

DEPARTMENT OF ENERGY**Office of the Secretary****10 CFR Part 1045**

RIN 1901-AA21

Information Classification**AGENCY:** Department of Energy.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE or Department) proposes to revise its regulations concerning its policies and procedures on the identification of classified information. These regulations establish the policies and procedures implementing the requirements of the Atomic Energy Act of 1954 for the classification and declassification of information as Restricted Data and Formerly Restricted Data and also implement those requirements of Executive Order 12958 concerning National Security Information (NSI) that directly affect the public. These regulations prescribe procedures to be used by all agencies of the Federal Government in the identification of Restricted Data and Formerly Restricted Data, and describe how members of the public may request DOE NSI and appeal DOE classification decisions regarding such requests.

DATES: Comments on the proposed rule (3 copies) must be submitted on or before March 17, 1997. A public hearing will be held on February 26, 1997. Written requests to speak at the hearing must be received at the address below by February 12, 1997.

ADDRESSES: Send written comments and requests to speak at the hearing to Janet O'Connell, Department of Energy, Office of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290. (Docket No. RM-96-1045). The hearing will be held at 9:00 a.m. at the Department of Energy, Forrester Building, Main Auditorium, 1000 Independence Ave, S.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Janet O'Connell, Department of Energy, Office of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290, (301) 903-1113, or Joseph S. Mahaley, Department of Energy, Office of the Assistant General Counsel for National Security, Washington, DC 20585, (202) 586-0806.

SUPPLEMENTARY INFORMATION:

I. Background

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I. Background

Under the Atomic Energy Act of 1954, 42 U.S.C. 2011, the Department of Energy is responsible for the classification and declassification of nuclear-related information. Such information is classified as Restricted Data (RD). The DOE has joint responsibility with the Department of Defense (DOD) for the classification and declassification of certain nuclear-related information which relates primarily to the military utilization of nuclear weapons. Military utilization information which can be protected as National Security Information (NSI) is classified as Formerly Restricted Data (FRD). These regulations specify the policies and procedures that organizations and individuals shall follow in classifying and declassifying RD and FRD. In formulating these policies and procedures, DOE has solicited and made use of significant recommendations from the public and other agencies of the Federal Government (hereafter referred to as "agencies"); the Department has embraced the goal of "open policies openly arrived at." The resulting proposed regulation balances the Department's commitment to maximize the amount of information made available to the public with the need to protect national security and prevent nuclear proliferation.

Section 5.6(c) of Executive Order (E.O.) 12958, "Classified National Security Information," requires that agencies that originate or handle classified information promulgate implementing regulations to be published in the Federal Register to the extent that they affect members of the public. Subpart D of these proposed regulations implements those requirements of the Executive order and was approved by the Information Security Oversight Office (ISOO) on July 5, 1996, in accordance with section 5.3(b)(3) of E.O. 12958.

This proposed regulation establishes overall classification and declassification policies and procedures and serves as the bridge between the Atomic Energy Act and E.O. 12958, the procedures contained in DOE and

agency orders and directives, and the technical guidance in classification guides.

II. Section by Section Analysis

This proposed regulation is written in four Subparts. Subpart A provides general information on the management of the RD classification system, including the responsibilities of DOE and all agencies with access to RD and FRD. Subpart B describes procedures for the classification and declassification of RD and FRD information (as contrasted with classification and declassification of documents containing such information). Requirements and procedures for the review, classification, and declassification of RD and FRD documents to be implemented by all agencies are described in Subpart C. Lastly, Subpart D provides DOE requirements and procedures concerning NSI to the extent that they affect the public, as required by Executive Order 12958.

This regulation incorporates recommendations of the Classification Policy Study of July 1992, the Atomic Energy Act Study of January 1994, and the National Academy of Sciences Review of 1995. Copies of these studies are available from the contact person in the **ADDRESSES** section of this notice. DOE has completed a Fundamental Classification Policy Review Study which is currently undergoing interagency coordination. Its major purpose is to determine what information must still be protected in light of the end of the Cold War and to recommend declassification of all other information. The Department will consider appropriate recommendations from this latest study and seek additional comments if necessary prior to issuance of the regulation in final form.

Subpart A deals with management of the RD classification program. Responsibilities are specified for the DOE Director of Declassification for the management of the Government-wide system for the classification and declassification of RD and FRD; for DOD concerning FRD; for agency heads with access to RD and FRD; and for agency RD management officials to oversee the implementation of the program within their agency. The Nuclear Regulatory Commission (NRC) has responsibility for assuring the review and proper classification of RD under this regulation, generated in NRC and in its licensed or regulated facilities and activities. NRC and the DOE jointly develop classification guides for programs over which both agencies have cognizance.

Definitions of all terms used in any Subpart are provided in proposed § 1045.3. Where appropriate, these definitions follow precisely legal or statutory language, as in the definition of Restricted Data taken from the Atomic Energy Act (AEA). The AEA and E.O. 12958 differ in the wording used for assessing the consequences of unauthorized disclosure of information at the lowest classification level. Therefore, "Confidential" is applied to NSI if disclosure is expected to cause "damage to the national security"; to RD and FRD if the expectation is "undue risk to the common defense and security."

In the proposed regulation, "information" is defined as "facts, data, or knowledge itself." "Document" is defined as "the physical medium on or in which information is recorded, or a product or substance which contains or reveals information, regardless of its physical form or characteristics." The distinction between "information" and "documents" is important in understanding DOE classification and declassification policies and procedures. Only a few senior Government officials have the authority to make decisions concerning the classification and declassification of information and set policy. Conversely, hundreds or even thousands of Government and contractor employees have the authority to make decisions concerning the classification and declassification of documents and follow such policy

The Director, Office of Declassification (hereafter DOE Director of Declassification), is subordinate to the Director, Office of Security Affairs (hereafter DOE Director of Security Affairs). The DOE Director of Declassification reviews new information, potentially falling within the definition of RD to determine if the information should be classified as RD. However, due to the especially sensitive nature of RD information, the authority to declassify RD information is vested in the DOE Director of Security Affairs.

The decisions concerning the classification and declassification of RD made by these Directors are explained in classification guides, which contain detailed instructions as to whether information is classified. These guides are the primary basis for the review of documents to determine whether they contain RD information.

A large number of individuals within the DOE, other agencies, and their contractors may determine whether a document contains RD and, therefore, should be classified or unclassified.

This centralized policy-setting, decentralized policy-following approach ensures consistency and efficiency. However, it means that the full benefit of the Department's Openness Initiative can only be realized if the policy decisions concerning the classification and declassification of RD information made by the DOE Directors of Declassification and Security Affairs are applied by one of the many document reviewers to previously classified documents so that they are declassified and made available to the public.

FRD information and documents are generally handled in the same manner as RD except that DOD and DOE have joint authority over the classification and declassification of FRD information and some RD information which has not been transclassified to FRD but which relates primarily to the military utilization of nuclear weapons. The DOD and the DOE jointly develop classification guides for programs over which both agencies have cognizance.

Proposed § 1045.5 provides for sanctions and alerts employees to the administrative penalties that can result from violation of policies and procedures prescribed in this regulation.

Proposed § 1045.6 states that DOE will maintain an Openness Advisory Panel to advise the Secretary regarding the current status and strategic direction for the Department's classification and declassification policies and programs as well as other aspects of the Department's ongoing Openness Initiative. Several studies of DOE classification policy and recommendations from public stakeholders led DOE to creation of this panel. It is anticipated that this panel will not only provide evaluation and advice on DOE classification policies, but will also serve as an independent authority to confirm for the public the validity of classification decisions in which the full rationale cannot be disclosed for reasons of national security. This panel is currently constituted under the Secretary of Energy's Advisory Board (SEAB), in accordance with the Federal Advisory Committee Act, and composed of thirteen recognized experts in a broad spectrum of disciplines.

