

July 2018

# U.S. Power Industry Update

## A Message from Mark Fishbaugh

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### Welcome to Summer!

On behalf of Aon Global Power, I am happy to provide you with our first newsletter of 2018. In this issue, we provide you with timely information and some great insights on topics and risks impacting your business as well as solutions to these issues that Aon Power has drawn from the best technical expertise in the industry.

Please reach out to me or our Aon Power colleagues for additional information and discussion. We look forward to seeing everyone in Chicago in July!

*P.S. Don't forget to register for Aon's Power Reception at AEGIS on Monday, July 16th 6:30-10:00 at AceBounce in Chicago. [Click here](#) for event details and to register.*

Best,

**Mark Fishbaugh**

U.S. Power Practice Leader  
Aon Global Power Specialty

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## New Hires

Aon's U.S. Power team is pleased to welcome aboard 2 new hires: Kathleen Musselman and David Reisinger.

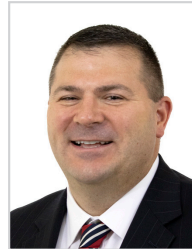


Kathy Musselman

**Kathy Musselman** joins our U.S. Power Practice Group as a Senior Property Placement Specialist. Kathy has thirty-two years of experience in underwriting property and natural catastrophe coverage for medium to large Power Generation risks as well as audit experience in both the London and Bermuda markets. She was most recently the Vice President of Power Generation Risks at

Swiss Re and before that spent eight years as the Energy/Power Generation Practice Group Leader at XL Capital.

Kathy will sit within the U.S. Power Practice Group. She will report directly to Derek Whipple, Power Brokerage Leader. Kathleen can be reached via email at: [kathleen.musselman@aon.com](mailto:kathleen.musselman@aon.com).



David Reisinger

**David Reisinger** joins our U.S. Power Practice Group as a Senior Property Placement Specialist. David has 23 years of experience in different facets of the Energy and Power industry: Project Finance for the development of international power projects, M&A and CapEx analysis at a Natural Gas Utility, M&A for Energy related consulting companies, and Energy and Power Property Underwriting

experience. From his well-rounded experience and technical background, David, brings a unique set of skills and understanding to help clients with their risk management needs.

David can be reached via email at [david.reisinger@aon.com](mailto:david.reisinger@aon.com).

## 2018 Aon U.S. Power Summit Recap

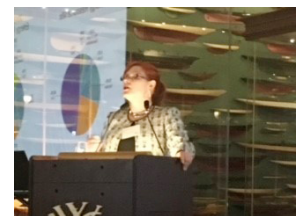
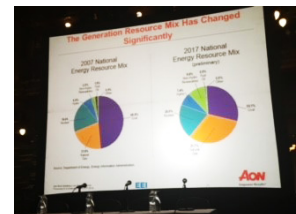
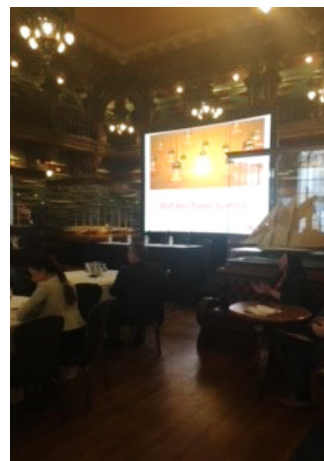
Our U.S. Power Practice team recently held its U.S. Power Summit on May 15th, 2018 at the New York Yacht Club in New York City.

We brought together clients, markets and industry stakeholders to participate in a candid conversation with their peers, colleagues and industry experts on changes, challenges and issues affecting the power industry today and in the future.

Key highlights from this Summit included presentations from Maryanne Hatch, Director of Federal Regulatory Affairs at the Edison Energy Institute who presented on the State of the U.S. Power Industry, and Ed Stroz, Co-President of Stroz Friedberg who presented on Global Cyber Risk and Physical Security.

We had a great turnout, with attendees from across the U.S. The agenda was well received and there were a lot of great discussions throughout the conference.

We will be planning our 2019 Summit soon so look out for details!



The U.S. Power Summit, May 15th, 2018 at the New York Yacht Club in New York City.

