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POLICY ISSUE (Information)

April 2, 1997

Secy-97-071

FOR: The Commissioners

FROM: L. Joseph Callan
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:

NOTE: TO BE MADE PUBLICLY AVAILABLE IN
5 WORKING DAYS FROM THE DATE OF
THIS PAPER

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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.


L. Joseph Callan
Executive Director
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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Section 3. Foreign Ownership, Control, or Influence (FOCI)

2-300. General.

- a. This Section establishes the policy concerning the initial or continued clearance eligibility of U.S. companies with foreign involvement; provides criteria for determining whether U.S. companies are under foreign ownership, control or influence (FOCI); prescribes responsibilities in FOCI matters; and outlines security measures that may be considered to negate or reduce to an acceptable level FOCI-based security risks.
- b. The foreign involvement of U.S. companies cleared or under consideration for a facility security clearance (FCL) is examined to ensure appropriate resolution of matters determined to be of national security significance. The development of security measures to negate FOCI determined to be unacceptable shall be based on the concept of risk management. The determination of whether a U.S. company is under FOCI, its eligibility for an FCL, and the security measures deemed necessary to negate FOCI shall be made on a case-by-case basis.

2-301. Policy. Foreign 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. The following FOCI policy for U.S. companies subject to an FCL is intended to facilitate foreign investment by ensuring that foreign firms cannot undermine U.S. security and export controls to gain unauthorized access to critical technology, classified information and special classes of classified information:

- a. A U.S. company is considered under FOCI whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through the ownership of the U.S. company's securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may affect adversely the performance of classified contracts.
- b. A U.S. company determined to be under FOCI is ineligible for an FCL, or an existing FCL shall be suspended or revoked unless security measures are

taken as necessary to remove the possibility of unauthorized access or the adverse affect on classified contracts.

- c. The Federal Government reserves the right and has the obligation to impose any security method, safeguard, or restriction it believes necessary to ensure that unauthorized access to classified information is effectively precluded and that performance of classified contracts is not adversely affected.
- d. Changed conditions, such as a change in ownership, indebtedness, or the foreign intelligence threat, may justify certain adjustments to the security terms under which a company is operating or, alternatively, that a different FOCI negation method be employed. If a changed condition is of sufficient significance, it might also result in a determination that a company is no longer considered to be under FOCI or, conversely, that a company is no longer eligible for an FCL.
- e. Nothing contained in this Section shall affect the authority of the Head of an Agency to limit, deny or revoke access to classified information under its statutory, regulatory or contract jurisdiction. For purposes of this Section, the term "agency" has the meaning provided at 5 U.S.C. 552(f), to include the term "DoD Component."

2-302. Factors.

- a. The following factors shall be considered in the aggregate to determine whether an applicant company is under FOCI; its eligibility for an FCL; and the protective measures required:
 - (1) Foreign intelligence threat;
 - (2) Risk of unauthorized technology transfer;
 - (3) Type and sensitivity of the information requiring protection;
 - (4) Nature and extent of FOCI, to include whether a foreign person occupies a controlling or dominant minority position; source of FOCI, to include identification of immediate, intermediate and ultimate parent organizations;