Subpart B applies to the small number of DOE and DOD officials who hold the authority to make decisions on the classification of information as RD or FRD. This authority is somewhat analogous to original classification authority for NSI. DOE has decided to publish these procedures and the criteria used in making classification determinations in order to formally implement the Department's openness

policies and to assure the public that the RD/FRD classification process serves the public interest as well as national security interests, and will continue to do so in the future.

Section 1045.13 proposes several classification prohibitions and specifies that the classification of RD and FRD shall not be used to prevent or delay the release of information bearing solely on the physical environment or public or worker health and safety. This prohibition is included to fulfill DOE's commitment to the public release of environmental, safety and health information, including information on human radiation experiments.

The definition of RD contained in the AEA has been interpreted to mean that all information falling within the RD definition is automatically classified or "born classified." When the AEA was written, this was effectively true and most of this type of information was classified. Now, this all-encompassing definition for RD has been reduced by nearly fifty years of declassification actions to a core of information. Information which remains classified as RD relates primarily to nuclear weapons design, or the use or acquisition of nuclear weapons or nuclear material, with nuclear science and much nuclear technology excluded because it is no longer classified. Only five areas of nuclear technology still contain information classified as RD or FRD. Each of these broad areas contains specific information that is still classified and other information that has been declassified. Identifying whether specific information is classified in these areas requires technical expertise and reference to a classification guide.

These five areas are: (1) Nuclear weapon design and utilization (includes selected information revealing theory, design principles and details, yields, inventories, mode of operation, methods for command and control, destruction, and vulnerabilities to sabotage or countermeasures); (2) nuclear material and nuclear weapon production (includes selected information revealing special techniques for manufacture); (3) inertial confinement fusion (includes selected target design and operational information judged to be particularly revealing of nuclear weapons technology); (4) military nuclear reactors (includes selected design, development, test, and operational information concerning reactor power systems for military purposes, especially for naval nuclear propulsion, and selected information concerning capabilities and vulnerabilities); and (5) isotope separation (includes key process and design information for practical

techniques for enrichment of uranium and certain other elements of military significance).

The nuclear field is now quite mature; any new information is likely to be either further detail in an area for which classification guidance is already well established, or characteristics of a new weapon design operating outside the envelope of its predecessors. In the latter case, the classification of such information is not automatically prescribed, but is determined by authorized officials by application of specific criteria. This procedure de-emphasizes, but does not abolish, the "born classified" concept. In order to abolish the concept, an amendment to the AEA would be required.

It is DOE policy to make information publicly available to the maximum extent possible while considering nonproliferation and national security implications. Section 1045.16 specifies the Department's criteria for evaluation of RD and FRD information. These criteria have been applied internally for several years. DOE shall classify information only if a risk of damage to the national security from unauthorized disclosure can be identified and described (for NSI), or if there is undue risk to the common defense and security which can be identified and described (for RD and FRD). If information does not warrant classification under the criteria, it should be declassified and released to the public unless otherwise restricted by law, treaty or international agreement. These criteria collectively form the harm-based system for the classification and declassification of RD and FRD. The proper application of these criteria results in a qualitative analysis of the relative benefits of classification and declassification.

As an aid to application of these criteria, § 1045.15 proposes certain areas in which information may generally be presumed to be classified RD or FRD, and others in which information is generally unclassified. The term "generally" means that, as a rule but not necessarily in every case, information in the identified areas has the classification indicated. These presumptions do not address every possible RD or FRD subject area. They reflect classification decisions that have already been made and, therefore, provide the initial input for the classification decision making process for new information. This proposed regulation requires that DOE be able to provide a publicly releasable justification whenever decisions are made which are contrary to these presumptions.

DOE has traditionally avoided use of the Top Secret classification level for RD, but has required DOE personnel and contractors to follow security procedures for Secret RD that were essentially equivalent to those used throughout the Government for Top Secret NSI. These included the requirement for background investigations to obtain a "Q" clearance authorizing access to Secret RD. Within the DOD, no distinction is made for access to RD. Access to all Secret information is based on a national agency check and credit checks, which is not as in-depth an investigation as a background investigation. Now, as a result of the National Industrial Security Program, security procedures are standardized. To ensure adequate protection for its most sensitive information, DOE is proposing to reinstate use of the Top Secret RD classification for only that nuclear-related information the release of which would cause exceptionally grave damage to the national security.

Section 1045.17 provides a description and examples of information which warrant classification at the Top Secret RD level. This section specifies that information which provides a comprehensive description of a nuclear weapons design warrants classification as Top Secret RD. By upgrading this information to Top Secret RD, a background investigation will be required for all agency and contractor personnel having access to it. This action is consistent with recommendations of the recent National Academy of Sciences study of the DOE classification program calling for "high fences around narrow areas * * * and maintaining stringent security around sharply defined areas." Before the Top Secret RD classification is reinstated by this regulation, the recommendations of the Fundamental Classification Policy Review regarding this issue will be considered.

Section 1045.18 permits the classification of newly generated information in a previously declassified area. For example, established technical information concerning the reprocessing of nuclear reactor fuel is unclassified, but a major breakthrough in reprocessing could be classified if it meets the requirements for classification as RD. This provision could not be used to reclassify information that has been widely disseminated in the public domain. While this provision is expected to be used in rare instances, it provides the opportunity to classify information if the circumstance warrants.

Section 1045.19 institutionalizes accountability by requiring that DOE be able to provide a written justification for classification and declassification decisions. This requirement does not apply to derivative classification decisions made routinely at the document level (which are the subject of Subpart C), but applies only to initial information classification decisions. By including this requirement, the public will be assured access to the rationale for classification decisions. Greater understanding of the decision making process should result in increased public trust. DOE envisions that this requirement may be fulfilled by a report which summarizes all such decisions, updated periodically.

Section 1045.20 would invite proposals for declassification of RD and FRD information from the public, agencies, or contractors. This section is included to seek input so that DOE can focus its declassification efforts on subject areas in which there is public interest. Procedures are included for the submission of such proposals.

DOE authority to classify RD which is privately generated by persons in the U.S., not pursuant to Government contracts, originates in the definition of RD in the AEA and is reconfirmed in §1045.21. This section would limit this unique authority to classify privately generated RD to the Secretary and Deputy Secretary.

Subpart C prescribes requirements for classifying and declassifying documents which are applicable to all Government agencies and industry components with access to RD and FRD. The AEA is the basis for DOE to specify the detailed policies and procedures for the Government-wide RD program and to provide oversight. This Subpart sets the foundation for more effective classification management of nuclear-related information throughout Government and in industry.

Section 1045.32 specifies the authorities for the classification and declassification of documents containing RD and FRD. Classification guides are to be used by RD classifiers as the primary basis for classification decisions. DOE prefers use of classification guides over the use of source documents for derivative classification decisions because use of guides results in greater consistency in classification decisions and fewer classification errors. DOE originally considered mandating the use of guides and prohibiting the use of source documents for derivative classification. After coordinating with other agencies, DOE proposes to allow the use of properly classified source documents

for derivative classification of RD and FRD documents.

Authority for the declassification of RD documents, whatever their origin, is limited to authorized DOE personnel. DOE considered authorizing other agencies with joint DOE/agency guides to declassify RD documents in accordance with those guides. However, because most personnel in other agencies do not have specialized technical knowledge and may lack access to all of the applicable classification guides required to adequately determine if an RD document can be declassified, DOE opted to limit this authority. Future events and circumstances may prompt DOE to reconsider this decision. The development of more advanced technology to support electronic exchange of classified documents between agencies, better distribution of classification guides, improved training of personnel in other agencies, and adequate resources are among the factors which may lead DOE to reevaluate authorities for declassification of RD documents.

