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## **POLICY ISSUE**

### **(Notation Vote)**

June 26, 2020

SECY-20-0056

FOR: The Commissioners

FROM: Margaret M. Doane  
Executive Director for Operations

SUBJECT: ADVANCE NOTICE OF PROPOSED RULEMAKING—ALTERNATIVES  
TO THE USE OF CREDIT RATINGS (RIN 3150-AJ92)

#### PURPOSE:

The purpose of this paper is to obtain Commission approval to publish an advance notice of proposed rulemaking (ANPR) to solicit public input to inform development of a proposed rule on decommissioning financial assurance mechanisms to comply with provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act or the Act).

#### BACKGROUND:

The U.S. Nuclear Regulatory Commission (NRC) must amend its approved decommissioning financial assurance mechanisms to comply with provisions of the Dodd-Frank Act. Following the financial crisis of 2007–2008, Congress determined 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.”<sup>1</sup> Accordingly, Section 939 of the Act (Removal of statutory references to credit ratings) 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 ... and any references to or requirements in such regulations regarding credit ratings.”<sup>2</sup> Section 939A further directed each Federal agency to “modify any such regulations identified by the review ...

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<sup>1</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), Pub. L. No. 111-203, § 931(5).

<sup>2</sup> Dodd-Frank Act, Pub. L. No. Public Law 111-203, § 939A(a)(1)-(2).

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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.”<sup>3</sup>

In response to the Dodd-Frank Act requirements, the staff reviewed NRC regulations to identify any reference to or requirements that rely on credit ratings.<sup>4</sup> Applicants and licensees may demonstrate decommissioning financial assurance by several means, including prepayment of funds, payment of funds into an external sinking fund, or use of a surety method, insurance, and other guarantee method including a letter of credit, a parent company guarantee, or a self guarantee. Parent company or a self guarantee are the only decommissioning financial assurance mechanisms in NRC regulations that rely, in part, on credit ratings. Appendices A, C, and E to Part 30 of Title 10 of the *Code of Federal Regulations* (10 CFR), “Rules of General Applicability to Domestic Licensing of Byproduct Material,” require and cite minimum bond rating (i.e., credit rating) thresholds necessary to satisfy certain decommissioning financial assurance requirements for materials, power reactor, and non-power reactor licensees, and as well as applicants seeking to use parent company or self guarantees for providing reasonable assurance of funds for decommissioning.

### *Regulatory History*

The NRC promulgated regulations in the 1980s and 1990s, that allow licensees to use parent company and self guarantee decommissioning financial assurance mechanisms. Specifically, NRC approved parent company guarantee and its accompanying financial tests in June 1988 (“General Requirements for Decommissioning Nuclear Facilities,” Final rule; 53 FR 24046, June 27, 1988), modeled from the U.S. Environmental Protection Agency’s (EPA)’s regulations in 40 CFR Parts 264 and 265. The EPA had established use of company guarantee mechanisms for owners and operators of hazardous waste treatment, storage, and disposal facilities in April 1982 (“Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Requirements,” Revised interim final rules; 47 FR 15032, April 7, 1982), including parent companies guaranteeing financial assurance for subsidiaries (“corporate guarantees”). Owners and/or operators and parent company guarantors could qualify to use these guarantee mechanisms by either meeting financial test metrics, of which liability and working capital-based criteria played a significant role, or minimum guarantor bond credit rating criteria. However, EPA noted at the time that “... 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.” Accordingly, EPA incorporated the use of credit rating test criteria, which it considered more appropriate for utilities and firms with similar financial characteristics.

In accordance with the Dodd-Frank Act, the staff is proposing to amend the identified appendices to 10 CFR Part 30 to remove these credit rating-based requirements. Other regulations that cite or reference these appendices also would be affected by the proposed 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).

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<sup>3</sup> Dodd-Frank Act, Pub. L. No. Public Law 111-203, § 939A(b).

<sup>4</sup> The three primary credit rating agencies include Standard & Poor’s, Moody’s Investors Service (Moody’s), and Fitch Ratings.

On July 1, 2019, staff provided a direct final rule package to the Commission (SECY-19-0068, Agencywide Documents Access and Management System [ADAMS] Accession No. ML19010A254) that would amend the regulations to comply with provisions of the Dodd-Frank Act.<sup>5</sup> Subsequently, the staff withdrew the package, because, upon the package becoming public, it became apparent that substantive stakeholder comments would be received if it were published. Based on this information, the staff sought Commission approval to withdraw the direct final rule package and transition to development of a proposed rule. In staff requirements memorandum (SRM-19-0068, ADAMS Accession No. ML19262D993), the Commission approved the staff's request.

## DISCUSSION:

### *Public Meeting Input*

The staff held a public meeting on October 30, 2019 (ADAMS Accession No. ML19276F107), and presented an analysis of the impact of the Dodd-Frank Act on NRC decommissioning financial assurance regulations and discussed alternatives for implementing the requirements of the Act. The meeting participants shared a consensus view that the staff's initial rulemaking approach, to remove credit rating criteria and instead rely on existing financial test criteria for determining a licensee's credit-worthiness for use of a guarantee mechanism, would have a substantial negative impact on the industry's ability to utilize parent company and self guarantee mechanisms (Public Meeting Summary, ADAMS Accession No. ML19322A692). Participants recommended that the NRC examine approaches taken by other Federal agencies for implementing the Dodd-Frank Act requirements to identify alternative approaches for assessing a licensee's credit-worthiness that do not significantly alter the availability of these guarantee mechanisms. Participants also recommended issuing an ANPR to solicit early stakeholder views to inform the development of the proposed rule.

