

May 5, 1978

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SECY-78-241

For: The Commissioners

From: **COMMISSIONER ACTION**  
James R. Shea, Director  
Office of International Programs

Thru: Executive Director for Operations *[Signature]*

Subject: PROPOSED RESPONSE TO STATE DEPARTMENT LETTER ON PROTECTION  
OF CATEGORY II AND III QUANTITIES OF MATERIAL IN THE US.

Purpose: Commission approval of proposed response.

Discussion: On February 21, Dr. Nye wrote the Chairman noting that:

- o The Nuclear Suppliers Group Guidelines (1) contain agreed criteria for levels of physical protection of various categories of nuclear material, and (2) transfers to non-nuclear weapons states require that exports of trigger list items be placed under effective physical protection;
- o The UK has exchanged notes with several members of the Suppliers Group to whom it exports nuclear materials affirming that the physical protection criteria will be applied;
- o The US is presently unable to comply with the UK's request for a similar exchange since State understands that regulations for protection of Category II and III materials have not been promulgated; and
- o State believes this poses a potentially embarrassing situation for our nonproliferation efforts since (1) State understands that France and the US are the only countries approached which have not completed such an exchange, and that France is preparing to do so within the next few weeks, and (2) the US risks exposure as the only member of the Suppliers Group which is unable to respond positively to the UK request.

U.S. NRC Declassification Review	
1 <sup>st</sup> REVIEW - DATE: 20250601	DETERMINATION (CIRCLE NUMBER(S))
REVIEWER: 3591	1. CLASSIFICATION RETAINED
AUTHORITY: <input type="checkbox"/> DC <input checked="" type="checkbox"/> DD	2. CLASSIFICATION CHANGED TO
2 <sup>nd</sup> REVIEW - DATE: 20200601	3. CONTAINS NO NRC CLASSIFIED INFO
REVIEWER: 3470	4. COORDINATE WITH:
AUTHORITY: <input checked="" type="checkbox"/> DD	5. DECLASSIFIED
	6. CLASSIFIED INFO BRACKETED
	7. OTHER (SPECIFY):

Contact:

M. A. Guhin (492-7866)  
K. D. Cohen (492-8155)

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In this light, State would appreciate the Commission's current judgment as to when the US might be in a position to say that we meet the Guidelines criteria and whether the necessary steps to this end can be expedited (Appendix B).

As noted in several previous Commission papers, NRC regulations already provide for protection equivalent to the Guidelines criteria for Category I material.

SECY 78-142 forwarded for the Commission's consideration a proposed rule on physical protection of Category II and III material in the US.\* Based upon guidelines contained in IAEA/INFCIRC 225, the proposed rule would clearly meet Supplier's Guidelines. Given the normal course for such proposed rules (including public comment period, further staff review and licensee implementation following promulgation), full compliance cannot be expected until early next year.

Nevertheless, while licensees are not presently required to apply physical protection to Category II and III material, a limited survey of affected facilities indicates that many of them have security measures in place which would satisfy the guidelines contained in INFCIRC/225.

A similar survey for transportation has not been conducted although it is generally agreed by the staff that the impact on the industry of applying Supplier Guidelines (or those measures in the proposed rule) would be minimal since the requirements are essentially administrative. For all practical purposes, they require only prior arrangements and agreements, including time, place and procedure, for transferring transport responsibility.

In this light, the staff has concluded that the Supplier's Guidelines, which are less specific in nature than those in INFCIRC/225 or the proposed Category II-III rule regarding physical security measures, are generally being met by a majority of licensees.

Accordingly, in terms of responding to Dr. Nye's letter, there are four alternatives as detailed below.

\* Reference SECY Staff Requirements Memorandum, dated April 21, 1978

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Alternative 1. Inform Dr. Nye that we are unable to provide formal assurance until sometime early next year when the Category II and III rule is expected to be fully implemented.

This approach would:

- o Not involve any change in the contemplated rulemaking process or any change in the present import licensing procedure; and
- o Permit the widest public participation and sufficient time for the staff to develop acceptance criteria and modify the proposed rule, as appropriate, to reflect public comment.

However, this choice would:

- o Not allow the US to give physical security assurances to other countries seeking them for Category II and III material they are exporting to the US;
- o Place the US in the position of being either the only country or the only other country besides France among the Suppliers Group unable to state to the UK that it completely meets the Suppliers Guidelines for Category II and III material; and
- o Create an inconsistency at the same time the US is seeking assurances from other nations that they will apply adequate physical protection measures on material exported from the US consistent with Supplier Guidelines and INFCIRC/225 recommendations.

