U.S. Department of Energy
Rulemaking on
Convention on Supplementary Compensation for Nuclear Damage
Contingent Cost Allocation,
75 Fed. Reg. 43945 (July 27, 2010),
75 Fed. Reg. 51986 (August 24, 2010),
75 Fed. Reg. 64717 (October 20, 2010).
79 Fed.Reg. 75076 (December 17, 2014),
80 Fed.Reg. 4227 (January 27, 2015),
80 Fed.Reg. 12352 (March 9, 2015),
81 Fed.Reg. 51140 and 51193 (August 3, 2016),
and
81 Fed.Reg. 66199 (September 27, 2016)

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and
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Comments of
Contractors International Group on Nuclear Liability

November 2016

The Contractors International Group on Nuclear Liability (CIGNL) hereby submits comments in response to the latest U.S. Department of Energy (DOE) Notices, 81 Fed.Reg. 51140 and 51193 (Aug. 3, 2016) and 81 Fed.Reg. 66199 (Sept. 27, 2016), in its Rulemaking on the Convention on Supplementary Compensation for Nuclear Damage (CSC) Contingent Cost Allocation. 79 Fed.Reg. 75076 (Dec. 17, 2014); 80 Fed.Reg. 4227 (Jan. 27, 2015); and, 80 Fed.Reg. 12352 (Mar. 9, 2015).

CIGNL's Interest

CIGNL is an *ad hoc* nongovernmental group of major U.S. nuclear suppliers formed in 1993 to promote more widespread adherence to the international nuclear liability conventions and adoption of consistent domestic nuclear liability laws. In particular, CIGNL actively promoted ratification of the CSC by the United States after it was signed in 1997, because CIGNL believed the CSC would help open international nuclear export markets to the United States. CIGNL worked closely with the Administration and Congress in securing the ratification of the CSC in 2006 and enactment of implementing legislation in 2007. CIGNL also has been working closely with the U.S. Government, the International Atomic Energy Agency and others to encourage more States to join this important Convention, noting it entered into force on April 15, 2015 following Japan's acceptance.

CIGNL's current members are as follows: AECOM; Bechtel Power Corporation; BWX Technologies, Inc.; Centrus Energy Corp.; Fluor Corporation; GE Hitachi Nuclear Energy LLC; and, Westinghouse Electric Company LLC.

In November 2010, CIGNL submitted comments intended to provide preliminary observations on the Department's earlier Notice of Inquiry (NOI) in this rulemaking. 75 Fed. Reg. 43945 (Jul. 27, 2010); 75 Fed. Reg. 51986 (Aug. 24, 2010); and, 75 Fed. Reg. 64717 (Oct. 20, 2010). On March 2, 2011, representatives of CIGNL met at the Forrestal Building with DOE officials at their invitation to discuss CIGNL's November 2010 written comments. On February 10, 2015, CIGNL submitted Questions and Topic Suggestions for and participated in the Department's February 20, 2015 public workshop, and submitted detailed written comments to DOE in April 2015 on the Department's Notice of Proposed Rulemaking (NOPR). On September 7, 2016, CIGNL submitted Questions and Topic Suggestions and a General Statement for and participated in the Department's September 16, 2016 public workshop.

Recognizing the difficult task that DOE faces and the considerable uncertainty about how to implement the 2007 legislation, CIGNL and each of its members respectfully reserve our rights to provide additional comments, collectively or individually, as this rulemaking proceeds.

Proposed Information Collection

As indicated in DOE's August 3, 2016 Federal Register Notices, the main purpose of the September 16, 2016 workshop and this round of public comments is to obtain comments on the Department's proposed collection of information, including the Department's draft CSC Data and Information Collection Form, to be used in support of further development of this rulemaking. One of the Department's Notices, 81 Fed.Reg. at 51141, said: "The proposed

information collection is a one-time effort to facilitate development of the regulation; it is separate from and not intended to be the same information that would be collected in connection with any reporting requirements that would take effect after promulgation of a final regulation." These comments thus will concentrate on the information collection and draft Collection Form proposed by DOE. Given the complexity of the issues presented by the NOPR and the fact that the September 16, 2016 DOE workshop was scheduled for only three hours, CIGNL reiterated, as set out in CIGNL's September 7, 2016 submission, it would be advisable for DOE to address as many of CIGNL's questions as possible at the public workshop and then to publish further information in the Federal Register addressing each of them before written comments from the public originally were due on the draft Collection Form on October 3, 2016. In the absence of such further clarifications by DOE, CIGNL reiterates key points made in its previous filings and at the September 16, 2016 workshop.

