROL, COMMON DEFENSE AND SECURITY, AND ENSURED DOMESTIC SUPPLY OF ENRICHMENT SERVICES

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U.S. NUCLEAR REGULATORY COMMISSION STANDARD REVIEW PLAN OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

1.4 DETERMINATION OF FOREIGN OWNERSHIP AND CONTROL, COMMON DEFENSE AND SECURITY, AND ENSURED DOMESTIC SUPPLY OF ENRICHMENT SERVICES

1.4.1 PURPOSE OF REVIEW

The purpose of this review is to determine that an applicant for certification is not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; that issuance of a certificate would not be inimical to the common defense or security of the United States; and that issuance of a certificate would not be inimical to the maintenance of a reliable and economical domestic source of enrichment services.

1.4.2 RESPONSIBILITY FOR REVIEW

Primary: Plant Project Manager

Secondary: Facilities Security Specialist/Safeguards Technical Analyst

Supporting: Material Control and Accounting Inspector/Resident Inspector

1.4.3 AREAS OF REVIEW

1. Foreign Ownership, Control, or Domination

Information submitted by the applicant, or obtained by other means, as specified in the National Industrial Security Program Operating Manual (NISPOM)¹. This information includes, but is not limited to:

- a. Portions of securities held by foreign entities or held by means that prevent the identification of the beneficial owner

¹ The proposed NISPOM requirements are more comprehensive and prescriptive than the statutory prohibition of foreign ownership in Section 193 of the Atomic Energy Act of 1954, as amended. Therefore the information submitted pursuant to the NISPOM requirements will also be sufficient to satisfy NRC's statutory and regulatory responsibilities to determine that the applicant is not owned, controlled or dominated by an alien, a foreign company, or a foreign government.

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- b. Management positions held by non-U.S. citizens
- c. Ability of foreign entities to control assignment of management positions
- d. Contracts and other agreements with foreign entities
- e. Finance and revenue sources involving foreign entities

2. Common Defense and Security

NRC staff will review the following for compliance with regulatory requirements to protect the common defense and security:

- a. Physical Security Plan
- b. Security Plan for the Protection of Classified Matter
- c. Fundamental Nuclear Material Control Plan
- d. Inspection, event, and resident inspector reports dealing with physical protection, transportation security, material control and accounting, facility security programs, and control of classified information

3. Ensured Domestic Source of Enrichment Services

The NRC staff will review the following material for indications that certification of the applicant would be inimical to the maintenance of a reliable and economical domestic source of enrichment services:

- a. Information required under Section 76.33 "information known to the applicant concerning the control or ownership, if any, exercised over the applicant by any alien, foreign company, or foreign government" and FOCI information received pursuant to NISPOM requirements
- b. Information provided to the NRC by the applicant or certificate holder to support their application for a certificate of compliance
- c. Information provided by the applicant or certificate holder to other federal agencies necessary for their administration and enforcement of uranium delivery limitations, which is made available to NRC

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- d. Information provided by DOE to the President for his annual report to the Congress on the effect of the low-enriched uranium deliveries under the Russian High Enriched Uranium Agreement on the domestic uranium mining, conversion and enrichment industries, and the operations of the gaseous diffusion plants
- e. Reports, projections, and views on the economic effects of privatization solicited from appropriate industry, private, and governmental sources

1.4.4 ACCEPTANCE CRITERIA

1.4.4.1 Regulatory Requirements

10 CFR § 76.22 addresses the ineligibility of applicants for certification if the Commission determines that:

1. The Corporation is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; or
2. The issuance of such a certificate of compliance would be inimical to
 - a. The common defense and security of the United States; or
 - b. The maintenance of a reliable and economical domestic source of enrichment services

10 CFR § 76.33 provides for NRC to require the applicant to supply additional information as necessary.

10 CFR § 95.15 addresses the collection of information necessary to determine that the applicant is not owned, controlled, or dominated by an alien, foreign corporation, or foreign government.

10 CFR Parts 76 and 95 contain and reference applicable regulatory requirements necessary to protect the common defense and security.