Alternative 2. Inform Dr. Nye that as an interim measure pending a final rulemaking for Category II and III we could provide assurances that Supplier Guidelines will be met on a case-by-case basis to countries requesting such assurances with respect to their exports to the US.

This choice could be put into effect in the following manner:

- o When we received an application to import special nuclear material from a country to which the US had, at that country's request, provided assurances that Supplier Guidelines would be met, the staff would inform the applicant of the assurances provided by the US and request a description of the security measures to accompany the import during transport and use or storage in the US.

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- o The physical security measures described by the applicant would be evaluated in terms of making a reasonable judgment as to whether they satisfied the Supplier Guidelines. The measures in the proposed Category II and III rule, which are substantively equivalent to the Suppliers' Guidelines, would serve as useful terms of reference for such evaluations, but are more detailed.
- o If the information supplied by the applicant indicated that Supplier Guidelines would be met, the import license review process could proceed on that basis. If the physical security measures clearly did not meet Supplier Guidelines, the staff would suggest to the applicant minimum measures to accomplish such.
- o The approach would not be defined as an NRC requirement as such but rather a requirement of the country exporting to the US and US assurances provided to that country.

This alternative would:

- o Allow the US to provide assurance to other countries seeking them while avoiding the potential embarrassment of being the only member of the Suppliers Group unable to provide such assurances;
- o Demonstrate to other countries, at a time when we are requesting their assurances for protecting certain quantities of materials, that we are committed to the same goals; and
- o Involve no change in the contemplated rulemaking process and probably no significant burden for applicants or the NRC in the import licensing process (particularly since the Supplier Guidelines contain few, if any, requirements which are not being met or cannot be easily met and since few imports are expected from countries requesting these assurances prior to completion of our rulemaking proceeding on Category II and III).

However, this alternative would:

- o Involve having to depend on licensee information and assurances with respect to meeting general guidelines without, at this time, NRC having formal requirements or acceptance criteria as review standards; and

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- o Possibly be viewed as discriminatory regulation since we would be requesting licensees to protect certain quantities of imported material pursuant to the Supplier Guidelines while other material and/or licensees would not be subject to this request.

Alternative 3. Issue a Commission order applicable to all licensees requiring them to implement the physical security measures of the Suppliers Guidelines for Category II and III material and provide written assurances to the NRC that this has been accomplished.

This would have essentially the same advantages as Alternative 2 while, in contrast to Alternative 2, avoid the possibility of being viewed as discriminatory regulation since it would apply equally to all licensees.

However, like Alternative 2 this alternative would involve having to depend on licensee information and assurances with respect to meeting general guidelines without, at this time, NRC having formal acceptance criteria as review standards. Moreover, unlike Alternative 2, it would require all licensees (including those not importing any material subject to such assurances) to take whatever additional measures are necessary without any opportunity for comment from them or the public and, at the same time, involve much more immediate staff effort to review all licensee programs.

Alternative 4. Make the Category II and III rule effective immediately.

This alternative would also have essentially the same advantages as Alternative 2 while, in contrast to Alternative 2, avoiding the possibility of being viewed as discriminatory regulation since it would apply equally to all licensees.

However, unlike Alternative 2 and like Alternative 3, this alternative would require all licensees (including those not importing any material subject to Supplier Guideline assurances) to take whatever additional measures are necessary without any opportunity for comment from them or the public on the details of the proposed rule. Moreover, this alternative would also require much more immediate staff effort than Alternative 2.

We understand from State that Alternatives 2, 3, or 4 would provide them a basis for giving the UK the assurance it is seeking.

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As a practical matter, relatively few imports of Category II and III quantities of material are anticipated in the next six months and very few of these, if any, would be from the UK. Most specifically licensed special nuclear material imports to the US are to Department of Energy facilities which, of course, would be responsible for providing assurances with regard to meeting the Supplier Guidelines at DOE facilities.

While the adoption of Alternatives 2, 3 and 4 at this time would enable the US to provide the assurance that the UK is seeking with regard to the Suppliers Guidelines, Alternative 2 would require much less immediate staff effort and probably a much less impact on licensees generally. Therefore, I recommend Alternative 2.

