RulemakingComments Resource

From: TRUE, Doug <det@nei.org>
Sent: Monday, March 08, 2021 5:44 PM
To: RulemakingComments Resource
Cc: Gregory.Trussell@nrc.gov.; Tappert, John; Coyne, Kevin
Subject: [External_Sender] Industry Comments on Advance Notice of Proposed Rulemaking, Alternatives to the Use of Credit Ratings [Docket ID: NRC-2017-0021]
Attachments: 03-08-21_NRC_NEI Comments Dodd Frank.pdf

THE ATTACHMENT CONTAINS THE COMPLETE CONTENTS OF THE LETTER

March 8, 2020

Secretary
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Submitted via Regulations.gov

Subject: Industry Comments on Advance Notice of Proposed Rulemaking, Alternatives to the Use of Credit Ratings [Docket ID: NRC-2017-0021]

Project Number: 689

Dear Rulemaking and Adjudications Staff:

On behalf of its members, the Nuclear Energy Institute (NEI)[1] appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking (ANPR)[2] addressing potential amendments to the Commission's decommissioning financial assurance requirements to address Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or the Act).[3] Section 939A requires federal agencies to identify and remove all references to credit ratings in their regulations, and to substitute alternative standards of credit-worthiness, taking into account the agency-specific regulatory purpose of those standards. Several of the financial tests provided in the Appendices to 10 CFR Part 30 and used in conjunction with the parent and self-guarantee methods of decommissioning funding assurance reference bond ratings and, thus, must be addressed under Section 939A.

As noted, our detailed comments are included in the attachment to this letter. These detailed comments contain an in-depth discussion of Section 939A, including its legislative history and implementation; a review of the regulatory history of the Part 30 financial tests, including key conclusions reached by the NRC in its 2011 decommissioning rulemaking; NEI's recommended revisions to the Appendices to Part 30; and responses to the four specific questions posed by the NRC staff in the ANPR.

We appreciate the opportunity to provide our views on the ANPR and look forward to participating as the rulemaking process continues. If you have any questions regarding these comments, please contact Bruce Montgomery at bsm@nei.org or 202-406-0054.

Sincerely,

Doug True

Doug True | *Senior Vice President and Chief Nuclear Officer*
1201 F Street, NW, Suite 1100 | Washington, DC 20004
P: 202.739.8093 M: 925.998.8810
nei.org

[1] NEI is responsible for establishing unified policy on behalf of its members relating to matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry.

[2] 85 Fed. Reg. 82,950 (Dec. 21, 2020).

[3] Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010).

DOUGLAS E. TRUE
Senior Vice President and
Chief Nuclear Officer

1201 F Street, NW, Suite 1100
Washington, DC 20004
P: 202.739.8083
det@nei.org
nei.org

NUCLEAR ENERGY INSTITUTE

March 8, 2020

Secretary
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Submitted via Regulations.gov

Subject: Industry Comments on Advance Notice of Proposed Rulemaking, Alternatives to the Use of Credit Ratings [Docket ID: NRC-2017-0021]

Project Number: 689

Dear Rulemaking and Adjudications Staff:

On behalf of its members, the Nuclear Energy Institute (NEI)[1] appreciates the opportunity to comment on the Advance Notice of Proposed Rulemaking (ANPR)[2] addressing potential amendments to the Commission's decommissioning financial assurance requirements to address Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or the Act).[3] Section 939A requires federal agencies to identify and remove all references to credit ratings in their regulations, and to substitute alternative standards of credit-worthiness, taking into account the agency-specific regulatory purpose of those standards. Several of the financial tests provided in the Appendices to 10 CFR Part 30 and used in conjunction with the parent and self-guarantee methods of decommissioning funding assurance reference bond ratings and, thus, must be addressed under Section 939A.

NEI has carefully reviewed Section 939A of the Dodd-Frank Act and its legislative history; other agencies' related rulemaking efforts; and the NRC's decommissioning regulations, including their regulatory history. Based on that review, NEI respectfully submits that the NRC can revise its regulations in a way that complies with Section 939A, but preserves the use of parent company guarantees and self-guarantees by commercial licensees without substantially altering the status quo.

Section 939A of the Dodd-Frank Act was enacted to preclude overreliance on credit ratings, but the Act does not categorically foreclose consideration of credit or bond ratings as one element in the evaluation of an

---

1 NEI is responsible for establishing unified policy on behalf of its members relating to matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry.

2 85 Fed. Reg. 82,950 (Dec. 21, 2020).

3 Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010).

entity's credit-worthiness. This is clear based upon both the legislative history associated with Section 939A and insights gleaned from how financial regulators have implemented Section 939A. Further, the Act provides federal agencies with discretion to develop uniform standards of credit-worthiness "appropriate for their regulations" by "taking into account the entities regulated by each such agency and the purposes for which such entities would rely on such standards of credit-worthiness."

Although Section 939A addressed one important contributing factor to the 2007-2009 financial crisis (overreliance on credit ratings), nothing in the Dodd-Frank Act or the NRC's previous rulemakings indicates that the agency's decommissioning funding requirements suffer from such overreliance. Moreover, in addition to the discretion provided by Section 939A itself, the NRC has broad regulatory discretion under the Atomic Energy Act. [4] Using this discretion, the NRC can craft an appropriately-tailored amendment to Part 30 that complies with the letter and spirit of Section 939A, without unnecessarily curtailing licensees' ability to use the guarantee methods to provide decommissioning funding assurance. We propose such a rule change in the detailed comments attached to this letter.

Specifically, our proposed amendment would remove the references to bond ratings from Part 30, and replace those references with less prescriptive criteria, while continuing to allow limited consideration of bond ratings (in conjunction with other financial criteria) to demonstrate credit-worthiness. This approach is consistent with the NRC's conclusions in its 2011 decommissioning planning rulemaking, issued approximately one year after promulgation of the Dodd-Frank Act.[5] In that rulemaking, the NRC recognized and explicitly considered the risks posed by overreliance on bond ratings, and concluded that the multi-factor financial tests provided in Appendices A and C to Part 30 effectively mitigated such risks.[6] Although the Dodd-Frank Act requires the NRC to remove the direct references to bond ratings from its regulations, Section 939A does not invalidate the conclusions reached in the 2011 decommissioning planning rulemaking. Nor does it mandate that NRC forgo the limited reliance on bond ratings that is currently part of its regulatory framework.

Preserving the parent guarantee and self-guarantee financial assurance options for commercial licensees is an important policy consideration. The NRC has historically permitted the use of parent company guarantees and self-guarantees as decommissioning financial assurance methods to reduce costs and increase flexibility for licensees. As the NRC noted in 2011, since its 1988 decommissioning rulemaking the agency has approved the use of parent company guarantees and self-guarantees for numerous reactor and materials licensees. Thus, revising the NRC's current financial tests to eliminate or greatly limit the use of parent company guarantees and self-guarantees by commercial licensees is not necessary to comply with Section 939A. Furthermore, it would unnecessarily reduce the flexibility offered by the NRC's regulations by making an otherwise valid method of decommissioning financial assurance unavailable to licensees.

---

[4] The AEA "sets up a comprehensive scheme of federal regulation of atomic energy, administered by the [NRC]."*Ill. v. Gen. Elec. Co.*, 683 F.2d 206, 214-15 (7th Cir. 1982), *cert denied*, 461 U.S. 913 (1983). Indeed, "[t]he AEA has been consistently read—as it was written—to give the Commission broad regulatory latitude," and is "hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends." *Massachusetts v. NRC*, 878 F.2d 1516, 1523 (D.C. Cir. 1989). *See also Vt. Yankee Power Corp. v. National Res. Def. Council*, 435 U.S. 519, 525-26 (1978) (noting the Commission's "broad regulatory authority" under the AEA); *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968) (explaining that "flexibility was a peculiar desideratum" of the AEA's proponents, and that "Congress agreed by enacting a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrating agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives'"); *Ohio ex rel. Celebrezze* v. NRC, 868 F.2d 810, 813 (6th Cir. 1989) (reiterating the court's statements in *Siegel* regarding the Commission's uniquely broad statutory authority).

[5] Decommissioning Planning; Final Rule, 76 Fed. Reg. 35,512 (June 17, 2011) (2011 Decommissioning Planning Rule).

[6] *Id.* at 35,324-25.

