U.S. Department of Energy
Notice of Proposed Rulemaking on
Convention on Supplementary Compensation for Nuclear Damage
Contingent Cost Allocation,
79 Fed. Reg. 75076 (December 17, 2014),
80 Fed.Reg. 4227 (January 27, 2015),
and
80 Fed.Reg. 12352 (March 9, 2015)

Docket Number DOE-HQ-2014-0021
and
Regulatory Information Number (RIN) 1990-AA39

Comments of
Contractors International Group on Nuclear Liability

April 2015

The Contractors International Group on Nuclear Liability (CIGNL) hereby submits comments in response to the U.S. Department of Energy (DOE) Notice of Proposed Rulemaking (NOPR) 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).

The following is an Executive Summary, which should be read in connection with the full comments to avoid any misunderstanding of the complicated issues canvassed:

Executive Summary

CIGNL is an *ad hoc* nongovernmental group of major U.S. nuclear suppliers formed in 1993 to promote more widespread adherence to international nuclear liability standards. CIGNL's current members are The Babcock & Wilcox Company; Bechtel Power Corporation; Chicago Bridge & Iron Company; Centrus Energy Corp.; Fluor Corporation; GE Hitachi Nuclear Energy; and Westinghouse Electric Company LLC.

As evident on the face of the NOPR and corroborated during the February 20, 2015 DOE workshop, suppliers would be challenged to calculate the total(s) of their past exports to CSC Member States (dating back as far as 1960), which would result in unreliable total(s) for the U.S. nuclear industry, aggregated or by sector. As currently proposed, the DOE rule would not enable U.S. suppliers to calculate, plan for, or potentially assess and insure against their risk exposure under the rule, considering that suppliers cannot currently evaluate their potential liability under either Alternative 1 or 2 of the NOPR. In short, the NOPR does not state a sufficient basis for the Alternatives proposed, in part due to an acknowledged lack of relevant data and information and apparent reliance on arbitrary risk-weighting factors and other unsupported assumptions.

DOE should publish a supplemental proposed rule, informed by industry comments received in advance of and during its February 20, 2015 workshop, by these written comments, as well as by needed agency study. Merely making additional data and information DOE obtains available (as indicated in the March 9, 2015 Federal Register notice), simply selecting one of the two Alternatives proposed in the NOPR, or promulgating a different alternative (absent review and comment) would not be tenable, and would not meet the standards set forth in the Administrative Procedure Act. This is because the requirements of the proposed rule are inextricably related to data and information in several critical areas, including, but not limited to, the number of nuclear suppliers that would be covered; the length of the reporting period that would be required; and the type of and the extent of data about transactions that would have to be reported. Such data and information must be compiled and/or validated by DOE in order to ensure an informed rulemaking.

It is recognized that the CSC entered into force on April 15, 2015, but that should not preclude the development and publication of an informed supplemental proposed rule with an opportunity for stakeholder review and comment. We observe that it is highly unlikely there could be any call for contributions to the CSC international fund in the near future, even if a nuclear incident were to occur in a CSC Member State this year.

The two most important features of this DOE rulemaking implementing the CSC must be the establishment of a "cap" or maximum contribution that a company would be required to make and the right-sizing of the pool, which, by all accounts, should encompass more suppliers than the 25 indicated in the NOPR. While the amount suggested in the NOPR ($25 million) is unsupportable, the DOE appears to recognize the importance of a firm maximum on any one supplier's contribution. This also would be consistent with the legislative history of the CSC Contingent Cost Allocation Act, which stressed that DOE must ensure that "the contingent cost is not allocated disproportionately to one supplier." Such a firm number will have the advantage of allowing companies to plan for their potential risk under the DOE rulemaking, including possibly securing insurance to cover that risk and complying with financial reporting requirements. With regard to the size of the pool, we know of no basis for the 25-member pool-size contemplated in the NOPR. Directing such assessments against a mere 25 suppliers would create an unfair burden on a small segment of the U.S. nuclear industry, and be arbitrary and capricious on the DOE's part.

Another critical feature of this DOE rulemaking is the reporting period for nuclear exports: 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, if any, should not extend prior to January 1, 2008. This date correlates to the 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. CIGNL members submit suppliers' initial reports should include data from January 1, 2008 (*i.e.,* just after the December 19, 2007 effective date of the 2007 Act) to December 31st of the year before the rule's effective date, with annual updates to be submitted no later than 30 calendar days after the close of the first quarter of the next calendar year. Only one CIGNL member indicated that it may elect to file separate comments expressing a different view regarding the reach-back aspect.

Tying 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 way of example only, the Nuclear Regulatory Commission (NRC) includes about 600 companies as part of its Vendor Inspection Program.

DOE should abandon its separate definition of "final nuclear supplier" and instead use a definition based on the definition of "nuclear supplier" in the statute and both alternative draft rules. CIGNL further recommends that the term "lead nuclear supplier" used only in Alternative 2 be deleted, because it appears to be based again on the DOE's inappropriate assumption that only about 25 U.S suppliers should be liable for the U.S. share of the CSC fund.

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. DOE should ensure that the International Atomic Energy Agency list of covered installations and any updates thereto are made available to U.S. suppliers.

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. Otherwise, it is likely that the CSC will impose a substantial burden and extremely unfair risk on U.S. suppliers (thereby not providing the protections for U.S. nuclear suppliers that form the rationale for requiring them to bear the cost of the U.S. share of the CSC fund).

The methodology that DOE has used to "risk inform" its proposed allocation of liability does not appear to be well-informed, much less risk-informed. For example, DOE does not provide any detailed analysis/justification for the various risk weighting factors and/or percentages used in both Alternatives 1 and 2. DOE should undertake study and provide such analysis/justification before promulgating a final rule. As it stands, the proposed weighting factors and percentages appear arbitrary.

While CIGNL agrees that some exclusion of "small" nuclear suppliers would be appropriate, the Small Business Administration (SBA) 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.

As to the DOE's proposed payment plans, DOE should exercise its authority to make any penalty discretionary, and should publish in the Federal Register a notice listing the assessments of all liable U.S. suppliers by name and amount. The final rule should contain an appropriate process for suppliers to challenge DOE's assessment calculations, either as to their own assessments or those of other suppliers (keeping in mind the need to protect trade secrets and proprietary or business confidential information).

In summary, CIGNL submits the proposed DOE rule would not enable U.S. suppliers to calculate, plan for, disclose in financial reports, or insure against their risk exposure under the rule, considering that suppliers cannot currently evaluate their potential liability under either Alternative 1 or 2 of the NOPR. Key questions presented and issues identified by CIGNL and others were not answered at the DOE workshop. Thus, it would be advisable for DOE to publish a supplemental proposed rule for stakeholder review and comment.

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 domestic nuclear liability laws consistent with the fundamental principles of those conventions. 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. The CSC was specifically designed to allow the United States to establish treaty relations with all of its existing and future trade partners on the issues of liability. Once in force with compatible domestic legislation in Member

States, the treaty will remove a major barrier to trade in nuclear goods and services with these countries.

