

**Testimony of
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**Before the
Committee on Foreign Relations
United States Senate**

“Commerce Department Role in Implementing the U.S. Additional Protocol”

January 29, 2004

Chairman Lugar, Senator Biden, and Members of the Committee:

Thank you for the opportunity to testify before the committee today on the impact of the Additional Protocol (Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America) on the U.S. commercial nuclear industry and the role of the Department of Commerce in implementation of the Additional Protocol. As you know, the mission of the Commerce Department’s Bureau of Industry and Security (BIS) is to advance U.S. national security, foreign policy, and economic interests. BIS’s responsibilities include assisting U.S. industry to comply with international arms control agreements. It is in this capacity that I am testifying before you today.

Background

The Additional Protocol is a critical amendment to the Safeguards Agreement. It will expand declaration requirements and access provisions beyond facilities handling source or special fissionable material to include upstream and downstream nuclear fuel cycle activities, such as mining and milling, research and development, equipment manufacturing, exports and imports, and waste processing. The recent discoveries by the International Atomic Energy Agency (IAEA) in Iran demonstrate the limitations of the Safeguards Agreement and the benefits of inspectors’ ability to access the full scope of nuclear fuel cycle-related activities to ensure a non-nuclear-weapon state’s compliance with the Nuclear Non-Proliferation Treaty.

Commerce and NRC Roles

The Additional Protocol, by expanding the application of the U.S. Safeguards Agreement to civil nuclear activities, subjects additional U.S. commercial locations to declaration and complementary access requirements. The Nuclear Regulatory Commission (NRC) will have the lead role for commercial activities that it licenses (e.g., uranium mills, infrastructure supporting facilities, and equipment exports). BIS will be responsible for implementation as it applies to any commercial activity not licensed by NRC, including uranium mining, research and development not involving nuclear materials, and manufacturing and importing of specially

designed nuclear equipment. To assist U.S. companies in determining to which regulations they are subject, BIS and NRC will ensure that our rules are complementary, and will jointly develop declaration forms and conduct outreach.

BIS Approach

BIS has a successful history of assisting industry to comply with the only other international arms control treaty that directly affects U.S. commercial activities: the Chemical Weapons Convention (CWC). Our approach to ensuring U.S. compliance has been both novel and successful. We have developed a partnership with commercial facilities built upon three guiding principles:

- (1) Demonstrating industry compliance;
- (2) Emphasizing the protection of confidential information; and
- (3) Minimizing burdens and costs to industry.

This approach has been successful from a compliance standpoint and has been commended by the largest domestic chemical industry trade group. We intend to implement the industry compliance provisions of the Additional Protocol following these same principles.

Additional Protocol Reporting System

As part of our implementation responsibilities, BIS has been tasked to develop a secure Additional Protocol Reporting System that will collect and process industry submissions, and will aggregate all agency information collected from declarations into a U.S. national declaration for transmission to the IAEA. As part of this system, BIS is developing an electronic tool that will permit agencies to identify activities with direct national security significance to the United States in order to protect these equities through a national security exclusion (NSE). Under Article 1.b of the Additional Protocol, the United States reserves the right to exclude locations or activities of direct national security significance from declaration to the IAEA. BIS regulations will instruct companies not to submit classified information with declarations. Nevertheless, the identification of activities and locations of certain companies, including defense contractors, could require the U.S. Government to exercise the NSE for commercial activities in order to guard against the potential to disclose information of direct national security significance. For example, this situation could exist where a program of direct national security significance is co-located with unrelated commercial activities (e.g., equipment manufacturing). The U.S. Government has the right to exercise the NSE to prevent such sensitive information from being submitted to the IAEA.

Protection of Sensitive Information

Additionally, declaration information must be protected from domestic release. There are many risks associated with releasing the identity and activities of commercial locations engaged in nuclear fuel cycle activities. Therefore, the U.S. Government needs an effective

means of preventing the domestic release of information contained in the unclassified Additional Protocol Reporting System. A statutory exception to Freedom of Information Act disclosure would provide the means of protecting our sensitive commercial information and the identity of those sensitive locations. Moreover, our right under the Additional Protocol to exercise the NSE would be undermined if information pertaining to excluded locations or activities were subject to domestic release.

Simplified Reporting

Based on studies conducted by the Departments of Commerce and State, we estimate that no more than 500 commercial locations or activities outside of the NRC's jurisdiction will be subject to declaration (excluding the one-time submission of declarations for abandoned uranium mines, which may total more than 1,000). Information required to be submitted will be kept to the minimum necessary to meet U.S. treaty obligations. In order to simplify reporting requirements, we are developing check-box forms that limit the need for free-style writing. Companies engaged in multiple activities subject to declaration may submit a combined declaration. BIS also will permit commercial locations to submit declarations electronically via the internet. After submitting initial declarations, companies whose activities remain unchanged from the previous calendar year will simply need to submit a "no-change" form, thereby further reducing paperwork burdens.

Industry Outreach

As was done in preparation for CWC implementation, BIS will conduct seminars, training and other outreach to industry in order to assist companies in understanding and implementing their declaration and complementary access obligations. We will also offer site assistance visits to companies that seek help in preparing for inspections. A primary focus of such outreach is to assist companies in identifying and protecting proprietary and other sensitive information and technology.

Complementary Access

As we have successfully done during 47 CWC inspections, BIS will manage complementary access visits at commercial locations. BIS will escort inspectors from the time they arrive at the front gate of a location until they depart the location. Based on discussions with the IAEA, we anticipate receiving no more than a few such visits annually. We will work with the Department of Defense and other agencies to ensure that a security countermeasures expert is available to participate on BIS host teams and to provide expertise with regard to inspecting IAEA equipment for integrity and safety purposes.

