DEPARTMENT OF ENERGY

10 CFR Parts 709, 710 and 711

[Docket No. CN–RM–99–POLY]

RIN 1992–AB24

Polygraph Examination Regulation

AGENCY: Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE or the Department) today is publishing a final rule for the use of polygraph examinations for certain DOE and contractor employees, applicants for employment, and other individuals assigned or detailed to Federal positions at DOE. The regulation describes the categories of individuals who will be eligible for polygraph testing and controls for the use of such testing and for prevention of unwarranted intrusion into the privacy of individuals. This regulation is an important element of the Department's efforts to protect highly sensitive and classified information and materials to which certain DOE and contractor employees have access. The final rule adopted today also contains conforming changes to regulations governing the Department's Personnel Security Assurance Program (PSAP) and Personnel Assurance Program (PAP).

EFFECTIVE DATE: January 18, 2000.

FOR FURTHER INFORMATION CONTACT: Douglas Hinckley, U.S. Department of Energy, Office of Counterintelligence, CN–1, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–5901; or Lise Howe, U.S. Department of Energy, Office of General Counsel, GC–73, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–2906.

SUPPLEMENTARY INFORMATION:

I. Introduction and Need for the Rule
II. Background
III. Discussion of General Public Comments
IV. Section-by-Section Review and Discussion of Public Comments
V. Regulatory Review
A. National Environmental Policy Act
B. Regulatory Flexibility Act
C. Paperwork Reduction Act
D. Unfunded Mandates Reform Act of 1995
E. Treasury and General Government Appropriations Act, 1999
F. Executive Order 12866
G. Executive Order 13132
H. Executive Order 12875
I. Executive Order 12988
J. Executive Order 13084
K. Small Business Regulatory Enforcement Fairness Act of 1996

I. Introduction and Need for the Rule

The national weapons laboratories of DOE are premier institutions among the world's government-sponsored scientific research and development organizations. Their discoveries not only helped the United States prevail in the Cold War, but they are providing for the continued national security through their mission to maintain the safety, security, and reliability of the nation's nuclear stockpile. As the repository of America's most advanced know-how in nuclear and related armaments and the home of some of America's finest scientific minds and engineering capabilities, these labs have been and will continue to be major targets of foreign intelligence services.

This threat to DOE and its facilities is not new; indeed it has been confirmed throughout the years by reports from the Federal Bureau of Investigation (FBI), the General Accounting Office (GAO), the intelligence community, independent commissions, private management consultants, and DOE's inspector general and security experts. Most recently it has been highlighted in Presidential Decision Directive (PDD)–61, ''The U.S. Department of Energy Counterintelligence Program,'' and in a report on security problems at DOE by a Special Investigative Panel of the President's Foreign Intelligence Advisory Board (the Rudman report). (The unclassified versions of these documents are on DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.)

During the past decade, DOE's security programs have been challenged as the potential threats faced by DOE have become more extended. The number of nations possessing, developing, or seeking weapons of mass destruction continues to increase, and warnings mount about the espionage goals of other nations. However, as the Rudman report found, DOE has ''devoted too little time, attention, and resources to the prosaic but grave responsibilities of security and counterintelligence in managing its weapons and other national security programs.'' (Rudman report at 1.) The weapons laboratories utilize some of the most advanced security technology in the world. Nevertheless, as the Rudman report noted, however, weak systems of personnel assurance, information security, and counterintelligence have invited attack by foreign intelligence services. (*Id.* at 3.)

DOE has acknowledged these deficiencies. In the past year, DOE has taken steps to improve security and counterintelligence throughout the Department in order to strengthen its protection of information and technologies in connection with DOE's atomic energy defense activities. Reform has focused on: the structure of the counterintelligence program; selection and training of field counterintelligence personnel; counterintelligence analysis; counterintelligence and security awareness; protections against potential insider threats; computer security; improved coordination with the FBI, the Central Intelligence Agency (CIA), and the National Security Agency (NSA); and the establishment of a counterintelligence-scope polygraph program.

II. Background

DOE has clear authority to implement a counterintelligence-scope polygraph program. DOE, as the successor agency to the Atomic Energy Commission, has broad national security responsibilities under the Atomic Energy Act of 1954 (AEA or Atomic Energy Act) to direct the development, use, and control of atomic energy. These responsibilities include a specific mandate to protect sensitive and classified information and materials involved in the design, production, and maintenance of nuclear weapons, as well as a general obligation to ensure that permitting an individual to have access to information classified under the AEA will not endanger the nation's common defense and security. Section 161 of the AEA authorizes DOE to adopt rules necessary to carry out those functions. 42 U.S.C. 2201.

Various Executive Orders of government-wide applicability also require DOE to take steps to protect classified information. Executive Order No. 12958, ''Classified National Security Information'' (April 17, 1995), requires the Secretary to establish controls to ensure that classified information is used only under conditions that provide adequate protection and prevent access by unauthorized persons. Executive Order 12968, ''Access to Classified Information'' (August 2, 1995), requires the Secretary to establish and maintain an effective program to ensure that employee access to classified information is clearly consistent with the interests of national security. In addition, in February 1998, President Clinton issued PDD–61, ''U.S. Department of Energy Counterintelligence Program,'' a classified document containing the President's determination that DOE must do more to protect the highly sensitive and classified information at its facilities. The President instructed DOE to develop and implement specific measures to reduce the threat to such information. Such measures may include additional requirements for financial disclosure, reporting of foreign travel, the establishment of Special

Access Programs (SAPs) where appropriate, and use of polygraph and psychological screening.

Congress recognized that polygraph examinations may appropriately be used by the Department when it provided two relevant exemptions from the general prohibitions contained in the Employee Polygraph Protection Act (Pub. L. 100–347) (EPPA) against the use of polygraph examinations in private employment settings. The prohibition in the EPPA does not apply to counterintelligence polygraph examinations administered by DOE to any expert, consultant or contractor employee of DOE in connection with atomic energy defense activities, 29 U.S.C. 2006(b)(1)(B). The prohibition also does not apply to counterintelligence polygraph examinations administered by a Federal agency, in the performance of an intelligence or counterintelligence function, to an individual whose duties involve access to Top Secret classified information or information designated as being within a SAP. 29 U.S.C. 2006(b)(2). The Congress in the EPPA leaves to DOE the discretion to develop rational procedures for evaluating and processing the results of polygraph examinations and for protecting individuals from misuse of such an examination.

DOE believes that requiring counterintelligence-scope limited polygraph examinations for individuals in positions with access to the most sensitive and classified information and materials in connection with DOE's atomic energy defense activities is one of several necessary, prudent actions required to fulfill its national security responsibilities. A counterintelligence-scope polygraph examination both serves as a means to deter unauthorized disclosures of classified information and provides a means for early detection of disclosures to enable DOE to take steps promptly to mitigate harm to the national security. A counterintelligence-scope polygraph examination is also an integral element of the DOE Accelerated Access Authorization Program (AAAP), a program that DOE utilizes to grant interim personnel security clearances on an expedited basis. In addition, use of a polygraph examination when an individual requests one as a means of explanation and corroboration in order to resolve issues in a counterintelligence or personnel security investigation is an additional component of the overall inquiry which hastens the DOE's resolution of such issues.