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 (IAEA) and others to encourage more States to join this important Convention, noting it entered into force on April 15, 2015 following Japan's recent acceptance.

CIGNL's current members are as follows: The Babcock & Wilcox Company; Bechtel Power Corporation; Chicago Bridge & Iron Company; Centrus Energy Corp.; Fluor Corporation; GE Hitachi Nuclear Energy; and Westinghouse Electric Company LLC.

CIGNL's interest in submitting these comments is to support efforts to fulfill the CSC's promised opening up of trade for the United States in foreign markets. CIGNL believes the CSC fully supports the President's Export Initiative and, importantly, will ensure that the United States remains a leading participant in the global nuclear industry, with attendant benefits for U.S. nuclear policy and the American economy. To the extent the rulemaking burdens the U.S. industry with the specter of uncertain costs or provides incentives not to export, it will defeat the purpose behind the CSC.

Procedural Background

In November 2010, CIGNL submitted comments intended to provide preliminary observations on the DOE'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. DOE did not seek to survey or otherwise collect data/input from CIGNL during the ensuing multi-year period between the March 2011 meeting and issuance of the NOPR in December 2014.

On February 10, 2015, CIGNL submitted questions and topic suggestions for the DOE's February 20, 2015 public workshop, in which it participated. On February 23, 2015, CIGNL sent a letter to DOE requesting that the public comment period on the NOPR be extended to May 18, 2015. The basis for that request was corroborated by the discussion in the public workshop, which only served to highlight the number of open questions regarding the proposed rule. CIGNL's extension request further stated it would be beneficial if the DOE would hold a second workshop before written comments are due, because it could serve to narrow the issues.

DOE's most recent March 9, 2015 Federal Register notice, 80 Fed. Reg. 12352, extended the comment period to April 17, 2015. In its March notice, however, DOE did not answer the questions or issues raised during the February 20, 2015 workshop, but rather listed additional issues for public comment, and indicated that DOE intends to make additional data and information it obtains available for public review and comment, the date and timing of which will be announced in a subsequent Federal Register notice.

Recognizing the difficult task that DOE faces and the considerable uncertainty about how to implement the 2007 legislation,[1] CIGNL and each of its members respectfully reserve our rights to provide additional comments, collectively or individually, as this rulemaking proceeds.[2]

Advantages of Supplemental Proposed Rule

At the February 20, 2015 DOE public workshop on the NOPR, CIGNL had hoped it would hear more detailed answers to its questions (submitted, in writing, in advance of the workshop) to facilitate the preparation of these comments. The workshop confirmed the sheer number and complexity of the issues presented by the NOPR. These, for example, are in areas such as covered nuclear suppliers, covered transactions, information collection, access to information, dispute resolution, risk assessment and cost allocation. As evident on the face of the NOPR and corroborated during the DOE workshop, suppliers would be challenged to calculate the in-scope total(s) of their past exports to CSC Member States (dating back as far as 1960), which would result in unreliable total(s) for the U.S. nuclear industry, aggregated or by sector for the same period. As currently proposed, the DOE rule would not enable U.S. suppliers to calculate, plan for, disclose in financial reports, or potentially assess and insure against their risk exposure under the rule, considering that suppliers cannot currently evaluate their potential liability under either Alternative 1 or 2 of the NOPR. In short, the NOPR does not state a sufficient basis for the Alternatives proposed, in part due to an acknowledged lack of relevant data and information and apparent reliance on arbitrary risk-weighting factors and other unsupported assumptions.

Since key questions were not answered at the DOE workshop, these comments re-state a number of remaining deficiencies of the proposed rule, including, but not limited to, the need for the additional data and information described herein. To address these deficiencies, DOE should publish a supplemental proposed rule, informed by industry comments received in advance of and during its February 20, 2015 workshop, by these written comments, as well as by needed agency study. Merely making additional data and information DOE obtains available (as indicated in the March 9, 2015 Federal Register notice), simply selecting one of the two Alternatives proposed in the NOPR, or promulgating a different alternative (absent review and comment) would not be tenable and would not meet the standards set forth in the Administrative Procedure Act. This is because the requirements of the proposed rule are inextricably related to data and information in several critical areas, including, but not limited to, the number of nuclear suppliers that would be covered; the length of the reporting period that would be required; and the type of and the extent of data about transactions that would have to be reported both initially and annually thereafter. Such data and information must be compiled and/or validated by DOE in order to ensure an informed rulemaking.

[1] 2007 CSC Contingent Cost Allocation Act (the 2007 Act or the Act), which was enacted as Section 934 of the Energy Independence and Security Act of 2007 and codified at 42 U.S.C. §17373.

[2] These comments reflect an attempt among members of CIGNL to reach an industry compromise. It does not preclude any of them individually from supporting aspects of the NOPR, particularly for those concerned that the DOE may feel compelled to adopt a rule without following CIGNL's recommendation that DOE defer adopting any rule until further study of the problems identified by CIGNL and publication of and comments on a supplemental rule.

It is recognized that the CSC entered into force on April 15, 2015, but that should not preclude the development and publication of an informed supplemental proposed rule with an opportunity for stakeholder review and comment. We observe that it is highly unlikely there could be any call for contributions to the CSC international fund in the near future. First, there would have to be a nuclear incident in another CSC Member State; and, then, there would have to be some judicial determination by the courts of the incident State that covered damages exceed the 300 million Special Drawing Rights threshold in order for any Member State contributions to the CSC fund to be required. This would take at least a year or more, even if a nuclear incident were to occur this year.

Opening Remark – Need for a Cap on Liability and Right-sizing the Supplier Pool

CIGNL reiterates what it said in its November 2010 comments on the DOE's earlier NOI in this rulemaking: CIGNL is concerned that the requirement that nuclear suppliers contribute financially to the U.S. share of a call for funds under the CSC will impose a great potential financial burden, the threat of which will reduce the competitiveness of the U.S. nuclear industry (which will need to take this burden into account in pricing its products or negotiating terms with foreign customers); and will certainly discourage new entrants into the industry and encourage early exit from the industry for others. The U.S. industry can ill afford such a burden, given the economic challenges facing the nuclear industry today and the comparatively greater resources of foreign competitors (whether or not government-owned) which either are not from CSC countries or which are from CSC countries but are not being asked to bear their governments' financial obligations under the CSC.

As further stated in our November 2010 comments, this burden also runs against the Administration's efforts to encourage U.S. exports and competitiveness. If the DOE does not provide for a clear and unambiguous rule (including a reasonable cap) to allow U.S. nuclear suppliers to assess the boundaries of their risk in future business ventures, such suppliers will be less likely to engage in foreign transactions, undercutting the efforts of both the U.S. Government and the U.S. industry to encourage the development of nuclear energy with our trading partners. As companies withdraw from international trade, the burden on the remaining U.S. nuclear suppliers could be imbalanced relative to the marketplace, creating further incentive for others to withdraw from or not enter this key export market.