As noted, our detailed comments are included in the attachment to this letter. These detailed comments contain an in-depth discussion of Section 939A, including its legislative history and implementation; a review of the regulatory history of the Part 30 financial tests, including key conclusions reached by the NRC in its 2011 decommissioning rulemaking; NEI's recommended revisions to the Appendices to Part 30; and responses to the four specific questions posed by the NRC staff in the ANPR.

We appreciate the opportunity to provide our views on the ANPR and look forward to participating as the rulemaking process continues. If you have any questions regarding these comments, please contact Bruce Montgomery at bsm@nei.org or 202-406-0054.

Sincerely,

Douglas E. True

Attachment

cc: John Tappert, Director, Division of Rulemaking, Environmental, and Financial Support, NRC
Kevin Coyne, Deputy Director, Division of Rulemaking, Environmental, and Financial Support, NRC
Gregory Trussell, Office of Nuclear Materials Safety and Safeguards, NRC

Attachment: NEI Detailed Comments Advance Notice of Proposed Rulemaking, Alternatives to the Use of Credit Ratings (RIN 3150-AJ92)

I. INTRODUCTION

These comments present the Nuclear Energy Institute's (NEI)[1] views and recommendations regarding potential amendments to the Nuclear Regulatory Commission's (NRC) decommissioning financial assurance regulations to address the requirements of Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act or the Act).[2] Enacted after the 2007-2009 financial crisis, Section 939A requires federal agencies to identify and remove all references to credit ratings in their regulations, and to substitute alternative standards of creditworthiness, taking into account the agency-specific regulatory purpose of those standards.

NEI has carefully reviewed Section 939A of the Dodd-Frank Act and its legislative history, other agencies' related rulemaking efforts, and the NRC's decommissioning regulations, including their regulatory history. Based on that review, NEI respectfully submits that the NRC can revise its regulations in a way that complies with Section 939A, but preserves the use of parent company guarantees and self-guaranties by commercial licensees without substantially altering the status quo.

Part II of these comments provide a brief background on the Dodd-Frank Act and the regulatory history of this rulemaking. NEI's specific suggested revisions to Appendices A and C of 10 CFR Part 30 and supporting rationale for those revisions are provided in Section III of these comments.[3] NEI's responses to the four specific questions posed by the NRC in the Advance Notice of Proposed Rulemaking (ANPR) are provided in Section IV of these comments.

II. BACKGROUND

Congress enacted the Dodd-Frank Act in 2010 to "promote the financial stability of the United States by improving accountability and transparency in the financial system" in the wake of the 2007-2009 financial crisis.[4] Congress found that inaccurate ratings on structured financial products fostered mismanagement of risks by financial institutions and investors that, in turn, adversely impacted the economy.[5] Accordingly, Congress sought to implement reforms aimed principally at financial institutions and investors and the federal agencies that regulate their business activities. As relevant to this rulemaking, Section 939A of the Act directs each federal agency to: (1) review any references to or requirements in the agency's regulations regarding credit ratings, and (2) modify any regulations identified in such review "to remove any reference to or requirement of

---

[1] The Nuclear Energy Institute (NEI) is responsible for establishing unified policy on behalf of its members relating to matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect and engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations involved in the nuclear energy industry.

[2] Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010).

[3] These comments recommend amendments to the financial tests contained in 10 CFR Part 30, Appendix A (concerning parent-company guarantees) and Appendix C (concerning self-guarantees that reference bond ratings). NEI has consulted with its members that would utilize the financial tests in 10 CFR Part 30, Appendix E, which covers the use of self-guarantees by nonprofit colleges, universities, and hospitals. These NEI members consist primarily of research and test reactor licensees, and represent only a portion of the licensees to which Appendix E applies. At this time, NEI is not recommending any changes to Appendix E that expand upon or modify the recommendation provided by the staff in SECY-19-0068 (i.e., that licensees subject to Appendix E would utilize the financial tests provided in Sections II.A.(2) or II.B.(2) of that appendix, as applicable). Although we have no additional recommendations on revisions to Appendix E at this time, NEI reserves the right to provide comments on proposed changes to Appendix E during the public comment period associated with the proposed rulemaking.

[4] Pub. Law 111-203 (Preamble).

[5] Pub. Law 111-203, Sec. 931(5).

reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations."[6]

As discussed in SECY-19-0068, the NRC staff reviewed NRC regulations for any references to or requirements regarding credit ratings.[7] The staff determined that Appendices A, C, and E to 10 CFR Part 30 reference specified bond ratings from Moody's or Standard and Poor's as part of certain decommissioning financial assurance tests for materials, power reactor and non-power reactor licensees, and applicants. Accordingly, the NRC opted to pursue rulemaking.[8]

On October 30, 2019, the NRC staff held a Category 3 public meeting during which it discussed its rulemaking efforts to date and requested additional information to support the development of a proposed rule.[9] In its presentation, the staff highlighted certain issues on which it desired input, including whether the NRC should "consider alternative financial test criteria to assess an applicant's or licensee's use of a guarantee to provide reasonable assurance of funds for decommissioning."[10] On December 21, 2020, the NRC published an ANPR, requesting public comment on potential approaches to amend the agency's decommissioning funding requirements to address the requirements of Section 939A.[11] These comments are being submitted in response to that ANPR.

---

6 Pub. Law 111-203, Sec. 939A(a)(1)-(2), (b).

7 See SECY-19-0068, "Direct Final Rule – Alternatives to the Use of Credit Ratings (RIN 3150-AJ92)" (July 21, 2019). The three primary credit rating agencies include Moody's, Standard and Poor's, and Fitch.

8 "Staff Requirements – SECY-19-0068 – Direct Final Rule – Alternatives to the Use of Credit Ratings (RIN 3150-AJ92)," at 1 (Sept. 19, 2019).

9 NRC Transcript "Public Meeting for Alternatives to Use of Credit Ratings Proposed Rulemaking" (Oct. 30, 2019) (ADAMS Accession Nos. ML19319B676 and ML19319B677).

10 NRC staff presentation "Dodd-Frank Act and the Alternatives to the Use of Credit Ratings Proposed Rule: 10 CFR Part 20" (Oct. 30, 2019) (slide 12).

11 85 Fed. Reg. 82950 (Dec. 21, 2020).

III. DISCUSSION

A. Section 939A of the Dodd-Frank Act Was Enacted to Preclude Overreliance on Credit Ratings

1. The Impetus for Congress' Credit Rating-Related Reforms in Title IX, Subsection C of the Dodd-Frank Act

Before turning to the NRC's ANPR, it is important to understand the historical context in which the Dodd-Frank Act was enacted and the intended purpose of Section 939A. The 2007-2009 financial crisis revealed significant deficiencies in credit ratings for certain fixed-income securities, especially structured products that were tied to the residential real estate market.[12] When the residential real estate market collapsed, such securities depreciated rapidly, causing insured depository institutions and banks to incur significant losses.[13] Although many affected bonds had been assigned strong credit ratings by nationally recognized statistical rating organizations (NRSRO) upon issuance, those bonds were later downgraded due to significant credit deterioration.[14] As the Federal Deposit Insurance Corporation (FDIC) explained:

> Investors' overreliance on credit ratings in the period leading up to the financial crisis contributed to the widespread underestimation of credit risk in certain fixed-income securities. Some banks did not adequately understand or independently assess the risk characteristics of a bond's obligor, the underlying collateral, or the payment structure of individual securities. Inadequate due diligence led to purchases of what were believed to be "investment-grade" bonds, but were not, as initial credit ratings failed to identify the inherent repayment risks and weaknesses that were exposed when the economy, real estate, and bond markets deteriorated. The severity and magnitude of the financial crisis triggered credit impairment in investment portfolios, resulting in significant principal write-downs that affected earnings and capital.[15]

The dire economic impacts of the financial crisis prompted passage of the Dodd-Frank Act. The express purpose of the Act is "[t]o promote the financial stability of the United States by improving *accountability and transparency* in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices."[16] Subtitle C ("Improvements to the Regulation of Credit Rating Agencies") to Title IX of the Act reflects Congress' finding that the inaccuracy of ratings on structured financial products "contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy in the United States and around the world."[17] Congress also found that "[s]uch inaccuracy necessitates increased accountability on the

---

[12] "Credit Risk Assessment of Bank Investment Portfolios," *FDIC Supervisory Insights Journal*, Vol. 10, Issue 1 (Summer 2013), at 3, https://www.fdic.gov/regulations/examinations/supervisory/insights.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Pub. Law 111-203 (Preamble)(emphasis added).