### *Actions taken by Other Federal Agencies*

Based on its research, the staff determined that some Federal agencies that regulate financial matters (e.g., U.S. Securities and Exchange Commission; Office of the Comptroller of the Currency (OCC); Federal Deposit Insurance Corporation; and Farm Credit Administration) have modified their regulations and guidance that cited credit ratings, as required by the Dodd-Frank Act. For example, the OCC, which charters, regulates, and supervises all national banks, amended its regulatory definition of "investment grade" by removing references to credit ratings. In addition, under revised regulations, OCC required that for a security to be considered "investment grade," banks must determine that the probability of default is low, and that the full and timely repayment of principal and interest can be expected. To comply with the new standard, banks may not rely exclusively on external credit ratings. Instead, they may continue to use such ratings as part of their determinations, and consistent with existing rules and guidance, supplement any consideration of external ratings with due diligence processes and additional analyses.

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<sup>5</sup> No rulemaking plan was prepared for this activity. As outlined in Management Directive 6.3, "The Rulemaking Process" (ADAMS Accession No. ML19211D136), there are rulemakings which are exempt from the rulemaking plan requirement (SECY-15- 0129, "Commission Involvement in Early Stages of Rulemaking," dated February 3, 2016 (ADAMS Accession No. ML16034A441). Rulemakings exempt from the rulemaking plan requirement include those required by statute.

In addition, the staff also contacted staff from two agencies with similar missions and regulatory oversight to NRC (the U.S. EPA and the U.S. Department of the Interior's Bureau of Ocean Energy Management) but did not identify any models that would be applicable to the NRC.

### *Analysis and Need for Stakeholder Input*

Based on the analysis of the Act's impact on NRC decommissioning financial assurance regulations, and with consideration of input received from the public and insights from other Federal agencies' actions, the staff continues to believe the agency should proceed with rulemaking to comply with the Act. This rulemaking would remove any reference to or requirement of reliance on credit ratings and incorporate regulatory changes that reflect new or modified financial test metrics for assessing the credit-worthiness of licensees who choose to use a parent or self guarantee for providing decommissioning financial assurance. The staff would seek mechanisms that meet this need in a manner that maintains the availability these guarantee methods.

The staff is currently considering two potential approaches to comply with the Dodd-Frank Act:

- Modified or new financial metrics for assessing credit-worthiness: Develop metrics based on financial statement data and other quantifiable financial characteristics that could be reported by licensees along with associated pass/fail limits. Such metrics would differ from working capital and liability-based metrics currently presented in the 10 CFR Part 30 appendices previously cited.
- Independent agency determination: Develop a method for the NRC staff to independently perform its own risk-informed, performance-based determination of a licensees' credit-worthiness. The staff 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. This could include evaluation of financial data available from the licensee, other open-sources, and from third parties, including credit ratings.

Based on the evaluation of these potential approaches and consideration of public input received, the staff has determined that it would be beneficial to issue an ANPR to solicit early stakeholder views to inform the development of the proposed rule. An ANPR is a vehicle for obtaining early public participation and stakeholder input in the formulation of a regulatory change. Specifically, in this case the ANPR would allow staff to gather stakeholder views on the development of potential financial metrics or methods for assessing licensee credit-worthiness. This step should result in a higher quality, more informed proposed rule that will conform our regulations to the requirements of the Act and take into account stakeholders views.

The ANPR would provide a 75-day comment period, during which time the staff would hold a public meeting to facilitate stakeholder engagement. Staff will evaluate the comments to inform development of the proposed rule. Staff expects to provide a proposed rule package to the Commission within one year after the close of the ANPR comment period.

### RECOMMENDATION:

The staff recommends that the Commission approve the publication of the enclosed *Federal Register* notice informing the public that the NRC is requesting comments on potential paths for complying with the Dodd-Frank Act.

### RESOURCES:

In accordance with Commission direction, this rulemaking has been designated as medium-priority and follows the NRC's Common Prioritization of Rulemaking process. A more detailed breakdown of estimated resources for current and future years is provided in Enclosure 2 entitled, "Resource Estimates."

COORDINATION:

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

Margaret M. Doane  Digitally signed by Margaret M. Doane  
Date: 2020.06.26 15:01:53 -04'00'

Margaret M. Doane  
Executive Director  
for Operations

Enclosures:

1. Advance Notice of Proposed Rulemaking
2. Resource Estimates (not publicly available)

SUBJECT: ADVANCE NOTICE OF PROPOSED RULEMAKING--ALTERNATIVES TO THE USE OF CREDIT RATINGS DATED: June 26, 2020

**SRM-S19-0068-2**

**ADAMS ACCESSION No.: ML20097C507 (Package) \*via e-mail**

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