The proposed response to Dr. Nye at Appendix A would (1) provide the status of our proposed rule, and (2) note that, as an interim measure, the Commission can assure that the Guidelines criteria are met for imported material under NRC jurisdiction in those instances where the US has, at the exporting country's request, provided assurances that the material being sent to the US will be afforded adequate physical security consistent with Supplier Guidelines and INFCIRC/225.

Recommendation: That the Commission approve the proposed response at Appendix A.

Coordination: NMSS and NRR concur. ELD has no legal objection.

  
James R. Shea, Director  
Office of International Programs

Enclosures:

Appendix A - Proposed response  
to Dr. Nye

Appendix B - Dr. Nye's ltr of 2/21/78

Note: Commissioner comments should be provided directly to the Office of the Secretary by c.o.b. Wednesday, May 17, 1978.

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Commission Staff Office comments, if any, should be submitted to the Commissioners NLT May 11, 1978, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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CHAIRMAN

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

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Dr. Joseph S. Nye  
Deputy to the Under Secretary  
for Security Assistance  
U.S. Department of State  
Washington, D.C. 20520

Dear Dr. Nye:

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Thank you for your letter of February 21 expressing concern about the ability of the United States to assure other countries, particularly those exporting to this country, that the United States meets the criteria set forth in the Nuclear Suppliers Group Guidelines for the physical protection of Category II and III quantities of materials.

I can assure you that the Commission appreciates and shares your concern in this regard. With respect to your request for our current judgment as to when regulations for domestic licensed activities might establish requirements meeting the criteria in the Guidelines for Category II and III quantities of material, and as to whether the necessary steps to this end can be expedited, I am pleased to provide the following information.

Under established rulemaking procedures, it appears that Commission physical security regulations for the upgraded protection for those categories of material in licensed activities would not be promulgated before mid-summer this year. In addition, following promulgation, the NRC staff and licensees would need a reasonable period to implement the new requirements. Although many licensees already meet Supplier Guidelines for these categories, we could not expect complete compliance with the upgraded requirements until early 1979.

However, pending promulgation and implementation of upgraded requirements in the U.S., the Commission can and is prepared to assure that the Guidelines criteria are met for imported material under NRC jurisdiction in those instances where the U.S. has, at the exporting country's request, provided assurances that the material being sent to the U.S. will be afforded adequate physical protection consistent with Supplier Guidelines and INFCIRC/225.

This can be accomplished for NRC licensees through case-by-case action in the import licensing process. This process would, of course, not cover protection at DOE facilities, to which most imported special nuclear material is sent. The Commission would need to be promptly informed when the U.S. provided such assurances to a country exporting to the U.S.

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APPENDIX A



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Dr. Joseph S. Nye

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I trust that this information will prove helpful. Please advise us if we can be of further assistance on this matter.

Sincerely,

Joseph M. Hendrie

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UNDER SECRETARY OF STATE  
FOR SECURITY ASSISTANCE  
WASHINGTON

February 21, 1978

Mr. Joseph Hendrie  
Chairman  
US Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Mr. <sup>Jar</sup>Hendrie:

As you know, the Nuclear Suppliers Group Guidelines for Nuclear Transfers, transmitted to the IAEA on January 11, require that all trigger list items transferred to non-nuclear weapons states be placed under effective physical protection to prevent unauthorized use and handling. Agreed criteria for levels of physical protection of various categories of nuclear materials were developed and included in the Guidelines.

The United Kingdom has exchanged notes with several members of the NSG to whom it regularly exports nuclear materials, affirming that the physical protection criteria will be applied. They have now approached the United States and proposed a similar exchange of notes. The United States is presently unable to comply with this request, since we understand that regulations for protection of Category II and III materials have not been promulgated.

As head of our delegation to the Nuclear Suppliers Group, I believe this poses a potentially embarrassing situation for our nonproliferation efforts. We understand that France and the US are the only countries approached which have not completed such an exchange, and that the French are preparing to do so within the next few weeks. The United States will risk exposure as the only member of the London Group which is unable to respond to the UK request, and as one which does not itself meet the minimum standards asked of its customers.

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I would appreciate your current judgment of when we might be in a position to say that we meet the Guidelines criteria. I am particularly interested in our ability to expedite the necessary steps to this end.

Thank you for your cooperation.

Sincerely,



Joseph S. Nye  
Deputy to the  
Under Secretary

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