## SEC Cybersecurity Disclosure Guidance - Cyber Risk is D&O Risk

By Gary Gresham Senior Vice President, FSG/Cyber Team Leader  
Aon Global Power Specialty



Gary Gresham

Cybersecurity continues to be a much talked about topic impacting all industry sectors, including the power and utility sector. Historically, cybersecurity disclosure headlines generally focus on personal information disclosure breaches. The power and utility sector's disclosure reporting concerns include "critical infrastructure" breaches and the risk of interruptions and/or

failure to supply electricity, natural gas, water or other vital resources. In my 20+ years of supporting the power and utility sector, many industry specific disclosures unique to the sector

including environmental, aging work- force, renewable requirements, etc., have been required, with cybersecurity now being added to the list. A November 2017 PWC (PricewaterhouseCoopers LLP) survey reports that 78% of the 73 SEC power and utility registrants surveyed included cybersecurity as a risk factor in their SEC disclosures. None of those surveyed disclosed that a cyber event occurred. While the cybersecurity exposures may differ for the power and utility organizations, the SEC requires similar disclosures of material information for all registered companies. Thus the below article is a timely discussion topic.

I am pleased to provide the below guest article post in this edition of the Power Newsletter, from Aon's Financial Services Group which provides analysis of the recent SEC Cybersecurity Disclosure Guidance. Much thanks to Ken McBrady, Ross Wheeler, and Chris Rafferty for their contributions.

*Until next time...*

### Analysis from Aon's Financial Services Group

## 2018 SEC Cybersecurity Disclosure Guidance – Cyber Risk is D&O Risk

Following a number of noteworthy cybersecurity breaches involving U.S. businesses, on February 21, 2018, the U.S. Securities & Exchange Commission ("SEC") released its Cybersecurity Disclosure Guidance ("Guidance"). The Guidance is intended to provide suggestions for public companies when preparing disclosures about cybersecurity risks and incidents, and communicates the SEC's views on the importance of maintaining comprehensive policies related to cybersecurity. We believe the Guidance aligns an SEC focus area with the emerging trend that "Cyber Risk is D&O Risk."

### In concert with the SEC's guidance, SEC Chairman Jay Clayton shared a statement on this Guidance:

In today's environment, cybersecurity is critical to the operations of companies and our markets. Companies increasingly rely on and are exposed to digital technology as they conduct their business operations and engage with their customers, business partners, and other constituencies. This reliance on and exposure to our digitally-connected world presents ongoing risks and threats of cybersecurity incidents for all companies, including public companies regulated by the Commission. Public companies must stay focused on these issues and take all required action to inform investors about material cybersecurity risks and incidents in a timely fashion.

### From the Guidance, several recommendations and observations relevant to Directors' and Officers' Liability Insurance emerge:

- **Carefully Determine Materiality Specific to Your Organization** - The SEC disclosure requirements cite "materiality" as the threshold for determining whether any matter, including a cyber incident, must be disclosed to an investor. According to the Guidance, the standard of materiality as determined by the U.S. Supreme Court in *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976), is that, a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important" in making an investment decision or if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available to the shareholder." The SEC reminds companies that it must tailor its disclosures to that company's particular cybersecurity risks and incidents, further mentioning that companies should avoid generic cybersecurity disclosures. The SEC also identifies several accommodative considerations with regard to materiality determination, including the recognition that companies are not expected to disclose information that could compromise its cybersecurity defenses, that it may take time for a company to evaluate an incident and determine materiality, and that required cooperation with law enforcement may affect the scope of disclosure.

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- *Timely and Comprehensive Disclosure is Critical -*

As Chairman Clayton noted, timely reporting is expected. The Guidance specifies that, “Where a company has become aware of a cybersecurity incident or risk that would be material to its investors, we would expect it to make appropriate disclosure timely and sufficiently prior to the offer and sale of securities...” The SEC further affirmatively states that ongoing investigations – both internal and external – do not, on their own provide a reason for companies to avoid timely disclosure of a cybersecurity incident.

- *Ensure Board Oversight of Cybersecurity -*

The Guidance reminds companies that, “disclosure about the board’s involvement in the oversight of the risk management process should provide important information to investors about how a company perceives the role of its board and the relationship between the board and senior management in managing the material risks facing the company.” The Guidance further advises that, particularly at those companies where cybersecurity risks are material to a company’s business, companies should disclose the nature of the board’s involvement with oversight of cybersecurity. These specific comments by the SEC, along with prior litigation targeting the directors and officers of companies with cybersecurity breaches, highlight the importance of board engagement with cybersecurity, as well as the need for public filers to detail to investors the board’s engagement to allow investors to make a carefully informed decision with regard to a company’s risk management in this area.