[17] Pub. Law 111-203, Sec. 931(5).

part of credit rating agencies," which "should be subject to the same standards of liability and oversight as apply to auditors, securities analysts, and investment bankers."[18]

2. Section 939A's Specific Requirements for Federal Agencies

In view of the above, Title IX of the Dodd-Frank Act is devoted largely to enhancing the regulation, accountability, and transparency of NRSROs and credit rating agencies. As pertinent to this rulemaking, Section 939A of the Act seeks to address the issue of potential overreliance on credit or bond ratings by federal agencies, particularly major financial regulators like the Securities and Exchange Commission (SEC), Federal Deposit Insurance Corporation (FDIC), and National Credit Union Administration (NCUA), among numerous others. Specifically, Section 939A of the Act requires federal agencies to take three actions:

(1) To review "any regulation issued by such agency that *requires* the use of an assessment of the credit-worthiness of a security or money market instrument [and] any references to or requirements in such regulations regarding credit ratings."[19]

(2) To "modify any such regulations identified by the review conducted under subsection (a) to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations *such standard of credit-worthiness as each respective agency shall determine as appropriate* for such regulations." Federal agencies must "seek to establish, to the extent feasible, uniform standards of credit-worthiness for use by each such agency, *taking into account the entities regulated by each such agency and the purposes for which such entities would rely on such standards of credit-worthiness*."[20]

(3) To report to Congress "a description of any modification of any regulation such agency made pursuant to subsection (b) [of Section 939A]."[21]

B. <u>The Dodd-Frank Act Does Not Categorically Foreclose Federal Agencies from Considering Credit Ratings as One Element of Their Analyses or Decision-Making Processes</u>

1. Legislative History Insights

Section 939A clearly directs agencies to remove explicit references to "credit ratings" from their regulations. However, it does not categorically prohibit agencies from considering credit ratings as one factor—among various others—in their regulatory evaluations or decision-making processes. Rather, Section 939A seeks to prevent agencies from relying exclusively, or otherwise excessively, on credit ratings. This fact is manifest in the legislative history of the Dodd-Frank Act and in the rulemakings conducted by major financial regulatory agencies to address the Act's requirements. For example, during a July 27, 2011 post-Dodd Frank Act Congressional oversight hearing, Representative Scott Garrett of New Jersey explained the purpose or intent of Section 939A's provisions as follows:

---

[18] *Id.*

[19] Pub. Law 111-203, Sec. 939A(a)(1)-(2)(emphasis added).

[20] Pub. Law 111-203, Sec. 939A(b)(emphasis added).

[21] Pub. Law 111-203, Sec. 939A(c).

> [O]ne significant area of bipartisanship did emerge through deliberation, that dealt with credit rating agencies. There was broad agreement that investors, because of the government's explicit requirement of ratings, had become basically overreliant on the rating agencies and failed to do their due diligence. And so by having the government require these ratings, investors believed that the ratings had a stamp of approval from the Federal Government. In order to refute this, Ranking Member Frank, Chairman Bachus and I crafted language to remove all rating requirements from the statutes and the regulations. So, I am pleased to see that in some regards, the regulatory community has been moving forward on implementing that. . . . As we can see by the discussion going on this week surrounding the debt debate, however, the rating agencies' opinion still does carry quite a bit of weight. *And while ratings can play a role in evaluating the credit of a company, security, or even a country, it should not be the sole determinant.*[22]

During the same oversight hearing, David Wilson, Senior Deputy Comptroller and Chief National Bank Examiner, Office of the Comptroller of the Currency (OCC), expressed a similar view regarding the post-Section 939A use of credit ratings by federal agencies. Mr. Wilson, like numerous commenters on the OCC's advanced notices of proposed rulemaking, asserted that "with appropriate operational and due diligence requirements, *credit ratings can be one valuable factor to consider* when evaluating the creditworthiness of financial instruments."[23] He further noted that "an approach that *precludes undo [sic] or exclusive reliance on credit ratings rather than imposing an absolute prohibition on their use* would strike an appropriate balance between the need to address the problems created by the overreliance on credit ratings with the need to enact sound regulations that can be consistently implemented."[24]

2. Insights from Other Agencies' Section 939A Rulemakings

The OCC adopted the aforementioned approach in a 2012 final rulemaking.[25] The final rule removed references in OCC's regulations at 12 CFR Parts 1, 16, and 160 to credit ratings provided by NRSROs and replaced those references with a requirement that national banks and Federal savings associations make assessments of a security's creditworthiness, similar to assessments required for unrated securities. The OCC revised the definition of "investment grade" in its regulations to no longer reference credit ratings. Under the revised definition, ''investment grade'' securities are those where the issuer has an adequate capacity to meet the financial commitments under the security for the projected life of the investment. To meet the new standard, national banks must determine that the risk of default by the obligor is low and the full and timely repayment of principal and interest is expected.

Importantly, the OCC did not construe Section 939A as categorically foreclosing the use of credit ratings. On the contrary, it noted that "credit ratings and assessments remain valuable sources of information and provide national banks with a standardized credit risk indicator."[26] The OCC further

---

22 *See Oversight of the Credit Rating Agencies Post-Dodd-Frank: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 112th Cong. 5 (July 27, 2011) (statement of Rep. Garrett, Member, H. Subcomm. on Oversight & Investigations of the Comm. on Fin. Servs.) (emphasis added).

23 *Id.* (statement of David K. Wilson, Senior Deputy Comptroller, Bank Supervision Policy, and Chief National Bank Examiner, Office of the Comptroller of the Currency) (emphasis added).

24 *Id.* (emphasis added).

25 Office of the Comptroller of Currency, Alternatives to the Use of External Credit Ratings in the Regulations of the OCC; Final Rule, 77 Fed. Reg. 35,253 (June 13, 2012).

26 *Id.* at 35,254.

explained, however, that when determining whether a security is ‘‘investment grade,’’ national banks should consider a number of factors, as appropriate. That is, if a national bank chooses to use credit ratings as part of its “investment grade” determination and due diligence, then the bank must “supplement the external ratings with a degree of due diligence processes and additional analyses that are appropriate for the bank’s risk profile and for the size and complexity of the instrument.”[27] This approach is consistent with the language of Section 939A(b), which gives federal agencies discretion to develop uniform standards of creditworthiness “appropriate for [their] regulations” by “taking into account the entities regulated by each such agency and the purposes for which such entities would rely on such standards of credit-worthiness.”

Notably, other federal agencies with substantial financial regulatory responsibilities and expertise have reached the same conclusion in developing revised regulations to implement Section 939A. They include, for example, the SEC, NCUA, and Commodity Futures Trading Commission (CFTC):

- In a November 2012 final rulemaking, the SEC stated: “We do not understand that the statutory amendment was intended to change the standard of credit quality represented by an investment grade rating. Accordingly, we are adopting 6a-5, as proposed, to establish a standard of credit-worthiness designed to achieve the same degree of risk limitation as the credit rating it replaces.”[28] In responding to a public comment, it further noted that in making their credit quality determinations, a business and industrial development company’s (BIDCO) board of directors or members “can also consider credit quality reports prepared by outside sources, including NRSRO ratings, that the BIDCO board or members conclude are credible and reliable for this purpose.”[29]

- In a separate January 2014 final rulemaking, the SEC responded to a public comment challenging the rule’s compliance with Section 939A by stating that “[w]e believe . . . that credit ratings can serve as a useful data point for evaluating credit quality, and as noted above, a fund’s board . . . may not rely solely on the credit ratings of an NRSRO without performing additional due diligence.”[30]

- In a December 2012 final rulemaking, the NCUA responded to a public comment asserting that the Dodd-Frank Act did not prohibit financial institutions from using credit ratings by noting that “nothing in [the Board’s notice of proposed rulemaking] prohibited credit unions from using credit ratings as an element of the required analysis.”[31]

- In a July 2011 final rulemaking, the CFTC explained that while the amendment to the Commission’s rule 4.24 would remove references to credit ratings, the revised rule would not prohibit the regulated organizations from relying on credit ratings to demonstrate the credit worthiness of investments, where appropriate.[32]

---

27 *Id.*

28 SEC, Purchase of Certain Debt Securities by Business and Industrial Development Companies Relying on an Investment Company Act Exemption; Final Rule, 77 Fed. Reg. 70,117, 70,118 (Nov. 23, 2012)

29 *Id.*

30 SEC, Removal of Certain References to Credit Ratings Under the Investment Company Act; Final Rule, 79 Fed. Reg. 1316, 1321 (Jan. 8, 2014).

