

Options

The staff has identified six options for regulatory actions that the U.S. Nuclear Regulatory Commission (NRC) could undertake regarding nuclear power plants that are foreign owned, controlled, or dominated (FOCD). The staff has also analyzed the means of implementing these six options as well as their respective challenges, advantages, and disadvantages. None of these options would affect the inimicality finding required by the Atomic Energy Act of 1954, as amended (AEA), Section 103d. and 104d. In addition, the options below are not mutually exclusive; the NRC may pursue some of the options simultaneously.

Option 1—Status Quo: Maintain the current NRC position on FOCD:

The status quo option would result in no changes to the FOCD requirements in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, “Domestic Licensing of Production and Utilization Facilities”; 10 CFR Part 54, “Requirements for Renewal of Operating Licenses for Nuclear Power Plants”; and 10 CFR Part 52, “Licenses, Certifications, and Approvals for Nuclear Power Plants,” and no proposals for legislative changes to Sections 103d. or 104d. of the AEA. If the NRC were to select this option, the agency would retain the current process for reviewing FOCD on a case-by-case-basis, applying a functional definition of control, analyzing the totality of facts and circumstances, and implementing negation action plans tailored to the specific situation. The status quo provides flexibility to the NRC to approve foreign ownership, including majority ownership, if the owner implemented sufficient negation action plans. Selection of this option would preclude issuance of a license in situations with 100 percent indirect foreign ownership and would disqualify 100 percent indirect foreign-owned entities from applying for licenses.¹ In addition, while foreign financing may also result in foreign control or domination, the current FOCD Standard Review Plan (SRP) provides no guidance to the staff with respect to how it should analyze foreign financing. Adopting the status quo option would leave the staff with no guidance on the analysis of foreign financing.

Some advantages to Option 1 are that it is consistent with previous legal positions and guidance. In appropriate circumstances, license conditions may be used after the staff has made its FOCD determination. Continuing the status quo does not, per se, deny all applicants where there may be FOCD and does not preclude ownership above 50 percent. The status quo option provides flexibility to address a variety of FOCD issues, including potential majority ownership and foreign financing, depending on the negation action plan.

Among the disadvantages of this option is that if it is selected, the absence of guidance to the staff regarding analysis of foreign financing will not be remedied. Furthermore, a case-by-case approach may not provide sufficient clarity to applicants regarding the acceptability of their corporate structures or financing arrangements for NRC licensing purposes early enough in the licensing process to be useful to them. In addition, the status quo does not establish sufficient

¹ There is an exception to this prohibition, however, for an entity whose stock is largely owned by U.S. citizens. This exception stems from a single anomalous case where a U.S. corporation, owned largely by U.S. citizens, moved offshore. The movement offshore rendered the corporation a foreign corporation, but the ultimate ownership remained largely domestic. See SECY-82-469, Planned Reorganization of McDermott Incorporated, Parent of Babcock and Wilcox (Nov. 25, 1982) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML13325B135) (reporting Commission approval of the transfer, conditioned upon the inclusion of license conditions to negate FOCD.)

criteria; therefore the staff would require significant information and analysis to ensure no foreign control and domination existed to approve greater than 50 percent ownership. The status quo option also does not provide for a graded response dependent on the degree of foreign ownership and control. Finally, the current FOCD SRP does not incorporate lessons learned from other Federal agencies regarding foreign ownership, other than to state that prior Commission decisions did not seem to turn on the particular nation associated with the applicant.

Option 2—Propose legislative change:

Under this option, the Commission would develop and submit a legislative proposal to Congress that would eliminate the current prohibition of FOCD of utilization facilities under Sections 103d and 104d. of the AEA.² The NRC would maintain the requirement that the Commission not authorize issuance of any license that is inimical to the common defense and security or the health and safety of the public. If the FOCD prohibition is removed from the AEA, rulemaking would be required to bring NRC regulations into conformity with the revised statutory language.