On March 17, 1999, DOE began developing and implementing a counterintelligence-scope polygraph requirement for sensitive positions by issuing an internal DOE directive, DOE Notice 472.2, Use of Polygraph Examinations. That Notice establishes a polygraph requirement for Federal employees who occupy or seek to occupy certain sensitive positions. The DOE Notice also provides for polygraph examinations to be administered to Federal employees as part of the AAAP and, upon employee request, as a means of resolving remaining questions. (The Notice is on DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.)

DOE published a Notice of Proposed Rulemaking (NOPR) on August 18, 1999 (64 FR 45062), that proposed expanding the counterintelligence polygraph program to cover all employees at its facilities, contractor employees as well as Federal employees, in positions with access to the most sensitive categories of classified information and materials, as well as applicants for such positions. The NOPR also proposed conforming changes to regulations governing the Department's PAP and PSAP.

After the NOPR was published, Congress directed DOE in section 3154 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 160–65) (NDAA), enacted on October 5, 1999, to conduct a counterintelligence polygraph program for specified defense-related activities of the Department. Section 3154 requires DOE to issue rules for administration of counterintelligence polygraph examinations to all officers or employees of the Department, experts or consultants under contract to DOE, and officers or employees of DOE contractors, who are in SAPs or the PSAP. Section 3154 provides for consultation with the FBI in developing the rule. It also requires DOE to submit to Congress, within 180 days after the date of enactment of the Act, a plan to extend the counterintelligence polygraph program to DOE employees and contractor employees who have access to the PAP and information identified as Sensitive Compartmented Information (SCI).

The NOPR explicitly covered SAP, PSAP, and PAP employees. It also covered employees with access to SCI by reason of proposed section 709.4(a)(1) and (2). As required by section 3154 of the NDAA, DOE provided a draft of this rule to the FBI for comment. DOE has been advised that pursuant to section 3154 the FBI concurs in issuance of today's final rule and did not recommend any changes.

In accordance with the Atomic Energy Act and section 3154 of the NDAA, DOE today addresses the relevant major issues from the public comments and after full consideration of those comments, DOE adopts a final rule governing use of counterintelligence-scope polygraph examinations for national security purposes, and use of polygraph examinations initiated at the request of an individual to address questions in the context of counterintelligence investigations or personnel security inquiries.

III. Discussion of General Public Comments

DOE received one hundred and five written comments on the proposed rule. In addition, eighty-seven people presented oral comments during public hearings held at Lawrence Livermore, Sandia, and Los Alamos National Laboratories, and Washington, D.C. on September 14, 16, 17 and 22, 1999, respectively. DOE has carefully considered all of these comments in preparing this final rule.

Some comments were general in nature, addressing over-arching issues such as the validity and reliability of polygraph examinations, the effect of the proposed polygraph program on national security and on retention and hiring of employees at the national laboratories, the constitutionality of DOE's proposed polygraph program, and alternatives to the program. This section discusses these issues and DOE's responses.

Other comments addressed specific elements and sections of the proposed rulemaking. DOE discusses those comments in section IV below. That section also explains the changes that DOE has made to the rule in response to the public comments and as a result of additional internal review.

a. Validity of Polygraph. DOE received numerous comments asserting that polygraph examinations have no theoretical foundation or validity. According to some commenters, while there is disagreement among scientists about the use of polygraph testing in specific-incident criminal matters, there is almost universal agreement that polygraph screening in the employment context is completely invalid. Other commenters stated that they believe that polygraph examinations lack reliability and may result in an unacceptable number of false positives and false negatives.

DOE developed and published the NOPR under general discretionary rulemaking authority in the Atomic Energy Act. In the absence of a specific Congressional mandate for a counterintelligence-scope polygraph examination program, the advisability of such a program in light of the facts

about polygraph reliability were fair subjects for public comment. However, during the public comment period, Congress enacted section 3154 of the NDAA. Section 3154 supplements the general authority of the Atomic Energy Act, and includes a non-discretionary mandate to implement a counterintelligence-scope polygraph program by rule for each person in four ''high risk'' programs.

Due to enactment of this non-discretionary mandate, DOE concludes as a matter of law that it is no longer free to act favorably on comments arguing generally against establishment of a counterintelligence-scope polygraph examination program because of information and claims about deficiencies in polygraph reliability. In DOE's view, this conclusion applies even though DOE's proposal listed more ''high risk'' programs than the four programs listed in section 3154. There is no meaningful distinction among the various programs listed in the NOPR with regard to general objections to polygraph examinations on grounds of alleged excessive unreliability.

Although, as a purely legal matter, there is no obligation to respond to comments generally attacking DOE's proposal to establish a polygraph examination program, DOE nevertheless is responding to specific objections to polygraph reliability that should be considered because, if valid, they might suggest modification of the proposed procedures. Commenters offering these objections did not suggest modifying those procedures. Nor did they offer supporting scientific information to validate their objections.

Some of the comments pointed to various medications and drugs, such as beta blockers and antimuscarines, and argued that ingestion of any of these substances, or the presence of illness or disease could invalidate a polygraph examination. DOE disagrees with these comments because neither these substances nor the presence of an illness or disease will cause differential effects within a particular examination as the examiner moves from one question to another. In addition, DOE has added to section 709.4(b)(2) a medical exception to the final rule for any individual who is being treated for a medical or psychological condition or is taking medication that, based upon consultation with the individual, the DOE Test Center determines would preclude the individual from being tested.

Other comments focused on various features of the polygraph instrument or polygraph procedures. One comment speculated about the relationship between electrode polarization of the sensors and known facts about electrodermal activity. Another suggested that blood pressure recordings are unreliable. Still another argued for instantaneous heart rate measures. With regard to electrodermal blood pressure, and heart rate measures, DOE is not persuaded that there is any significant inaccuracy because the examiner is looking only at the relative magnitude of phasic responses. The issue is changes in skin conditions, blood volume and heart rate to specific questions when they are repeated several times.

In view of the foregoing, DOE concludes that none of the reliability issues suggested in public comments warrants changes in the proposed polygraph procedures. Moreover, given their speculative nature, they do not warrant curtailing the number of categories of employees who are subject to polygraph examinations under today's final rule.

b. Johnson Memorandum. Another commenter asserted that DOE's decision to implement a counterintelligence-scope polygraph program is inconsistent with President Johnson's memorandum entitled ''Use of Polygraph in the Executive Branch.'' That memorandum, which is intended to ''prevent unwarranted intrusion into the privacy of individuals,'' prohibits federal agencies from subjecting federal employees to polygraph examinations except in limited situations. One of the exceptions permits an executive department or agency that has an intelligence or counterintelligence mission directly affecting national security to use polygraph examinations for employment screening, and personnel investigations, and intelligence and counterintelligence operations. DOE believes that the institution of its polygraph program is clearly permitted within the terms of the Johnson memorandum.

c. Employee Morale and Retention and Hiring. DOE has received a number of comments asserting that the polygraph program will have a negative impact on employee morale and that the establishment of the polygraph program will make it more difficult to retain and recruit the high caliber of scientists needed to maintain the safety and reliability of the nuclear weapons stockpile. In the opinion of many commenters, this potential loss of employees ultimately will so significantly degrade the quality of scientific research necessary to ensure the continuance of a reliable nuclear deterrent that the national security of the United States will be threatened.

The issues of recruitment and retention of personnel and their potential impact on national security are matters of great importance. DOE notes these issues pre-date its proposed use of counterintelligence-scope polygraph examinations, and are well documented in the March 1999 Report of the Commission on Maintaining United States Nuclear Weapons Expertise (Chiles report). (The report, which was cited by a number of commenters, is available at DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.)