- *Insider Trading and Cybersecurity Intersect -*

The Guidance reminds companies that issuers, their directors and officers, and other insiders must comply with trading rules regarding material non-public information, which can

include information related to cybersecurity incidents as well as vulnerabilities. The Guidance reminds issuers that it is illegal to trade securities, “on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.” The Guidance notes that many exchanges require listed companies to adopt policies and a code of conduct that promote compliance with all applicable rules and regulations, including insider trading. The Guidance encourages companies to consider how those codes of conduct address insider trading related to cybersecurity risks, and further prompts issuers to consider prohibiting insider trading while companies are investigating cybersecurity incidents. The Guidance cautions companies to avoid even the appearance of insider trading by implementing stricter disclosure and insider trading protocols.

### Conclusion

Public company directors and officers have a duty to understand the ramifications of cybersecurity on their business, and to proactively design risk mitigation procedures and internal disclosure guidelines specific to their company’s unique cybersecurity needs. Further, it is believed that the potential for insider trading based upon knowledge of cybersecurity incidents is firmly within the SEC’s crosshairs, and possible cause for further corporate governance focus. The SEC’s recent Guidance on the cybersecurity topic is believed to signal a growing and continued focus on this matter, and serves as notice that all companies must be prepared.

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**Public company directors and officers have a duty to understand the ramifications of cybersecurity on their business.**

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## Aon Environmental Wrap

*Christine Palomba, U.S. Power Casualty Team Leader, Aon Global Power Specialty & Cynthia Fee, Senior Casualty Power Specialist, Aon Global Power Specialty*



Christine Palomba



Cynthia Fee

For some time, we have heard increased feedback by risk managers questioning whether the limited pollution coverage contained in the AEGIS excess liability policy is broad enough to provide protection for the types of losses that may arise out of utility operations. Through these discussions, it became apparent that there is a critical need to provide an immediate environmental solution that: 1) bridges the gap between first-party and third-party pollution coverage, 2) affirmatively fills in the gaps in the AEGIS limited pollution coverage contained within the excess liability policy, and 3) provides excess pollution limits. We are excited to roll-out the bespoke Aon Environmental Wrap, a differences-in-condition solution and suite of endorsements offering critical

affirmative pollution coverage enhancements for AEGIS members.

Many AEGIS members rely solely upon the pollution coverage contained within the AEGIS excess liability policy as the sole risk-recovery mechanism for pollution losses. There are certain significant limitations to this coverage, namely that it is generally

intended to cover only short-term pollution events and third-party loss. Additionally, typically on-site clean-up is not included, meaningful protection is not provided for coal/ash ponds, and defense costs are within the limits. Further, once the pollutant or waste is disposed of, sold, or converted for beneficial re-use, there is unlikely to be residual or on-going coverage.

### As highlighted below, the Aon Environmental Wrap solution offers the following features:

- DIC, wrap around coverage filling in and supplementing the pollution coverage provided in the AEGIS excess liability policy
- Matches the member's retroactive date on AEGIS excess liability policy
- Utilizes AEGIS excess liability application with short supplemental application- no lengthy separate application to complete
- No Phase I or Phase II reports required
- No coverage limitation to only scheduled locations/facilities
- Up to \$250M limits available
- Preferential rating with separate rates depending upon coal, natural gas, and/or renewables exposure, and leveraged pricing due to utilization of the pollution coverage currently contained within the AEGIS excess liability policy.