While CIGNL recognizes that the DOE rulemaking responds to a statutory requirement, it should also conform closely to the principles articulated in the implementing legislation that were intended to mitigate the impact on the U.S. nuclear industry and bring clarity for purpose of promoting the development of nuclear energy with our trading partners "by allocating the contingent costs equitably, on the basis of risk, among the class of nuclear suppliers relieved by the Convention from the risk of potential liability resulting from any covered incident outside the United States." Accordingly, CIGNL's comments are directed primarily at ensuring that these principles are reflected in whatever final rule DOE may adopt.

The two most important features of this DOE rulemaking implementing the CSC must be the establishment of a "cap" or maximum contribution that a company would be required to make; and the right-sizing of the pool, which, by all accounts, should encompass more

suppliers than the 25 indicated in the NOPR. Its legislative history and the implementing legislation itself indicate that Congress intended such a maximum or cap be adopted, and provided that only nuclear suppliers with "a *de minimis* share of the contingent cost" can be excluded from the assessment formula.[3] Given the uncertain outcome for companies of any "risk-informed" calculation and the need to demonstrate to the U.S. industry and to suppliers and governments worldwide that the CSC is not a drag on competition, CIGNL urges the DOE to clearly state that no single company will be asked to contribute more than $5 million of the U.S. Government's contingent cost.[4] In addition, to promote fairness or to avoid disputes over the precise amounts of retrospective premium payments where a supplier's liability is relatively low, the formula could impose a minimum liability that should be relatively small (*e.g.*, $100,000, payable over five years[5]).

While the amount suggested in the NOPR ($25 million) is unsupportable, the DOE appears to recognize the importance of a firm maximum on any one supplier's contribution. This also would be consistent with the legislative history of the Act, which stressed that DOE must ensure that "the contingent cost is not allocated disproportionately to one supplier."[6] Such a firm number will have the advantage of allowing companies to plan for their potential risk under the DOE rulemaking, including possibly securing insurance to cover that risk and complying with financial reporting requirements. At a minimum, having a firm number in hand as a company's maximum exposure will provide a basis for discussion between the industry and insurers regarding the cover that could be provided to individual companies to address their respective risk. A $5 million maximum exposure for any single company also ensures that any large CSC call for funding in response to a catastrophic event will be necessarily allocated across the nuclear supplier industry as a whole and not overly burden any particular sector or participant within that sector. To the extent the exposure must be included in pricing to comply with prudent business practices, the maximum exposure will minimize effects on U.S. nuclear supplier competitiveness.

With regard to the size of the pool, we know of no basis for the 25-member pool-size contemplated in the NOPR. Directing such assessments against a mere 25 suppliers would create an unfair burden on a small segment of the U.S. nuclear industry, and be arbitrary and capricious on the DOE's part. Tying these assessments to suppliers with export licenses or authorizations is fraught with problems, and is not likely to reflect accurately the large number of

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[3] 42 U.S.C. §17373(C)(ii)(I)(cc).

[4] CIGNL said in its November 2010 comments on the NOI that the DOE rules should establish a maximum amount (*e.g.*, $5 million) that a company could be liable for, notwithstanding the number of categories in which it was included (*i.e.*, a company that supplied equipment and services falling into two groups would be subject to the $5 million maximum in terms of capping its total liability under the Act). The merit of a figure like $5 million is that, under the provisions of Section 934, the payment of such an amount could be allocated over a five-year period (with interest), thereby rendering yearly payments to a level that most companies could bear. Further, given the very small chance that a covered incident resulting in a call for funds would occur, the exposure to such an amount, spread over five years, even with interest, arguably would not pose a significant burden to trade nor discourage companies from participating as suppliers.

[5] This would equate to $20,000 per year over the five-year payment period, which is not inconsistent with the amount a company might pay annually for the American Nuclear Insurers Foreign Supplier's and Transporter's Form nuclear liability policy.

[6] *Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation Act*, S. Rep. 109-346, 109th Cong., 2d Sess. (Sept. 25, 2006) [hereinafter "Senate Committee Report"] at 5. The Report said: "The Committee believes the Secretary should also ensure that the burden imposed by the risk-informed formula among nuclear suppliers is shared in a fair and equitable manner, and that the contingent cost is not allocated disproportionately to one supplier. Accordingly, the formula may provide for a minimum and maximum share to be borne by nuclear suppliers not otherwise excluded from the formula."

U.S. suppliers that export goods or services to foreign nuclear installations. In the way of example only, the NRC includes about 600 companies as part of its Vendor Inspection Program. Relatedly, DOE should abandon its separate definition of "final nuclear supplier," and instead use the broad definition of "nuclear supplier" in the statute and in both Alternatives 1 and 2. CIGNL further recommends that the term "lead nuclear supplier" (used only in Alternative 2) of the NOPR be deleted, because it too appears to be based on the DOE's inappropriate assumption that only about 25 U.S suppliers should be liable for the U.S. share of the CSC fund.

Specific Issues on Which DOE Seeks Comment

The DOE NOPR, 79 Fed.Reg. at 75090 to 75091, and the DOE notice on extension of the public comment period ("Extension Notice"), 80 Fed.Reg. at 12352 to 12353, each list a number of separate issues and related requests for information. CIGNL caveats its response by reiterating that neither the NOPR nor the subsequent Extension Notice provides sufficient detail upon which CIGNL members can accurately assess the impact of the proposed rule. Nevertheless, CIGNL attempts to accommodate DOE's stated requests for information (in the NOPR and Extension Notice), and comments on these as follows:

National Export Initiative

In the NOPR, DOE seeks additional commentary and specific information from the nuclear industry on the potential impacts to U.S. competitiveness in the nuclear export arena and the President's National Export Initiative. Per the NOPR, DOE is also interested in receiving comment on which of the proposed alternative cost allocation formulas, the first or the second, is better suited to mitigate the impacts, if any, on U.S. competitiveness in the nuclear export arena. CIGNL notes that either of the proposed Alternatives (Alternative 1 or 2) would serve as a disincentive for a U.S. company to be a nuclear supplier, which would have a negative impact on the U.S. nuclear industry, U.S. jobs, exports, ability to obtain parts, and competitiveness.

Alternatives 1 and 2

All CIGNL members agree that both of DOE's two proposed Alternatives would have an unquantifiable negative impact on U.S. nuclear suppliers. In particular, as noted in CIGNL's previously filed comments and its observations at the workshop, CIGNL's members are finding it difficult, if not virtually impossible, to calculate their overall risk exposure under either of the two proposed Alternatives. Factors contributing to this difficulty range from the lack of detail being offered by the DOE on how these Alternatives were developed and how they would be applied, lack of clarity on the sites to be covered, and the difficulty in collecting accurate information. Thus, notwithstanding many hours of seeking to understand the DOE's proposed Alternatives with the aim of finding common ground on a single alternative, CIGNL finds it impossible to provide the DOE with specific comments upon the ultimate question of which Alternative would have a more onerous impact on its members in terms of real dollars. Such determination is contingent upon a multitude of factors, such as identification of the covered sites, the number of possible participants in each segment, the value of transactions reported by each participant, the effective date for reporting prior transactions, and many other factors which are not clear on the face of the NOPR. Among the most significant issues in this regard are: first,

understanding the scope of the suppliers that would have to contribute to the U.S. share; and, second, determining how best to ensure that the rule would not disproportionately burden one or more companies in the industry.