31 NCUA, Alternatives to the Use of Credit Ratings; Final Rule, 77 Fed. Reg. 74,103 (Dec. 13, 2012).

32 CFTC, Removing Any Reference to or Reliance on Credit Ratings in Commission Regulations; Proposing Alternatives to the Use of Credit Ratings; Final Rule, 76 Fed. Reg. 44,262, 44,264 (July 25, 2011).

In summary, consistent with the plain language and legislative history of Section 939A, numerous federal agencies with significant financial regulatory responsibilities and expertise have concluded that they have discretion in adopting the alternative standard of creditworthiness required by that statutory provision. That discretion is informed by the agencies' specific statutory responsibilities and the nature of the entities they regulate, and allows for agency consideration of credit ratings as one element of the required analysis, where appropriate.

C. NRC's Current Decommissioning Financial Assurance Tests for Commercial Licensee Parent Company Guaranties and Self-Guarantees do not Result in Overreliance on Bond Ratings and Provide an Adequate Level of Decommissioning Funding Assurance

1. Overview of the NRC's Decommissioning Financial Assurance Requirements

The NRC's statutory responsibilities under the Atomic Energy Act of 1954, (AEA) as amended, center on protecting public health and safety and the common defense and security.[33] Those responsibilities include ensuring the safe and timely decommissioning of NRC-licensed facilities. Accordingly, the NRC's regulations at 10 CFR §§ 30.35, 40.36, 50.75, 70.25, and 72.30 seek to ensure that licensees have sufficient funding to decommission their facilities in a timely manner. The NRC must find "reasonable assurance that at the time of termination of operations, adequate funds are available so that decommissioning can be carried out in a safe and timely manner and that lack of funds does not result in delays that may cause potential health and safety problems."[34]

The NRC's financial assurance rules require that licensees have sufficient funding which can be promptly converted into cash for decommissioning activities. Financial assurance is achieved through the use of financial instruments. Under current NRC regulations, licensees may use a number of different types of financial instruments to demonstrate financial assurance: (1) pre-payments into a trust; (2) payment of funds into an external sinking fund; (3) letters of credit; (4) surety bonds; (5) parent company guarantees, and (6) self-guarantees.[35] This rulemaking is concerned solely with the last two types—parent company guarantees and self-guarantees.

Each entity (a company, a parent company, or a nonprofit college, university, or hospital) from whom the NRC accepts a parent company guarantee or self-guarantee to provide financial assurance, must pass one of the financial tests provided in Appendices A, C, D, and E to 10 CFR Part 30.[36] Some of these financial tests rely, in part, on bond ratings, while other tests do not. In addition to meeting other financial criteria, entities seeking to meet the tests that rely on bond ratings must show a current rating for their most recent "uninsured, uncollateralized, and unencumbered" bond issuance of AAA, AA, A (Standard & Poor's) or Aaa, Aa, A, or Baa (Moody's), including adjustments.[37] In contrast, entities that do not issue bonds or do not have

---

33 *See*, *e.g.*, AEA §§ 103(b) & (d), 104(d), 161(b), 182a, 189a(1)(B)(ii) & (iii), 42 U.S.C. §§ 2133(b) & (d), 2134(d), 2201(b), 2232(a), 2239(a)(1)(B)(ii) & (iii). *See also Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units No. 3 and 4), 4 AEC 9, 12 (Commission 1967) (these two statutory phrases "are fundamental to a delineation of the Commission's licensing authority and responsibility for [nuclear power plant] facilities"), *aff'd sub. nom. Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968).

34 General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,037 (June 27, 1988)(1988 Decommissioning Rule).

35 Under 10 CFR § 50.75(e)(1)(vi), reactor licensees may use combinations of the above-listed instruments if the resulting funding arrangement provides "assurance of decommissioning funding equivalent to that provided by the mechanisms specified in paragraphs (e)(1)(i) through (v)."

36 The financial tests specified in Appendix A to 10 CFR Part 30 also apply to licensees regulated under10 CFR Part 40, 10 CFR Part 70, and 10 CFR Part 72.

37 10 CFR Part 30, App. A, Sec. II.A.2(i); App. C, Sec. II.A.(3).

bond ratings instead must meet the financial criteria specified in other financial tests provided in the regulations. The specific tests for commercial licensee parent company guarantees and self-guarantees are discussed further below.

2. NRC's Current Financial Tests for Parent Company Guaranties in Appendix A to 10 CFR Part 30

A parent company guarantee is a guarantee from a licensee's parent company that it will fund decommissioning activities if the licensee fails to do so.[38] The parent company must annually pass (within 90 days after the close of each succeeding fiscal year) one of two financial tests specified in Appendix A to 10 CFR Part 30 to demonstrate that it has adequate financial strength to provide the guarantee.[39] As noted, one test includes a bond rating criterion while the other does not.

a. Financial Test 1 (10 CFR Part 30, Appendix A, Section II.A.1)

Under this test, the parent company must have:

(i) Two of the following three ratios: A ratio of total liabilities to total net worth less than 2.0; a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and a ratio of current assets to current liabilities greater than 1.5; and

(ii) Net working capital and tangible net worth each at least six times the amount of decommissioning funds being assured by a parent company guarantee for the total of all nuclear facilities or parts thereof (or prescribed amount if a certification is used); and

(iii) Tangible net worth of at least $21 million; and

(iv) Assets located in the United States amounting to at least 90 percent of the total assets or at least six times the current decommissioning cost estimates for the total of all facilities or parts thereof (or prescribed amount if a certification is used), or, for a power reactor licensee, at least six times the amount of decommissioning funds being assured by a parent company guarantee for the total of all reactor units or parts thereof.

b. Financial Test 2 (10 CFR Part 30, Appendix A, Section II.A.2)

Under this test, the parent company must have:

(i) A current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, A, or BBB (including adjustments of + and –) as issued by Standard and Poor's or Aaa, Aa, A, or Baa (including adjustment of 1, 2, or 3) as issued by Moody's;[40] and

[38] *See* 10 CFR Part 30, App. A, Sec. I.

[39] *See* 10 CFR Part 30, App. A, Sec. II.C.1.

[40] Parent companies without an actual bond rating may still use the bond rating alternative of the financial test by obtaining a so-called "indicative" bond rating from either Standard & Poor's or Moody's. Indicative bond ratings, which are available for a fee, are for information only and are provided as an indication of what a rating would be if the firm were to issue debt. A parent company seeking to use an indicative bond rating should submit the rating and name of the rating service as part of the financial test demonstration. In this case, the company would not be able to provide the NRC with information on the dates of issuance and maturity of the bond, nor would it be able to certify that the rating pertained to its "most recent bond issuance." Therefore, the parent company must explain that the rating is an indicative rating. The parent company also must update the indicative rating every year as it repeats the passage of the financial test. *See* NRC, "Consolidated Decommissioning Guidance – Financial

(ii) Total net worth at least six times the amount of decommissioning funds being assured by a parent company guarantee for the total of all nuclear facilities or parts thereof (or prescribed amount if a certification is used); and

(iii) Tangible net worth of at least $21 million; and

(iv) Assets located in the United States amounting to at least 90 percent of the total assets or at least six times the current decommissioning cost estimates for the total of all facilities or parts thereof (or prescribed amount if a certification is used), or, for a power reactor licensee, at least six times the amount of decommissioning funds being assured by a parent company guarantee for the total of all reactor units or parts thereof.[41]

3. NRC's Current Financial Tests for Self-Guarantees by Commercial Companies

A self-guarantee is a guarantee by a licensee that it will fund and conduct decommissioning activities.[42] A licensee using a self-guarantee to provide financial assurance for decommissioning must not have a parent company. NRC regulations for self-guarantees apply to three general categories of licensees: (1) commercial companies that issue bonds (regulated under Appendix C to Part 30); (2) commercial companies that do not issue bonds (regulated under Appendix D to Part 30); and (3) nonprofit colleges, universities, and hospitals (regulated under Appendix E to Part 30). The licensee must annually pass (within 90 days after the close of each succeeding fiscal year) the applicable financial test specified in Appendix C, D, or E to 10 CFR Part 30 to show that it has adequate financial strength to provide the guarantee.[43] The financial tests for commercial companies are listed below.

a. <u>Financial Test for Commercial Companies That Issue Bonds (Appendix C, Section II.A)</u>

Under this test, the licensee must have the following:

(1) Tangible net worth of at least $21 million, and total net worth at least 10 times the amount of decommissioning funds being assured by a self-guarantee for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor for the total of all nuclear facilities or parts thereof (or the current amount required if certification is used).

