

January 13, 2000

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Karen D. Cyr /RA/
General Counsel

SUBJECT: ARMS CONTROL, NONPROLIFERATION, AND SECURITY ASSISTANCE ACT OF 1999

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On November 29, 1999, President Clinton signed into law the Consolidated Appropriations Act for Fiscal Year 2000, Public Law 106-113. Incorporated into this omnibus legislation is the Foreign Relations Authorization Act for Fiscal Years 2000 and 2001. Division B of that authorization legislation was enacted as the "Arms Control, Nonproliferation, and Security Assistance Act of 1999" ("1999 Act").

Subtitle B of the 1999 Act amends existing law to impose generally more specific and stringent requirements on particular agencies, including the NRC, to report to Congress on certain nuclear export and non-proliferation activities. Attached for Commission review and approval is a draft All Employees Announcement to implement this new requirement.

1. Congressional Notification of Non-Proliferation Activities under the Nuclear Nonproliferation Act

a. Summary and Discussion

Subtitle B, Section 1131 of the 1999 Act revises and expands the obligation of the NRC and identified executive branch agencies⁽¹⁾ under Section 602(c) of the Nuclear Non-Proliferation Act of 1978 ("NNPA") to keep Congress "fully and currently informed" with respect to nonproliferation-related activities through notifications to the Senate Committee on Foreign Relations and Governmental Affairs and the House of Representatives Committee on International Relations. The legislative history reflects that these amendments were in large part prompted by a congressional perception that executive branch agencies had not been fulfilling their notification responsibilities under existing law in a timely or adequate manner. 145 Cong.Rec. H12583 (Nov. 17, 1999). The legislation leaves intact the pre-existing NNPA reporting requirement that Congress be notified by these agencies of "their activities to carry out the purposes and policies of [the NNPA] and to otherwise prevent proliferation" (NNPA § 602(c)(1)(A), as amended) and of "the current activities of foreign nations which are of significance from the proliferation standpoint" (NNPA § 602(c)(1)(B), as amended). However, where the pre-existing NNPA reporting requirement had covered only nuclear proliferation, Section 1131 amends the NNPA to extend the reporting requirement to "the proliferation of nuclear, chemical, or biological weapons, or their means of delivery." NNPA § 602(c)(1)(A), as amended.

The legislation also includes provisions making clear Congress's expectation that agencies take their NNPA reporting obligations -- particularly those pertaining to proliferation-related activities of foreign nations -- seriously and fulfill these obligations in a timely manner. Section 1131 amends the NNPA to require that agencies, in fulfilling their obligation to keep Congress "fully and currently" informed of the activities of foreign nations under NNPA Section 602(c)(1)(B), must "transmit[] ... credible information not later than 60 days after becoming aware of the activity concerned." NNPA § 602(c)(2), as amended. Section 1134(a) of the 1999 Act likewise emphasizes that each department and agency responsible for reporting of information under NNPA Sections 602(c) and (d)⁽²⁾ shall "promptly provide information to the chairman and ranking minority member of the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House...." Finally, to ensure that all of the desired information is provided to the Senate Foreign Relations Committee and the House International Relations Committee, including all relevant information obtained through special access programs, Section 1134(b) of the 1999 Act instructs these agencies, including the NRC, to issue directives implementing this reporting requirement to agency employees.⁽³⁾ The directives are required to be issued by February 1, 2000, and, upon issuance, copies of the directives must be forwarded to the Senate Foreign Relations and House International Relations committees.