- (5) Record of compliance with pertinent U.S. laws, regulations and contracts; and
 - (6) Nature of bilateral and multilateral security and information exchange agreements that may pertain.
- b. In addition to the factors shown above, the following information is required to be furnished to the CSA on the CSA-designated form. The information will be considered in the aggregate and the fact that some of the below listed conditions may apply does not necessarily render the applicant company ineligible for an FCL.
- (1) Ownership or beneficial ownership, direct or indirect, of 5 percent or more of the applicant company's voting securities by a foreign person;
 - (2) Ownership or beneficial ownership, direct or indirect, of 25 percent or more of any class of the applicant company's non-voting securities by a foreign person;
 - (3) Management positions, such as directors, officers, or executive personnel of the applicant company held by non U.S. citizens;
 - (4) Foreign person power, direct or indirect, to control the election, appointment, or tenure of directors, officers, or executive personnel of the applicant company and the power to control other decisions or activities of the applicant company;
 - (5) Contracts, agreements, understandings, or arrangements between the applicant company and a foreign person;
 - (6) Details of loan arrangements between the applicant company and a foreign person if the applicant company's (the borrower) overall debt to equity ratio is 40:60 or greater; and details of any significant portion of the applicant company's financial obligations that are subject to the ability of a foreign person to demand repayment;
 - (7) Total revenues or net income in excess of 5 percent from a single foreign person or in excess of 30 percent from foreign persons in the aggregate;
 - (8) Ten percent or more of any class of the applicant's voting securities held in "nominee shares," in "street names," or in some other method that does not disclose the beneficial owner of equitable title;
 - (9) Interlocking directors with foreign persons and any officer or management official of the applicant company who is also employed by a foreign person;
 - (10) Any other factor that indicates or demonstrates a capability on the part of foreign persons to control or influence the operations or management of the applicant company; and
 - (11) Ownership of 10% or more of any foreign interest.
- 2-303. Procedures.**
- a. If there are any affirmative answers on the form, or other information is received which indicates that the applicant company may be under FOCI, the CSA shall review the case to determine the relative significance of the information in regard to:
 - (1) Whether the applicant is under FOCI, which shall include a review of the factors listed at 2-302;
 - (2) The extent and manner to which the FOCI may result in unauthorized access to classified information or adversely impact classified contract performance; and
 - (3) The type of actions, if any, that would be necessary to negate the effects of FOCI to a level deemed acceptable to the Federal Government. Disputed matters may be appealed and the applicant shall be advised of the government's appeal channels by the CSA.
 - b. When a company with an FCL enters into negotiations for the proposed merger, acquisition, or takeover by a foreign person, the applicant shall submit notification to the CSA of the commencement of such negotiations. The submission shall include the type of transaction under negotiation (stock purchase, asset purchase, etc.), the identity of the potential foreign person investor, and a plan to negate the FOCI by a method outlined in 2-306. The company

shall submit copies of loan, purchase and shareholder agreements, annual reports, bylaws, articles of incorporation, partnership agreements and reports filed with other federal agencies to the CSA.

- c. When a company with an FCL is determined to be under FOCI, the facility security clearance shall be suspended. Suspension notices shall be made as follows:

- (1) When the company has current access to classified information, the GCAs and prime contractor(s) of record shall be notified of the suspension action along with full particulars regarding the reason(s) therefor. Cognizant contracting agency security and acquisition officials shall be furnished written, concurrent notice of the suspension action. All such notices shall include a statement that the award of additional classified contracts is prohibited so long as the FCL remains in suspension.

- (2) The company subject to suspension action shall be notified that its clearance has been suspended, that current access to classified information and performance on existing classified contracts may continue unless notified by the CSA to the contrary, and that the award of new classified contracts will not be permitted until the FCL has been restored to a valid status.

- d. When necessary, the applicant company shall be advised that failure to adopt required security measures, may result in denial or revocation of the FCL. When final agreement by the parties with regard to the security measures required by the CSA is attained, the applicant shall be declared eligible for an FCL upon implementation of the required security measures. When a previously suspended FCL has been restored to a valid status, all recipients of previous suspension notices shall be notified.

- e. A counterintelligence threat assessment and technology transfer risk assessment shall be obtained by the CSA and considered prior to a final decision to grant an FCL to an applicant company under FOCI or to restore an FCL previously suspended. These assessments shall be updated periodically under circumstances and at intervals considered appropriate by the CSA.

- f. Whenever a company has been determined to be under FOCI, the primary consideration shall be the safeguarding of classified information. The CSA is responsible for taking whatever interim action necessary to safeguard classified information, in coordination with other affected agencies as appropriate. If the company does not have possession of classified material, and does not have a current or impending requirement for access to classified information, the FCL shall be administratively terminated.

2-304. Foreign Mergers, Acquisitions and Takeovers, and the CFIUS.

- a. Proposed merger, acquisition, or takeover (transaction) cases voluntarily filed for review by the Committee on Foreign Investment in the United States (CFIUS) under Section 721 of Title VII of the Defense Production Act (DPA) of 1950 (P.L. 102-99) shall be processed on a priority basis. The CSA shall determine whether the proposed transaction involves an applicant subject to this Section and convey its finding to appropriate agency authorities. If the proposed transaction would require FOCI negation measures to be imposed if consummated, the parties to the transaction shall be promptly advised of such measures and be requested to provide the CSA with their preliminary acceptance or rejection of them as promptly as possible.