One of the advantages of this option is that it may permit applicants to take greater advantage of global capital markets to obtain financing for new commercial nuclear power plants. Also, the elimination of foreign ownership reviews could streamline licensing reviews in some cases.

However, because prior efforts at legislative change have not been successful, the probability of a legislative change occurring is questionable. The staff is unable to predict whether or how Congress would act on such a proposal. In addition, the staff would still be required to conduct an inimicality review, which may not shorten licensing reviews. Finally, seeking a legislative change may reduce the incentive to make changes in the NRC's regulatory guidance.

Option 3—Revise the FOCD SRP and develop regulatory guidance:

Under this option, the staff would revise the current FOCD SRP and develop regulatory guidance through notice and comment. The revised guidance would include graded negation action plans that would take into account multiple factors based on the potential for control and domination of licensee decision-making by a foreign entity. Under this approach, the staff would identify and prioritize the most important graded negation action plan criteria for the Commission's consideration.³ In addition, the staff would develop new generic negation action criteria that would clarify the types of negation plans that would be acceptable to the staff.⁴ The staff would develop a technical basis for revising the FOCD SRP and developing an FOCD regulatory guide. Having generic negation action plan criteria would help to provide greater transparency and regulatory efficiency. The revised FOCD SRP and development of an FOCD regulatory guide would be published for notice and public comment to solicit stakeholder input. This option would maintain the staff's current approach of not establishing a specific threshold above which it would be conclusive that an applicant is controlled by foreign interests.

² The NRC would maintain the requirement that the Commission not authorize issuance of any license that is inimical to the common defense and security or the health and safety of the public.

³ A detailed discussion of the history of negation action plans is included in Enclosure 2, "Commission Case Law, Agency Case Histories, and FOCD Negation Action Plans."

⁴ Generic negation criteria could also be issued by rule or established in a policy statement.

However, Option 3 would clarify that the extent of negation required should be graded, depending on the degree of FOCD. This option could be implemented, whether the Commission chooses to change its interpretation of the FOCD provision or of the statutory term “owned.” Adoption of this option may result, in some cases, in more comprehensive negation action plans and in other cases, less extensive negation action plans, depending on the degree of FOCD.

The advantages of Option 3 include the flexibility to closely tailor negation action plans to the degree of FOCD, including indirect ownership of greater than 50 percent. In addition, this option would provide applicants with greater clarity because it would provide them with information regarding the treatment of FOCD issues, including graded negation action plan criteria and sample negation action plans acceptable to the staff.

On the other hand, revising the FOCD SRP and developing regulatory guidance may require a reprioritization of resources, depending on the kind and number of changes involved. This option could provide less clarity and certainty than the use of specific bright-line thresholds. FOCD analysis may become lengthier as more complex contractual and financial arrangements are reviewed and require negation.

The staff considered implementing this option through rulemaking. However, a rulemaking approach presents several drawbacks: (1) it would require additional resources; (2) it would be very difficult to establish criteria through rulemaking that would cover every potential FOCD situation that could arise; (3) it would be a lengthy process that would involve a regulatory basis stage, at least one proposed rule stage, and a final rule stage; and, (4) no stakeholders proposed rulemaking as an option.

Option 4—Use of alternative procedures to address FOCD:

This option is outlined in the FOCD SECY Paper under the heading “SRM ISSUE 3: The availability of alternative methods such as license conditions for resolving—following issuance of a combined license—foreign ownership, control or domination concerns,” and discussed more fully in Enclosure 3, “SRM Issues,” to the FOCD SECY paper.

Option 5—Redefining ownership to mean direct ownership:

Under this option, the Commission would redefine the statutory term “owned.” The Commission currently defines “owned” to mean both direct and indirect ownership. The Commission could redefine “owned” to mean direct ownership only. This could be accomplished through various methods, including development of guidance, issuance of a revised FOCD SRP, or rulemaking.