The Chiles report characterized the DOE as being in a war for talent with the private sector. The scientific and technical talent that DOE must attract and retain has many options in today's competitive technology marketplace. The Chiles report points out the reasons DOE has not been successful in recruiting and retaining laboratory employees, and section 3163 of the NDAA requires DOE to report to Congress on measures that will be taken to retain skills necessary to maintain the U.S. nuclear deterrent force.

DOE's federal and contractor employees have achieved remarkable scientific advances and have contributed immensely to the nation's security. DOE recognizes that enhanced security and counterintelligence measures may be factors in attracting and retaining the best and brightest scientific and technical talent. The value of the contributions of DOE's employees was taken into account in developing this rule. DOE further notes the National Reconnaissance Office, NSA, CIA, and FBI also recruit scientists. They continue to be successful in recruiting and retaining top-caliber individuals in their fields despite the use of polygraph examinations in their screening processes.

DOE received at least ten comments that the proposed regulation reflects a lack of trust in the employees of the national laboratories. Commenters objected to what they perceived as a new DOE requirement that they must now prove their loyalty to the United States. Several commenters cited factors which they argued demonstrated their loyalty, including military backgrounds, and scientific contributions toward nuclear deterrence. While the polygraph requirement is a new condition of participating in select programs that involve access to the most sensitive classes of information with which DOE deals, DOE does not view it as materially different from other measures presently utilized. DOE currently conducts background investigations and

periodic reinvestigations, monitors financial records, imposes restrictions on publishing materials, and, for some employees, requires mandatory drug tests and medical assessments. Despite these measures, critical reports from the FBI, the GAO, the intelligence community, independent commissions, private management consultants, and DOE's inspector general and security experts have judged DOE's security program to be lacking. Now, the President, through PDD–61, has directed DOE to consider establishing a polygraph program as one component of an overall counterintelligence program. In addition, Congress, speaking through the NDAA, has mandated similar remedial measures. The polygraph program is a new component being added to existing protections, rather than a fundamental change in DOE's treatment of national laboratory or other contractor and DOE personnel.

d. Effect of the NDAA. Although DOE's notice of proposed rulemaking cited general rulemaking authority in the Atomic Energy Act of 1954 as the legal basis for DOE's proposal, several comments focused on pending legislation that eventually was enacted as the NDAA. Some comments argued for extending or reopening the comment period because the Congressional bill language differed from the terms of DOE's proposal. One of the comments specifically noted that the Congressional bill language required consultation with the FBI in the development of the regulation and identified fewer classes of employees to be polygraphed than the number of classes listed in the notice of proposed rulemaking. These features appear in the final legislative language, enacted as section 3154 of the NDAA.

With regard to the foregoing comments, section 3154 of the NDAA is significant for this rulemaking chiefly because it requires FBI consultation on rule development, buttresses the Department's authority for carrying out this rulemaking, and gives specific directions that resolve some issues (*e.g.*, whether to establish a polygraph program) posed as matters of policy in DOE's proposal. The requirement for FBI consultation is not reason enough to reopen the comment period because section 3154 does not specifically require that consultation occur prior to publication of a proposal. The FBI consultation was carried out in connection with DOE's consideration of the public comments received on the proposal. Enactment of additional authority for this rulemaking is also not a reason to reopen the comment period because the substantive differences between section 3154 and the proposed regulation do not warrant such a reopening. Substantively, section 3154 requires DOE to prescribe regulations for conducting a counterintelligence polygraph program applicable to each covered person in certain ''high-risk'' programs. It is silent and neutral on the issue of whether to include other classes of employees. It is mandatory with regard to some of the details of basic program elements of initial testing and consent, periodic testing, the scope of questions calculated to obtain counterintelligence information, procedures to identify and address ''false positives,'' and the circumstances for undertaking adverse personnel actions on the basis of a response to a question in a polygraph examination. The DOE notice of proposed rulemaking specifically addressed each of these program elements. Apart from some mandatory details to which DOE must conform regardless of what public comments may be directed to them, section 3154 does not significantly alter, or add to, the policy issues in this rulemaking. Members of the public have already had a full and fair opportunity to comment on those issues. On the basis of the foregoing, DOE concludes that additional opportunity to comment is unnecessary, and, given the need to enhance security at the national laboratories, contrary to the public interest.

e. Constitutional Claims. Some commenters stated that this proposed rulemaking was unconstitutional and violated the Constitution's Fourth Amendment prohibition against unreasonable searches and the Fifth Amendment protection against self-incrimination. Other commenters stated that the proposal would erode civil liberties and invade privacy. DOE believes that the case law on these issues is well settled, and that the counterintelligence polygraph program as DOE proposes to use it does not violate an individual's civil liberties. The proposal does not violate the Fourth Amendment because an individual must give his or her consent before taking the polygraph examination. The Fifth Amendment is not violated because the proposal provides an individual an opportunity to consult with an attorney and contains a statement of the privilege against self-incrimination. Furthermore, polygraph examination results generally are not admissible in a criminal trial.

f. Alternatives to Polygraph. DOE received a number of suggestions for alternatives to the polygraph program. These included enhanced or more frequent background investigations; ''old fashioned detective work'' and surveillance; interview hot lines to report suspicious behavior; larger security staffs; spot checks of employees as they enter and leave DOE facilities; an open dialogue with lab employees on how to improve security; peer counseling for new hires; examination of financial records and money wired to employee accounts from foreign sources; monitoring of banking and charge accounts to look for unusual financial or travel activities; improved security of computer systems; classified areas of the facilities with some individuals having two offices: one for classified work and a second one for unclassified work; use of magnetic tape on classified documents to detect improper removal of such documents; and undercover or sting operations. In the opinion of DOE, while some of these suggested alternatives would be useful once it has been determined that an individual should be monitored because of some suspicious activity, these activities would be exceedingly intrusive into the lives of DOE and contractor employees if adopted on a widespread basis. DOE believes that the polygraph program is more narrowly focused and less intrusive because it does not require constant monitoring, and more effective as a screening device than many of these alternatives.

Other commenters suggested that DOE should use the ''guilty knowledge'' polygraph test format rather than the control question format. DOE did not accept these suggestions because it believes that the control question format, which is more standardized and therefore more easily applied to a diverse population, is more appropriate for the counterintelligence scope polygraph program that it has proposed.

Other commenters suggested that the money spent on the polygraph program would be better spent on the suggested alternatives to enhance external security and to perform more background investigations. DOE does not believe that it is necessary to spend more money on additional external security enhancements since its systems already are among the best in the federal government. DOE notes that the polygraph program serves an important function that is different from the background investigation, or additional external security enhancements. Whereas the background investigation provides an external view of the individual, *i.e.*, information derived from friends, neighbors, and coworkers, and external documents such as financial records, the polygraph examination provides an internal view of how the individual understands his or her behavior, a view that is rarely

seen by anyone other than the individual. Additional enhanced external security measures by themselves provide little protection against the cleared employee who decides to engage in espionage. However, when external security measures are coupled with other tools such as polygraph examinations the combination constitutes a strong deterrent to those who would compromise national security and defense.

g. Use of Polygraph Countermeasures. Several individuals expressed their belief that spies trained in polygraph countermeasures will be able to pass the counterintelligence-scope polygraph examination. DOE is aware that there have been cases in which agents of a foreign intelligence service have been able to successfully employ polygraph countermeasures. While such countermeasures are relatively easy to teach in a laboratory environment, they are much more difficult to employ in real life situations. The Department of Defense Polygraph Institute (DODPI) continues to conduct research on countermeasures and how to counter countermeasures, and DOE's polygraph examiners receive training in detecting countermeasures as part of their training requirements. Accordingly, DOE is not persuaded that it should dispense with counterintelligence-scope polygraph examinations because of the potential use of countermeasures.