Final Nuclear Supplier

All CIGNL members agree the rule should be drafted to include a more realistic and, hence, significantly larger number of suppliers. Indeed, as CIGNL noted in its November 2010 comments on the NOI, which entities should fall within this definition is the key threshold issue of this rulemaking. Unfortunately, the NOPR does not adequately define or scope the population of U.S. suppliers that should be subject to the CSC contingent cost allocation; and, indeed, leaves the impression that DOE is seeking to impose the burden of any future call for funds on a disproportionately small group of companies.

First, it appears from the proposed information collection statement that DOE submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1995 that DOE thinks its proposed rule would apply to only about 25 U.S. suppliers. NOPR, 79 Fed.Reg. at 75093. However, the DOE provides no transparency on how it arrived at 25 companies or the criteria on which it bases this supposition. All CIGNL members agree this number is far too low, especially considering the large number of suppliers who have provided goods, services or technology for or relating to the engineering, design, construction, fueling, training, operation, storage, maintenance and/or decommissioning of the world's nuclear power plants and other nuclear installations. CIGNL notes that the NRC includes about 600 companies as part of its Vendor Inspection Program. Further, CIGNL's November 2010 comments on the NOI specifically noted to the DOE 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. Over the last decade alone, hundreds of companies have supplied such goods and services to nuclear installations. Given this background, narrowing the application of the rule to merely 25 would create an unfair burden on a small segment of the U.S. nuclear industry, and clearly would be arbitrary and capricious.

Second, both of the NOPR's alternate proposals further would make only the "final nuclear supplier" liable to pay an assessment. That term means the nuclear supplier that obtains, where required, a NRC general or specific license under 10 CFR Part 110, a Department of Commerce export license under 15 CFR Part 734, or a DOE authorization under 10 CFR Part 810 for the export of the item(s) involved in a reportable transaction. Tying assessments only to suppliers with export licenses or authorizations is fraught with problems, and is not likely to reflect accurately the number of suppliers that participate in exporting goods or services to foreign nuclear installations. This is particularly true where such licenses or authorizations are obtained by "freight forwarders" who are not the manufacturer of the goods to be installed or used at the installation (and whose current average number of employees and/or average annual sales receipts would entitle them to exclusion as a "small" nuclear supplier[7]). It is unclear if and

[7] In its November 2010 comments on the NOI, CIGNL cited a then recent report of the U.S. Government Accountability Office (GAO) indicating that no single Federal Agency systematically tracks and reports the data necessary to determine the amount and value of U.S. nuclear exports facilitated by U.S. nuclear cooperation agreements. *See* GAO, *Nuclear Commerce – Governmentwide Strategy Could Help Increase Commercial Benefits from U.S. Nuclear Cooperation Agreement with Other*

how the DOE plans to evaluate the various export licenses or authorizations to determine whether a party who obtained such license in fact actually produced/delivered the product or provided the service, or whether goods for which an export license/authorization was obtained were actually installed or used in a nuclear installation. Furthermore, DOE has not explained its rationale for using export licenses/authorizations for determining which suppliers are in-scope versus including, for example, all suppliers subject to 10 CFR Part 21 or suppliers with 10 CFR Part 50, Appendix B quality assurance programs.

Therefore, CIGNL recommends that the DOE abandon its separate definition of "final nuclear supplier" and instead use the broad definition of "nuclear supplier" found in the statute and both proposed Alternatives 1 and 2 of the NOPR (*i.e.,* any person who "supplies facilities, equipment, fuel, services or technology pertaining to the design, construction, operation or decommissioning of a covered installation" or "transports nuclear materials that could result in a covered incident") and to focus on exports by this group.[8] Use of this broad definition is appropriate, given that the DOE is basing its information collection effort under the proposed rule on that definition, and not on the definition of "final nuclear supplier." Further, the broad definition of "nuclear supplier" includes every person or company intended by Congress to be covered by the rule.

Reporting Requirements

Another critical feature of this DOE rulemaking is the reporting period for nuclear exports: CIGNL submits that the Department's proposed reporting requirements are completely overbroad:

First, the DOE's proposed reporting requirements seek information about all transactions, not just those with CSC Member States or prospective CSC Member States. This goes far beyond the authority granted by the statute, which only permits the DOE to "collect information necessary for developing and implementing the formula for calculating the deferred payment of a nuclear supplier." Requiring reports about transactions worldwide will provide much more information than the DOE needs for this purpose. Accordingly, the DOE should modify the requirement so that it requires only reporting of transactions with covered installations in CSC Member States on the date the rule becomes effective and during subsequent annual reporting periods.

Second, the DOE's proposed reporting requirements appear to seek information from an ill-defined or potentially over-broad population. The reporting requirements should only apply to those nuclear suppliers that could be liable to make a retrospective premium payment. As stated,

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Countries, GAO-11-36 (Nov. 2010). CIGNL then indicated that, absent further data collection by DOE, any rule based on the six factors in the 2007 Act would have to be speculative and subjective, rather than being based on the type of empirical data typically used by commercial insurers to set their premium rates for covering conventional nonnuclear risks, and such a rule would be subject to challenge as lacking a rational basis.

[8] However, any definition should not capture a subsupplier, if the subsupplier's goods and services are not specifically identifiable as coming from the subsupplier when exported (*e.g.,* due to fungibility) or are substantially transformed prior to export to the covered installation. For example, enriched uranium supplied to a U.S. fabricator for use in fabricating nuclear fuel for a covered installation would not be a covered export to the covered facility.

infra, however, CIGNL submits that the definition of suppliers that could be liable should be broadened to include all those falling within the definition of "nuclear supplier" or "covered nuclear supplier."

Third, the DOE's proposed reporting requirements appear to seek information in the initial report that extends to periods that begin more than a few years before the initial report. It should be recognized, however, that many suppliers have not maintained records of transactions dating back to 1960. Most records-retention programs do not require keeping records for such a lengthy period of time. Other complications include the numbers of mergers, acquisitions, bankruptcies, and technology transfers in the U.S. nuclear industry over the last five decades. Thus, it would be inequitable and wholly arbitrary on the Department's part to, in effect, penalize companies that may have maintained records of long-ago transactions by making them subject to greater assessments than companies without records. Furthermore, assuming any records are available, as stated *infra*, it is unrealistic to think that they could be complied in the timeframes and at the costs projected by DOE in the NOPR's discussion with respect to the Paperwork Reduction Act of 1995.

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, if any, should not extend prior to January 1, 2008. 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. CIGNL members submit suppliers' initial reports should include data from January 1, 2008 (*i.e.,* just after the December 19, 2007 effective date of the 2007 Act) to December 31st of the year before the rule's effective date, with annual updates to be submitted no later than 30 calendar days after the close of the first quarter of the next calendar year. Only one CIGNL member indicated that it may elect to file separate comments expressing a different view regarding the reach-back aspect.