There are advantages associated with this option. Under appropriate circumstances and with an appropriate negation action plan in place, this option would allow 100 percent indirect foreign ownership. The staff would retain the ability to analyze the indirect ownership of the applicant through the staff’s separate review of prohibitions against FOCD and as needed to address any inimicality concerns that could affect safe operations of NRC licensed facilities. There are also a number of disadvantages associated with this option. It would differ from the approach the

NRC has taken in all previous FOCD cases and from the approach of other Federal agencies.⁵ Redefining ownership to mean direct ownership would also constitute a substantial change in Commission interpretation. In any event, a justification for changing NRC policy would have to be developed and published for notice and comment. In addition, this option would require revisions to the FOCD SRP to explain this new interpretation and how this interpretation would affect the staff review process. Because foreign control and domination would still be subject to staff review, this option is unlikely to result in any substantial resource savings. Moreover, selection of this option may not have much practical effect because the negation action plan requirements to facilitate license issuance at a high level of indirect foreign ownership are likely to be no different than the negation required for licensees with direct foreign owners. Furthermore, the negation action plan requirements for a high level of indirect foreign ownership may be so onerous as to be practically infeasible. Finally, indirect foreign ownership arrangements can result in significant control and domination by the direct owners. In such situations, determining the measures and appropriate level of negation may be challenging and resource intensive.

Option 6—Establishing bright-line determinations and safe harbors:

Several stakeholders offered proposals for establishing bright-line determinations and safe harbors for analyzing FOCD. The staff considered how this approach could be implemented and determined that a bright-line determination and safe harbor could be established for ownership but the staff would still need to consider control and domination, as well as potential national security issues associated with FOCD that may affect the NRC-licensed facility.

Under this option, the Commission would replace some or all of its current “totality of facts” approach to analyzing the FOCD provision with generic, “bright-line” determinations based on ownership percentages of the applicant. This could involve the Commission in establishing safe harbors, where the staff would not require negation action plans for FOCD under certain circumstances (e.g., percentage of ownership of stock).

The Nuclear Energy Institute (NEI) has suggested that criteria could include membership in the Nuclear Suppliers Group (NSG).⁶ NEI suggested a safe harbor in the following circumstances: (1) where the foreign interest provides only financing for the nuclear project (including 100 percent foreign financing), absent any special control rights and assuming the foreign interest is not from an embargoed or restricted destination country, as set forth in 10 CFR 110.28, “Embargoed Destinations,” and 10 CFR 110.29, “Restricted Destinations;” (2) where a foreign entity has less than 10 percent of the voting control of an operating licensee;

⁵ See “Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons,” (73 *Federal Register* (FR) 70702 (November 21, 2008)). The definition by the Committee on Foreign Investment in the United States (CFIUS) of “control” is similar to the NRC’s. In addition, bright lines are not used by CFIUS, which considers “[t]ogether all relevant facts and circumstances in light of their potential on a person’s ability to determine, direct or decide important matters affecting an entity. As a result of this approach, the regulations provide no ownership threshold or other bright lines above which CFIUS would find control in all circumstances.”

⁶ NEI has suggested that criteria could include membership in NSG. See NEI Comments. NSG is a multilateral nuclear export control organization of 46 participating governments that establish guidelines for transfers of nuclear-related materials, equipment, and technology. See Hibbs, Mark. *The Future of the Nuclear Suppliers Group*. Carnegie Endowment for Peace, 2011.