IV. Section-by-Section Review and Discussion of Public Comments

Subpart A—General Provisions

Section 709.1 What Is the Purpose of This Part?

One commenter suggested that DOE should state more clearly the desired goal of the regulation at the beginning and describe in clear, precise terms the steps of the process by which the goal will be achieved. A second commenter questioned the relationship of proposed section 709.1, which establishes the purpose of this regulation, to proposed section 709.4(6), which describes a category of individuals eligible for polygraph testing. In response to these comments DOE has revised section 709.1. Section 709.1 of the final rule states that its purpose is to describe the categories of individuals who are eligible for counterintelligence-scope polygraph testing, and to provide guidelines for the use of counterintelligence-scope polygraph examinations and exculpatory examinations and guidelines to protect the rights of individuals subject to this regulation.

DOE believes that it is unnecessary to make section 709.1 more specific regarding the precise procedures the Department will follow in achieving the goal of the regulation because the operative provisions in subparts B and C of the regulation cover those procedures.

Section 709.3 What Are the Definitions of Terms Used in This Part?

Several commenters requested that DOE clarify terms or add definitions for terms used in the NOPR. DOE has revised several definitions. DOE also has added to section 709.3 a definition of ''access'' as it applies to this regulation. In addition, DOE has added definitions of ''access authorization,'' ''control questions,'' ''deception indicated,'' ''eligibility evaluation,'' ''local commuting area,'' ''no deception indicated,'' ''no opinion,'' ''personnel security clearance,'' ''polygraph examination records,'' ''polygraph report,'' ''relevant questions,'' and ''unresolved issues.''

DOE is deleting the definition of ''Presidential appointee'' in light of its decision to eliminate the proposed exception from the polygraph requirement for any Presidential appointee who had received a favorably adjudicated, full-field FBI background investigation.

Section 709.4 To Whom Does the Polygraph Examination Requirement Under This Part Apply?

A number of commenters alleged that the categories of positions subject to a polygraph examination included more positions than necessary. Several commenters stated that the NOPR included positions whose incumbents merely have access to ''sensitive'' information, as opposed to classified information. The categories of positions identified in the rule have access to DOE's most sensitive and classified information and materials. Although the focus is on ''classified'' information and materials, DOE would be remiss if it ignored the potential damage that would result from the unauthorized disclosure of ''sensitive'' information and material.

Other commenters noted that the categories were excessively vague or that the categories did not specify which individuals actually will be polygraphed. Still other commenters expressed concern specifically that proposed section 709.4(a)(6), which provides that positions are eligible for polygraph examination that ''DOE has determined have a need-to-know or access to information specifically designated by the Secretary or his delegatee regarding the design and operation of nuclear weapons and associated use control features,'' was so broad that everyone with a ''Q'' clearance would be included.

DOE does not intend to include in section 709.4 everyone with a ''Q'' clearance. PDD–61 charged DOE with developing and implementing specific measures for reducing the threat to sensitive and classified information at DOE. DOE determined that the best approach was first to identify those ''high risk'' programs that control DOE's most sensitive information. DOE concluded that the individuals in the ''high risk'' programs identified in section 709.4(a)(1)–(8) are the most attractive targets to foreign intelligence services because of the highly sensitive information to which they have access, and therefore represent the greatest potential threat to national security.

The Offices of Counterintelligence (709.4(a)(1)), Intelligence (709.4(a)(2)), Independent Oversight and Performance Assurance (709.4(a)(7)), and Security and Emergency Operations (709.4(a)(8)) administer DOE's counterintelligence, intelligence and security programs and therefore have responsibility for the highly sensitive and classified information, including SCI, and materials within these programs. Similarly, SAPs (709.4(a)(3)) involve highly sensitive and classified information and materials. DOE notes that other U.S. government agencies routinely require counterintelligence-scope polygraph examinations as a prerequisite for obtaining or retaining access to SAP programs. Section 709.4(a)(6) includes positions that DOE has determined have need-to-know or access to information regarding the design and operation of nuclear weapons and associated use control features.

Several commenters recommended that the ''PSAP'' (709.4(a)(4)) and ''PAP'' (709.4(a)(5)) categories should not automatically be included in the categories of employees subject to polygraph examinations. These commenters asserted that there are strong and legitimate arguments for the people in these programs being subject to psychiatric and drug abuse testing, but they did not believe that there is a strong correlation between their job responsibilities and the espionage threat. The PAP and PSAP include individuals who are assigned nuclear explosive duties (PAP) or have access to Category I quantities of special nuclear material (PSAP). In both cases, the potential for causing damage to national security is great. Moreover, as noted previously in the NDAA, Congress has required DOE to polygraph individuals

who are members of SAPs and the PSAP and to present a plan to Congress within 180 days concerning the polygraphing of individuals who are members of the PAP or have access to SCI.

DOE recognizes that many individuals in positions within these eight categories are uncertain as to whether they actually will be polygraphed. DOE has decided to issue an implementation plan simultaneously with this final rule. That plan identifies the positions whose incumbents will be polygraphed initially and provides for a review of the program after twelve months. (The implementation plan is on DOE's Internet home page at the following address: http://home.doe.gov/news/fedreg.htm.)

Several commenters objected to proposed section 709.4(b)(1), which provided that the polygraph examination requirement would not apply to Presidential appointees who had received a favorably adjudicated full-field FBI background investigation. Upon review, DOE has decided to delete proposed section 709.4(b)(1), believing that anyone with access to DOE's highly sensitive information or materials should meet the same standards, regardless of position.

DOE also has decided to delete proposed paragraph 709.4(b)(2) which provides that the polygraph requirement does not apply to positions requiring access to SAPs that are intelligence-related and therefore subject to requirements promulgated by the Director of Central Intelligence. This paragraph is unnecessary because proposed section 709.4(b)(4) of the NOPR (now renumbered as section 709.4(b)(1)) contains an exception for individuals for whom the Director of the Office of Counterintelligence gives a waiver based upon certification from another Federal agency that the individual has successfully completed a full-scope or counterintelligence-scope polygraph examination administered within the last five years.

DOE received comments suggesting that the rule should contain an exception for medical reasons. DOE agrees with this suggestion and has added a new paragraph 709.4(b)(2) that provides an exception from this regulation for any individual who is being treated for a medical or psychological condition or is taking medication that, based upon consultation with the individual, the DOE Test Center determines would preclude the individual from being tested.

DOE also received comments objecting to paragraph 709.4(b)(3) that provides that the polygraph examination requirement does not apply to individuals for whom the Secretary of Energy gives a written waiver in the interest of national security. DOE has decided not to delete this provision, believing that it is necessary to provide the Secretary the authority to grant a national security exemption similar to that provided by other agencies that conduct counterintelligence-scope polygraph programs. DOE recognizes the success of the counterintelligence polygraph program depends in large measure upon employees' confidence that no one is being arbitrarily targeted or preferentially exempted, but believes that this written exemption is appropriately limited.