Section 1045.33 requires each agency with access to RD and FRD to appoint an RD management official to implement this regulation. This management official is similar to the senior agency official required by E.O. 12958 and can be the same person. An RD management official should be at the appropriate level to effectively communicate with classification and security officials as well as RD classifiers in the agency. This official will also serve as the primary point of contact with DOE for RD classification issues. Within the DOD, an RD management official shall be appointed at each DOD agency.

Section 1045.34 requires that persons who classify RD and FRD documents be designated as RD classifiers, except within the DOD. Because of the size, mission, organizational diversity and personnel turnover rate within DOD, designation of persons who classify RD or FRD is recommended, but not required. In any case, RD management officials within DOD, and within all agencies with access to RD and FRD, will ensure that persons who handle RD and FRD documents have access to classification guides needed and are trained.

Within DOE, all original and derivative classifiers and declassifiers are formally designated, trained, and certified. Training and ongoing performance-based testing of these personnel is standard practice within the DOE. DOE does not require other agencies which generate RD and FRD

documents to institute a training program comparable to the DOE program. Section 1045.35 specifies that DOE will take the lead in Government-wide RD related training by developing training materials for RD classifiers in all agencies. DOE and RD management officials will consult periodically concerning the adequacy of training. DOE shall review any RD-related training materials submitted by agencies.

Section 1045.36 specifies that DOE will consult periodically with RD management officials and may conduct on-site reviews of agencies when consultations indicate a need for a review or that such a review would be mutually beneficial. These provisions are proposed in order for DOE to effectively manage the Government-wide RD classification program.

Section 1045.37 prescribes the procedures for the development and use of classification guides. This section would require that all agencies which develop classification guides with RD or FRD topics coordinate a review of those guides with DOE prior to their issuance.

Section 1045.38 emphasizes that documents containing RD and FRD are never automatically declassified; a positive action by an authorized person is required to declassify them. As the automatic declassification provisions of E.O. 12958 are being implemented, DOE is working to ensure that RD and FRD are not inadvertently declassified. This section of the regulation furthers DOE's efforts in this regard.

Section 1045.40 prescribes requirements for marking RD and FRD documents. DOE has never required that individual portions of RD or FRD documents be marked to indicate their classification level or category. In fact, it is DOE policy not to portion mark RD and FRD documents. DOE considered extending this policy to all agencies. However, DOE has determined that most agencies require the portion marking of NSI documents as well as RD and FRD documents. Consequently, this section states that portion marking is an agency option.

To facilitate public release of as much information as possible, §1045.41 emphasizes that originators of RD or FRD documents should prepare a classified addenda whenever classified information constitutes a small portion of an otherwise publicly releasable document.

Section 1045.42 describes the procedure for processing mandatory and Freedom of Information Act reviews of RD and FRD documents. With the exception of the appeal authority, this process is the same as that described for

NSI in Subpart D. The DOE appeal authority for RD (as well as NSI) documents is the DOE Director of Security Affairs. However, while NSI denials may be challenged by further appeal to the Interagency Security Classification Appeals Panel, this Panel has no jurisdiction over RD and FRD.

Section 1045.43 formally establishes a Government-wide systematic declassification review program, based on public priorities and likelihood of declassification, for RD and FRD. It is not intended that every classified document should be reexamined at regular intervals because many documents (e.g., nuclear weapons design drawings) will be unlikely candidates for declassification. Instead, resources will be applied to well-defined areas of interest, with systematic review of new areas undertaken as earlier reviews are completed or resources become available. Public interest priorities will be determined by solicitation of stakeholder input. Also, the Openness Advisory Panel will play a major role in determining these priorities. Within DOE, a large-scale declassification review effort has been ongoing to declassify RD and FRD documents. This requirement will codify the current practice within DOE and extend it to other agencies.

E.O. 12958 requires that every agency classifying information as National Security Information (NSI) publish implementing regulations in the Federal Register to the extent these regulations affect the public. Subpart D complies with this requirement of the E.O. 12958.

Subpart D does not parallel earlier Subparts in that it does not describe DOE authorities and procedures for the classification and declassification of NSI. These authorities and procedures are uniform throughout the Government as specified in E.O. 12958 and in implementing directives issued by the Information Security Oversight Office (ISOO). Aspects of NSI unique to DOE are the particular procedures DOE has established for the public to use in requesting mandatory review of DOE originated NSI, and for appealing decisions regarding NSI to DOE authorities. This Subpart describes these procedures and identifies the appropriate appeal channels. All other aspects of E.O. 12958 which are being implemented by DOE are specified in internal DOE directives.

III. Rulemaking Requirements

A. Review Under Executive Order 12866

Today's regulatory action does not constitute a "significant regulatory

action" as defined in section 3(f) of Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735), and has not been reviewed by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

B. Review Under Paperwork Reduction Act

No new information collection requirements subject to the Paperwork Reduction Act, 44 U.S.C. 501 *et seq.*, are imposed by today's regulatory action.

C. Review Under the National Environmental Policy Act

This rule would amend DOE's policies and procedures for the classification and declassification of information. Implementation of this rule would not affect whether such information might cause or otherwise be associated with any environmental impacts. The Department has therefore determined that this rule is covered under the Categorical Exclusion found at paragraph A.5 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to the establishment of a rulemaking interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

D. Review Under Executive Order 12612

Executive Order 12612, 52 FR 41685 (October 30, 1987), requires that rules be reviewed for any substantial direct effect on States, on the relationship between the National Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive order requires preparation of a federal assessment to be used in all decisions involved in promulgating and implementing a policy action. Today's regulatory action amends DOE's policies and procedures on information classification and declassification. Therefore, the Department has determined that these amendments will not have a substantial direct effect on the institutional interests or traditional functions of States.

E. Review Under Executive Order 12988

Section 3 of Executive Order 12988, 61 FR 4729 (February 7, 1996), instructs each agency to adhere to certain requirements in promulgating new regulations. These requirements, set forth in Section 3 (a) and (b), include eliminating drafting errors and needless

ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation describes any administrative proceeding to be available prior to judicial review and any provisions for the exhaustion of administrative remedies. The Department has determined that today's regulatory action meets the requirements of Section 3 (a) and (b) of Executive Order 12988.

F. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 requires each Agency to assess the effects of Federal regulatory action on State, local, and tribal governments and the private sector. Today's regulatory action amends DOE's policies and procedures on information classification and declassification. The Department has determined that today's regulatory action does not impose a Federal mandate on State, local, or tribal governments or on the private sector.

G. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, directs agencies to prepare a regulatory flexibility analysis for each proposed rule or to certify that the rule will not have a "significant economic impact on a substantial number of small entities." Today's proposed rule would amend DOE's policies and procedures on information classification and declassification. The rule, if promulgated, will apply to all agencies, persons and entities that generate and maintain RD or FRD information or documents. The Department has identified over 50 federal government entities that have access to RD or FRD information or documents. Each of these government entities may, in turn, have contractors or consultants that have access to RD or FRD information or documents.

Section 1045.35 would impose on the government, in the person of the RD management official the responsibility to ensure that RD classifiers are properly trained. That section further imposes on the DOE Director of Declassification the obligation to develop and review training materials related to the implementation of this regulation. The proposed regulation imposes on non-government entities the requirement that persons with access to RD or FRD be properly trained. The economic impact of the training requirement on

non-government entities would be limited to the labor hours required to familiarize those persons with access to RD and FRD with the training materials provided by DOE and the RD management official.

Section 1045.40 would require that government and non-government RD classifiers clearly mark each new document generated to convey that it contains RD or FRD information. The burden of the marking requirement would vary depending on the number of documents the entity generates. DOE considers the proper marking of a classified document to be an act integrated in the act of creating the document. As such, the marking of individual documents containing RD and FRD imposes minimal costs on the entity generating new RD documents.

Finally, DOE recognizes that non-government entities that generate documents containing RD or FRD will do so pursuant to a government contract. In those instances, any costs incurred in compliance with the regulation will be charged back to the government.