(2) Assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the amount of decommissioning funds being assured by a self-guarantee, for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor for the total of all nuclear facilities or parts thereof (or the current amount required if certification is used).

Assurance, Recordkeeping, and Timeliness," (Final Report), NUREG-1757, Vol. 3, Rev. 1, App. A at A-77 (Feb. 2012) (ADAMS Accession No. ML12048A683).

[41] For the purposes of these financial tests, "total net worth" is defined to exclude the net book value and goodwill of the nuclear facility and site. "Tangible net worth" is defined to exclude all intangible assets and the net book value of the nuclear facility and site.

[42] *See* 10 CFR Part 30, App. C, Sec. I.

[43] *See*, *e.g.*, 10 CFR Part 30, App. C, Sec. II.B.(3). The financial tests specified in Appendices C, D, and E to 10 CFR Part 30 also apply to licensees regulated under 10 CFR Part 40, 10 CFR Part 70, and 10 CFR Part 72.

(3) A current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A (including adjustments of + and –) as issued by Standard and Poor's, or Aaa, Aa, or A (including adjustments of 1, 2, or 3) as issued by Moody's.[44]

b. <u>Financial Test for Commercial Companies That Do Not Issue Bonds (Appendix D)</u>

Under this test, the licensee must have the following:

(1) Tangible net worth of at least $21 million, and total net worth of at least 10 times the amount of decommissioning funds being assured by a self-guarantee for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor for the total of all nuclear facilities or parts thereof (or the current amount required if certification is used).

(2) Assets located in the United States amounting to at least 90 percent of total assets or at least 10 times the total current decommissioning cost estimate (or the current amount required if certification is used) for all decommissioning activities for which the company is responsible as self-guaranteeing licensee and as parent-guarantor.

(3) A ratio of cash flow divided by total liabilities greater than 0.15 and a ratio of total liabilities divided by total net worth less than 1.5.

5. The NRC Has Discretion Under the Dodd-Frank Act Section 939A and the AEA to Develop Appropriate Standards of Creditworthiness in Its Financial Tests for Decommissioning Funding Assurance

Section 939A(2) of the Dodd-Frank Act, which is aimed principally at regulation of the financial sectors, gives federal agencies discretion to develop uniform standards of creditworthiness "appropriate for their regulations" by "taking into account the entities regulated by each such agency and the purposes for which such entities would rely on such standards of credit-worthiness." The NRC, while not a financial regulator per se, is no exception. In fact, the NRC's discretion in this regard arguably is greater given its unique statutory authorities under the AEA, which "sets up a comprehensive scheme of federal regulation of atomic energy, administered by the [NRC]."[45] Indeed, "[t]he AEA has been consistently read—as it was written—to give the Commission broad regulatory latitude," and is "hallmarked by the amount of discretion granted the Commission in working to achieve the statute's ends."[46] This broad authority extends to the NRC's development and implementation of its decommissioning financial assurance requirements.[47]

---

[44] To pass the financial test, a commercial licensee who issues bonds also must have at least one class of equity securities registered under the Securities Exchange Act of 1934.

[45] *Ill. v. Gen. Elec. Co.*, 683 F.2d 206, 214-15 (7th Cir. 1982), *cert denied*, 461 U.S. 913 (1983).

[46] *Massachusetts v. NRC*, 878 F.2d 1516, 1523 (D.C. Cir. 1989). *See also Vt. Yankee Power Corp. v. National Res. Def. Council*, 435 U.S. 519, 525-26 (1978) (noting the Commission's "broad regulatory authority" under the AEA); *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968) (explaining that "flexibility was a peculiar desideratum" of the AEA's proponents, and that "Congress agreed by enacting a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administrating agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives'"); *Ohio ex rel. Celebrezze* v. NRC, 868 F.2d 810, 813 (6th Cir. 1989) (reiterating the court's statements in *Siegel* regarding the Commission's uniquely broad statutory authority).

[47] *See* Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, 62 Fed. Reg. 44,071, 44,075 (Aug. 19, 1997) ("The NRC's principal mission is . . . to ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment. As part of carrying out this mission, the NRC must monitor licensee activities and any changes in licensee activities, as well as external factors that may affect the ability of individual licensees to safely operate and *decommission* licensed power production facilities."). *See also id.* at 44,076 ("[T]he NRC has

6. The Multi-Factor Financial Tests in Appendices A and C Already Reflect NRC's Consideration of the Risks Associated with Overreliance on Bond Ratings and Incorporate Specific Requirements to Mitigate Those Risks

The NRC explicitly considered the potential for overreliance on bond ratings and the associated regulatory implications in its 2011 Decommissioning Planning Rule, which was finalized nearly one year after promulgation of the Dodd-Frank Act.[48] At that time, the NRC noted that "recent events and trends" suggest that "a high bond rating by itself does not necessarily signal financial strength" and "may not provide the additional assurance that the NRC is seeking."[49] These concerns stemmed directly from the same 2007-2009 financial crisis that prompted promulgation of the Dodd-Frank Act. Specifically, the crisis "cause[d] the NRC to question the adequacy of the bond rating requirement to provide financial assurance."[50] As a result, the NRC concluded that the bond rating requirement in Appendices A and C to 10 CFR Part 30 should be coupled with another requirement, and that the minimum tangible net worth requirement "is an adequate accompaniment."[51] The NRC accordingly amended those regulations.

Before the 2011 rulemaking, the financial tests in Appendices A and D to 10 CFR Part 30 each required the entity seeking to pass the relevant financial test to have a tangible net worth of at least $10 million.[52] The financial test in Appendix C required the applicant or licensee to have a tangible net worth at least 10 times the current decommissioning cost estimate or certification amount for decommissioning. The final rule amendments required a tangible net worth of at least $21 million in each of the financial tests in Appendices A, C, and D to 10 CFR Part 30.[53] The NRC concluded that, "[a]lthough the use of a company's bond rating remains a *joint criterion* with the use of intangible assets in some of the financial tests, . . . *an investment grade bond rating coupled with a minimum amount of tangible net worth does provide an additional level of assurance*."[54]

The NRC explained the purpose and importance of the tangible net worth requirements vis-à-vis the agency's use of bond ratings as follows:

> Some of the financial tests in 10 CFR part 30, Appendices A, C, and E involve bond valuations. In the past, only tangible assets were considered within the calculations performed under the financial tests. . . . [T]he NRC staff considered whether allowing the use of intangible assets would materially increase the risk of a shortfall in decommissioning funds. The NRC concluded that if a licensee can meet a minimum tangible net worth requirement, then allowing that licensee to use intangible assets

---

authority under the AEA to *take actions that may affect a licensee's financial situation* when these actions are warranted to protect public health and safety.").

48 *See* NRC, Decommissioning Planning; Final Rule, 76 Fed. Reg. 35,512 (June 17, 2011) (2011 Decommissioning Planning Rule).

49 *Id.* at 35,525.

50 *See id.* at 35,525 (citing Katz, J., Salinas, E., & Stephanou, C., "Credit Rating Agencies: No Easy Regulatory Solution," *Crisis Response: Public Policy for the Private Sector, Note Number 8,* 4–5 (October 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485140; Katz; O'Brien, B., "Fitch Fells Berkshire's Credit Rating," Barron's (March 13, 2009), *http://blogs.barrons.com/stockstowatchtoday/2009/03/13/fitch-fells-berkshires-credit-rating/*).