(3) where the foreign interest owns less than 20 percent, files a Schedule 13G⁷ with the Securities and Exchange Commission, and is not from an embargoed or restricted destination country, as set forth in 10 CFR 110.28 and 10 CFR 110.29; and, (4) where a foreign interest holds less than 50 percent of an owner-licensee that does not have operating authority, provided that the foreign interest is from an NSG country, would result in a presumption of “no control” and not violate the FOCD provision.⁸ Further, industry representatives assert that where a “no control” presumption applies, there should be no need to impose mitigation measures through a negation action plan, because there is no corresponding concern regarding national security or control over special nuclear material.⁹

The staff does not recommend that the NRC implement this option. First, the NRC’s longstanding approach is to review all factors including, but not limited to, ownership, to make a determination regarding whether an entity is foreign controlled or dominated, regardless of the percentage of ownership or the nationality of the applicant. The staff’s experience is that FOCD can be exercised independent of ownership, such as through contractual arrangements or unanimous consent provisions. Limited liability companies can be organized so that ownership is decoupled from control. Anomalies can result from bright-line rules. For example, under a bright-line rule, the NRC may consider a 19.99-percent ownership free from FOCD, while requiring a 20.01-percent foreign ownership to undergo review.

Although adoption of this approach may create regulatory efficiencies in some cases, it is not clear that bright-line tests would actually lead to simplified reporting or review. Other Federal agencies have found bright-line tests challenging to implement. For example, CFIUS has not established bright lines and reviews and evaluates “...all relevant facts and circumstances in light of their potential on a person’s ability to determine, direct, or decide important matters affecting an entity. As a result of this approach, the regulations provide no ownership threshold or other bright lines above which CFIUS would find control in all circumstances.”¹⁰ In addition, CFIUS applies the same rules to each transaction, regardless of the nationality of the investor or the economic sector of the investment. Likewise, for the NRC FOCD analysis, the staff must review together all of the factors underlying any proposed ownership structure and consider that applicants may have affiliate ownership with another foreign country and may not indicate where the control exists.

Option 6 would restrict the staff’s ability to identify and negate problematic foreign control, which may also be inconsistent with the NRC’s requirements and intent to focus on the power to direct decision-making that affects plant safety and security. Because the definition of ownership is not defined in NRC regulations, it may be challenging for the staff to calculate the different ownership or control levels for any large, complex international entity. Further, in some cases, it is possible that even small levels of ownership might be precluded in control and domination,

⁷ The beneficial owner of more than 5 percent of any equity security of a class shall file with the SEC either a Schedule 13D or a Schedule 13G. The Schedule 13G asserts, in part, that the owner acquired the securities in the ordinary course of business and not with the “purpose nor the effect of changing or influencing the control of the issuer.” 17 CFR 240.13d-1(b)(1).

⁸ See NEI Comments at 21.

⁹ *Id.*

¹⁰ See “Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons,” (73 FR 70702 (November 21, 2008)).

depending on factors of the control arrangements. While the staff does not recommend establishing specific thresholds below which an FOCD review would not be conducted, as noted under Option 3, the staff's approach would consider the extent of FOCD, along with other factors, in establishing negation action plans.

RECOMMENDATIONS:

The staff recommends Option 3—that the NRC revise the FOCD SRP and develop regulatory guidance to be graded based on the level of FOCD. This options-graded approach would ensure that the regulatory burden imposed as a result of FOCD is commensurate with the level of FOCD.

However, the staff also believes that the NRC should not pursue any significant departure from the current interpretation of ownership. The staff believes FOCD determinations should continue to include both direct and indirect licensee ownership, since control of a licensee to date has always occurred through indirect ownership. This approach is also consistent with other Federal agencies' procedures and recommendations. In addition, it ensures that the staff can identify foreign ownership and control in complex ownership structures, such as LLC arrangements or holding companies. Finally, it provides sufficient flexibility to address emergent foreign ownership issues.

Under this option, the staff would revise the FOCD SRP, develop a regulatory guide, and submit the revised FOCD SRP and the new regulatory guide to the Commission for approval. Consistent with the NRC's principles of good regulation, the staff believes that the agency can achieve more clarity and efficiency through revised guidance. Such guidance would include examples of acceptable negation action plans and would provide information on how the staff would review and negate FOCD and implement license conditions.