Subject to the specific policy terms, conditions, and exclusions, when compared with the pollution coverage included in the AEGIS excess liability policy, the Aon Environmental Wrap solution affirmatively seeks to fill in the following potential coverage gaps/limitations:

### Aon Environmental Wrap Solution

Risk of Loss	AEGIS	Aon Environmental Wrap
First party on site clean-up for sudden and accidental release	Excluded	✓
Transportation of waste	Restricted to events known to insured within 7 days	✓
Temporary or permanent storage of waste	Excluded	✓
Portion of defense costs outside the limit	Not included	✓
Broad definition of "pollutant" including affirmative coverage for coal	Not included	✓
Products liability arising from beneficial reuse or repurposing	Not included	✓
Expressly includes emerging risks of loss	Not included	✓
Civil fines and Natural Resource Damage coverage	Excluded	✓

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**Translating the above into specific examples of claims contemplated by the Aon Environmental Wrap solution:**

- **Beneficial Re-Use:** Fly ash is sold or given to a third party to include in bricks/concrete/road aggregate. A claim for bodily injury is brought alleging exposure to the metals contained in the ash. AEGIS would not likely cover this exposure as it arises out of a “waste” but the Aon Environmental Wrap policy is designed to respond.
- **Disposal Site:** Pollutant is stored off-site at a third party disposal site. The disposal site goes bankrupt and the Federal or State government issues a notice to all parties who have disposed pollutants at the site that they are responsible for a proportionate amount of clean-up costs. AEGIS would not likely respond as the liability arises out of a “waste” but the Wrap policy is designed to respond based on the percentage of the liability allocated to the Insured.
- **Large aboveground tanks spills diesel or another fluid but the spill is contained within the boundaries of the power plant.** AEGIS would not likely respond to the claim for clean-up as no third-party has been impacted. The Wrap policy is designed to respond as long as the spill was discovered within 30 days.

The Aon Environmental Wrap is an industry leading solution for the multitude of AEGIS members who rely solely on the AEGIS excess liability form to provide pollution protection. For those AEGIS members already maintaining standalone pollution policies, this is a viable solution offering “all other” sites coverage, including locations recently procured or not currently added to their existing standalone pollution liability program, as well as those sites for which no Phase I and II reports have been completed. Leveraging the pollution coverage terms and conditions already contained in the AEGIS excess liability policy, the Aon Environmental Wrap solution is designed to fill in gaps, provide broader first-party protection, and offer additional capacity limits.

**Please contact your Aon Service Team or Christine Palomba or Cynthia Fee if you have any questions or would like additional information.**

*All descriptions, summaries or highlights of coverage are for general informational purposes only and do not amend, alter or modify the actual terms or conditions of any insurance policy. Coverage is governed only by the terms and conditions of the relevant policy.*

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## Update on Fukushima Lawsuits

*By Thomas Magnuson, Broker - Nuclear Risk, Aon Global Power Specialty and additional contributors include Brian DeBruin and Marshall Nadel, Managing Directors, Aon Global Power Specialty*



Thomas Magnuson



Brian DeBruin



Marshall Nadel

Much of the international legal framework related to nuclear liability remains theoretical as there have been few historical accidents to test the system. The current Fukushima-related litigation in U.S. Federal courts has given a unique look at some of the legal challenges that can arise from a large nuclear accident.

Even though Japan's nuclear liability law channels liability damage exclusively to the operator and provides for unlimited liability, U.S. lawsuits brought in 2012 and 2017 against some of the nuclear plant's suppliers are still active. The three supplier-related lawsuits that have been filed in the U.S. are Cooper V. TEPCO, Batel V. TEPCO, and Imamura V. General Electric Company.

Cooper V. TEPCO was first filed in 2012 in California initially against Tokyo Electric Power Company (TEPCO) for allegedly causing injuries to U.S. Navy service members exposed to radiation from the Fukushima-Daiichi Nuclear Power Plant during 2011 relief efforts. Later, the lawsuit was amended to include one supplier by name and allowing for others to be added in the future. TEPCO and

the government of Japan have tried to bring the claim back within the borders of Japan to keep claims centralized and meet the intent

of their nuclear liability laws but because Japan was not yet a signatory to the Convention on Supplementary Compensation (CSC) the U.S. Ninth Circuit Court of Appeals has upheld the lawsuit in the U.S.

Bartel V. Tokyo Electric Power Company is a class action suit brought in California in 2017 against TEPCO and unnamed suppliers that alleges negligence, manufacturing defects, and even wrongful death. This suit was initially dismissed on jurisdictional grounds but has been refiled by the Bartel Plaintiffs.