The fundamental deficiency of the draft Collection Form is that it asks for export values "expressed in U.S. dollars" only by types of installations without regard to the types of goods and services supplied to each. None of the six example risk factors in the 2007 CSC Contingent Cost Allocation Act refer to the revenue, profit or other commercial benefit earned by suppliers from nuclear trade.[1] CIGNL submits it, therefore, is unclear how DOE could use the financial and other data proposed to be collected to develop the *risk-informed* formula mandated by Congress, taking into account both the types of installations and the nature of goods and services supplied. Among other comments pertaining to risk-informing DOE's proposed CSC cost allocation formula, set forth in CIGNL's earlier April 2015 Comments at pages 15-20, CIGNL said the formula should seek to group exporting suppliers into categories of goods and services based on the types of installations that use these goods and services, rather than the types of goods and services themselves as proposed in the NOPR's Alternative 2. CIGNL noted at the

[1] 42 U.S.C. §§17373(e)(2)(C)(i) and –(ii) provide:

> (i) **IN GENERAL**.--Not later than 3 years after December 19, 2007, and every 5 years thereafter, the Secretary shall, by regulation, determine the risk-informed assessment formula for the allocation among nuclear suppliers of the contingent cost resulting from a covered incident that is not a Price-Anderson incident, taking into account risk factors such as--
>
> (I) the nature and intended purpose of the goods and services supplied by each nuclear supplier to each covered installation outside the United States;
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> (II) the quantity of the goods and services supplied by each nuclear supplier to each covered installation outside the United States;
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> (III) the hazards associated with the supplied goods and services if the goods and services fail to achieve the intended purposes;
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> (IV) the hazards associated with the covered installation outside the United States to which the goods and services are supplied;
>
> (V) the legal, regulatory, and financial infrastructure associated with the covered installation outside the United States to which the goods and services are supplied; and
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> (VI) the hazards associated with particular forms of transportation.
>
> (ii) **FACTORS FOR CONSIDERATION**.--In determining the formula, the Secretary may--
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> (I) exclude--
>
> (aa) goods and services with negligible risk;
>
> (bb) classes of goods and services not intended specifically for use in a nuclear installation;
>
> (cc) a nuclear supplier with a de minimis share of the contingent cost; and
>
> (dd) a nuclear supplier no longer in existence for which there is no identifiable successor; and
>
> (II) establish the period on which the risk assessment is based.

September 2016 workshop that the draft Collection Form does not appear to distinguish between nuclear installations under construction, in operation or in the process of being decommissioned. It was noted at the September 2016 workshop that the Instructions for Completing the Collection Form state that "[v]alue should be expressed in adjusted U.S. dollars…." CIGNL reiterates DOE should specify a particular adjustment index that includes energy prices, if the Department continues to seek export values "expressed in U.S. dollars". Further, absent a specific formula, the process of adjustment itself will add significant burden on companies completing the Collection Form.

CIGNL still questions the basis for DOE's estimate in the August 3, 2016 Federal Register, 81 Fed.Reg. 51193, that there will be only 150 Respondents to the Collection Form. As noted in CIGNL's September 2016 Questions and Topic Suggestions for the workshop, the Nuclear Regulatory Commission includes about 600 companies as part of its Vendor Inspection Program. Further, CIGNL's November 2010 comments on the NOI specifically noted that as many as 1,800 different types of goods and services go into engineering, designing, constructing, fueling, operating and maintaining a nuclear power plant. Additionally, the Instructions for Completing the Collection Form refer to a "Nuclear Supplier" as "the principal party in interest in the supply of the nuclear goods or services or nuclear material transport" and as "…the person receiving the primary monetary benefit from the export transaction…." Information provided at the September 2016 workshop did not clarify just which companies in a supply chain would be required to report exports, nor was it clear whether DOE intends to apply the final Rule only to U.S. suppliers whose goods and/or services are subject to export licenses or authorizations.[2] The draft Collection Form should apply, not only to nuclear suppliers that are prime contractors, but also to subcontractors that provide goods to and/or services at a foreign nuclear installation. In its April 2015 Comments, CIGNL suggested that DOE use or draw upon the statutory definition of "nuclear supplier." CIGNL's April 2015 Comments added that tying the CSC assessments to suppliers with export licenses or authorizations is fraught with problems, and is not likely to reflect accurately the large number of U.S. suppliers that export goods or services to foreign nuclear installations. In any case, reporting should be based on risk, not the revenue, profit or other monetary or commercial benefit earned by suppliers from nuclear trade, as also stated in CIGNL's April 2015 Comments on the NOPR.