CIGNL recognizes that, as new countries join the CSC, cumulative exports used to calculate retrospective premium payments would include the aggregated total value of covered exports to all CSC Member States, but the rule needs to be clear that, unless put on notice by DOE of the date on which a country became a Member State, companies are not obligated to maintain records from before commonly applicable legal record-keeping periods (*e.g.,* going back seven years from the date of DOE's notice) in order to report transactions to be included in cumulative exports after the country joins the CSC. For example, if, in 2030, DOE notified nuclear suppliers that "Country A" ratified the CSC, nuclear suppliers would be expected to maintain records of potential covered exports beginning from 2023 and not from 2008 or earlier, given that those pre-2023 records likely would not be available or complete in 2030. This is not a theoretical risk due to the length of time for ratifications: For example, the Vienna Convention on Civil Liability for Nuclear Damage was signed in 1963 and came into force in 1977, but various countries (*e.g.,* Jordan, Kazakhstan, Mauritius and Saudi Arabia) only joined within the past five years, while others (*e.g.,* Nigeria, Russia and Senegal) only joined in the last ten years.

The NOPR does not provide any indication as to whether and how assessments would be allocated among present-day joint venture and/or consortium partners, suppliers and

subsuppliers, etc. If a US supplier used a local fabricator or contractor in a foreign installation state, the NOPR also does not clearly indicate whether the value of the local fabrication or work would be excluded from the assessment calculation. And, the NOPR does not indicate whether and how sales by foreign subsidiaries, affiliates or branches of a U.S. supplier, as well as licensing and royalty arrangements among suppliers, their partners or customers, would be treated. DOE should clarify whether and how all such arrangements would be addressed.

DOE should also provide guidance as to how vertically integrated companies should report transactions involving exports of nuclear goods or services, particularly where they fall in more than one of the sectors identified in the NOPR. Such guidance must avoid the unintended effect of imposing an additive burden on such companies. Finally, as CIGNL indicated in its November 2010 comments on the NOI, it is particularly important that the regulation make clear that the U.S. operations of foreign companies, if engaged in exports from the United States, will be subject to the Department's contingent cost allocation formula.[9]

Collection of Information

The DOE seeks comment on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of information to be collected; (d) ways to minimize the burden of the collection of information, including the use of automated collection techniques or other forms of technology; and (e) ways to determine the information collected is complete and accurate. The NOPR's evaluation of the collection of information under the provisions of the Paperwork Reduction Act of 1995 is totally unrealistic. The NOPR suggests the number of burden hours for suppliers would be only 25 hours annually, and a one-time reporting requirement totaling 100 hours, with annual estimated reporting and recordkeeping cost burden of $8,000 annually, and a one-time reporting requirement cost of $32,000. There is no way any company could search and report on records going back as far as 1960 in such a small amount of time or with such a small cost. Annual reports similarly would involve much more time and cost.

[9] While the 2007 Act contains broad definitions of the terms "nuclear supplier" and "covered person," some have suggested that the 2007 Act's provisions that a person that may be required to pay if there is a "Price-Anderson incident" within the United States would never have to pay for "covered incident" that occurred outside the United States. This, for example, would mean that any U.S. nuclear power plant operator that separately sold goods or services (*e.g.,* operator training) to a nuclear installation outside the United States would not be subject to the Department's contingent cost allocation formula. The DOE rule should make it clear that that is not the case, *i.e.* any U.S. nuclear power plant operator or other person who sells goods or services associated with a covered installation outside the United States would to be subject to assessment without regard to the fact it also is a U.S. nuclear power plant operator. There is no rational basis to exclude such persons as nuclear suppliers, if they are engaged in exports of nuclear goods or services to one or more CSC countries. With the CSC now in force, the Price-Anderson Act amount of public liability will be increased by the funds made available from other CSC Member States under Article VII of the CSC. 42 U.S.C. §17373(d). This amount will depend upon the number of CSC Member States at the time of the nuclear incident. As of April 16, 2015 (at the exchange rate of 1 Special Drawing Right = $1.372610), this could range from about $104 million to $525 million, and would form a new tier above 300 million Special Drawing Rights (about $412 million). It is anomalous that U.S. nuclear power plant operators will not be required to contribute to the CSC fund for this benefit, while U.S. nuclear suppliers that are not operators will be required to contribute between about $61 million to 137 million in the event of an accident in another CSC Member State. 42 U.S.C. §17373(e).

As noted *supra*, the DOE's definition of "reportable transactions" is overly broad, because it would cover all transactions worldwide, even those with countries who are not parties or prospective parties to the CSC. This is an unnecessarily burdensome requirement that will yield information that is not reasonably required for implementation of the rule. Please see CIGNL's comment on reporting requirements, *supra,* for more information concerning our views on this burden.

Retrospective Premium Payment Cap

The DOE proposes a cap on the retrospective premium payment for any one nuclear supplier. The DOE seeks comment from the public on a specific amount, such as $25 million, or percentage of contingent cost, such as 5% or 25%, that is appropriate as a cap on any one supplier's premium payment. The NOPR says the DOE welcomes additional comment and feedback from the public on the process for ensuring the United States is paid in full by nuclear suppliers for its contributions under the Convention. CIGNL appreciates DOE's recognition that a cap on any one supplier's liability would be appropriate, and further supports a firm maximum, as noted *supra*. However, CIGNL finds it unreasonable on the part of the DOE to suggest a cap as high as $25 million. This number presumably is based on DOE's ill-founded assumption that only about 25 U.S suppliers should be liable for the U.S. share. As noted *supra,* the pool should be more properly defined or scoped to include many more (potentially hundreds of) companies who typically supply nuclear installations, thus the cap should not be determined on the basis of such a small subset of only 25 suppliers.

In its November 2010 comments on the NOI, given the uncertain outcome for companies of any "risk-informed" calculation and the need to demonstrate to the U.S. industry (and to suppliers and governments worldwide) that the CSC is not a drag on competition, CIGNL urged the DOE to clearly state that no single company will be asked to contribute more than $5 million of the U.S. Government's contingent cost. CIGNL re-submits that $5 million still is the appropriate figure. (One CIGNL member indicated that it may elect to file separate comments expressing a different view as to the amount of the cap.) Such an amount would be more consistent with the actual number of U.S. suppliers to foreign nuclear installations. Again, DOE should report this issue to Congress, and seek any amendment to the 2007 CSC Contingent Cost Allocation Act that might be necessary to set a reasonable and appropriate cap on the retrospective premium payment for any one nuclear supplier.

In any case, DOE should indicate how any single cap would be applied to companies and entities that are nuclear suppliers falling under a consolidated balance sheet, as well as to companies that supply good, services and technology falling into more than one sector.