b. Implementation

The statutory language itself, in Section 602(c) of the NNPA, as amended by Section 1131 of the 1999 Act, contains little

guidance as to precisely what type of information Congress is seeking. Rather, the information requirement has been crafted in broad, sweeping terms -- i.e., "credible information" regarding the agency's "activities to carry out the purposes and policies of [the NNPA] and to otherwise prevent proliferation, including the proliferation of nuclear...weapons, or their means of delivery" and "the current activities of foreign nations which are of significance from the proliferation standpoint." Accordingly, it is OGC's view that the NRC has a fair amount of discretion to interpret the information requirement in a workable and practical manner. The staff believes that most of the information that would be of interest to Congress consists of classified or special access information generated not by the NRC but by executive branch agencies that are subject to the very same reporting requirement, e.g., the Central Intelligence Agency and the Departments of State, Energy, and Defense. This raises a question whether the legislation places any obligation on the NRC itself to report information received from the executive branch. The statute ties reporting by agencies to "their activities," which, while not definitive, could support the view that the NRC need only report information that it has originated or received from its regulated community, such as the receipt of significant export license applications and Commission decisions on such applications. In light of the statutory ambiguity and in the absence of any guidance in the legislative history, we believe that it is reasonable to view the NRC's reporting obligation as extending only to information that the NRC itself generates or originates or which it receives from a member of the regulated community, i.e., license applicants or licensees. This is a sensible construction of the reporting obligation since the agencies that originated the information would be in the best position to assess the sensitivities of the information and how and when the information should be reported, which would be of particular concern with classified or special access information. Given that most of the information covered by the legislation consists of classified or special access information generated by the executive branch, the NRC staff believes that it should not have difficulty reporting its activities in carrying out NNPA non-proliferation objectives within the 60-day reporting requirement.

As noted above, the NRC must promulgate and issue a "directive" by February 1, 2000, notifying NRC staff of the reporting obligations under Sections 602(c) and (d) of the NNPA. Appended to this memorandum as an attachment is a draft Yellow Announcement that sets forth the NRC policy in complying with the new reporting requirement. Consistent with our interpretation of the statute as discussed above, the draft directive limits the information that the NRC staff is required to report to information generated or originated by the NRC or obtained from a member of the NRC's regulated community, including NRC license applicants and NRC licensees. The NRC staff has indicated that it will establish a practice of notifying the originating executive branch agency of any information received that the staff believes should be reported by the executive branch. We recommend that the directive be codified in the NRC Management Directives after it is approved and provided to Congress.

2. Congressional Notification of Nuclear Exports

a. Summary and Discussion

Subtitle B, Section 1135 of the 1999 Act amends Section 1523 of the Defense Authorization Act for Fiscal Year 1999 (codified at 42 U.S.C. § 2155 note). Section 1523 requires the President to notify Congress upon the granting of a license by the NRC for the "export or re-export of any nuclear-related technology or equipment, including source material, special nuclear material, or equipment or material especially designed or prepared for the processing, use, or production of special nuclear material," to a state that the President has determined has detonated a nuclear explosive device and that is not a member of the North Atlantic Treaty Organization. The current amendments to Section 1523 are intended to "clarif[y] the type of information that the appropriate committees expect to receive in connection with Congressional notifications of nuclear-related exports for commercial power generation." 145 Cong. Rec. H12583 (Nov. 17, 1999).

Section 1523 was originally enacted on October 17, 1998 (Pub. L. No. 105-261). During the past legislative session, the Senate Committee on Foreign Relations reported out various amendments to the original reporting requirement. OGC discussed these proposed revisions in a memorandum submitted to the Commission (COMSECY 99-028, dated August 12, 1999). In that memorandum, OGC informed the Commission that provisions in both the existing reporting requirement as well as the proposed legislative amendments reflect a misunderstanding of the NRC's statutory role in the nuclear export licensing process.⁽⁴⁾ OGC provided proposed comments which could be presented to the NRC's oversight committees in order to clarify the NRC's role in the export licensing process. These comments, which were included as attachments to COMSECY 99-028, explained that the NRC has only a consultative role in both the approval of nuclear technology transfers and the reexports (i.e., subsequent arrangements) of U.S.-origin nuclear material and equipment; related that the NRC's statutory obligations for export licensing do not require the agency to ascertain information on any "offset" agreements entered into by the licensee⁽⁵⁾ or to obtain a projected delivery date; and advised the oversight committees that government officials (including NRC staff) generally do not go abroad to implement exports. At the Commission's direction, OCA orally communicated these concerns to the Senate Committee staff.