51 *Id.*

52 The $10 million in tangible net worth requirement was first adopted by the EPA in 1981, and the financial test adopted by the NRC in 1988 used the same criterion. In its 2011 Decommissioning Planning Rule, the NRC concluded that the criterion should be adjusted to represent the value in current dollars of $10 million in 1981. *See* 76 Fed. Reg. 35,524-25.

53 Decommissioning Planning Rule, 76 Fed. Reg. at 35,525, 35,544.

54 *Id.* at 35,524 (emphasis added).

> to meet a total net worth requirement beyond the minimum tangible net worth amount, *in conjunction with certain bond valuations of the guarantor*, would not materially decrease the ability of the licensee to provide assurance that it will have the requisite decommissioning funding.
>
> Although the use of a company's bond rating remains a *joint criterion* with the use of intangible assets in some of the financial tests, the NRC is making other changes so that licensees that pass the tests will have an increased likelihood of providing financial assurance. *Recent data suggests that regulators should not rely on a bond rating by itself to provide financial assurance* . . . . *However, an investment grade bond rating coupled with a minimum amount of tangible net worth does provide an additional level of assurance.* In a 1982 revised interim final rule, the EPA [Environmental Protection Agency] provided several reasons for accepting a minimum tangible net worth requirement . . . . Once these other components of the financial tests are met, licensees can use intangible assets for a total net worth requirement beyond the minimum tangible net worth requirement.[55]

Citing the 1982 EPA Rule, the NRC concluded that permitting the use of intangible assets after the minimum tangible net worth requirement is met, in conjunction with an investment grade bond rating, would prevent undue reliance on intangible assets and bond ratings.[56] The NRC further concluded that this approach "would not materially decrease the ability of the licensee to provide assurance that it will have adequate decommissioning funding."[57]

The NRC cited two other related considerations in support of its conclusions. First, it noted that to further assure the efficacy of a company's current bond rating, the final rule specified that the bond must be "uninsured, uncollateralized, and unencumbered" to be used in the financial test.[58] The NRC found that this requirement "is desirable and increases assurance" because "[a]n uninsured, uncollateralized, and unencumbered bond rating is an opinion as to the *issuer's* ability to meet its repayment obligations in a timely manner."[59]

In addition, the NRC emphasized that licensees who opt to use the parent company guarantee or self-guarantee as a financial assurance option must pass the tests on an annual basis.[60] The NRC noted that because a company that satisfies the minimum tangible net worth criterion and has an investment grade bond rating is less likely to default in a one-year period, the annual re-passage requirement will normally provide adequate time for the guarantor to obtain alternative financial assurance, if necessary.[61]

In sum, the NRC took a reasoned approach in its 2011 Decommissioning Planning Rule – ensuring that the risks of overreliance were mitigated, while recognizing the value of bond ratings as one,

---

55 *Id.* (citing EPA, Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Requirements; Revised interim final rules, 47 Fed. Reg. 15,032 (Apr. 7, 1982)) (1982 EPA Rule) (emphasis added).

56 *Id.* at 35,524, 35,525.

57 ` *Id.* at 35,524.

58 *Id.* The bond criterion in Appendix E to 10 CFR Part 30 already contained this requirement.

59 *Id.* at 35,543. (emphasis added). In contrast, and for reasons explained in the 2011 Decommissioning Planning Rule, the NRC concluded that when a rated bond has insurance or pledged assets to provide additional security, the bond rating may not directly reflect the creditworthiness of the bond issuer. *Id.* at 35,525.

60 *Id.* at 35,524, 35,525. The licensee must annually submit to the NRC revised financial statements, financial test data, and an auditor's special report.

61 *Id.* at 35,524.

limited factor in meeting the financial tests provided in Part 30. This approach is consistent with the viewpoint communicated by the senior official from the OCC during the post-promulgation legislative hearings on the Dodd-Frank Act, where he noted "an approach that *precludes undo [sic] or exclusive reliance on credit ratings rather than imposing an absolute prohibition on their use* would strike an appropriate balance between the need to address the problems created by the overreliance on credit ratings with the need to enact sound regulations that can be consistently implemented."[62] Indeed, when used properly and in combination with static financial metrics, credit ratings (including bond ratings) can enhance a decisionmaker's assessment of creditworthiness because rating agencies are able to assess credit quality with a myriad of factors beyond historical metrics. These factors include forward-looking expectations (e.g., expected growth and profitability) and qualitative factors (e.g., country risk, industry characteristics, and entity-specific factors) that can build a more comprehensive view of a company's risk profile.[63]

D. <u>NEI's Proposed Revisions to NRC's Current Financial Tests for Parent Company Guarantees and Self-Guarantees in 10 CFR Part 30, Appendices A and C Would Allow the NRC to Comply with Section 939A of the Act Without Fundamentally Altering the Manner in Which the NRC Applies Those Tests</u>

Given their explicit references to bond ratings, NEI recommends appropriately tailored revisions to the financial tests for parent company guarantees and self-guarantees for commercial companies specified in 10 CFR Part 30, Appendices A and C, respectively.[64] As explained below (*see* Sections III.D.2 and D.3, *infra*), NEI's proposed revisions to those financial tests would enable the NRC to achieve technical compliance with Section 939A(2) of the Dodd-Frank Act by removing the express references to bond ratings contained in the NRC's current regulations. Importantly, it also would allow the NRC to achieve substantive compliance with Section 939A(2)—i.e., meet the actual intent of the statute—while still permitting the agency to consider bond ratings as one element in its multi-factor financial tests for parent company guarantees and self-guarantees.

1. Longstanding NRC Policy Favors Regulatory Flexibility and the Continued Availability of Parent Company Guarantees and Self-Guarantees as Instruments for Demonstrating Decommissioning Financial Assurance

Before discussing our proposed revisions to the financial tests, it is important to note that preserving the parent company guarantee and self-guarantee financial assurance options for commercial company licensees is an important policy consideration. The NRC historically has permitted the use of parent company guarantees and self-guarantees as decommissioning financial assurance methods, as warranted, to reduce costs and increase flexibility for licensees. As the NRC noted in 2011, since its 1988 decommissioning rulemaking the agency has approved parent company guarantees and self-guarantees for numerous reactor and materials licensees.[65]

---

[62] *See Oversight of the Credit Rating Agencies Post-Dodd-Frank: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs., 112th Cong. 5* (July 27, 2011) (statement of David K. Wilson, Senior Deputy Comptroller, Bank Supervision Policy, and Chief National Bank Examiner, Office of the Comptroller of the Currency) (emphasis added).

[63] *See id.* (statement of Deven Sharma, President, Standard & Poor's)("We also firmly believe that perhaps the most important value of ratings is the independence and forward-looking view they express about future creditworthiness."); SEC*, Report to Congress Credit Rating Standardization Study: As Required by Section 939(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Sept. 2012 ("A Standard & Poor's issuer credit rating is a forward-looking opinion about an obligor's overall financial capacity (its creditworthiness) to pay its financial obligations. This opinion focuses on the obligor's capacity and willingness to meet its financial commitments as they come due."). *Id*. at 55.

[64] Given that the Appendix D financial tests do not reference or rely on bond ratings, NEI does not propose any revisions to that test. In addition, NEI's position with respect to Appendix E is provided above in footnote 3.

[65] Decommissioning Planning Rule, 76 Fed. Reg. at 35,517, 35,546.

For example, power reactor licensees have used parent company guarantees temporarily and in combination with other methods of financial assurance, particularly during market downturns when other non-cash methods (e.g. , letters of credit) are unavailable or prohibitively expensive to obtain.[66] In addition, the NRC has relied upon the ability of licensees to pass the financial tests and obtain parent company guarantees (if necessary) to support exemptions necessary to facilitate efficient decommissioning.[67]

Thus, revising the NRC's current financial tests in a way that eliminates or greatly limits the use of parent company guarantees and self-guarantees by commercial licensees is not only unnecessary from a legal standpoint, but also would run counter to longstanding NRC policy and practice.