List of Covered Installations

The DOE seeks additional commentary from the public on the suggestion that it produce a list of the nuclear installations outside the United States that would be covered installations under the Convention. CSC Article VIII provides for the International Atomic Energy Agency (IAEA) to maintain, update and circulate annually to all CSC Member States a list of nuclear installations covered by the Convention and to give notice as soon as possible of the communications it receives with respect thereto. Therefore, DOE should ensure that the IAEA list and any updates

thereto are made available to U.S. suppliers, preferably by prompt posting on the DOE website. DOE likewise should provide a list of nuclear installations in countries that might join the CSC. Otherwise, U.S. suppliers will not be able to accurately comply with the transaction reporting requirements contained in the DOE's proposed 19 CFR Part 951, particularly if U.S. suppliers will be required by DOE to report exports to all foreign countries whether or not such countries currently are Parties to the CSC. It is clearly necessary for U.S. suppliers to know the nuclear installations for which they are to be held responsible in the event of a nuclear incident that could trigger an assessment.

Compliance with CSC

As more countries seek to ratify the CSC, the United States should pay closer scrutiny to each ratifying country's domestic nuclear liability laws and its compliance with standards, both in the present and in the past, to ensure that its laws and standards are compatible with the object, purpose and specific terms of the CSC. Otherwise, it is likely that the CSC will impose a substantial burden and extremely unfair risk on U.S. suppliers that might be required to pay the U.S. share of the CSC international fund for an accident in a country whose law is not CSC-compliant (thereby not providing the protections for U.S. nuclear suppliers that form the basis for the U.S. Government's stated rationale for requiring them to bear the cost of the U.S. share). It is especially a concern if U.S. nuclear suppliers are required to pay for the U.S. share with respect to a country to which they never exported any services or goods. For countries that seek to ratify the CSC with non-compliant national laws and standards, or where the country has covered installations that represent an unusually high risk of a nuclear incident as compared to any other CSC country'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.

Comments on the NOPR's Alternatives

Alternative 1—Risk Ranking in Appendices

The appendices in the proposed rule (Alternative 1) identify particular nuclear goods and services to which they assign a risk rating or ranking -- primary or secondary -- and a corresponding weight—2 or 1. The DOE's NOPR seeks comment from the public on the risk-sharing classification of covered items in the appendices and suggestions, with supporting bases, for additions or deletions from the list. It is unclear from the NOPR how DOE decided upon the proposed risk weighting to be applied across DOE's proposed Alternatives and sectors. In fact, it appears that the DOE's primary and secondary weighting of products in order to "risk inform" its proposed allocation of liability is overly simplistic and is not in fact risk-informed. Risk-informed would mean that DOE has looked at design-basis accidents and beyond-design-basis accidents for the causes and consequences, allocating the greatest responsibility to the source of the likely causes of the accidents with greatest consequences. The weighting needs to match likelihood and consequence. Notably, several of the Alternative 1 -- Appendix B items listed do not contribute appreciably to the risk of a nuclear incident at a covered installation. DOE can consult with both the NRC and the nuclear insurance community for further guidance on risk-informing its proposed rule. In addition, experts can be engaged to undertake studies of the risks

associated with the goods listed in the appendices to Alternative 1.

DOE should provide its detailed analysis/justification for its risk weighting in the appendices before promulgating the final rule. Absent such justification, the proposed weighting factors and percentages appear arbitrary.

"Value" of Covered Transactions

The proposed rule provides the risk exposure of a nuclear supplier would be based upon the "adjusted value" ("expressed in U.S. dollars") of all covered transactions by the nuclear supplier, while none of the six example risk factors in the 2007 CSC Contingent Cost Allocation Act, 42 U.S.C. §17373(e)(2)(C)(i), refer to the revenue, profit or other commercial benefit earned by suppliers from nuclear trade.[10] It is unclear if the measure of "value" would be based solely on payments in U.S. dollars, or whether a company will be required to assess other elements of non-monetary value. It further is unclear whether value would be based only on what was paid in U.S. dollars under the contract for specific exports from the United States, or, if the contract also required follow-on services, whether such services would be those included in the value calculation. It also is unclear how the value of technology would be measured. This lack of clarity regarding the method of calculation of value and the potential that a particular method may have a disparate negative impact on certain U.S. suppliers could incentivize suppliers to withdraw from industry sectors that are perceived to carry greater risk or for which they will no longer be competitive when risk contingencies are considered.

At a minimum, in the rule or in supplemental guidance, accounting guidelines will be needed to ensure that all nuclear suppliers report value received on the same accounting basis.

Alternative 1 -- Small Nuclear Supplier Exclusion

The DOE seeks comment on what dollar amount or other criterion, such as classification as a "small business" under U.S. Small Business Administration (SBA) size standards, is reasonable to use for exclusion of small nuclear suppliers in Alternative 1's proposed §951.9. While CIGNL agrees that some exclusion of "small" nuclear suppliers would be appropriate, the SBA size standard may not be the best measure. SBA size standards are matched to North American Industry Classification Systems (NAICS) Codes, and are based on *average annual* sales receipts expressed in millions of dollars or *average current* number of employees. *See* 13 CFR §§121.104 and 121.106. In other words, use of SBA standards would not capture U.S. suppliers that cumulatively might have supplied goods and/or services to covered nuclear installations during the applicable reporting period in excess of the average annual sales amount that would allow it to claim to be a "small" business under SBA size standards. For example, given the variety and differences in goods and services that U.S. nuclear suppliers may supply to foreign nuclear installations, the NOPR says DOE estimates that U.S. nuclear suppliers may fit within one or more sectors and codes listed in the NAICS as "small" businesses, including but

[10] The Senate Committee Report, *supra* at 5 said: "Given the variability of prices of nuclear goods and services in the market and the lack of any necessary connection between the price of a good or service and the risk or hazard it poses, the share of the contribution assessed on a nuclear supplier should be determined principally by the risks and hazards associated with such nuclear supplier's goods and services, as indicated by the factors listed in the Act."

not limited to: 1) manufacturing sector, NAICS 238990, ``All Other Specialty Trade Contractors'' (size limit of $14 million); retail trade sector, NAICS 454319, ``Other Fuel Dealers'' (size limit $7 million); and professional, scientific and technical services sector, NAICS 541690 ``Other Scientific and Technical Consulting Services'' (size limit $7 million). *See also* 13 CFR §121.201. The NOPR indicated one commenter on the NOI "suggested nuclear suppliers with less than $1 million in annual total sales to covered nuclear installations may be considered 'de minimis.'" Again, any number based on *annual* sales would not take into account total sales during the reporting periods in the DOE's proposed 19 CFR Part 951. As suggested by CIGNL's November 2010 comments, a preferable approach would be to exclude a supplier from the formula if its average revenue from the export of nuclear goods and services over a prescribed period prior to the date of an incident is less than the minimum share (*e.g.,* $100,000). However, this comment, and any exclusion for small business, should not apply where the company is a subsidiary or an affiliate of a larger organization that owns or controls such company; and, therefore, benefits from the subsidiary's or affiliate's revenues.