Based on the foregoing, DOE has determined that the proposed rule, if promulgated, will not have a "significant economic impact." As permitted by section 605 of the Regulatory Flexibility Act, DOE certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities.

IV. Freedom of Information Act (FOIA) Considerations

RD and FRD classified under the Atomic Energy Act fall within the scope of exemption 3 of the FOIA (5 U.S.C. 552(b)(3)). Thus RD and FRD are not subject to disclosure under the FOIA. Similarly, information that is properly classified as NSI under E.O. 12958 may be withheld from disclosure under exemption 1 of the FOIA.

DOE shall process requests for documents made under the FOIA in accordance with applicable DOE regulations and orders which implement the FOIA within the Department. DOE shall process these requests promptly and shall respond to the requester in a timely manner. DOE shall coordinate requests involving FRD information and RD information which relates primarily to the military utilization of nuclear weapons with the DOD. The Director of Security Affairs shall decide all appeals of denials of requests for classified information covered by sections 141 and 142 of the Atomic Energy Act and E.O. 12958.

V. Opportunity for Public Comment

A. Written Comments

Interested persons are invited to participate in this proceeding by submitting data, views, or comments with respect to today's notice.

Three copies of written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. Comments should be identified on the outside of the envelope and on the documents themselves with the designation "Information Classification, Docket No. RM 96-1045." In the event any person wishing to provide written comments cannot provide three copies, alternative arrangements can be made in advance with the Department.

All comments received will be available for public inspection as part of the administrative record on file for this rulemaking in the Department of Energy Freedom of Information Office Reading Room, Room 1E-090, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586-6020, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

Any person submitting information which that person believes to be exempt by law from public disclosure, should submit one complete copy, as well as two copies from which the information claimed to be exempt by law from public disclosure has been deleted. The Department is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it accordingly under 10 CFR 1004.11.

B. Public Hearing

A public hearing will be held pursuant to this notice at the time, date, and place indicated in the **DATES** and **ADDRESSES** sections of this notice. Any person who has an interest in making an oral presentation should make a written request to speak. Such requests should be sent to the address given in the **ADDRESSES** section of this notice and must be received by 4:30 p.m. on the date specified in the **DATES** section. The person should also provide a daytime phone number where the person may be reached. Those persons requesting an opportunity to make an oral presentation should bring nine copies of their statement to the hearing.

DOE will establish the procedures governing the conduct of the hearing. The length of each presentation will be limited to 10 minutes. A DOE official will preside at the hearing, and may ask questions. Any further procedural rules needed for the proper conduct of the

hearing will be announced by the presiding officer.

If DOE must cancel the hearing, DOE will make every effort to give advance notice of the cancellation. The hearing may be canceled in the event no requests to speak are received by the deadline for submission of such a request.

VI. Interagency Coordination

The Department of Energy has coordinated this proposed regulation with classification representatives from the Department of Defense (DOD), Central Intelligence Agency, Nuclear Regulatory Commission (NRC), and Department of State. Concurrence from the NRC was obtained on February 21, 1996. Concurrence from the DOD was obtained on June 28, 1996.

List of Subjects in 10 CFR Part 1045

Classified information.

Issued in Washington, D.C. on January 8, 1997.

Hazel R. O'Leary,
Secretary of Energy.

For the reasons set forth in the preamble, 10 CFR Part 1045 is proposed to be revised to read as follows:

PART 1045—INFORMATION CLASSIFICATION

Subpart A—Program Management of the Restricted Data and Formerly Restricted Data Classification System

Sec.

- 1045.1 Purpose and scope.
- 1045.2 Applicability.
- 1045.3 Definitions.
- 1045.4 Responsibilities.
- 1045.5 Sanctions.
- 1045.6 Openness Advisory Panel.
- 1045.7 Suggestions or complaints.
- 1045.8 Procedural exemptions.

Subpart B—Identification of Restricted Data and Formerly Restricted Data Information

Sec.

- 1045.10 Purpose and scope.
- 1045.11 Applicability.
- 1045.12 Authorities.
- 1045.13 Classification prohibitions.
- 1045.14 Process for classification and declassification of restricted data and formerly restricted data information.
- 1045.15 Classification and declassification presumptions.
- 1045.16 Criteria for evaluation of restricted data and formerly restricted data information.
- 1045.17 Classification levels.
- 1045.18 Newly generated information in a previously declassified subject area.
- 1045.19 Accountability for classification and declassification determinations.
- 1045.20 Ongoing call for declassification proposals.
- 1045.21 Privately generated restricted data.
- 1045.22 No Comment policy.

Subpart C—Generation and Review of Documents Containing Restricted Data and Formerly Restricted Data

Sec.

- 1045.30 Purpose and scope.
- 1045.31 Applicability.
- 1045.32 Authorities.
- 1045.33 Appointment of restricted data management official.
- 1045.34 Designation of restricted data classifiers.
- 1045.35 Training requirements.
- 1045.36 Reviews of agencies with access to restricted data and formerly restricted data.
- 1045.37 Classification guides.
- 1045.38 Automatic declassification prohibition.
- 1045.39 Challenging classification and declassification determinations.
- 1045.40 Marking requirements.
- 1045.41 Use of classified addendums.
- 1045.42 Mandatory and Freedom of Information Act reviews for declassification of restricted data and formerly restricted data documents.
- 1045.43 Systematic review for declassification.
- 1045.44 Classification review prior to public release.
- 1045.45 Review of unmarked documents with potential restricted data or formerly restricted data.

Subpart D—Access to Information: Executive Order 12958, "Classified National Security Information" Requirements Affecting the Public

Sec.

- 1045.50 Purpose and scope.
 - 1045.51 Mandatory declassification review requests.
 - 1045.52 Appeal of denial of mandatory declassification review requests.
- Authority: 42 U.S.C. 2011; E.O. 12958.

Subpart A—Program Management of the Restricted Data and Formerly Restricted Data Classification System

§1045.1 Purpose and scope.

This subpart establishes responsibilities associated with this part, describes the Openness Advisory Panel, defines key terms, describes sanctions related to violation of the policies and procedures in this part, and describes how to submit suggestions or complaints concerning the Restricted Data classification and declassification program, and how to request procedural exceptions.

§1045.2 Applicability.

This subpart applies to—

- (a) Any person with authorized access to RD or FRD;
- (b) Any agency with access to RD or FRD; and
- (c) Any person who might generate information determined to be RD or FRD.

§1045.3 Definitions.

As used in this part:

Agency means any "Executive Agency" as defined in 5 U.S.C. 105; any "Military Department" as defined in 5 U.S.C. 102; and any other entity within the executive branch that comes into possession of RD or FRD information or documents.

Atomic Energy Act means the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.).

Authorized holder means a person with the appropriate security clearance required to have access to classified information and the need to know the information in the performance of Government-approved activities.

Automatic declassification means the declassification of information or documents based solely upon:

(1) The occurrence of a specific date or event as determined by the classifier; or

(2) The expiration of a maximum time frame for duration of classification established under Executive Order 12958.

Classification means the act or process by which information is determined to be classified information.

Classification Guide means a written record of detailed instructions as to whether specific information is classified, usually concerning a system, plan, project, or program. It identifies information to be classified and specifies the level (and duration for NSI only) of classification assigned to such information. Classification guides are a primary basis for reviewing documents to determine whether they contain classified information.

Classification level means one of three designators:

(1) *Top Secret* is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the appropriate official is able to identify or describe.

(2) *Secret* is applied to information (RD, FRD, or NSI), the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the appropriate official is able to identify or describe.

(3) *Confidential*. (i) For NSI, Confidential is applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the appropriate official is able to identify or describe.

(ii) For RD and FRD, Confidential is applied to information, the unauthorized disclosure of which could reasonably be expected to cause undue

risk to the common defense and security that the appropriate official is able to identify or describe.