2. NEI's Proposed Revision to 10 CFR Part 30, Appendix A, Section II.A.2

To effectuate compliance with Section 939A of the Dodd-Frank Act, NEI recommends that the NRC delete current paragraph (i) of Section II.A.2 of Appendix A and replace it with the new, alternative version of paragraph (i) provided below:

<u>Proposed Deletion</u>:

> ~~(i) A current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, A, or BBB (including adjustments of + and –) as issued by Standard and Poor's or Aaa, Aa, A, or Baa (including adjustment of 1, 2, or 3) as issued by Moody's; and~~
>
> <u>Proposed Insertion:</u>
>
> <u>(i) An external credit risk assessment, which verifies that the risk of default by the parent company is low, and that full and timely payment of the amount guaranteed is expected, if necessary.</u>

3. NEI's Proposed Revision to 10 CFR Part 30, Appendix C, Section II.A.

To effectuate compliance with Section 939A of the Dodd-Frank Act, NEI recommends that the NRC delete current paragraph (3) of Section II.A.2 of Appendix C and replace it with the new, alternative version of paragraph (3) provided below:

<u>Proposed Deletion</u>:

> ~~(3) A current rating for its most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, or A (including adjustments of + and –) as issued by Standard and Poor's, or Aaa, Aa, or A (including adjustments of 1, 2, or 3) as issued by Moody's.~~

---

66 *See* "Summary Findings Resulting from the Staff Review of the 2010 Decommissioning Funding Status Reports for Operating Power Reactor Licensees," SECY-11-0149 (Oct. 26, 2011) (describing how decommissioning funding shortfalls for both the 2008 and 2010 reporting years were resolved by licensees – including, in several instances, through the use of parent company guarantees).

67 *See* "Dominion Energy Kewaunee, Inc., Kewaunee Power Station, Submittal of Commitment for Parent Company Guarantee and Request to Discontinue Existing Parent Support Agreement," Jan. 28, 2015 (providing the licensee's commitment to "provide of (if already existing) increase a parent company guarantee to provide a total in parental assurance of up to 10% of the remaining Trust Fund balance or $60 million, whichever is less" and to provide information to NRC regarding its continuing ability to meet the financial tests in either Paragraph II.A.1 or II.A.II of Appendix A to 10 CFR Part 30.)

Proposed Insertion:

(3) An external credit risk assessment, which verifies that the risk of default by the self-guaranteeing licensee is low, and that full and timely payment of the amount guaranteed is expected, if necessary.

4. NEI's Proposed Revisions to 10 CFR Part 30, Appendices A and C Must be Accompanied by a Clear Explanation in the Rulemaking that Bond Ratings May Continue to be Used in Combination with the Other Factors Provided in Appendices A and C.

NEI's proposed revisions to 10 CFR Part 30, Appendices A and C would remove direct references to bond ratings resulting in compliance with the Dodd-Frank Act's express requirement to remove all such references. However, as explained above: (1) Section 939A was promulgated to prevent overreliance on credit or bond ratings, but does not categorically prohibit reliance on bond ratings in concert with other measures of financial health; (2) the NRC has already considered overreliance on bond ratings and adjusted the financial tests in Appendices A and C to prevent such overreliance; and (3) the use of guarantees as a decommissioning funding method serves a valuable purpose and should not be unnecessarily limited by this rulemaking.

Thus, in order to ensure clarity going forward and prevent unnecessary impacts on licensees' ability to utilize guarantees, the proposed changes to the NRC's regulations described above must be applied consistent with the Commission's conclusions in the 2011 rulemaking that reliance on NRSRO ratings of "uninsured, uncollateralized, and unencumbered" bonds, in conjunction with the minimum tangible net worth requirements contained in Appendices A and C, sufficiently guard against the overreliance that Section 939A seeks to mitigate.

Specifically, NEI's proposed new language allows for the use of "external risk assessments" (which could include bond ratings) to ensure a low risk of default and a high likelihood that "full and timely payment" of the amount guaranteed will be made. The NRC should explicitly state in the Preamble (i.e., Statements of Consideration) for any new rule (and in any related NRC implementing guidance) that using the most recent "uninsured, unencumbered, uncollateralized" bond rating is one acceptable means to meet the revised requirement. In order to ensure that the amendments to the rule language proposed above do not unnecessarily restrict the continued use of guarantees as a valuable method of decommissioning funding assurance, the following points should be clearly articulated in the Preamble to any rule adopting NEI's proposed amendments to Appendices A and C:

- Text explaining that Section 939A of the Dodd-Frank Act was intended to address the specific problem of overreliance on credit ratings by regulators and investors. In order to achieve this objective, the Act requires, in part, that agencies "remove any reference to or requirement of reliance on credit rating and . . . substitute . . . such standard[s] of credit-worthiness as each respective agency shall determine as appropriate for such regulations." Section 939A also directs agencies to establish uniform, substitute standards and provides agencies with the discretion to "tak[e] into account the entities regulated by each agency and the purposes for which such entities would rely on such standards of credit-worthiness."

- Text explaining the role that bond ratings play in the NRC's regulatory scheme. Specifically, this text should explain that bond ratings are one factor, in a set of multi-factor tests used to

demonstrate that certain NRC licensees qualify to use either a parent company or self-guarantee to provide decommissioning funding assurance. Thus, bond ratings are not relied upon in isolation to make determinations regarding the use of guarantees, but compliment the other static financial metrics used in the financial tests by providing more forward-looking assessment of creditworthiness.

- Text explaining that, consistent with the mandate in Section 939A, the proposed changes to Appendices A and C "remove any reference to or requirement of reliance on credit ratings" from the NRC's regulations. The proposed change also provides a substitute standard of creditworthiness that is appropriate in the context of the NRC's decommissioning funding requirements. The proposed substitute standard would no longer explicitly direct licensees to rely upon ratings issued by specific NRSROs, such as Standard and Poor's and Moody's. The substitute standard is intended to create enough flexibility to make it possible for licensees to rely upon external credit risk assessments, including but not limited to those developed by credit rating agencies, irrespective of the rating agency's status as an NRSRO.

- Text explaining that although the revised standard no longer directs licensees to rely on commercial bond ratings, it does not prohibit such reliance. The Preamble should make it clear that, consistent with the rationale provided in the Commission's 2011 Decommissioning Planning Rulemaking, if a licensee intends to rely on external commercial bond ratings to meet the creditworthiness prong of Section II.A.2 and II.A.3, then the Commission believes that the guarantor's most recent *uninsured, uncollateralized, and unencumbered* bond issuance of AAA, AA, A, or BBB (including adjustments of + and –) as issued by Standard and Poor's or Aaa, Aa, A, or Baa (including adjustment of 1, 2, or 3) as issued by Moody's would be one acceptable method of meeting the revised creditworthiness prong. This limitation, when combined with: (1) the existing minimum tangible and total net worth requirements, (2) the requirement that the guarantor have a requisite amount of U.S.-based assets, and (3) the annual reporting and documentation requirements, adequately mitigate the risk of overreliance on bond ratings in the limited context of NRC decommissioning funding assurance. Other external credit risk assessments can be reviewed by the NRC staff on a case-by-case basis to determine whether they meet the standard articulated in the rule.

In addition to incorporating the foregoing points in the rulemaking preamble, NEI also recommends that the NRC staff consider updating its regulatory guidance accordingly.

IV. RESPONSES TO QUESTIONS PRESENTED IN THE ANPR

In this section, NEI provides concise responses to the four specific questions posed by the NRC in its ANPR. Our responses are informed by and reference, as applicable, the detailed discussion presented in Sections I through III above.

(Question 1) Are there licensees that meet the current credit rating-based financial test for a guarantee that would not be able to meet the alternate working capital and liability-based financial tests currently presented in 10 CFR Part 30 Appendices?