Alternative 2—Small Nuclear Supplier Exclusion

The DOE seeks comment from the public on what dollar or quantity amounts are an appropriate basis for exclusion, as well as whether exclusion on the basis of being defined as a "small business'' under SBA size standards is appropriate in Alternative 2's proposed §951.15. The DOE also seeks comment on whether there are any nuclear suppliers in the facility sector that would or should qualify for the small nuclear supplier exception. The same concerns stated above with respect to the small supplier exclusion in Alternative 1 also apply to Alternative 2's proposed §951.15. Also, the DOE has not justified any basis for suggesting the amount of 1,000 MT of nuclear material as the cutoff for a "small" business exclusion. As stated *supra,* a preferable approach to defining the rule's "small" nuclear supplier exclusion would be to exclude a supplier from the formula if its average revenue from the export of nuclear goods and services over some prescribed period prior to the date of a nuclear incident is less than the minimum share.

Impact on Small Entities

DOE has proposed two alternative-risk-assessment methodologies and requests comment on whether either Alternative would result in a lower impact on small entities. The DOE requests comment from the public on any other alternatives that could minimize impacts on small entities. CIGNL members are not small entities and are not in a position to identify specifically which Alternative might be better for such entities.

Alternative 2—Nuclear Supplier Sectors

The nuclear supplier sectors proposed in Alternative 2 are: (1) facility; (2) equipment and technology; (3) nuclear material and nuclear material transportation; and (4) services. The DOE seeks comment on other ways to define nuclear sectors (*e.g.,* defining the sectors based upon the stages of the fuel cycle or by installation type). Without further information regarding how many companies would fall into each sector or the basis for the percentages assigned to each sector, CIGNL cannot comment on whether the four sectors in Alternative 2 are workable.

As CIGNL stated in its November 2010 comments, it believes a formula based on nuclear supplier sectors could be developed, after further data-collection, analysis and consultation with industry, based on certain key principles:

First, 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 Alternative 2.

Second, each category of nuclear installations should be compared to the other categories to determine which category is most likely to experience a nuclear incident that would result in a call for funds. This assessment should be done by experts in risk assessment. The category with the highest risk of such a nuclear incident should be expected to pay the greatest share of the contingent cost, the category with the second highest risk should be expected to pay the second greatest share and so on. For example, operating nuclear power plants could be in one sector, while nuclear power plants in the process of decommissioning (after all fuel elements have been removed permanently from the reactor core and have been stored safely in accordance with approved procedures[11]) should be treated differently. Consistent with the NRC's past practice with respect to coverage under the Price-Anderson Act,[12] reprocessing plants, and plutonium processing and plutonium fuel fabrication facilities should be in a higher sector than other nuclear fuel cycle facilities.

Third, the calculation of what percentage each category would bear is beyond the scope of this comment, but potentially also could be calculated by experts who are knowledgeable of the nuclear installations in CSC Member States falling in each category and the risks of nuclear incidents at such facilities. Such experts, which should include legal counsel, could be engaged in a fully transparent process involving open dialogue and input from various industry sources, and their assessments could be updated as the formula is updated every five years. In any case, CIGNL believes that all categories should be assigned at least some risk and, therefore, some share of the assessment, so that all covered suppliers would have to contribute.

Fourth, companies that supply goods or services to nuclear installations of the type in each category would share liability for the portion of the contingent cost allocated to that category. The allocation of liability could be based on the relative risk associated with the goods or services supplied by each company as compared to the goods or services supplied by others, or, given the complexity of such an assessment, could simply be based on the applicable revenues of such company as a nuclear supplier to installations in that category located in a CSC Member State over a period of time prior to the call for funds. Further, in the event of a call for funds, all suppliers to installations in a category would contribute to the share assigned to their category, even if the covered incident did not occur at an installation in their category.

While cautiously reiterating this approach in concept, CIGNL members did not reach a consensus on how the specific categories should be structured, and felt instead that the DOE should study the concept in greater detail to be presented in a supplemental proposed rule.

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[11] This is the standard prescribed by CSC, Article IV.3 for determining when a nuclear reactor shall be excluded from the calculation of a Member State's share of the international fund.

[12] *See* 39 Fed.Reg. 43867 (Dec. 19, 1974); and, 42 Fed.Reg. 20139 (Apr. 18, 1977).

Alternative 2—Lead Nuclear Supplier

The DOE seeks comment on the descriptor of a "lead nuclear supplier" appropriate for inclusion in the rule to further clarify the definition of facility sector nuclear suppliers. The term "lead nuclear supplier" as used in Alternative 2 (coupled with the provision in proposed §951.3) might mean that only a nuclear supplier involved in the development and deployment of nuclear installations whose adjusted value of reportable transactions for the period 1960 through 2007 "exceeds $500 million [or some other amount, e.g., $1 billion]") could be included in the Facility Sector. Further, the companies in this sector would bear 50% of the U.S. share of any call for funds. This appears to be based again on the DOE's inappropriate assumption that only a small number of U.S suppliers should bear the greatest portion of the U.S. share. Since hundreds of companies were involved in the development and deployment of nuclear installations prior to 2007, applying assessments to a small group of suppliers would be arbitrary and capricious on the DOE's part. CIGNL recommends that this definition be deleted.

In addition, as CIGNL has previously indicated and hereby re-submits, reaching back to 1960 is unnecessary and unreasonable;[13] particularly where the objectives of the Act can be achieved by allocating the U.S. Government's contingent cost across suppliers who have elected to enter or continue to participate in the industry following its enactment. Moreover, such legacy sales may bear little to no link to the structures, systems or components currently in operation or the services being provided today. For these reasons, CIGNL recommends that this definition of "lead nuclear supplier" be deleted; and, as noted *infra*, that DOE re-evaluate its sector approach and associated "risk" weighting.

Alternative 2—Nuclear Sectors

The DOE seeks comment from the nuclear industry on whether the nuclear sector approach is appropriately structured, should be defined in the rule, and, if not, alternative suggestions. If the DOE elects to use its current approach in Alternative 2, it needs to revisit the relative weights given to the Facilities Sector (50%), Equipment and Technology Sector (25%), and the Services Sector (10%). As the record now stands, it is not clear how DOE intends to assess the relative risks associated with the (1) NSSS vendor, (2) architect/engineer, and (3) constructor (supplemented, as may be appropriate, by other/post-construction suppliers of equipment and services, *e.g.,* post-construction vendors), or why exports from the pre-2008 period are more risky than those from 2008 and beyond to justify the higher share allocated to the Facilities Sector. DOE should clearly demonstrate that it has relied on expert advice and proven risk-informed methodologies, rather than what appear to be unsupported subjective presumptions in proportionately allocating assessments between sectors. To do otherwise would be arbitrary and capricious.

It appears that each nuclear sector in Alternative 2 has been allocated a risk based upon the perceived relative risk that the goods or services supplied within that sector would contribute to a

[13] Only one CIGNL member indicated that it may elect to file separate comments expressing a different view regarding the reach-back aspect.

nuclear incident that could result in a call for funds. Clearly, allocation of risks to such sectors is speculative, and root cause analyses of failures (Chernobyl, Three Mile Island and Fukushima) show that risk factors are highly dependent on particular circumstances. If risk factors were easily identified and allocable, it would be easy to allocate the great risk to suppliers of the widgets and gimlets that are most likely to cause nuclear incidents. Instead, the risk associated with nuclear installations that are operated and maintained by third parties long after the original supply may have occurred is largely driven by unknown intervening factors, such as differing inspection and regulatory requirements that may not have complied with current standards at all times during installation operation. How the installation was operated and maintained by the operator and major facility modifications also influence the risk of nuclear incidents. There is simply no principled basis upon which to assign risk to a particular industry sector under DOE Alternative 2.

