RULEMAKING ISSUE
(Affirmation)

July 1, 2019 SECY-19-0068

FOR: The Commissioners

FROM: Margaret M. Doane
Executive Director for Operations

SUBJECT: DIRECT FINAL RULE – ALTERNATIVES TO THE USE OF CREDIT RATINGS (RIN 3150-AJ92)

PURPOSE:

The purpose of this paper is to obtain Commission approval to publish a direct final rule and companion proposed rule that would amend the U.S. Nuclear Regulatory Commission's (NRC) regulations for approved decommissioning financial assurance mechanisms to comply with Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, referred to as the Dodd-Frank Act (Public Law 111-203, enacted July 21, 2010).

SUMMARY:

The staff has prepared a direct final rule (Enclosure 1) and a companion proposed rule (Enclosure 2) that would amend the NRC's regulations for approved financial assurance mechanisms for decommissioning, specifically for parent-company guarantees and self-guarantees, which require bond ratings issued by credit rating agencies. The direct final rule would implement the provisions of the Dodd-Frank Act. The Dodd-Frank Act directed agencies to amend their regulations "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." The direct final rule would remove from the NRC's regulations those requirements that require financial tests that

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rely in part on credit ratings and retain those requirements that do not require these financial tests. Specifically, the direct final rule would: 1) remove Section II.A.2 from Appendix A to Part 30 of Title 10 of the *Code of Federal Regulations* (10 CFR) and rely entirely on Section II.A.(1); 2) remove in its entirety Appendix C to 10 CFR Part 30 and rely entirely on Appendix D; and 3) remove Sections II.A.(1) and II.B.(1) from Appendix E to 10 CFR Part 30 and rely entirely on Sections II.A.(2) and II.B.(2).

BACKGROUND:

In 2010, Congress passed the Dodd-Frank Act to "promote the financial stability of the United States by improving accountability and transparency in the financial system."[1] In the Dodd-Frank Act, Congress found that "ratings on structured financial products have proven to be inaccurate" and that "[t]his inaccuracy contributed significantly to the mismanagement of risks by financial institutions and investors, which in turn adversely impacted the health of the economy."[2] In Section 939A of the Dodd-Frank Act, Congress directed each Federal agency 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."[3] Section 939A further directed each such agency to "modify any such regulations identified by the review ... to remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness as each respective agency shall determine as appropriate for such regulations."[4]

As directed by Section 939A of the Dodd-Frank Act, the staff reviewed the NRC's regulations for any references to or requirements regarding credit ratings. The three primary credit rating agencies include Moody's, Standard and Poor's, and Fitch. Appendices A, C, and E to 10 CFR Part 30 require specified bond ratings from Moody's or Standard and Poor's to satisfy certain decommissioning financial assurance requirements for materials, power reactor, and non-power reactor licensees and applicants. In accordance with the Dodd-Frank Act, the staff is proposing to amend these appendices to remove these requirements and rely instead on already existing alternative financial tests that do not contain a credit rating criterion. Other regulations that cite or reference these appendices would also be affected by the direct final rule, including: 10 CFR 30.35(f)(2); 10 CFR 40.36(e)(2); Appendix A to 10 CFR Part 40, Criterion 9; 10 CFR 50.75(e)(1)(iii)(C); 10 CFR 70.25(f)(2); and 10 CFR 72.30(e)(2).

DISCUSSION:

The staff is using the direct final rule process since the removal of the regulations regarding credit ratings that rely on already existing alternative financial tests is considered non-controversial. The direct final rule process allows an agency to issue a proposed and final rule in parallel. If no significant and adverse comments are received on the proposed rule, the final rule can become effective without further formal action. As such, the time and associated schedule to issue a direct final rule is shorter than a standard rule. Even though this rule is required by statute, the staff is using the direct final rule process rather than issuing a final rule to allow for the public to provide comment on the specific approach being taken to comply with the Dodd-Frank Act. Also, the NRC is issuing interim guidance, "Interim Staff Guidance on

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[1] Public Law 111-203, Preamble.
[2] Public Law 111-203, Sec. 931(5).
[3] Public Law 111-203, Sec. 939A(a)(1)-(2).
[4] Public Law 111-203, Sec. 939A(b).

Removal of Bond Ratings from Parent and Self-Guarantees, Decommissioning Financial Assurance," for the implementation of the requirements in this rulemaking.

The direct final rule would remove regulations that require bond ratings. Instead, it would rely on already existing alternative financial tests that do not contain a credit rating criterion. Applicants and licensees must demonstrate reasonable assurance that funds will be available when needed for decommissioning in order to obtain and maintain a reactor license and certain materials licenses.[5] Under current regulations, such a demonstration may be made by prepayment of funds, payment of funds into an external sinking fund, a surety method, insurance, or other guarantee method including a letter of credit, a parent-company guarantee, or a self-guarantee.[6] The direct final rule concerns only the NRC's regulations on parent-company guarantees or self-guarantees. Only these financial assurance mechanisms rely in part on credit ratings.

For each entity (a company, a parent company, or a nonprofit college, university, or hospital) from which the NRC accepts a guarantee to provide decommissioning financial assurance, two financial tests exist in Appendices A, C, D, and E to 10 CFR Part 30: one for entities with credit ratings and one for those without credit ratings.

The direct final rule would remove from the NRC's regulations those requirements that require financial tests that rely in part on credit ratings and retain those paragraphs that do not require these financial tests. The direct final rule would: 1) remove Section II.A.2 from Appendix A to 10 CFR Part 30 and rely entirely on Section II.A.1; 2) remove in its entirety Appendix C to 10 CFR Part 30 and rely entirely on Appendix D; and 3) remove Sections II.A.(1) and II.B.(1) from Appendix E to 10 CFR Part 30 and rely entirely on Sections II.A.(2) and II.B.(2).