- b. The CFIUS review and the industrial security review are carried out in two parallel, but separate, processes with different time constraints and considerations. Ideally, when industrial security enhancements (see Sections 2-305 and 2-306) are required to resolve industrial security concerns of a case under review by CFIUS, there should be agreement before a recommendation on the matter is formulated. As a technical matter, however, a security agreement cannot be signed until the proposed foreign investor legally completes the transaction, usually the date of closing. When the required security arrangement, (1) Has been rejected; or (2) When it appears agreement will not be attained regarding material terms of such an arrangement; or (3) The company has failed to comply with the reporting requirements of this Manual, industrial security authorities may recommend that the Department position be an investigation of the proposed transaction by CFIUS to assure that national security concerns are protected.

2-305. FOCI Negation Action Plans. If it is determined that an applicant company may be ineligible for an FCL or that additional action would be necessary to negate the FOCI, the applicant shall be promptly advised and requested to submit a negation plan.

- a. In those cases where the FOCI stems from foreign ownership, a plan shall consist of one of the methods prescribed at 2-306. Amendments to purchase and shareholder agreements may also serve to remove FOCI concerns.
- b. When factors not related to ownership are present, the plan shall provide positive measures that assure that the foreign person can be effectively denied access to classified information and cannot otherwise adversely affect performance on classified contracts. Examples of such 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 persons; elimination or resolution of problem debt; assignment of specific oversight duties and responsibilities to board members; formulation of special executive-level security committees to consider and oversee matters that impact upon the performance of classified contracts; physical or organizational separation of the facility component performing on classified contracts; the appointment of a technology control officer; adoption of special board resolutions; and other actions that negate foreign control or influence.

2-306. Methods to Negate Risk in Foreign Ownership Cases. Under normal circumstances, foreign ownership of a U.S. company under consideration for an FCL becomes a concern to the U.S. Government when a foreign shareholder has the ability, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of one or more members to the applicant company's board of directors by any means (equivalent equity for unincorporated companies). Foreign ownership which cannot be so manifested is not, in and of itself, considered significant.

- a. **Board Resolution.** When a foreign person does not own voting stock sufficient to elect, or otherwise is not entitled to representation to the applicant company's board of directors, a resolution(s) by the applicant's board of directors will normally be adequate. The Board shall identify the foreign shareholder and describe the type and number of foreign

owned shares; acknowledge the applicant's obligation to comply with all industrial security program and export control requirements; certify that the foreign shareholder shall not require, shall not have, and can be effectively precluded from unauthorized access to all classified and export-controlled information entrusted to or held by the applicant company; will not be permitted to hold positions that may enable them to influence the performance of classified contracts; and provide for an annual certification to the CSA acknowledging the continued effectiveness of the resolution. The company shall be required to distribute to members of its board of directors and its principal officers copies of such resolutions and report in the company's corporate records the completion of such distribution.

b. Voting Trust Agreement and Proxy Agreement.

The Voting Trust Agreement and the Proxy Agreement are substantially identical arrangements whereby the voting rights of the foreign owned stock are vested in cleared U.S. citizens approved by the Federal Government. Neither arrangement imposes any restrictions on a company's eligibility to have access to classified information or to compete for classified contracts.

- (1) Establishment of a Voting Trust or Proxy Agreement involves the selection of three trustees or proxy holders respectively, all of whom must become directors of the cleared company's board. Both arrangements must provide for the exercise of all prerogatives of ownership by the voting trustees or proxy holders with complete freedom to act independently from the foreign person stockholders. The arrangements may, however, limit the authority of the trustees or proxy holders by requiring that approval be obtained from the foreign person stockholder(s) with respect to matters such as: (a) The sale or disposal of the corporation's assets or a substantial part thereof; (b) Pledges, mortgages, or other encumbrances on the capital stock; (c) Corporate mergers, consolidations, or reorganizations; (d) The dissolution of the corporation; and (e) The filing of a bankruptcy petition. However, nothing herein prohibits the trustees or proxy holders from consulting with the foreign person stockholders, or vice versa, where otherwise consistent with U.S. laws, regulations and the terms of the Voting Trust or Proxy Agreement.