Section 709.4(c) of the NOPR provided that the Director of the Office of Counterintelligence (D/OCI), in consultation with the appropriate Program Manager, would establish the criteria for identifying the specific positions that warrant a polygraph examination and the order of priority for conducting polygraph examinations. Several commenters stated that DOE should have provided the criteria as part of the NOPR so that the public could comment on the criteria. While DOE believes that it was appropriate to solicit public comments on the categories of positions described in 709.4(a)(1)–(8), the criteria that DOE will use to identify the specific positions for polygraph examinations within those eight categories are subject to review and change. DOE has revised paragraph 709.4(c) to provide that the appropriate Program Manager for positions identified in paragraphs (a)(1)–(8) of this section, rather than the D/OCI, identifies, in order of priority, those specific positions that will be polygraphed. New paragraph (d) requires the Program Manager to submit those positions to the D/OCI for review and concurrence. The D/OCI forwards the positions, with any suggested additions or deletions, to the Secretary for approval. This revision will provide an extra level of review to ensure that no positions are targeted unfairly.

Section 709.5 How Will an Individual Know If His or Her Position Will be Eligible for a Polygraph Examination?

DOE received several comments seeking clarification of the relationship of proposed section 709.5 to proposed section 709.4. The purpose of section 709.5 is to describe the process by which an individual will be notified that he or she is eligible for a polygraph examination. DOE has revised proposed section 709.5 to provide that, when a polygraph examination is scheduled, DOE must notify the individual, in accordance with section 709.21. Applicants for those positions identified in section 709.4(a)(1)–(8) will be notified in the vacancy announcement that the individual selected for the position may be required to complete successfully a counterintelligence-scope polygraph examination before being hired.

Section 709.6 How Often Will an Individual be Subject to Polygraph Examination?

DOE has added a new section 709.6 to clarify that the individuals in positions identified in section 709.4(a)(1)–(8) are subject to a five-year periodic, as well as an aperiodic, reinvestigation polygraph examination.

Subpart B—Polygraph Examination Protocols and Protection of National Security

Section 709.11 What Types of Topics Are Within the Scope of a Polygraph Examination?

Several commenters suggested that some of the six counterintelligence topics identified in proposed paragraph 709.11(b) should be revised or deleted. DOE has decided not to accept this suggestion, because DOE believes that paragraph 709.11(b) accurately states the topics on which DOE should focus during a counterintelligence-scope polygraph examination. Furthermore, these topics are the same ones used by the eleven other federal agencies that utilize polygraph examinations for screening purposes.

Several commenters recommended that DOE modify the regulation to explain that the examiners will ask ''control questions.'' Control questions are a standard part of a counterintelligence-scope polygraph examination and are designed to determine an individual's ability to respond during a polygraph examination. Since they do not constitute the topics of the counterintelligence-scope polygraph examination, it is not necessary to identify control questions in this section of the regulation. However, DOE has revised section 709.24(d) to clarify that the examiner will review with the individual all the questions to be asked during the examination.

DOE received several general comments concerning section 709.11(c), which limits the type of questions that DOE may ask during the polygraph examination. One commenter suggested that DOE revise proposed section 709.11(c)(2) to refer to ''conduct that has no counterintelligence implication'' as distinguished from ''conduct that has no

security implication,'' as it read in the NOPR. Section 709.11(c)(2) has been revised to reflect this suggestion.

Other commenters expressed concern that DOE would expand the scope of the polygraph examination in the future to ask either lifestyle questions or questions not covered by the six topics identified in proposed paragraph 709.11(a). DOE may not ask lifestyle questions or expand the six topics without amending this regulation after providing an opportunity for public comment.

One commenter asked how DOE could guarantee, without counsel or witnesses present, that the examiner would not ask inappropriate questions, notwithstanding section 709.11(c), which would make the individual so upset that he or she would ''fail'' the test. DOE tapes the entire test from the beginning to the conclusion. In addition, a senior examiner continually supervises the conduct of the examination via a closed-circuit system, and would be able to intervene immediately if the examiner were to ask any inappropriate questions.

Section 709.12 How Does DOE Determine the Wording of Questions?

Several commenters asserted that proposed sections 709.11 and 709.12 do not adequately restrict the subject areas of the questions, thereby allowing different questions for different individuals. Section 709.11 limits the subject matter of any questions asked to the six topics identified in that section. However, the examiner is afforded flexibility in the formulation of the actual questions in order to assist the individual being tested to understand the topics of the examination. It would be counterproductive to predetermine the exact wording of the counterintelligence questions because some individuals may find it confusing or difficult to respond to the questions without additional clarification. The examiner needs to have the flexibility to determine the wording of a specific question based upon a pretest interview with the individual. In DOE's experience, this is the best way to assure the individual understands the question and can answer it appropriately, thereby minimizing the likelihood of unresolved issues.

Section 709.13 May An Individual Refuse to Take a Polygraph Examination?

One commenter asked what DOE would do with any information gathered during an examination if the individual terminated the examination, given that the regulation provides that DOE will treat a termination as a refusal to take the polygraph examination under section 709.13. DOE will make decisions on a case-by-case basis in accordance with the provisions of this regulation about information developed during a counterintelligence-scope polygraph examination that is terminated before completion.

Section 709.14 What Are The Consequences of a Refusal to Take a Polygraph Examination?

The discussion of this section in the preamble of the NOPR stated that ''[a]ll polygraph examinations administered by DOE are voluntary.'' In other words, DOE cannot compel an individual to take a polygraph test against his or her will. A large number of commenters took exception to that statement in the NOPR, noting that the refusal to take a polygraph examination may result in a severe job consequence, including denial or loss of access to the information or activity that justified the polygraph examination. DOE has noted before that the polygraph examination requirement does not differ significantly from other requirements for jobs within the DOE complex involving access to highly sensitive and classified information. Refusal to complete a financial disclosure form, complete or cooperate in a security investigation, agree to be fingerprinted, or follow established security procedures will result in denial or loss of a personnel security clearance. Nonetheless, DOE has deleted the term ''voluntary'' from proposed section 709.23(c). Section 709.23(c) of the final rule now provides that DOE may not administer a polygraph examination unless DOE has obtained written consent from the individual.

Proposed section 709.14 provided that DOE may deny applicants or incumbents who refuse to take a polygraph examination access to the information or involvement in the activities that justified the polygraph examination. After DOE issued the NOPR, Congress enacted the NDAA, which requires DOE to polygraph individuals who are members of SAPs and the PSAP. The NDAA also requires DOE to present a plan to Congress within 180 days for polygraphing individuals who are subject to the PAP or who have access to SCI. In addition, the NDAA provides that DOE may not grant initial access to SAPs and the PSAP to any covered individual who has not consented in writing to and undergone a counterintelligence polygraph examination. The law further provides that an incumbent may not have continued access to either of these programs unless that person undergoes a counterintelligence polygraph examination within five years after receiving initial access, and thereafter not less frequently than every five years, and at any time at the direction of the D/OCI.

DOE has revised section 709.14 by adding new paragraphs (a)–(d) to conform it with the specific terms of section 3154 of the NDAA. The new paragraph (a) provides that DOE and its contractors must refuse to employ, assign, or detail any individual who is an applicant for employment, assignment, or detail to one of the positions described in section 709.4(a)(1)–(8), and refuses to take a counterintelligence polygraph examination required by statute as an initial condition of access. The new paragraph (b) provides that DOE and its contractors may refuse to employ, assign, or detail any individual who is an applicant for employment, assignment, or detail to a position described in section 709.4(a)(1)–(8) and refuses to take a counterintelligence polygraph examination otherwise required by this part as an initial condition of access.