The NRC staff has identified 12 licensees that would be impacted by this rule at a one-time cost of approximately $100,000, or an average of $8,000 per licensee. This cost is attributed to updating licensee procedures as needed and applying a one-time change to the appropriate financial tests.

Parent-Company Guarantees

Under the current Section II.A.2 of Appendix A to 10 CFR Part 30, the NRC may accept a parent-company guarantee based in part on credit ratings. Under the direct final rule, which would remove Section II.A.2 of Appendix A to 10 CFR Part 30, these entities would be required to meet the financial test in Section II.A.1 of Appendix A to 10 CFR Part 30. This financial test contains two criteria that differ from the test in current Appendix A to 10 CFR Part 30, Section II.A.2:

1) The parent-company must meet two of the following three ratios:
   a) a ratio of total liabilities to total net worth less than 2.0;
   b) a ratio of the sum of net income plus depreciation, depletion, and amortization to total liabilities greater than 0.1; and
   c) a ratio of current assets to current liabilities greater than 1.5.

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[5] Section 182a of the Atomic Energy Act of 1954, as amended, provides that "Each application for a license...shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant...as the Commission may deem appropriate for the license."

[6] 10 CFR 30.35(f), 40.36(e), 50.75(e), 70.25(f), and 72.30(e).

2) The parent company must have net working capital and tangible net worth each at least six times the amount of decommissioning funds being assured.

The other two criteria of the financial test in Section II.A.1 are the same as in Section II.A.2.

Self-Guarantees

Under the current Appendix C to 10 CFR Part 30, the NRC may accept a company self-guarantee based in part on credit ratings through use of the two risk-mitigation requirements of the Securities and Exchange Act currently found in Appendix C to 10 CFR Part 30, Criterion II.B.(1) and the immediate reporting requirement currently found in Appendix C to 10 CFR Part 30, Criterion II.C. Because Appendix C to 10 CFR Part 30 relies principally on the credit ratings of the licensee with some risk mitigation related to Security and Exchange Act requirements and reporting requirements, the removal of references to credit ratings in accordance with Section 939A of the Dodd-Frank Act would leave Appendix C without a basis to determine that reasonable assurance that funds will be available when needed for decommissioning in order to obtain and maintain a reactor license and certain materials licenses. Without the references to the credit ratings, Appendix C would only reference the risk-mitigation requirements that provided additional confidence in the credit ratings.

Under the direct final rule, which would remove Appendix C to 10 CFR Part 30, those entities would be required to meet the financial test in Appendix D to 10 CFR Part 30. The financial test in Appendix D to 10 CFR Part 30 contains a criterion that differs from the test in Appendix C to 10 CFR Part 30. The difference is that, in lieu of providing a certain credit rating, the licensee would be required to meet a ratio of cash flow divided by total liabilities greater than 0.15 and a ratio of total liabilities divided by net worth less than 1.5.

Self-Guarantees for Nonprofit Colleges, Universities, and Hospitals

Under the current Section II.A.(1) of Appendix E to 10 CFR Part 30, the NRC may accept a self-guarantee based on credit ratings from a nonprofit college or university. Under the direct final rule, which would remove Section II.A.(1) of Appendix E to 10 CFR Part 30, those licensees would be required to meet the financial test in Section II.A.(2) of Appendix E to 10 CFR Part 30. The financial test in Section II.A.(2) requires an unrestricted endowment consisting of assets located in the U.S. of at least $50 million, or at least 30 times the total current decommissioning cost estimate, whichever is greater.

Under the current Section II.B.(1) of Appendix E to 10 CFR Part 30, the NRC may accept a self-guarantee based on credit ratings from a nonprofit hospital. Under the direct final rule, which would remove Section II.B.(1) of Appendix E to 10 CFR Part 30, those licensees would be required to meet the financial test in Section II.B.(2) of Appendix E to 10 CFR Part 30. The financial test in Section II.B.(2) requires the following: 1) a ratio of (total revenues less total expenditures) divided by total revenues must be 0.04 or greater; 2) long-term debt divided by net fixed assets must be less than or equal to 0.67; 3) (current assets and depreciation fund) divided by current liabilities must be greater than or equal to 2.55; and 4) operating revenues must be 100 times the total current decommissioning cost estimate.

RECOMMENDATIONS:

The staff recommends that the Commission:

1) Approve the enclosed direct final rule and companion proposed rule for publication in the *Federal Register*.

2) Note the following:

   a) The staff has prepared a regulatory analysis for the final rule (Enclosure 3).

   b) The staff is issuing interim guidance, "Interim Staff Guidance on Removal of Bond Ratings from Parent and Self-Guarantees, Decommissioning Financial Assurance."

   c) The staff will inform the appropriate congressional committees.

   d) The Office of Public Affairs will consider issuing a press release when the NRC publishes the direct final rule in the *Federal Register*.

   e) The Chief Counsel for Advocacy of the Small Business Administration will be informed of the certification and the reasons for it, as required by the Regulatory Flexibility Act, 5 U.S.C. 605(b). This certification is included in the direct final rule (Enclosure 1).

   f) The direct final rule contains amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) that must be submitted to the Office of Management and Budget for its review and approval before publication of the final rule in the *Federal Register*.

COORDINATION:

The Office of the General Counsel has reviewed this paper and has no legal objections. The Office of the Chief Financial Officer has reviewed this paper and has no objections.

/RA/ for

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for Operations

Enclosures:
1. Direct final rule
2. Companion proposed rule
3. Regulatory analysis

DIRECT FINAL RULE – ALTERNATIVES TO THE USE OF CREDIT RATINGS, DATED: July 1, 2019

ADAMS Accession Nos:
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