Yes. The ability of a licensee to meet the financial tests provided in the Appendices to 10 CFR Part 30 would need to be evaluated at the time a guarantee becomes necessary. However, NEI's interactions with our member companies indicate that most commercial power reactor licensees and some large fuel cycle licensees that can meet the financial tests provided in Section II.A.2 of

Appendix A, will generally not be able to satisfy the requirements of Section II.A.1 of Appendix A. For power reactor licensees, the financial ratios in Section II.A.1(i) and tangible net worth requirement in Section II.A.1(ii) (i.e., requirement for tangible net worth at least six times the amount of decommissioning funds being assured by the guarantee) are problematic. For at least one large fuel cycle licensee, the tangible net worth requirement in Section II.A.1(ii) is problematic. Thus, simply eliminating the alternative test provided in Section II.A.2 of Appendix A would eliminate parent company guarantees as a method of decommissioning funding assurance for a significant number of (if not all) commercial power reactor licensees and some large fuel cycle licensees, without any discernible benefit to NRC's and industry's protection of the public health and safety.[68]

This result isn't surprising or indicative of reactor licensees' ability to meet their decommissioning financial assurance obligations, given the origins of the financial tests included in Appendix A to Part 30. Specifically, as explained in the NRC's 1988 decommissioning rulemaking, "the use of the parent company guarantee and financial test [in 10 CFR Part 30] is taken from the U.S. Environmental Protection Agency's regulations 10 CFR Parts 264 and 265."[69] In turn, when the EPA adopted its financial tests just a few years earlier, it recognized that financial tests useful for evaluating firms engaged in manufacturing, were not necessarily useful for evaluating firms engaged in other types of industries, such as "utilities" and "service-related industries." Specifically, EPA explained:

> However, financial tests found to be valid for distinguishing viable from nonviable firms engaged in manufacturing were often not valid or useful for establishing the viability of firms in industries with unique financial characteristics, such as utilities. Positive net working capital, for instance, is uncommon for electric utilities and firms in some other service-related industries. As a result, an alternative financial test option was developed (see Alternative II above), which is based on bond ratings and is more appropriate for utilities and firms with similar financial characteristics. The Agency believes on the basis of its evaluation . . . that with these two options the financial test is valid for all industries likely to engage in hazardous waste management.[70]

Would such licensees be able to meet the decommissioning funding assurance requirements using one or more other funding assurance methods allowed for by regulation (i.e., prepayment, surety bond, insurance, external sinking fund)?

Possibly. In order to answer this question more precisely, the factual context and circumstances surrounding the need to provide additional decommissioning funding assurance would need to be considered. For example, parent company guarantees have been used successfully by operating commercial power reactor licensees to bridge temporary, market-driven decommissioning funding shortfalls in their Nuclear Decommissioning Trusts (NDT).[71] Market conditions during such downturns can make other non-cash methods of decommissioning funding assurance, such as

[68] Although not specifically addressed in this answer, NEI's proposed approach to revising the financial tests in Appendix C would also preserve the ability of eligible licensees to use self-guarantees as method of decommissioning funding.

[69] 1988 Decommissioning Rule, 53 Fed. Reg. at 24,035-36; *See also*, "Advance Notice of Proposed Rulemaking – Alternatives to the Use of Credit Ratings (RIN 3150-AJ92)," SECY-20-0056 at 2 (June 26, 2020) (explaining the regulatory history of NRC's financial tests).

[70] 1982 EPA Rule, 47 Fed. Reg. at 15034.

[71] *See* "Summary Findings Resulting from the Staff Review of the 2010 Decommissioning Funding Status Reports for Operating Power Reactor Licensees," SECY-11-0149 (Oct. 26, 2011) (describing how decommissioning funding shortfalls for both the 2008 and 2010 reporting years were resolved by licensees – including, in several instances, through the use of parent company guarantees).

letters of credit, difficult or impractical to obtain. Further, cash payments into NDTs cannot be recovered once market conditions improve (i.e., they are essentially stranded in the NDT until decommissioning). Given that the NRC's current financial tests do not result in inappropriate overreliance on bond ratings, NEI believes that there is no valid policy reason to modify the regulations in a manner that makes it more difficult for licensees to utilize the full spectrum of decommissioning funding assurance techniques, including guarantees.

(Question 2) Modified or new financial metrics for assessing creditworthiness: Please provide your views on financial statement metrics or other quantifiable financial characteristics that could be reported by licensees to assess a licensee's credit-worthiness and hence, its ability to use a parent company guarantee or self-guarantee mechanism for providing reasonable assurance that decommissioning funding will be available (see § 50.75, ''Reporting and recordkeeping for decommissioning planning''). Suggested metrics should differ from the current working capital and liability-based metrics currently presented in 10 CFR part 30 appendices cited in the Background to this notice and include pass or fail criteria limits.

NEI and its member companies explored the availability of such metrics in preparing these comments, and we believe that developing new or adapting existing metrics would be a difficult and resource-intensive activity with no commensurate safety benefits. Our conclusion is confirmed by the fact that even expert financial regulators have struggled to develop such metrics.[72] NEI does not believe that modified or new metrics for assessing creditworthiness are necessary, or that the NRC should endeavor to develop such metrics given: (1) NRC's primary statutory mission and expertise as a regulator of radiological health, safety, and security; (2) the NRC's prior conclusions concerning the lack of overreliance concerns with respect to the use of bond ratings in the appendices to Part 30; and (3) the limited application of the financial tests containing bond ratings in NRC's regulatory scheme.

(Question 3) Independent agency determination: Please provide your views on the NRC performing an independent, risk-informed, performance-based determination of a licensee's credit-worthiness. The NRC would seek to determine the licensee's risk of default based on its review of financial data while providing some degree of flexibility on the part of licensees as to the type of financial data submitted. This could include evaluation of financial data available from the licensee, open sources, and from third parties, including credit ratings.

NEI's proposed path forward, as described in Section III.D above, fits within this category, with one significant caveat. As described in Section III.D, NEI recommends that the NRC replace the prescriptive financial criteria currently contained in paragraph (i) of Section II.A.2 of Appendix A, and paragraph (3) of Section II.A.2 of Appendix C with a less prescriptive requirement that does not explicitly reference bond ratings. That said, as described above in Section III.D.4, it is critical that the proposed performance-based revision to the NRC's regulations must be applied consistent with the Commission's conclusions in the 2011 rulemaking that reliance on NRSRO ratings of "uninsured, uncollateralized, and unencumbered" bonds, in conjunction with the minimum tangible

[72] *See, e.g.*, *Oversight of the Credit Rating Agencies Post-Dodd-Frank: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 112th Cong. 5 (July 27, 2011) (statement of David K. Wilson, Senior Deputy Comptroller, Bank Supervision Policy, and Chief National Bank Examiner, Office of the Comptroller of the Currency describing the challenges that the OCC and other federal banking agencies faced in implementing Section 939A, and expressing the view that "an approach the precludes undo or exclusive reliance on credit ratings rather than imposing an absolute prohibition on their use would strike an appropriate balance between the need to address the problems created by the overreliance on credit ratings with the need to enact sound regulations that can be consistently implemented.").

net worth requirements contained in Appendices A and C, sufficiently guard against the overreliance that Section 939A seeks to mitigate.

Specifically, NEI's proposed new language allows for the use of "external risk assessments" (which could include bond ratings) to ensure a low risk of default and a high likelihood that "full and timely payment" of the amount guaranteed will be made. Consistent with the rationale provided in the NRC's 2011 Decommissioning Planning Rulemaking, the preamble to the revised regulations must clearly state that demonstrating the guarantor's most recent uninsured, uncollateralized, and unencumbered bond issuance of AAA, AA, A, or BBB (including adjustments of + and –) as issued by Standard and Poor's, or Aaa, Aa, A, or Baa (including adjustment of 1, 2, or 3) as issued by Moody's would be one acceptable method of meeting the revised financial criteria contained in paragraph (i) of Section II.A.2 of Appendix A, and paragraph (3) of Section II.A.2 of Appendix C.

(Question 4) Should the NRC consider other alternative financial test criteria not presented above to assess an applicant's or licensee's use of a guarantee to provide reasonable assurance of funds for decommissioning? If yes, please provide details of the alternative criteria and the financial data needed for its use.

NEI believes that the proposed path forward articulated in these comments would allow the NRC to comply with both the letter and spirit of Section 939A, while not unnecessarily impacting the ability of licensees to use the guarantee methods of decommissioning funding assurance. Thus, we do not believe that alternative financial test criteria are necessary.

V. CONCLUSION

Section 939A of the Dodd-Frank Act requires the NRC to remove explicit references to credit ratings or bond ratings from its regulations. However, for the reasons explained above, that statutory provision does not require the NRC to eliminate the use of parent company guarantees or self-guaranties by commercial company licenses seeking to demonstrate decommissioning financial assurance. Nor does it require the NRC to fundamentally alter the manner in which it currently applies its financial tests for parent company guarantees or self-guaranties by commercial licensees. By amending the financial tests in 10 CFR Part 30, Appendices A and C in the manner suggested by NEI herein, the NRC would be able to fully comply with both the letter and spirit of the Section 939A of the Dodd-Frank Act, while still preserving these important decommissioning financial assurance options for commercial reactor and materials licensees.