Classified Information means:

(1) Information classified as RD or FRD under the Atomic Energy Act and this part; or

(2) Information determined to require protection against unauthorized disclosure under Executive Order (E.O.) 12958 or prior Executive orders (also identified as National Security Information or NSI).

Contractor means any industrial, educational, commercial, or other non-Government entity that has access to RD or FRD.

Declassification means a determination by appropriate authority that information or documents no longer require protection against unauthorized disclosure in the interests of national security.

Department or DOE means Department of Energy.

Director of Declassification means the Department of Energy Director, Office of Declassification, or any person to whom the Director's duties are delegated. The Director of Declassification is subordinate to the Director of Security Affairs.

Director of Security Affairs means the Department of Energy Director, Office of Security Affairs, or any person to whom the Director's duties are delegated.

Document means the physical medium on or in which information is recorded or a product or substance which contains or reveals information, regardless of its physical form or characteristics.

Formerly restricted data (FRD) means classified information jointly determined by DOE and the DOD to be related primarily to the military utilization of nuclear weapons and removed (by transclassification) from the RD category pursuant to section 142d of the Atomic Energy Act.

Government means the executive branch of the Federal Government of the United States.

Government information means information that is owned by, produced by or for, or is under the control of the U.S. Government.

Information means facts, data, or knowledge itself.

Interagency Security Classification Appeals Panel means a panel created pursuant to Executive Order 12958 to perform functions specified in that order with respect to National Security Information.

National security means the national defense or foreign relations of the United States.

National security information (NSI) means information that has been

determined pursuant to Executive Order 12958 or prior Executive orders to require protection against unauthorized disclosure and is marked to indicate its classification status when in document form.

Nuclear weapon means atomic weapon.

Person means:

(1) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency, any State, or any political subdivision of, or any political entity within a State; and

(2) Any legal successor, representative, agent, or agency of the foregoing.

Portion marking means the application of certain classification markings to individual words, phrases, sentences, paragraphs, or sections of a document to indicate their specific classification level and category.

Restricted data (RD) means a kind of classified information that consists of all data concerning the following, but not including data declassified or removed from the RD category pursuant to section 142 of the Atomic Energy Act:

(1) Design, manufacture, or utilization of atomic weapons;

(2) Production of special nuclear material; or

(3) Use of special nuclear material in the production of energy.

Restricted data or RD classifier means an individual who derivatively classifies RD or FRD documents.

Restricted data or RD management official means an individual appointed by any agency with access to RD and FRD who is responsible for managing the implementation of this part within that agency or any person to whom these duties are delegated. This person may be the senior agency official required by E.O. 12958.

Secretary means the Secretary of Energy.

Source document means a classified document, other than a classification guide, from which information is extracted for inclusion in another document. The classification of the information extracted is determined by the classification markings shown in the source document.

Special nuclear material means plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Secretary determines to be special nuclear material pursuant to the Atomic Energy Act.

§1045.4 Responsibilities.

(a) The DOE Director of Declassification shall:

(1) Manage the Government-wide system for the classification and declassification of RD and FRD in accordance with the Atomic Energy Act;

(2) In coordination with the DOD, develop regulations to implement the RD and FRD classification system;

(3) Determine whether nuclear-related information is RD;

(4) Oversee agency implementation of the RD and FRD classification system to ensure compliance with this part;

(5) Review agency implementing policies and conduct on-site reviews of each agency's program established under this part;

(6) Prepare and distribute classification guides concerning RD and FRD and review such guides developed by any agency; and

(7) Consider and take action on complaints and suggestions from any person with respect to administration of this program.

(b) The DOE Director of Security Affairs shall:

(1) Declassify RD which may be published without undue risk to the common defense and security;

(2) Jointly with the DOD, determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category; and

(3) Jointly with the DOD, declassify FRD which may be published without undue risk to the common defense and security

(c) The DOD jointly with the DOE shall:

(1) Determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category;

(2) Ensure that classification guides for FRD and RD relating primarily to the military utilization of nuclear weapons are prepared; and

(3) Declassify FRD and RD relating primarily to the military utilization of nuclear weapons which may be published without undue risk to the common defense and security.

(d) The Nuclear Regulatory Commission (NRC) shall:

(1) Jointly with the DOE, develop classification guides for programs over which both agencies have cognizance; and

(2) Ensure the review and proper classification of RD by RD classifiers under this part, generated by the NRC or by its licensed or regulated facilities and activities.

(e) Agency heads with access to RD and FRD shall:

(1) Ensure that RD and FRD are classified in such a manner as to assure

the common defense and security in accordance with the policies established in this part;

(2) Designate an RD management official to direct and administer the RD classification program within the agency; and

(3) Promulgate implementing directives.

(f) RD management officials shall:

(1) Jointly with the DOE, develop classification guides for programs over which both agencies have cognizance;

(2) Ensure that agency and contractor personnel who generate RD and FRD documents have access to any classification guides needed;

(3) Ensure that persons with access to RD and FRD are trained on the procedures for classifying, marking, declassifying, and handling the information; and

(4) Cooperate and provide information as necessary to the DOE Director of Declassification to fulfill responsibilities under this part.

§ 1045.5 Sanctions.

(a) Knowing, willful, or negligent action contrary to the requirements of this part which results in the misclassification of information may result in appropriate sanctions. Such sanctions may range from administrative sanctions to civil or criminal penalties, depending on the nature and severity of the action as determined by appropriate authority, in accordance with applicable laws.

(b) Other violations of the policies and procedures contained in this part may be grounds for administrative sanctions as determined by appropriate authority.

§ 1045.6 Openness Advisory Panel.

The DOE shall maintain an Openness Advisory Panel, in accordance with the Federal Advisory Committee Act, to provide the Secretary with independent advice and recommendations on Departmental openness initiatives, including classification and declassification issues that affect the public.

§ 1045.7 Suggestions or Complaints.

(a) Any person who has suggestions or complaints regarding the Department's classification and declassification policies and procedures may direct them in writing to the Openness Coordinator, Department of Energy, Office of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290.

(b) Such letters should include a description of the issue or problem, the suggestion or complaint, all applicable

background information, and an address for the response.

§ 1045.8 Procedural Exemptions.

(a) Exceptions to the procedural provisions of this part may be granted by the DOE Director of Declassification.

(b) A request for an exception shall be made in writing to the DOE Director of Declassification and shall provide all relevant facts, justification, and a proposed alternate procedure.

Subpart B—Identification of Restricted Data and Formerly Restricted Data Information

§ 1045.10 Purpose and Scope.

(a) This subpart implements sections 141 and 142 (42 U.S.C. 2161 and 2162) of the Atomic Energy Act, which provide for Government-wide policies and procedures concerning the classification and declassification of RD and FRD information.

(b) This subpart establishes procedures for classification prohibitions for RD and FRD, describes authorities and procedures for identifying RD and FRD information, and specifies the policies and criteria DOE shall use in determining if nuclear-related information is RD or FRD.

§ 1045.11 Applicability.

This Subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person who might generate information determined to be RD or FRD.

§ 1045.12 Authorities.

(a) The DOE Director of Declassification may determine whether nuclear-related information is RD.

(b) Except as provided in paragraph (c) of this section, the DOE Director of Security Affairs may declassify RD information.

(c) The DOE Director of Security Affairs jointly with the DOD may determine which information in the RD category relating primarily to the military utilization of nuclear weapons may be declassified or placed into the FRD category.

(d) The DOE Director of Security Affairs jointly with the DOD may declassify FRD information.

§ 1045.13 Classification prohibitions.

In no case shall information be classified RD or FRD in order to:

(a) Conceal violations of law, inefficiency, or administrative error;

(b) Prevent embarrassment to a person, organization, or Agency;

- (c) Restrain competition;
- (d) Prevent or delay the release of information that does not require protection because of national security or nonproliferation concerns;
- (e) Unduly restrict dissemination by assigning an improper classification level; or
- (f) Prevent or delay the release of information bearing solely on the physical environment or public or worker health and safety.