As to the estimates in the Department's August 3, 2016 Federal Register Notice, 81 Fed.Reg. 51193, that the draft data Collection Form could be completed in 5 burden hours per response at a cost of $1,500 per Respondent, CIGNL reiterates that these estimates are much too low. While the individual response times and costs would vary by Respondent, each CIGNL member now estimates the figures would be significantly higher for each CIGNL Respondent and be dependent upon the level of details with respect to nuclear exports DOE ultimately requests.

CIGNL members generally agree that for purposes of record-keeping, reporting and cost allocation pursuant to the CSC Contingent Cost Allocation Act, the reach-back period should not

[2] At a minimum, companies who supply fungible goods to a U.S. facility that are substantially transformed before being exported, such as occurs when low enriched uranium hexafluoride is delivered to a U.S. fabrication plant and transformed into nuclear fuel, should not be required to report the supply of those fungible goods.

extend prior to January 1, 2008, as now proposed in DOE's draft Collection Form. As noted in CIGNL's April 2015 comments, this date correlates to the date of enactment of the 2007 Act, the earliest date on which affected nuclear suppliers may have been on notice of some additional cost burden, and the period for which such records generally are maintained for tax purposes. Only one CIGNL member indicated at the September 2016 workshop that DOE should adopt an earlier reach-back period.

DOE has not indicated how it would ensure that every U.S. supplier subject to the final DOE CSC contingent cost allocation rule will be informed of the need to respond to the Collection Form. DOE needs to pay additional attention to the dissemination of information about the data collection effort. While publication in the Federal Register is the minimum amount of notice required, CIGNL urges DOE to reach out directly to exporters. Possible venues for such outreach include government-sponsored events, such as the Nuclear Regulatory Commission's Regulatory Information Conference. *(see* http://www.nrc.gov/public-involve/conference-symposia/ric/) and the Commerce Department's Bureau of Industry and Security seminars *(see* https://www.bis.doc.gov/index.php/compliance-a-training/current-seminar-schedule). There are also commercial seminars offered on export controls, in which DOE representatives could appear to discuss the rulemaking and the collection effort. A broadening of the outreach to include these existing channels of information would make more companies aware of the requirement, and help to give DOE a larger data set from which to work when drafting the new rule.

Additionally, it was unclear at the September 2016 workshop how DOE will monitor compliance with the data collection requirement. It also was unclear the extent to which Respondents would be required to "certify" the accuracy of the data submitted.[3] Related to this, CIGNL indicated at the September 2016 workshop that DOE should publish a list of the names of U.S. nuclear suppliers that have submitted Collection Forms to ensure transparency in the identity of U.S. nuclear suppliers that have responded, and to ensure that the industry can assist DOE in identifying any company that should have responded. Of course, the substantive data submitted by individual U.S. suppliers would be confidential or proprietary, and should be exempt from public disclosure.

It was not resolved at the September 2016 workshop whether Respondents to the Collection Form would be required to submit information for exports to all countries or only current or prospective CSC Member States with consistent domestic legislation. CIGNL's April 2015 Comments said DOE should require reporting of covered transactions only in those countries that are CSC Member States on the date the Rule becomes effective and during subsequent annual reporting periods. CIGNL's position is that the countries covered by the draft Collection Form should be limited to current CSC Member States.[4] It further remained unclear at

[3] DOE should make clear whether any legal liability attaches to the certification. CIGNL does not believe that 18 U.S.C. §1001 or similar laws should apply to the completion of the Collection Form.

[4] For countries that seek to ratify the CSC with non-compliant national laws or where the country has covered installations that represent an unusually high risk of a nuclear incident as compared to any other CSC Member State's covered installations, DOE should report this concern to Congress, and seek an amendment to the 2007 CSC Contingent Cost Allocation Act that would remove the requirement for U.S. nuclear suppliers to make contributions to such country.

the September 2016 workshop whether DOE will ensure that the International Atomic Energy Agency list of covered installations and any updates thereto are made available to U.S. suppliers. CIGNL submits such a list is essential to ensure a rational basis for reporting to DOE. DOE further should indicate whether a transaction would not have to be reported if either the goods or services exported from the United States were not used at a foreign nuclear installation or have been replaced at the foreign nuclear installation.