The new paragraph (c) provides that DOE and its contractors must deny an incumbent access to any position described in section 709.4(a)(1)–(8), consistent with section 709.15, if that individual refuses to take a counterintelligence polygraph examination required by statute. The new paragraph (d) provides that DOE and its contractors may deny an incumbent access to any position described in section 709.4(a)(1)–(8), consistent with section 709.15, if the individual refuses to take a couterintelligence polygraph examination otherwise required by this part. DOE has redesignated the proposed paragraphs 709.14(b), (d), (e), and (f) as paragraphs 709.14(e), (f), (g), and (h), respectively.

Several commenters asked whether the refusal to take a polygraph meant the revocation of a personnel security clearance (*i.e.*, revocation of an access authorization), the automatic loss of a ''Q'' clearance, or loss of a job. Refusal to be polygraphed does not result in the termination of one's personnel security clearance. DOE recognizes that its use of the term ''access'' in this part may have caused confusion because of its similarity to the term ''access authorization'' as used in 10 CFR part 710. DOE has added definitions to section 709.3 of ''access,'' ''access authorization,'' and ''personnel security clearance'' to clarify their use in this regulation.

Proposed section 709.14(c) also provided that, ''[i]f the individual is a DOE employee, DOE may reassign or realign the individual's duties or take other action, consistent with the denial of access.'' Several commenters asked DOE to clarify the phrase ''take other action.'' In new paragraphs (c) and (d), DOE has added a sentence that indicates that if the individual is a DOE employee, DOE may reassign or realign the individual's duties, within the local commuting area, or take other action, consistent with that denial of access. DOE has added a definition of ''local commuting area'' to section 709.3 of the final rule. DOE recognizes that in some instances, if the individual's skills are intrinsically linked to a program identified in section 709.4(a)(1)–(8) and access to that program has been denied, it may not be possible to reassign that individual or realign that individual's duties within the local commuting area. In such circumstances, DOE may have no reasonable option other than to terminate that individual's employment.

The language of the NOPR discussing this section provided that:

> In some instances, the information or activities may be essential to the individual's ability to do his or her job. In such a case, the employer (whether DOE or contractor) must make every effort to find a new position for which the individual would be suitable, consistent with that denial of access. [64 FR 45063]

Both employees and contractors asked DOE to explain what ''make every effort'' entailed. DOE will make every reasonable effort to find a job for employees who refuse to take a polygraph examination and therefore are denied access to the information or involvement in the activities that justified conducting the polygraph examination. Specifically, DOE will look for appropriate jobs within the local commuting area.

In addition, a comment from a contractor suggested that DOE should delete all language in the NOPR that explicitly or implicitly references conduct of the contractor. DOE has decided not to delete all language that references conduct of the contractor because DOE believes that contractor employees should be treated similarly to federal employees under this regulation whenever possible. DOE strongly encourages contractors to make a similar effort to locate job opportunities for employees who refuse to take a polygraph examination.

Proposed section 709.14(f) would prohibit DOE from recording in a personnel file an employee's refusal to take a polygraph examination, and the NOPR encouraged contractors to adopt a similar policy. Nonetheless, one commenter expressed concern that the revocation of a clearance and transfer to an unclassified position will be recorded by the contractor and have the same effect as an entry into the employee's personnel file. Refusal to be polygraphed results in denial or loss of access to the position that required the polygraph examination, but does not result in the loss of a personnel security clearance.

Section 709.15 How Does DOE Use Polygraph Examination Results?

Section 709.15(a) of the NOPR contemplates an ''in-depth interview'' by the polygraph examiner if there are unresolved issues. One commenter stated that this seemed very vague and alarmingly broad. Accordingly, DOE has added a definition of ''unresolved issues.'' The same commenter asked if the individual would be attached to the polygraph instrument during the in-depth interview, and whether there would be limitations on the subject areas that may be explored in the in-depth interview. The individual will not be attached to the polygraph during the in-depth interview. DOE will explore only relevant topics that require resolution.

One commenter asked DOE to set a time limit for the in-depth interview, while another asked DOE to indicate the time frame within which the eligibility evaluation typically would be concluded. DOE is aware of the stress that the process may cause some individuals. DOE will not extend the evaluation period beyond that absolutely necessary to conduct a fair, in-depth interview or an appropriate eligibility evaluation which considers the examination results, the individual's personnel security file, and all other pertinent facts. In fairness to the individual, it is inappropriate to set arbitrary time limits because a deadline might result in an incomplete eligibility evaluation.

One commenter asked what assistance the employee may seek during the evaluation process and suggested that the national laboratory employing the individual should be allowed to assist in the resolution of the issue. DOE believes that there may be instances in which the national laboratories may be called upon to assist; however, any such instances will be addressed on a case-by-case basis. It is inappropriate to make a general statement identifying particular organizations or persons DOE might ask to assist in resolving issues.

One commenter suggested that there would be great value in reassuring individuals that no denial of access to a position identified in section 709.4(a)(1)–(8) would take place until the eligibility evaluation has been completed, unless the denial of access is justified by serious national security concerns. DOE agrees that no denial or revocation of access to the position will take place until the eligibility evaluation has been completed. DOE believes that this is consistent with section 3154(g) of the NDAA that provides that:

> [The polygraph regulations] shall include procedures * * *
>
> (2) ensuring that adverse personnel actions not be taken against an individual solely by reason of that individual's physiological reaction to a question in a polygraph examination, unless reasonable efforts are first made to independently determine through alternative means the veracity of that individual's response to the question.

In addition, the Conference Committee Report states that:

> The conferees direct that the Secretary not use failure of such polygraph examinations as the sole basis for the removal of any covered employee.
>
> H.R. Report No. 106–301, 106th Cong. 1st Sess. 917 (1999) (''Conference Report'').

Paragraph 709.15 (c) has been revised to reflect that no denial or revocation of access to the information or involvement in the activities that justified conducting the polygraph examination will take place until the eligibility evaluation has been completed. However, if justified by serious national security concerns, access may be suspended, but not denied, in accordance with section 709.25.

Another individual noted that while proposed paragraph 709.15(c) provides that DOE may interview the individual as part of the eligibility evaluation, it does not give the individual the opportunity to provide additional information or the right to an interview. The individual always has the right to provide additional relevant information. DOE does not believe it is necessary or appropriate to accord the individual the right to an interview in all instances. Proposed paragraph 709.15(c) has been revised to indicate that OCI will conduct an eligibility evaluation, and that it will interview the individual if it determines that such an interview will assist in resolving the issue.

Several commenters recommended that the regulation should be revised to provide a specific appeals process. DOE has decided that it is not appropriate to establish an appeals process in this part for positions that are established pursuant to other DOE regulations, e.g., PAP 10 CFR part 711; PSAP 10 CFR part 710, subpart B. However, paragraph 709.15(e) has been added to provide that

DOE and contractor employees, applicants for employment, and other individuals assigned or detailed to Federal positions at DOE whose access to the categories described in 709.4(a)(1)–(8) is denied or revoked may request reconsideration by the relevant head of the departmental element, as identified in the notice of revocation or denial.