Section 1135 of the Authorization Act contains the final amendments to the nuclear export reporting requirement. There is only one noteworthy change to the proposed legislation discussed in COMSECY 99-028 (deletion of a provision requiring the President to submit a report to the Senate Foreign Relations Committee and the House International Relations Committee 14 days prior to the granting of a NRC export license). The remaining amendments originating from Senator Helms' committee were enacted into law. As a result, the President must now include the following information in all nuclear export reports submitted to Congress:

- (1) a detailed description of the articles or services to be exported or re-exported, including a brief description of the capabilities of any article to be exported or re-exported;

- (2) an estimate of the number of officers and employees of the United States Government and of United States Government civilian contract personnel expected to be required in such country to carry out the proposed export or re-export;
- (3) the name of each licensee expected to provide the article or service proposed to be sold and a description from the licensee of any offset agreements proposed to be entered into in connection with such sale (if known on the date of transmittal of such statement);
- (4) the projected delivery dates of the articles or services to be exported or re-exported; and
- (5) the extent to which the recipient country in the previous two years has engaged in any of the actions specified in subparagraphs (A), (B) or (C) of section 129(2) of the Atomic Energy Act.

b. Implementation

As noted, the legislation specifically designates the President to notify Congress when nuclear technology, equipment, or material is licensed to be exported or re-exported to non-NATO countries that have exploded nuclear weapons. Therefore, it is clearly the executive branch which is responsible for the preparation and submission of the required reports to Congress, including any such reports pertaining to nuclear exports over which the NRC has licensing authority. The Office of International Programs can work with the Department of State as necessary to provide information pertaining to exports licensed by the NRC. Procedures setting forth the NRC's role in the reporting of nuclear exports will be reflected in a Management Directive.

The NRC does not currently have ready access to information concerning offset agreements or the projected delivery dates of proposed exports. OGC and the Office of International Programs will explore how best to obtain this information, including whether amendments to current regulations may be needed.

Recommendation: The Commission should approve issuance of the attached Directive to Agency Employees, which would then be provided to the Congress. In addition, the NRC staff should be directed to codify the directive in NRC's Management Directive System.

SECY, please track.

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Attachment: Proposed Yellow Announcement

cc w/attachment: EDO
IP
OCA
SECY
OIG

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1. The identified executive branch agencies include the Department of State, the Department of Defense, the Department of Commerce, the Department of Energy, and the Central Intelligence Agency.
 2. NNPA Section 602(d) directs the submission of any classified portions of information required to be reported under NNPA Section 602(c) to the Senate Foreign Relations Committee and the House International Relations Committee.
 3. Section 1134(b) provides:

Not later than February 1, 2000, the Secretary of State, the Secretary of Defense, the Secretary of Commerce, the Secretary of Energy, the Director of Central Intelligence, and the Chairman of the Nuclear Regulatory Commission shall issue directives, which shall provide access to information, including information contained in special access programs, to implement their responsibilities under [Sections 602(c) and (d) of the NNPA]. Copies of such directives shall be forwarded promptly to the [Senate Foreign Relations and House International Relations Committees] upon the issuance of the directives.
 4. These include: 1) the misperception that the NRC is the lead agency for approving transfers of nuclear technology and U.S.-origin nuclear "reexports" (DOE is the lead agency); 2) the misperception that U.S. government officials "go abroad" to carry out a nuclear export; 3) the misperception that delivery dates of nuclear exports are known in advance or have any bearing on the NRC's export licensing decisions ; and 4) the misperception that "offset agreements" are within the NRC's export licensing responsibilities.
 5. An offset agreement is apparently an arrangement or agreement between an exporter and the importing state under which the exporter agrees to purchase (or promote the purchase by other persons) of goods or services from the importing state as consideration for the purchase of the export by the importing state.