Advance Preparation for Complementary Access

Under the CWC, we have found that the ability to provide advance assistance to facilities prior to the inspection team's arrival is invaluable. Such assistance includes training company personnel on escort techniques to facilitate compliance with verification aims and to protect confidential information. We will make such services available in the event of a complementary access visit under the Additional Protocol as well. Moreover, should an inspection take place at a location under contract by the U.S. Government, any agency concerned will participate on the host team and instruct BIS as to whether and how to invoke the NSE to manage access pursuant to Article 1.c of the Additional Protocol.

Managed Access and Protection of Confidential Information

In addition, BIS will vigorously employ the managed access measures permitted under Article 7 of the Additional Protocol and contained in the U.S. Subsidiary Arrangement to protect confidential or proprietary information. Invocation of managed access techniques does not require advance agreement with the IAEA. As with our implementation of CWC inspections, we will work closely with companies to identify and protect confidential information, and will not respond to IAEA inspector questions not directly related to compliance with the Additional Protocol.

Basis for IAEA Complementary Access

The most effective way to protect confidential and other sensitive information is to avoid complementary access visits. The United States has no plans to volunteer a commercial location for complementary access. Unlike the routine inspection provisions of the CWC, the IAEA will not seek to routinely verify declarations submitted pursuant to the Additional Protocol. For uranium mines, the IAEA has access on a selective basis to assure the absence of undeclared nuclear material and activities. For all other commercial locations that will be subject to BIS regulations, the IAEA will have access to a location only after the IAEA gives the United States an opportunity to resolve a question or inconsistency and only where the visit would be consistent with the requirements of the Fourth Amendment. BIS's objective is to ensure the submission of complete and accurate declarations in order to preclude the need for complementary access at these commercial locations. In addition to providing support to companies to ensure accurate declarations, BIS will work closely with companies to develop a comprehensive U.S. response to an IAEA clarification request if one is received.

Nevertheless, prudent planning dictates that BIS conduct site assistance visits to help locations prepare for complementary access visits, particularly any locations that are co-located with sensitive programs. As demonstrated under the CWC, hosting an inspection is greatly facilitated by advance planning and proper execution.

Voluntary Consent and Warrants

Regardless of the location to be inspected, the Administration's draft implementing legislation provides that a complementary access visit will not occur unless a company grants consent or an administrative search warrant is obtained, except in any situations where such consent or warrant is not required by the Fourth Amendment.

IAEA Protection of Confidential Information

Article 15 of the Additional Protocol requires the IAEA to maintain a stringent regime to ensure protection of confidential information. No information submitted to the IAEA is subject to release without a state party's consent. While certain confidential information may be required to be released to the IAEA in order to comply with the Additional Protocol, it will be kept to a minimum and the U.S. Government will closely monitor the IAEA's adherence to the requirements of protecting such information. At a minimum, BIS will review all information prior to release to IAEA inspectors to ensure it is relevant to the Additional Protocol. Additionally, no company documentation, including photographs, may be taken off-site by IAEA inspectors without BIS's approval.

Vetting of Inspectors

In preparation for complementary access visits, the U.S. Government has the right to exclude certain inspectors from inspecting locations in the United States. We will work with the interagency community to exercise this right with regard to nationals from terrorist-supporting countries and will take account of espionage concerns when vetting inspector lists.

Entry-Into-Force

With regard to entry-into-force, we are committed to implementing the requirements of the Additional Protocol as soon as possible after ratification and enactment of implementing legislation. However, to ensure that proper protections are established and industry has adequate time to understand and implement its reporting obligations, entry-into-force will not occur until BIS publishes its regulations in final form and vulnerability assessments of declared locations of direct national security significance are completed. In the interim, BIS will promulgate a proposed rule and offer interested parties an opportunity to comment.

Expected Low Burden to Industry

Based upon the limited response to our request for public comments on the Additional Protocol in a Federal Register Notice of Inquiry and discussions with the Nuclear Energy Institute, we do not anticipate that implementation will be overly burdensome on industry. The Nuclear Energy

Institute has stated that it "... does not foresee significant burdens on industry from ratification and imposition of the U.S. Additional Protocol."¹

Our experience with implementing the CWC's declaration and inspection requirements also suggests that the impact of the Additional Protocol on industry will be modest. The limited amount of information required to be declared will minimize the burden on industry from filling out forms. Moreover, complementary access visits will occur less frequently and their duration will be much shorter than CWC inspections, based on the IAEA's current practice in other states that have implemented the Additional Protocol. As we proceed with implementation, BIS will coordinate closely with affected companies to ensure declaration forms are user-friendly and implementation procedures are fully understood.

Conclusion

In conclusion, while the bulk of U.S. locations affected by the Additional Protocol are engaged in purely commercial or academic activities, the burdens are expected to be low and the potential vulnerabilities can be mitigated through a public-private partnership. The Department of Commerce recognizes the international nonproliferation benefits of this agreement and will do its utmost to support the treaty's nonproliferation goals. We will demonstrate industry compliance while protecting confidential information and minimizing the burden on industry.

¹ "Comments on the Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency Concerning the Application of Safeguards in the United States of America ("U.S. Additional Protocol") [67 Fed.Reg. P. 70049 - November 20, 2002]", Nuclear Energy Institute, January 23, 2003.