Mixing methods *(e.g.,* use of the quantity of transactions in determining the risk exposure of nuclear suppliers in the facility sector and metric tonnage in the nuclear materials and nuclear materials transportation sectors, while using adjusted value for the other facilities sectors) has not been justified in the proposed rule, and thus appears arbitrary and capricious.

If the sectors were organized based on the types of facilities and activities to which goods or services are being supplied, rather than on the basis of the types of suppliers, as CIGNL suggested in 2010, it might be easier to arrive at a comparative risk assessment of the possibility that a nuclear incident resulting in a call for funds would occur in a covered facility in each sector.

Payments to the United States

The DOE's NOPR seeks comments on the proposed payment plans whereby, in accordance with §934(h)(1)(B)(i) and -(ii) of the 2007 Act, nuclear suppliers must pay the required deferred payment to the general fund of the Treasury within 60 days after notification by the Secretary, or elect to prorate payment in 5 equal annual payments (including interest on the unpaid balance at the prime rate prevailing at the time the first payment is due). The DOE seeks comment on the proposed payment plans and any alternative options for payment plans that meet the U.S. Government's obligations under the CSC and are consistent with §934. The DOE is also seeking comment on whether nuclear suppliers should be required to demonstrate that they have an adequate financial mechanism (such as a state-administered fund, bond, private insurance, or certificate of deposit) to ensure the availability of financial resources sufficient to cover the risk premium payment to ensure full and timely payment to the United States Government. The NOPR says comments may address the feasibility, cost and necessity of demonstrating the adequate availability of funds, and whether such a financial demonstration, if appropriate, should be mandatory or discretionary.

With respect to DOE's proposed payment plans, CIGNL submits: (a) DOE should have some mechanism in place to assure some suppliers do not bear an inequitable share of the risk/cost, due to other suppliers' failure or inability to pay; (b) DOE should exercise its authority to make any penalty discretionary, taking into account all attendant facts and circumstances (*e.g.,* having discretion not to extract a penalty (original assessment x 2) where the supplier is only one

day late); (c) a notice should be published in the Federal Register listing the assessments of all liable U.S. suppliers by name and amount; (d) in addition to the Federal Register notice, DOE should separately and directly notify the affected suppliers; (e) the final rule should indicate how DOE intends to adjust for inflation or time value of money, if at all; (f) the final rule should address the responsible party for the payment of shares for suppliers that are no longer in business; (g) the final rule should provide that the payment constitutes a direct and not an indirect or consequential cost or penalty (to assist suppliers who may have a right of indemnity from customers); and (h) the final rule should contain an appropriate process for contesting an allocation.

Failure to Pay

The DOE has proposed a mandatory penalty payment. The DOE seeks comment on whether the penalty payment should be discretionary and on what factors may be appropriate and considered by the DOE to mitigate the penalties or support a claim of extraordinary circumstances in the case of a delinquent supplier. CIGNL submits that all U.S. suppliers should be required to pay their respective shares of the CSC fund. Otherwise, it would make it more difficult to maintain a cap on each supplier's share. As stated in its November 2010 comments, CIGNL reiterates that the amount of interest should be based upon the rate of the current value of funds to the United States Treasury (the Treasury tax and loan account rate) prescribed by the current quarter and published in the Federal Register and the Treasury Financial Manual Bulletins. *See* 10 C.F.R. §15.37(d) (setting this rate to be used by the NRC). CIGNL again submits a possible model is contained in the NRC regulations at 10 C.F.R. §15.37.

Issues Not Included in DOE's Questions

There are two additional issues CIGNL comments on, as follows:

Dispute Resolution and Information for Financial Reporting

The proposed rule does not provide for any process for suppliers to challenge DOE's assessment calculations, either as to their own assessments or those of other suppliers (keeping in mind the need to protect trade secrets and proprietary or business confidential information).[14] The NOPR also does not provide any mechanism to ensure all suppliers are interpreting or applying the rule in a consistent manner, *i.e.* DOE should have a mechanism in place to assess, audit or otherwise check the completeness and accuracy of such information. Provisions for suppliers to confirm the fairness and accuracy of the information that is used to calculate their respective shares will be essential if an actual call for funds occurs. This should not require information to be reviewed or shared by the industry prior to such a call.

DOE should provide U.S. suppliers with detailed information about their expected assessments both for use in their annual financial reports and to facilitate the possibility of securing insurance therefor.

[14] As noted in CIGNL's November 2010 comments on the NOI, the Department of Agriculture's Export Sales Reporting System, which monitors U.S. agricultural exports on a daily and weekly basis via online, fax and e-mail, provides that all data are kept confidential, and released only in aggregate form. 7 C.F.R. §20.7.

DOE should provide U.S. suppliers with information relating to covered installations, sufficient for U.S. suppliers to determine the accuracy of assessments, as well as for the purpose of accurate risk assessment, insurability, risk-sharing, defenses, and evaluation of any contracts under which goods or services may have been supplied which may preserve rights of indemnity or further recourse.

Exclusion of Natural Uranium

The NOPR (at page 75082) says suppliers of natural or depleted uranium or uranium conversion services would not be subject to the requirements of the proposed rule. Depleted and natural uranium is supplied to covered enrichment and fabrication facilities for the production of nuclear material that can be the cause of a nuclear incident. In such cases, suppliers of converted uranium and depleted uranium, transporters of converted and depleted uranium and suppliers of the equipment used to transport such uranium should be nuclear suppliers subject to the rule. Rather than categorically exclude natural and depleted uranium from the definition of "nuclear material," a better approach would be for DOE to include direct exports of such uranium to a covered installation but not if the uranium is substantially transformed (*e.g.*, enriched or fabricated) prior to such export to the covered installation. Similarly, those who supply equipment, services and technology for handling and transportation of natural and depleted uranium to covered installations would be considered covered nuclear suppliers.

Conclusions

CIGNL appreciates the opportunity to participate in the DOE's rulemaking on the CSC Contingent Cost Allocation, and urges DOE to fully consider CIGNL's comments submitted in advance of and during the February 20, 2015 workshop together with this submission, which demonstrate a significant number of deficiencies of the proposed rule. As now proposed, the DOE rule would not enable U.S. suppliers to calculate, plan for, disclose in financial reports, or insure against their risk exposure under the rule, considering that suppliers cannot currently evaluate their potential liability under either Alternative 1 or 2 of the NOPR. The several open issues, including but, not limited to, the most fundamental questions about the number of companies that will be required to contribute to the retrospective premium payment, and the likely size of the payment that each company will be required to make, prevented CIGNL from formulating consensus opinions on all points on which DOE requested comment. As these and other key questions presented and issues identified by CIGNL and others were not answered in the NOPR or at the DOE workshop, it would be advisable for DOE to publish a supplemental proposed rule for stakeholder review and comments.

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