Imamura V. General Electric Company was filed in Massachusetts in 2017 by Japanese property owners on the behalf of more than 150,000 Japanese residents and hundreds of businesses against General Electric and unnamed suppliers. The plaintiffs are alleging negligence, strict liability, and other violations and are seeking unspecified amounts of monetary and punitive damages. GE has moved to dismiss the case with prejudice and is continuing to make the argument that the CSC should apply.

These U.S. cases are likely to remain unsolved for years to come but the lesson they provide is striking. They have reinforced the fear that legal claims can be brought outside of the country where the accident occurs, thus circumventing the country's domestic laws. Additionally, the ruling by the Ninth Circuit Court shows the danger for suppliers with U.S. assets to assume that they are fully protected by any convention that the U.S. is not a signatory to or that a post-accident signing of the CSC by another country would cause the U.S to apply those rules to any related lawsuits. Until the CSC is globally adopted, suppliers should seek to address the risk of prolonged lawsuits with a robust global nuclear liability insurance program.

**Please contact your Aon Service Team or [Thomas Magnuson](#) if you have any questions or would like additional information.**

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## Revision of NEIL Deductible Credits

*By Thomas Magnuson, Brian DeBruin and Marshall Nadel*

In December 2017, upon recommendation from the Insurance Advisory Committee, the NEIL Board of Directors voted unanimously to revise the Primary Property Policy Form's deductible credits to provide greater optionality and encourage higher retentions of risk for Members with sufficient risk appetite.

If not already done, risk managers should take the opportunity to review loss expectancies and factor them into the deductible credit calculations to evaluate optimal retention levels. The long term yearly savings could greatly benefit a nuclear plant in lowering its overall operating costs. However, before choosing higher retention limits, consideration should be given to whether a Member can withstand increased loss volatility, the resources available if a loss occurred, and their company-specific metrics for financial success.

The insurance that NEIL provides as a mutual enterprise combined with the associated retrospective and upfront financial benefits (for example, policyholder distributions and renewal credits) make NEIL's value proposition exceptionally attractive. However, the opportunity now exists to cut additional upfront premium costs through increasing the NEIL Primary Property Policy deductible to the newly created higher credit areas.

**Please contact your Aon Service Team or [Thomas Magnuson](#) if you have any questions or would like additional information.**

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## Update on Used Nuclear Fuel Cost Recovery

*By Thomas Magnuson, Brian DeBruin and Marshal Nadel*

Used nuclear fuel cost recovery begins with the Nuclear Waste Policy Act of 1982, where the DOE entered into an agreement with reactor owners to take possession of their highly radioactive used fuel waste for ultimate disposition. By not providing a used fuel repository after having levied fees against nuclear reactor owners, the DOE is the target of allegations that it has been in breach of its agreement since the 90s. Reactor owners have thus brought claims against the DOE to recoup the costs associated with on-site storage of used fuel in Independent Spent Fuel Storage Installations (ISFSI).

Until recently, only the storage and maintenance costs have been levied against the DOE, leaving the utilities to bear the remaining cost of risk. Recognizing this, NEIL members proposed a change to specifically highlight the premium associated with insuring the risk of these installations.

In 2017, at the recommendation of the Insurance Advisory Committee, the NEIL Board of Directors approved the implementation of a methodology for explicitly underwriting ISFSI exposures, providing a significant opportunity for associated

insurance cost recovery for the nuclear industry at the discretion of individual insureds. This change, however, may draw questions of proposed allocation from the DOE. Reactor owners therefore need to be prepared to defend their position to the DOE that there is a cost of risk associated with the ISFSI exposure.

Other methods of cost recovery are being attempted by some utilities by additionally seeking recovery for such things as past premiums associated with the ISFSI from their NEIL Primary Property Insurance and ANI nuclear energy liability policies. However, NEIL has not explicitly underwritten ISFSI exposures at most insured locations for past years and ANI has never provided any specific premium breakout for the ISFSI exposure.

In this challenging economy for nuclear power plants, utilities are finding creative ways to save money. Reducing operations costs, more efficiently hedging or transferring risk, and finding alternative ways to recover costs continue to be major goals of nuclear plants. Some reactor owners are even seeking tax deductions for the high nuclear waste handling fees paid to the DOE. Whatever method is used, reactor owners are working hard to improve efficiency to better compete in their markets.

**Please contact your Aon Service Team or [Thomas Magnuson](#) if you have any questions or would like additional information.**

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### About Aon

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance.

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