One commenter asked DOE to define ''eligibility evaluation'' more precisely. DOE has added a definition of ''eligibility evaluation'' to section 709.3. Procedures for the eligibility evaluation have been added to section 709.15. Another commenter asked a series of questions concerning the eligibility evaluation: (1) Who in DOE conducts the eligibility evaluation; (2) why is the personnel security file a part of the evaluation process; (3) what constitutes ''other pertinent information''; (4) how is an individual notified of the evaluation results; (5) is a written record maintained of the evaluation; and (6) does an individual has access to the examination and evaluation results. Section 709.15 has been revised to indicate that the Office of Counterintelligence will conduct the eligibility evaluation. The personnel security file often is an important source of information for resolving counterintelligence issues. It is impossible to describe what constitutes ''other pertinent information'' since the information considered by OCI depends upon the counterintelligence topics that require resolution. The decision about whether or not to grant, retain, deny, or revoke access is made by the appropriate Program Manager. The polygraph report and the eligibility evaluation are permanent records. An individual is able to file requests for release of these records under the provisions of the Privacy Act.

One commenter requested DOE provide the individual with a written copy of the examiner's opinions or conclusions as well as the questions asked and charted responses before DOE may deny the individual access to a position identified in section 709.4(a)(1)–(8). DOE will not establish a policy of releasing written copies of examiners' opinions and conclusions or the questions asked and charted responses because such materials contains information concerning investigative techniques of the Department. However, an individual may file a request for the release of these materials under the Freedom of Information Act or the Privacy Act and the request will be processed in accordance with the applicable regulations.

DOE has added a new paragraph 709.15(f) which indicates that, using the DOE security criteria used to grant or deny access to classified information, OCI will make a determination whether disclosures during a counterintelligence polygraph examination warrant referral to the Office of Security and Emergency Operations or the Manager of the applicable Operations Office. OCI will not report minor security infractions that do not create a serious question as to the individual's eligibility for a personnel security clearance.

Subpart C—Safeguarding Privacy and Employee Rights

Section 709.21 When Is an Individual Notified That a Polygraph Examination is Scheduled?

Several commenters stated that the forty-eight hour notification prior to a polygraph examination was insufficient notice. DOE's proposal was based on the policy guidance contained in the Department of Labor's regulation implementing the EPPA (29 CFR 801.23(a)(1)). In light of the comments, DOE has revised proposed section 709.21 to provide that individuals will receive notification of at least ten days, excluding weekend days and holidays, as opposed to forty-eight hours.

Other commenters asked how individuals would be notified of a scheduled examination. A DOE representative from the DOE Test Center will call individuals by telephone and will set a date and a time for their counterintelligence-scope polygraph examination. DOE will follow up with a letter to the individual confirming the date and time, and providing additional administrative instructions, including directions to get to the test center.

DOE also received several comments that suggested DOE should not simply offer to make available to individuals a copy of this regulation as provided in section 709.21 of the NOPR, but instead should provide individuals with the regulation. DOE agrees with those comments and has revised section 709.21 accordingly.

Section 709.22 What Rights to Counsel or Other Representation Does an Individual Have?

The proposed regulation provides that an individual has the right, at his or her expense, to obtain or consult with legal counsel or another representative prior to the polygraph examination. One commenter suggested that legal counsel of the individual's choosing should be provided at DOE's expense. DOE has not adopted this suggestion because DOE has concluded that it is not an appropriate use of taxpayer dollars.

One commenter requested DOE make clear in the regulation that only the examiner and the individual will be present in the room during the polygraph examination. The commenter was concerned that additional personnel in the room could make the individual feel he or she was being ''ganged up on,'' thus adding to the individual's level of stress. DOE agrees with this concern and has revised section 709.22 to make clear that only the individual and the examiner are in the room during the polygraph examination. All examinations, however, are monitored by a senior examiner via a closed-circuit system and are videotaped from beginning to end for the protection of the individual and the examiner.

DOE received a number of comments objecting to the ban on having legal counsel in the room during the polygraph examination. On a related issue some commenters addressing section 709.15 (How does DOE use polygraph examination results?) suggested that DOE should permit an individual to consult with counsel if a personal interview takes place as part of the eligibility evaluation process. Other commenters suggested that not only should the individual have legal counsel present in the room during the polygraph examination, but should also have another witness or even two witnesses, such as an independent, certified polygrapher or a union representative. DOE believes that the presence of legal counsel or other witnesses in the examination room would be a distraction to the individual and the examiner and would interfere with conducting the examination. Furthermore, DOE notes that the prohibition on consulting with counsel is consistent with provisions of the EPPA (29 U.S.C. 2007(b)(2)(A)). Legal counsel or witnesses may not be present in the examination room or during any interview that may occur as part of the polygraph examination. However, legal counsel may be available for private consultation in a private room at the test center before the examination. DOE has added a new paragraph (b) that provides an individual may consult with legal counsel or another representative any time during a personal interview that is conducted as part of the eligibility evaluation process.

Section 709.23 How Does DOE Obtain an Individual's Consent to a Polygraph Examination?

DOE received questions about the content of the polygraph consent form.

In addition, several commenters asked if by signing the consent form the individual was waiving any rights, such as the right against self-incrimination. The individual is asked to sign a form that states that the individual consents to the polygraph examination and that no threats have been made or promises extended to the individual to obtain his or her agreement to take a polygraph examination. No specific warning regarding self-incrimination is required, other than that given by the examiner in accordance with section 709.24. However, the exclusion of a specific warning does not preclude the individual from consulting with legal counsel prior to the polygraph examination at the individual expense. The individual is asked to sign a second portion of the consent form at the end of the polygraph examination reaffirming that the examination was taken freely. There is nothing in the form that could be interpreted in any way as a waiver of an individual's rights accorded by law.

DOE also has deleted the requirement in proposed paragraph (b) to offer a copy of this part because it has revised section 709.21 to require that DOE provide a copy of this part.

Section 709.24 What Other Information is Provided To the Individual Prior To a Polygraph Examination?

DOE received several types of comments concerning the use of audio and video recording devices during the examination. Several commenters stated that DOE should provide each individual a copy of polygraph reports and any audio or video tape made of the test, possibly at the individual's own expense. Other commenters suggested that the individual should have the right to record the polygraph examination, and any interview that might occur as part of the eligibility evaluation in accordance with section 709.15. DOE will not establish a policy of releasing the polygraph reports or videotapes of examinations or permitting individuals to record all or any portion of the polygraph examination or related interviews. Such materials contain information concerning investigative procedures and techniques of the Department. However, an individual may file a request for the release of these materials under the Freedom of Information Act or the Privacy Act and the request will be processed in accordance with applicable regulations.

Other commenters noted that the text of section 709.24 does not indicate how the videotape of the polygraph examination might be used if an individual should reveal information not specifically related to counterintelligence matters in the course of attempting to resolve questions raised during the polygraph examination. One commenter asked specifically if the videotape would be used in a possible criminal action against the individual, and if so, how would the individual's right against self-incrimination be preserved? All polygraph records are protected in accordance with section 709.26. If the individual reveals information concerning a security matter, OCI will make a determination, based upon the DOE security criteria used to grant or deny access to classified information, whether such information warrants referral, as appropriate, to the Office of Security and Emergency Operations or the Manager of the applicable Operations Office for appropriate action with respect to that individual's personnel security clearance. OCI will not report minor security infractions that do not create a serious question as to the individual's eligibility for a personnel security clearance. As to the concern about the right against self-incrimination, section 709.24 provides that the examiner will advise the individual of his or her privilege against self-incrimination.