Another point not clarified at the September 2016 workshop was why the draft Collection Form includes Question 6 as to whether the Nuclear Supplier is considered a "small business" under the Small Business Administration size standards at 13 CFR part 121. CIGNL noted at the September 2016 workshop that its April 2015 Comments said the Small Business Administration size standards may not be the best measure, as they are based on *average annual* sales receipts or *average current* number of employees. Use of SBA standards would not capture U.S. suppliers that cumulatively might have exported goods and/or services during the applicable reporting period. Further, again because the statutory scheme assumes that the allocation of costs will be based on risk and not revenue, CIGNL opposes any exclusion for small businesses, as small businesses can contribute to a nuclear incident as easily as large businesses. In CIGNL's view, DOE should ensure that "small businesses" that cumulatively exported goods and/or services during the applicable reporting period above any proposed *de minimis* standards should be subject to CSC cost allocation. There is no reason to grant a *per se* exclusion for small businesses.

As noted in CIGNL's Questions and Topic Suggestions for the September 2016 workshop, the December 17, 2014 NOPR, 79 Fed.Reg. at 75082, said DOE believed that suppliers of natural or depleted uranium or uranium conversion services are not suppliers of fuel and thus not nuclear suppliers that would be subject to the requirements of the proposed rule. The definition of "nuclear material" in the Instructions for Completing the Collection Form also does not include such materials. CIGNL again submits that depleted and natural uranium supplied to a nuclear installation should be considered to be "nuclear material", since release of this material at an installation, such as an enrichment or fabrication plant, could cause a nuclear incident given the toxic properties of this material. Since they supply enrichment facilities with converted uranium hexafluoride, suppliers of converted uranium, transporters of converted uranium and suppliers of the equipment used to transport such uranium should be nuclear suppliers under the proposed rule. Rather than exclude natural and depleted uranium from the definition of "nuclear material", a better approach would be to exclude mines and conversion facilities from the definition of "nuclear installation," but include natural and depleted uranium in the definition of "nuclear material" where it is supplied to a covered installation.

Conclusions

CIGNL's core objective in this proceeding still is to ensure that the final rule adopted by the Department provides for *a fair, risk-informed assessment* of the exposure that will provide an adequate base of suppliers to meet the U.S. contribution to the international supplementary fund under the CSC, without discouraging U.S. trade in nuclear goods and services. To the extent the rulemaking burdens the U.S. industry with the specter of uncertain and uninsurable costs or provides incentives not to export, it will defeat the purpose behind the CSC. Congress mandated

that the CSC cost allocation rule should be adopted by December 19, 2010. 42 U.S.C. §17373(e)(2)(C)(i). If the rulemaking cannot be completed under the current provisions of the 2007 CSC Contingent Cost Allocation Act, CIGNL again submits DOE should seek statutory amendments. In fact, the 2007 Act specifically provided that the Secretary of Energy, not later than 5 years after the date of the enactment of the Act on December 19, 2007, and every 5 years thereafter, must submit to the Committee on Environment and Public Works of the Senate and the Committee on Energy and Commerce of the House of Representatives "a report on whether there is a need for continuation or amendment of the section, taking into account the effects of the implementation of the Convention on the United States nuclear industry and suppliers." 42 U.S.C. §17373(e)(2)(C)(iv). There is no record such a report has been submitted.[5]

As stated in CIGNL's April 2015 Comments and General Statement for the September 2016 workshop, one of the most important features of this DOE rulemaking implementing the CSC must be the establishment of a "cap" or maximum contribution of $5 million that a company would be required to make and the right-sizing of the pool, which, by all accounts, should encompass even more suppliers than the 150 indicated in DOE's latest Federal Register notices. CIGNL hereby reiterates the necessity for such a cap in any rule.

CIGNL appreciated the opportunity to participate again in the Department's latest public workshop on the CSC Contingent Cost Allocation, and urges DOE to fully consider CIGNL's previous and current comments. However, as key questions presented and issues identified by CIGNL and others were not answered conclusively in the NOPR in 2014 and 2015 or at the DOE workshops in 2015 and 2016, it would be advisable for DOE to publish a supplemental proposed rule for stakeholder review and comments, following publication and public comments on the revised Collection Form. It is very important to underline that CIGNL does not believe that the one-time data collection effort planned by DOE, standing alone, will provide a sufficient basis for issuance of a final rule. Rather, once the one-time Collection Form is commented upon and finalized and the information based on it is collected, DOE should issue a new supplemental proposed rule for further review and public comment before a final rule is issued.

[5]Similarly, the Senate conditioned CSC ratification on the Secretary of State reporting on U.S. diplomatic efforts to encourage other nations to become CSC Contracting Parties and providing Congress a description of the domestic laws enacted by each Contracting Party. 152 Cong. Rec. S8901 (Aug. 3, 2006). The Senate's resolution of advice and consent to ratification of the CSC provided such reports should be submitted not later than 180 days after entry into force of the Convention for the United States (which occurred on April 15, 2015) and annually thereafter for four additional years. *Id.* There also is no record such reports have been submitted to Congress.