§ 1045.14 Process for classification and declassification of restricted data and formerly restricted data information.

(a) *Classification of restricted data.* (1) *Submission of potential RD for evaluation.* Any authorized holder who believes he or she has information which may be RD shall submit it to the DOE Director of Declassification for evaluation. The DOE Director of Declassification shall determine whether the information is RD within 90 days of receipt by doing the following:

- (i) Determine whether the information is already classified RD;
- (ii) If it is not already classified, determine if the information concerns the design, manufacture, or utilization of nuclear weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy; and,
- (iii) Apply the criteria in § 1045.16 as the basis for determining the appropriate classification.

(2) *Protection of potential RD during evaluation.* Pending a determination by the DOE Director of Declassification, potential RD submitted for evaluation by authorized holders shall be protected at a minimum as Confidential Restricted Data.

(b) *Declassification of restricted data.* The DOE Director of Security Affairs shall apply the criteria in § 1045.16 when determining whether RD may be declassified.

(c) *Classification of formerly restricted data.* The DOE Director of Declassification, jointly with the DOD, shall remove information which relates primarily to the military utilization of nuclear weapons from the RD classification and classify it as FRD.

(d) *Declassification of formerly restricted data.* The DOE Director of Security Affairs, jointly with the DOD, shall apply the criteria in § 1045.16 when determining whether FRD may be declassified.

§ 1045.15 Classification and declassification presumptions.

(a) The DOE Directors of Declassification and Security Affairs shall consider the presumptions listed

in paragraphs (d) and (e) of this section before applying the criteria in § 1045.16.

(b) Not all areas of nuclear-related information are covered by the presumptions.

(c) As a general rule, the information listed in paragraphs (d) and (e) of this section has the classification indicated. Inclusion of specific information in one of the presumption categories does not mean that the information is or is not classified, but only that arguments to change the classification status of the information should use the appropriate presumption as a starting point.

(d) The DOE Directors of Declassification and Security Affairs shall presume that information in the following areas is unclassified unless application of the criteria in § 1045.16 indicates otherwise:

(1) Basic science: mathematics, chemistry, theoretical and experimental physics, engineering, materials science, biology and medicine;

(2) Instruments and equipment;

(3) Magnetic confinement fusion technology;

(4) Civilian power reactors, including nuclear fuel cycle information but excluding technologies for uranium enrichment;

(5) Source materials (defined as uranium and thorium and ores containing them);

(6) Fact of use of safety features (e.g., insensitive high explosives, fire resistant pits) to lower the risks and reduce the consequences of nuclear weapon accidents;

(7) Generic weapons effects;

(8) Physical and chemical properties of uranium and plutonium, their alloys and compounds, under standard temperature and pressure conditions;

(9) Nuclear fuel reprocessing technology and reactor products not revealing classified production rates or inventories;

(10) The fact, time, location, and yield range (e.g., less than 20 kiloton or 20–150 kiloton) of all U.S. nuclear tests;

(11) General descriptions of nuclear material production processes and theory of operation;

(12) DOE special nuclear material aggregate inventories and production rates;

(13) Types of waste products resulting from all DOE weapon and material production operations; and

(14) Operations solely relating to the public and worker health and safety or to environmental quality.

(e) The DOE Directors of Declassification and Security Affairs shall presume that information in the following areas is classified unless the application of the criteria in § 1045.16 indicates otherwise:

(1) Detailed designs, specifications, and functional descriptions of nuclear explosives, whether in the active stockpile or retired;

(2) Material properties under conditions achieved in nuclear explosions that is principally useful only for design and analysis of nuclear weapons;

(3) Vulnerabilities of U.S. nuclear weapons to sabotage, countermeasures, or unauthorized use;

(4) Nuclear weapons logistics and operational performance information (e.g., specific weapon deployments, yields, capabilities), related to military utilization of those weapons required by the DOD;

(5) Details of the critical steps or components in nuclear material production processes; and

(6) Features of military nuclear reactors, especially naval nuclear propulsion reactors, that are not common to or required for civilian power reactors.

§ 1045.16 Criteria for evaluation of restricted data and formerly restricted data information.

(a) The DOE Director of Declassification shall classify information as RD and the DOE Director of Security Affairs shall maintain the classification of RD (and FRD in coordination with the DOD) only if the undue risk of damage to the common defense and security from its unauthorized disclosure can be identified and described.

(b) The DOE Director of Declassification shall not classify information and the DOE Director of Security Affairs shall declassify information if there is significant doubt about the need to classify the information.

(c) In determining whether information should be classified or declassified, the DOE Directors of Declassification and Security Affairs shall consider the following:

(1) Whether the information is so widely known or readily apparent to knowledgeable observers that its classification would cast doubt on the credibility of the classification system;

(2) Whether publication of the information would assist in the development of countermeasures or otherwise jeopardize any U.S. weapon or weapon system;

(3) Whether the information would hinder U.S. nonproliferation efforts by significantly assisting potential adversaries to develop or improve a nuclear weapon capability, produce nuclear weapons materials, or make other military use of nuclear energy;

(4) Whether publication of the information would have a detrimental effect on U.S. foreign relations;

(5) Whether publication of the information would benefit the public welfare, taking into account the importance of the information to public discussion and education and potential contribution to economic growth; and

(6) Whether publication of the information would benefit the operation of any Government program by reducing operating costs or improving public acceptance.

§ 1045.17 Classification levels.

(a) *Restricted data.* The DOE Director of Declassification shall assign one of the following classification levels to RD information to reflect the sensitivity of the information to the national security. The greater the damage expected from unauthorized disclosure, the higher the classification level assigned to the information.

(1) *Top Secret.* The DOE Director of Declassification shall classify RD information Top Secret if it is vital to the national security and if its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of RD information that warrant Top Secret classification include comprehensive descriptions of a nuclear explosive design (i.e., a major proliferation threat), information that would make possible the unauthorized use of a U.S. nuclear weapon, or information revealing catastrophic failure or operational vulnerability in a U.S. nuclear weapon.

(2) *Secret.* The DOE Director of Declassification shall classify RD information as Secret if its unauthorized disclosure could reasonably be expected to cause serious damage to the national security, but the RD information is not sufficiently comprehensive to warrant designation as Top Secret. Examples of RD information that warrant Secret classification include designs for specific weapon components, key features of uranium enrichment technologies, or specifications of weapon materials.

(3) *Confidential.* The DOE Director of Declassification shall classify RD information as Confidential if it is deemed to be of significant use to a potential adversary or nuclear proliferant and its unauthorized disclosure could reasonably be expected to cause undue risk to the common defense and security. An example of RD information that warrants Confidential classification is the amount of high explosives used in nuclear weapons.

(b) *Formerly restricted data.* The DOE Director of Declassification, jointly with the DOD, shall assign one of the classification levels in paragraph (a) of this section to FRD information to reflect its sensitivity to the national security.

§ 1045.18 Newly generated information in a previously declassified subject area.

The DOE Director of Declassification may evaluate newly generated specific information in a previously declassified subject area using the criteria in section 1045.16 and classify it as RD, if warranted.

§ 1045.19 Accountability for classification and declassification determinations.

(a) Whenever a classification or declassification determination concerning RD or FRD information is made, the DOE Directors of Declassification and Security Affairs shall be able to justify the determination. For FRD and RD primarily related to military utilization, the DOE Directors of Declassification and Security Affairs shall coordinate the determination and justification with the DOD. If the determination involves a departure from the presumptions in §1045.15, the justification shall include a rationale for the departure. Often the justification itself will contain RD or FRD information. In such a case, the DOE Directors of Declassification and Security Affairs shall ensure that a separate justification can be prepared which is publicly releasable. The publicly releasable justification shall be made available to any interested person upon request to the DOE Director of Declassification.