1.4.4.2 Regulatory Guidance

Regulatory guidance applicable to the areas of review in this chapter are:

1. U.S. Department of Defense, "National Industrial Security Program Operating Manual (NISPOM)," DOD 5520.22-M, Jan. 1995
2. U.S. Department of Energy, U.S. Nuclear Regulatory Commission, and United States Enrichment Corporation, Draft "Restrictions on Foreign Involvement in USEC's

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Privatization", February 21, 1997.

3. U.S. Nuclear Regulatory Commission, Reg Guide 5.67, "Material Control and Accounting for Uranium Enrichment Facilities Authorized to Produce Special Nuclear Material of Low Strategic Significance," Dec. 1993
4. U.S. Nuclear Regulatory Commission, NUREG-1456, "An Alternative Format for Category I Fuel Cycle Facility Physical Protection Plans," June 1992
5. U.S. Nuclear Regulatory Commission, "Security Plan Format and Content Guide for NRC Licensees, Certificate Holders, and Related Organizations," March 1994

1.4.4.3 Regulatory Acceptance Criteria

The application is acceptable if the following criteria are met:

Foreign Ownership, Control, or Domination

A determination is made, using the information as specified in the NISPOM, and criteria set forth in "Restrictions on Foreign Involvement in USEC's Privatization", that the applicant is free from foreign ownership, control, or influence.

Common Defense and Security

1. The applicant's Physical Security plan has been reviewed and approved.
2. The applicant's Security Plan for the Protection of Classified Matter has been reviewed and approved.
3. The applicant's Fundamental Nuclear Material Control Plan has been reviewed and approved.
4. A review of NRC inspection reports and resident inspector reports does not indicate a general failure to protect the common defense and security interests of the United States.

Ensured Domestic Source of Enrichment Services

A review of the information collected, including the views of other interested Federal government entities, does not indicate that certification would be inimical to the maintenance of a reliable and economical domestic source of enrichment services.

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1.4.5 REVIEW PROCEDURES

The reviewer should determine that there is no indication that the applicant is subject to any of the criteria set forth in 10 CFR Part 76.22, "Ineligibility of Certain Applicants."

Foreign Ownership, Control, or Domination

The reviewer should consult with the Division of Security to determine that a FOCI investigation has been completed and that no information was collected that indicates the Corporation is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.

Common Defense and Security

1. The reviewer should determine that the applicant's Physical Security plan and Fundamental Nuclear Material Control Plan has been reviewed and approved by the appropriate NMSS personnel.
2. The reviewer should consult with the Division of Security to determine that the applicant's Security Plan for the Protection of Classified Matter has been reviewed and approved.
3. The reviewer should ensure that NRC inspection reports and resident inspector reports do not indicate a general failure to protect the common defense and security interests of the United States.

Ensured Domestic Source of Enrichment Services

The reviewer should consult with Executive Branch entities, such as the following, to obtain their views on the economic impacts of certification:

Department of Energy
Department of Commerce
Department of Labor
Department of State
Department of Treasury
Defense Intelligence Agency
National Economic Council
Securities and Exchange Commission
Central Intelligence Agency
Board of Governors of Federal Reserve System
Office of the Comptroller of the Currency
Drug Enforcement Administration

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Bureau of Economic Analysis
Federal Energy Regulatory Commission
General Accounting Office
Council of Economic Advisors
Defense Special Weapons Agency
Export-Import Bank of the US
Federal Bureau of Investigation
Internal Revenue Service

1.4.6 EVALUATION FINDINGS

After evaluating the application and the supporting information, and determining the information to be adequate, the reviewer will be able to write a statement of the following type for inclusion in the CER:

On the basis of the staff's review and evaluation of the application for certification, and the views of concerned Federal government entities, the staff concludes that there is no indication of the following:

1. The applicant is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.
2. Issuance of a certificate of compliance would be inimical to the common defense or security of the United States.
3. Issuance of a certificate of compliance would be inimical to the maintenance of a reliable and economical domestic source of enrichment services.

1.4.7 REFERENCES

1. U.S. Nuclear Regulatory Commission, NUREG/CR-5734, "Recommendations to the NRC on Acceptable Standard Format and Content for the Fundamental Nuclear Material Control (FNMC) Plan Required for Low-Enriched Uranium Enrichment Facilities," Nov. 1991
2. Nuclear Regulatory Commission, NUREG-1322, "Acceptance Criteria for the Evaluation of Category I Fuel Cycle Facility Physical Security Plans," Jan. 1991