(2) The voting trustees or proxy holders must assume full responsibility for the voting stock and for exercising all management prerogatives relating thereto in such a way as to ensure that the foreign stockholders, except for the approvals enumerated in (1) above, shall be insulated from the cleared company and continue solely in the status of beneficiaries. The company shall be organized, structured, and financed so as to be capable of operating as a variable business entity independent from the foreign stockholders.

(3) Individuals who serve as voting trustees or proxy holders must be: (a) U.S. citizens residing within the United States, who are capable of assuming full responsibility for voting the stock and exercising management prerogatives relating thereto in a way that ensures that the foreign person stockholders can be effectively insulated from the cleared company; (b) Completely disinterested individuals with no prior involvement with the applicant company, the corporate body with which it is affiliated, or the foreign person owner; and (c) Eligible for a PCL at the level of the FCL.

(4) Management positions requiring personnel security clearances in conjunction with the FCL must be filled by U.S. citizens residing in the United States.

c. **Special Security Agreement and Security Control Agreement.** The Special Security Agreement (SSA) and the Security Control Agreement (SCA) are substantially identical arrangements that impose substantial industrial security and export control measures within an institutionalized set of corporate practices and procedures; require active involvement of senior management and certain Board members in security matters (who must be cleared, U.S. citizens); provide for the establishment of a Government Security Committee (GSC) to oversee classified and export control matters; and preserve the foreign person shareholder's right to be represented on the Board with a direct voice in the business management of the company while denying unauthorized access to classified information.

(1) A company effectively owned or controlled by a foreign person may be cleared under the SSA arrangement. However, access to "proscribed information" is permitted only with the written permission of the cognizant U.S.

agency with jurisdiction over the information involved. A determination to disclose proscribed information to a company cleared under an SSA requires that a favorable National Interest Determination (see 2-309) be rendered prior to contract award. Additionally, the Federal Government must have entered into a General Security Agreement with the foreign government involved.

(2) A company not effectively owned or controlled by a foreign person may be cleared under the SCA arrangement. Limitations on access to classified information are not required under an SCA.

d. **Limited Facility Clearance.** The Federal Government has entered into Industrial Security Agreements with certain foreign governments. These agreements establish arrangements whereby a foreign-owned U.S. company may be considered eligible for an FCL. Access limitations are inherent with the granting of limited FCLs.

(1) A limited FCL may be granted upon satisfaction of the following criteria: (a) There is an Industrial Security Agreement with the foreign government of the country from which the foreign ownership is derived; (b) Access to classified information will be limited to performance on a contract, subcontract or program involving the government of the country from which foreign ownership is derived; and (c) Release of classified information must be in conformity with the U.S. National Disclosure Policy.

(2) A limited FCL may also be granted when the criteria listed in paragraph (1) above cannot be satisfied, provided there exists a compelling need to do so consistent with national security interests.

2-307. Annual Review and Certification.

a. **Annual Review.** Representatives of the CSA shall meet at least annually with senior management officials of companies operating under a Voting Trust, Proxy Agreement, SSA, or SCA to review the purpose and effectiveness of the clearance arrangement and to establish common understanding of the operating requirements and their implementation. These reviews will also include an examination of the following:

- (1) Acts of compliance or noncompliance with the approved security arrangement, standard rules, and applicable laws and regulations.
 - (2) Problems or impediments associated with the practical application or utility of the security arrangement.
 - (3) Whether security controls, practices, or procedures warrant adjustment.
- b. **Annual Certification.** Depending upon the security arrangement in place, the Voting trustees, Proxy holders or the Chairman of the GSC shall submit annually to the CSA an implementation and compliance report. Such reports shall include the following:
- (1) A detailed description of the manner in which the company is carrying out its obligations under the arrangement.
 - (2) Changes to security procedures, implemented or proposed, and the reasons for those changes.
 - (3) A detailed description of any acts of noncompliance, whether inadvertent or intentional, with a discussion of steps that were taken to prevent such acts from recurring.
 - (4) Any changes, or impending changes, of senior management officials, or key Board members, including the reasons therefor.
 - (5) Any changes or impending changes in the organizational structure or ownership, including any acquisitions, mergers or divestitures.
 - (6) Any other issues that could have a bearing on the effectiveness of the applicable security clearance arrangement.
- b. The members of the GSC are required to ensure that the company maintains policies and procedures to safeguard export controlled and classified information entrusted to it.
- c. The GSC shall also take the necessary steps to ensure that the company complies with U.S. export control laws and regulations and does not take action deemed adverse to performance on classified contracts. This shall include the appointment of a Technology Control Officer (TCO) and the development, approval, and implementation of a Technology Control Plan (TCP).
- d. The Facility Security Officer (FSO) shall be the principal advisor to the GSC and attend GSC meetings. The Chairman of the GSC, must concur with the appointment of replacement FSOs selected by management. FSO and TCO functions shall be carried out under the authority of the GSC.