(b) The DOE Director of Declassification shall prepare a report on an annual basis on the implementation of this part. This report shall be available to any interested person upon request to the DOE Director of Declassification.

§ 1045.20 Ongoing call for declassification proposals.

The DOE Director of Security Affairs shall consider proposals from the public or agencies or contractors for declassification of RD and FRD information on an ongoing basis. Declassification proposals for RD and FRD information shall be forwarded to the Department of Energy, Director of Security Affairs, Washington, D.C. 20585. Any proposed action shall include a description of the information concerned and may include a reason for the request. DOE and DOD shall coordinate with one another concerning declassification proposals for FRD information.

§ 1045.21 Privately generated restricted data.

(a) DOE may classify RD which is privately generated by persons not pursuant to government contracts, in accordance with the Atomic Energy Act.

(b) In order for information privately generated by persons to be classified as RD, the Secretary or Deputy Secretary shall make the determination personally and in writing. This authority shall not be delegated.

(c) DOE shall publish a Federal Register notice when privately generated information is classified as RD.

§ 1045.22 No Comment Policy.

(a) Authorized holders of RD and FRD shall not confirm, deny, or expand upon the classification status or technical accuracy of public statements in an RD or FRD subject area.

(b) If the public statements are sufficiently authoritative or credible, the DOE Director of Security Affairs shall examine the possibility of declassification.

Subpart C—Generation and Review of Documents Containing Restricted Data and Formerly Restricted Data

§ 1045.30 Purpose and scope.

This subpart specifies Government-wide classification program implementation requirements for agencies with access to RD and FRD, describes authorities and procedures for RD and FRD document classification and declassification, provides for periodic or systematic review of RD and FRD documents, and describes procedures for the mandatory review of RD and FRD documents. This subpart applies to all RD and FRD documents, regardless of whether they also contain National Security Information (NSI), or other controlled information such as "For Official Use Only" or "Unclassified Controlled Nuclear Information."

§ 1045.31 Applicability.

This subpart applies to—

(a) Any person with authorized access to RD or FRD;

(b) Any agency with access to RD or FRD; and

(c) Any person generating a document containing RD or FRD.

§ 1045.32 Authorities.

(a) *Classification of RD and FRD documents.* (1) To the extent practical, all RD and FRD documents shall be classified based on classification guides. When not practical, properly classified source documents may be used as an alternative.

(2) Only individuals designated as RD classifiers may classify RD and FRD documents, except within the DOD. Within the DOD, any individual with access to RD and FRD who has been trained may classify RD and FRD documents.

(b) *Declassification of RD and FRD documents.* (1) Only DOE may declassify documents containing RD.

(2) Except as provided in paragraph (b)(3) of this section, only DOE or appropriate individuals in DOD may declassify documents marked as FRD in accordance with joint classification guides.

(3) The DOE and DOD may delegate these authorities to other agencies and to contractors. Contractors without the delegated authority shall send any document marked as RD or FRD that needs to be considered for declassification to the appropriate agency office.

§ 1045.33 Appointment of restricted data management official.

(a) Each agency with access to RD or FRD shall appoint an official to be responsible for the implementation of this part and shall advise the DOE Director of Declassification of such appointment.

(b) This official shall ensure the proper implementation of this part within his/her agency and shall serve as the primary point of contact for coordination with the DOE Director of Declassification on RD and FRD classification and declassification issues.

(c) Within the DOD, an RD management official shall be appointed in each DOD agency.

§ 1045.34 Designation of restricted data classifiers.

Except within the DOD, RD management officials shall ensure that persons who derivatively classify RD or FRD documents are designated by position or by name as RD classifiers.

§ 1045.35 Training requirements.

(a) RD management officials shall ensure that persons with access to RD and FRD information are trained on the procedures for classifying, declassifying, marking and handling the information.

(b) The DOE Director of Declassification shall develop training materials related to implementation of this part and shall provide these materials to RD management officials and any other appropriate persons.

(c) The DOE Director of Declassification shall review any RD-related training material submitted by agency and contractor representatives to ensure consistency with current policy.

§ 1045.36 Reviews of agencies with access to restricted data and formerly restricted data.

(a) The DOE and each agency with access to RD and FRD shall consult periodically to assure appropriate implementation of this part. Such consultations may result in DOE conducting an on-site review within the agency if DOE and the RD management official determine that such a review would be mutually beneficial or that it is necessary to remedy a problem.

(b) To address issues concerning implementation of this part, the DOE Director of Declassification shall establish a standing group of all RD management officials to meet periodically.

§ 1045.37 Classification guides.

(a) The classification and declassification determinations made by the DOE Directors of Declassification and Security Affairs under the classification criteria in § 1045.16 are promulgated in classification guides.

(b) DOE shall jointly develop classification guides with the DOD, NRC, NASA, and other agencies as required for programs for which DOE and these agencies share responsibility.

(c) Agencies shall coordinate with the DOE Director of Declassification whenever they develop or revise classification guides with RD or FRD information topics.

(d) Originators of classification guides with RD or FRD topics shall review such guides at least every five years and make revisions as necessary.

(e) RD Classifiers shall use classification guides as the primary basis for classifying and declassifying documents containing RD and FRD.

(f) Each RD management official shall ensure that persons working with RD and FRD information have access to all pertinent nuclear classification guides.

§ 1045.38 Automatic declassification prohibition.

(a) Documents containing RD and FRD remain classified until a positive action by an authorized person is taken to declassify them.

(b) In accordance with the Atomic Energy Act, no date or event for automatic declassification ever applies to RD and FRD documents, even if such documents also contain NSI.

(c) E.O. 12958 acknowledges that RD is exempt from all provisions of the E.O., including automatic declassification.

§ 1045.39 Challenging classification and declassification determinations.

(a) Any authorized holder of an RD or FRD document who, in good faith,

believes that the RD or FRD document has an improper classification status is encouraged and expected to challenge the classification with the RD Classifier.

(b) Agencies shall establish procedures under which authorized holders of RD and FRD documents are encouraged and expected to challenge any classification status they believe is improper. These procedures shall assure that:

(1) Under no circumstances are persons subject to retribution for bringing forth a classification challenge.

(2) A response is provided within 90 days to the person bringing forth the challenge.

(3) A decision concerning a challenge involving RD or FRD may be appealed to the DOE Director of Declassification.

In the case of FRD and RD related primarily to the military utilization of nuclear weapons, the DOE Director of Declassification shall coordinate with the DOD. If the justification for classification is still unsatisfactory, a further appeal may be made to the DOE Director of Security Affairs.

(c) Classification challenges concerning documents containing RD and FRD information are not subject to review by the Interagency Security Classification Appeals Panel, unless those documents also contain NSI which is the basis for the challenge. In such cases, the RD and FRD portions of the document shall be deleted and the NSI and unclassified portions shall be provided to the Interagency Security Classification Appeals Panel for review.

§ 1045.40 Marking requirements.

(a) RD classifiers shall ensure that each RD and FRD document is clearly marked to convey to the holder that it contains RD or FRD information, the level of classification assigned, and the additional markings in paragraphs (b)(3) and (4) of this section.

(b) *Front marking.* In addition to the overall classification level of the document, the following notices shall appear on the front of the document, as appropriate:

(1) If the document contains RD:

RESTRICTED DATA

This document contains RESTRICTED DATA as defined in the Atomic Energy Act of 1954. Unauthorized disclosure subject to administrative and criminal sanctions.

(2) If the document contains FRD but does not contain RD:

FORMERLY RESTRICTED DATA

Unauthorized disclosure subject to administrative and criminal sanctions. Handle as RESTRICTED DATA in

foreign dissemination. Section 144b, Atomic Energy Act of 1954.

(3) An RD or FRD document shall be marked to identify the classification guide or source document used to classify the document:

Derived from: _____
(Guide or source document)

(4) An RD or FRD document shall be marked with the identity of the RD classifier, unless the classifier is the same as the document originator or signer.

RD Classifier: _____
(Name or position/title)

(c) *Interior page.* RD Classifiers shall ensure that documents are clearly marked at the top and bottom of each interior page with the overall classification level and category of the document or the classification level and category of the page, whichever is preferred. The abbreviations "RD" and "FRD" may be used in conjunction with the document classification (e.g., SECRET RD, SRD or SECRET FRD, SFRD).

(d) Portion marking of RD and FRD documents is an agency option.

(e) *Declassification marking.* Declassified RD and FRD documents shall be marked with the identity of the RD classifier authorizing its declassification, the declassification date and the classification guide which served as the basis for the declassification. RD classifiers shall ensure that the following marking is affixed on RD and FRD documents which they declassify:

Declassified on: _____
(Date)

RD Classifier: _____
(Name and position/title)

Authority: _____
(Classification Guide)

§ 1045.41 Use of classified addendums.

(a) In order to maximize the amount of information available to the public and to simplify document handling procedures, document originators should segregate RD or FRD into an addendum whenever practical.

(b) When segregation of RD or FRD into an addendum is not practical, DOE document originators are encouraged to prepare separate unclassified versions of documents with significant public interest.

§ 1045.42 Mandatory and Freedom of Information Act reviews for declassification of restricted data and formerly restricted data documents.

(a) *General.* (1) Agencies with documents containing RD and FRD shall respond to mandatory review and

Freedom of Information Act requests for these documents from the public.

(2) In response to a mandatory review or Freedom of Information Act request, DOE or DOD may refuse to confirm or deny the existence or nonexistence of the requested information whenever the fact of its existence or nonexistence is itself classified as RD or FRD.

(b) *Processing requests.* (1) Agencies shall forward documents containing RD to DOE for review.

(2) Agencies shall forward documents containing FRD to the DOE or to the DOD for review, depending on which is the originating agency.

(3) The DOE and DOD shall coordinate the review of RD and FRD documents as appropriate.

(c) *Denying official.* (1) The denying official for documents containing RD is the DOE Director of Declassification.

(2) The denying official for documents containing FRD is either the DOE Director of Declassification or an appropriate DOD official.

(d) *Appeal authority.* (1) The appeal authority for RD documents is the DOE Director of Security Affairs.

(2) The appeal authority for FRD documents is either the DOE Director of Security Affairs, or an appropriate DOD official.

(e) The denying official and appeal authority for Naval Nuclear Propulsion Information is the Director, Office of Naval Reactors.

(f) The review and appeal process is the same as that described in subpart D of this part with the exception of the appeal authority. The Interagency Security Classification Appeals Panel (ISCAP) is an appeal authority for mandatory or Freedom of Information Act reviews of documents containing NSI. RD and FRD are not under the jurisdiction of the ISCAP. DOE and DOD shall not forward RD and FRD documents to the ISCAP for appeal review unless those documents also contain NSI. In such cases, the DOE or DOD shall delete the RD and FRD portions and shall forward the NSI and unclassified portions to the ISCAP for review.

(g) RD and FRD information contained in documents shall be withheld from public disclosure under exemption 3 of the FOIA (5 U.S.C. 522(b)(3)) because such information is under the statutory jurisdiction of the Atomic Energy Act.

§ 1045.43 Systematic review for declassification.

(a) The DOE Director of Declassification (and the DOD for FRD) shall ensure that RD documents are periodically and systematically reviewed for declassification. The focus

of the review shall be based on the degree of public and researcher interest and likelihood of declassification upon review.

(b) Agencies with RD or FRD document holdings shall cooperate with the DOE Director of Declassification (or the DOD for FRD) to ensure the systematic review of RD and FRD documents.

(c) Review of documents in particular areas of public interest shall be considered if sufficient interest is demonstrated. Proposals for systematic document reviews of given collections or subject areas should be addressed to the Director of Declassification, Department of Energy, 19901 Germantown Road, Germantown, MD 20874-1290.

§ 1045.44 Classification review prior to public release.

Any person with authorized access to RD or FRD who generates a document intended for public release in an RD or FRD subject area shall ensure that it is reviewed for RD or FRD by an RD Classifier prior to its release.

§ 1045.45 Review of unmarked documents with potential restricted data or formerly restricted data.

(a) Individuals reviewing NSI records of permanent historical value under the automatic or systematic review provisions of E.O. 12958 may come upon information they think may be RD or FRD, but which is not so marked. Such documents are not subject to automatic declassification.

(b) Such documents shall be reviewed by an RD Classifier as soon as possible to determine their classification status. Assistance may be requested from the DOE Director of Declassification.

Subpart D—Access to Information: Executive Order 12958 "Classified National Security Information" Requirements Affecting the Public

§ 1045.50 Purpose and scope.

(a) This subpart describes the procedures to be used by the public in questioning or appealing DOE decisions regarding the classification of NSI.

(b) This subpart applies to any person with authorized access to DOE NSI or who desires access to DOE documents containing NSI.

§ 1045.51 Mandatory declassification review requests.

All DOE information classified as NSI is subject to review for declassification by the DOE if:

(a) The request for a review describes the document containing the information with sufficient specificity to

enable the agency to locate it with a reasonable amount of effort;

(b) The information is not exempted from search and review under the Central Intelligence Agency Information Act;

(c) The information has not been reviewed for declassification within the past 2 years; and

(d) The request is sent to the Department of Energy, Director of Declassification, 19901 Germantown Road, Germantown, Maryland 20874-1290.

§ 1045.52 Appeal of denial of mandatory declassification review requests.

(a) If the Department has reviewed the information within the past 2 years, or the information is the subject of pending litigation, the Department shall inform the requester of this fact and of the requester's appeal rights.

(b) When the Director of Declassification has denied a request for review of NSI, the requester may, within 30 calendar days of its receipt, appeal the determination to the Director of Security Affairs.

(c) *Elements of appeal.* The appeal shall be in writing and addressed to the Director of Security Affairs, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. The appeal shall contain a concise statement of grounds upon which it is brought and

a description of the relief sought. It should also include a discussion of all relevant authorities which include, but are not limited to DOE (and predecessor agencies) rulings, regulations, interpretations, and decisions on appeals, and any judicial determinations being relied upon to support the appeal. A copy of the letter containing the determination being appealed shall be submitted with the appeal.

(d) *Receipt of appeal.* An appeal shall be considered to be received upon receipt by the appeal authority, who is the Director of Security Affairs.

(e) *Action within 60 working days.* The appeal authority shall act upon the appeal within 60 working days of its receipt. If no determination on the appeal has been issued at the end of the 60-day period, the requester may consider his or her administrative remedies to be exhausted and may seek a review by the Interagency Security Classification Appeals Panel. When no determination can be issued within the applicable time limit, the appeal shall nevertheless continue to be processed. On expiration of the time limit, DOE shall inform the requester of the reason for the delay, of the date on which a determination may be expected to be issued, and of his or her right to seek further review by the Interagency

Security Classification Appeals Panel. Nothing in this subpart shall preclude the appeal authority and the requester from agreeing to an extension of time for the decision on an appeal. The appeal authority shall confirm any such agreement in writing and shall clearly specify the total time agreed upon for the appeal decision.

(f) *Form of action on appeal.* The appeal authority's action on an appeal shall be in writing and shall set forth the reason for the decision. The Department may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under E.O. 12958.

(g) *Right of final appeal.* The requester has the right to appeal a final Department decision or a failure to provide a determination on an appeal within the allotted time to the Interagency Security Classification Appeals Panel for those appeals dealing with NSI. In cases where NSI documents also contain RD and FRD, the RD and FRD portions of the document shall be deleted and the NSI and unclassified portions shall be provided to the Interagency Security Classification Appeals Panel for review.

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