2-309. National Interest Determination.

- a. A company cleared under an SSA and its cleared employees may only be afforded access to "proscribed information" with special authorization. This special authorization must be manifested by a favorable national interest determination (NID) that must be program/project/contract-specific. Access to proscribed information must be predicated on compelling evidence that release of such information to a company cleared under the SSA arrangement advances the national security interests of the United States. The authority to make this determination shall not be permitted below the Assistant Secretary or comparable level of the agency concerned.
- b. A proposed NID will be prepared and sponsored by the GCA whose contract or program, is involved and it shall include the following information:
 - (1) Identification of the proposed awardee along with a synopsis of its foreign ownership (include solicitation and other reference numbers to identify the action);
 - (2) General description of the procurement and performance requirements;
 - (3) Identification of national security interests involved and the ways in which award of the contract helps advance those interests;

2-308. Government Security Committee (GSC).

Under a Voting Trust, Proxy Agreement, SSA and SCA, an applicant company is required to establish a permanent committee of its Board of Directors, known as the GSC.

- a. The GSC normally consists of Voting Trustees, Proxy Holders or Outside Directors, as applicable, and those officers/directors who hold PCLs.

- (4) The availability of any other U.S. company with the capacity, capability, and technical expertise to satisfy acquisition, technology base, or industrial base requirements and the reasons any such company should be denied the contract; and
 - (5) A description of any alternate means available to satisfy the requirement, and the reasons alternative means are not acceptable.
- c. An NID shall be initiated by the GCA. A company may assist in the preparation of an NID, but the GCA is not obligated to pursue the matter further unless it believes further consideration to be warranted. The GCA shall, if it is supportive of the NID, forward the case through appropriate agency channels to the ultimate approval authority within that agency. If the proscribed information is under the classification or control jurisdiction of another agency, the approval of the cognizant agency is required; e.g., NSA for COMSEC, DCI for SCI, DOE for RD and FRD, the Military Departments for their TOP SECRET information, and other Executive Branch Departments and Agencies for classified information under their cognizance.
- d. It is the responsibility of the cognizant approval authority to ensure that pertinent security, counterintelligence, and acquisition interests are thoroughly examined. Agency-specific case processing details

and the senior official(s) responsible for rendering final approval of NID's shall be contained in the implementing regulations of the U.S. agency whose contract is involved.

2-310. Technology Control Plan. A TCP approved by the CSA shall be developed and implemented by those companies cleared under a Voting Trust Agreement, Proxy Agreement, SSA and SCA and when otherwise deemed appropriate by the CSA. The TCP shall prescribe all security measures determined necessary to reasonably foreclose the possibility of inadvertent access by non-U.S. citizen employees and visitors to information for which they are not authorized. The TCP shall also prescribe measures designed to assure that access by non-U.S. citizens is strictly limited to only that specific information for which appropriate Federal Government disclosure authorization has been obtained; e.g., an approved export license or technical assistance agreement. Unique badging, escort, segregated work area, security indoctrination schemes, and other measures shall be included, as appropriate.

2-311. Compliance. Failure on the part of the company to ensure compliance with the terms of any approved security arrangement may constitute grounds for revocation of the company's FCL.

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

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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

<u>Primary:</u>	Plant Project Manager
<u>Secondary:</u>	Facilities Security Specialist/Safeguards Technical Analyst
<u>Supporting:</u>	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 "Recommendations on Foreign Involvement in USEC's Privatization", February 21, 1997.

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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
Bureau of Economic Analysis

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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