Another commenter noted that the proposed regulation requires the examiner to inform the individual of any audio or video recording devices, but is silent on the disclosure of other observation devices, such as two-way mirrors and observation rooms. DOE has modified the regulation to reflect that the examiner will provide this information.

One commenter suggested that the regulation should contain a clear statement of the individual's rights—the rights in the pre-test phase, the actual testing phase, and the post-test phase—akin to those found in the Department of Labor (DOL) regulation at 29 CFR 801.22–25 for employees in the private sector. DOE believes that the regulation adopted today constitutes a substantially comparable statement of an individual's rights in the pre-test, test, and post-test phases, although they are not in the same format as the DOL regulation. For example, the medical exception and the limitation on the types of questions set forth at 29 CFR 801.22 are similar to provisions of section 709.4 and section 709.11, respectively, of the regulation. The provision in 29 CFR 801.23 concerning the information that must be provided to the individual before the examination is similar to that in section 709.24 of the regulation.

Several commenters asserted that the individual should receive a copy of the questions far enough in advance of the scheduled examination to obtain legal advice, if desired. The individual may seek detailed guidance from counsel based upon the description of the counterintelligence topics identified in section 709.11, which also lists the types of questions that may not be asked. It is not possible to provide the exact questions in advance, because, as section 709.12 explains, the exact wording of the polygraph questions is determined by the examiner based on the examiner's pretest interview of the individual, the individual's understanding of the questions, and other input from the individual.

Another commenter suggested that DOE should add a paragraph to proposed section 709.24 stating that the examiner must advise the individual that he or she may decline to answer any question that would divulge or compromise classified information. DOE does not believe that this is necessary because all of the examiners hold a ''Q'' access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, they must have been granted SCI access approval. DOE will protect from public disclosure all videotapes and other polygraph records.

DOE received several suggestions that the privilege against self-incrimination must be made available, and that exercising that privilege while answering a specific question, or questions, does not constitute a refusal to submit to the examination or, by itself, a termination of the examination. Section 709.24(e) provides that, before administering the examination, the examiner must advise the individual of his or her privilege against self-incrimination. DOE recognizes and respects the individual's privilege in this regard. However, exercise of that privilege will constitute a refusal to submit to the examination or a termination of the examination.

One commenter noted that the proposed regulation fails to notify the individual of the office within DOE to which complaints should be addressed in the event the individual feels that the examiner has violated his or her rights. DOE has added a new paragraph 709.24(f) which provides that the individual will receive a pre-addressed envelope addressed to the D/OCI in Washington, D.C., which may be used to submit comments or complaints concerning the examination. As part of DOE's commitment to protecting the privacy of any individual polygraphed under this program, the D/OCI is the

only person who routinely will see such letters.

Section 709.25 Are There Limits on Use of Polygraph Examination Results That Reflect ''Deception Indicated'' or ''No Opinion''?

Section 709.25(a) of the NOPR provided that DOE or its contractors may not take an adverse personnel action against an individual solely on the basis of a polygraph examination result of ''deception indicated'' or ''no opinion'' except when the Secretary or the Secretary's designee made a written determination that the information to which the individual had access is of such extreme sensitivity that access under the circumstances posed an unacceptable risk to national security or defense. Several commenters interpreted section 709.25(a) to mean that any individual whose polygraph results are ''deception indicated'' or ''no opinion'' may have his or her access to classified information suspended. DOE has combined portions of paragraphs (a) and (b) of proposed section 709.25 into a new paragraph 709.25(a). Section 709.25 of the final rule makes clear that DOE and its contractors may not take adverse personnel actions against individuals solely on the basis of a polygraph examination result of ''deception indicated'' or ''no opinion'' or use those polygraph examination results as a substitute for any other required investigation.

Several commenters objected to the authority provided in proposed section 709.25(a) for the Secretary, or his designee, to suspend access under certain conditions, arguing that the Secretary already has the authority to suspend a personnel security clearance. DOE has retained this authority because it addresses the suspension of access as distinguished from suspension of a personnel security clearance, but has clarified its use in section 709.25(b) of the final rule.

Several commenters asked DOE to clarify or specify by category the phrases in the proposed paragraph 709.25(a) ''under the circumstances,'' and ''of such extreme sensitivity.'' In revising section 709.25, DOE has deleted both of these phrases. Another commenter asked DOE to specify at least by category those circumstances where access to the information ''poses an unacceptable risk to national security or defense,'' arguing that such circumstances should be restricted to those where there is an imminent danger to national security or defense that requires the Secretary or the designee to act immediately and investigate later. DOE does not agree with the commenter's recommendation that an unacceptable risk to national defense and security must be ''imminent.'' The fact that the individual has access to DOE's most sensitive information (709.4(a)(1)–(8)), and the Secretary or the D/OCI has information, based upon the individual's admissions during the polygraph examination, that the individual poses an unacceptable risk to national defense and security is sufficient justification for suspending the individual's access.

The new paragraph 709.25(b) (hereinafter referred to as the ''national security or defense'' exception) states that the Secretary or the Director of the Office of Counterintelligence, may suspend an individual's access based upon a written determination that the individual's admission(s) of involvement in one or more of the activities covered by a counterintelligence-scope polygraph examination, when considered in the context of the individual's access to one or more of the ''high risk'' programs identified in section 709.4(a)(1)–(8), poses an unacceptable risk to national security or defense. The new paragraph also states that DOE will investigate the matter immediately and make a determination of whether to revoke the individual's access.

One commenter suggested that the regulation should include a requirement that if the ''national security or defense'' exception is used, that DOE will investigate the matter immediately and restore the status quo ante, at the earliest date, if there is no clear and convincing evidence to corroborate the negative polygraph examination results. Another commenter suggested that DOE should limit the time to six months that an individual's access may be suspended, and that after such time, if there is no additional information, that the individual's access will be reinstated. DOE agrees with the suggestion that it should immediately investigate the matter and determine whether to maintain or revoke the individual's access. DOE will make every effort to ensure that the suspension of access is as short as possible, but does not believe that it is appropriate to establish artificial time limits for investigations concerning national security matters, or an unduly high evidentiary standard for corroboration of polygraph results.

Another commenter recommended that while the individual's access is suspended the individual should be paid at the same pay grade. DOE agrees with this recommendation because suspension of access does not constitute an adverse personnel action.

One commenter suggested that the regulation should provide that the ''national security or defense'' exception will not be used except where the polygraph examination has been employed in response to a specific counterintelligence concern as distinct from its use as a general screening instrument. If there is no known problem, the commenter asserted that employees should not be adversely impacted by polygraph results, given the high probability of false positives. DOE disagrees. It has revised section 709.25 to make clear that the use of the ''national security or defense'' exception is limited to instances involving the individual's admission of involvement in one or more of the counterintelligence topics, which when considered in the context of the individual's access to one or more of the ''high risk'' programs identified in section 709.4(a)(1)–(8), poses an unacceptable risk to national security or defense. The same commenter suggested that the regulation should include a review mechanism for use of the ''national security or defense'' exception, which is independent of the office that recommends exceptions, to ensure that the exception is not abused. Proposed section 709.25 provided that the exception could be exercised by the Secretary or the Secretary's designee. DOE has revised the language of section 709.25 to provide that the ''national security or defense'' exception can be made only by the Secretary or the Director of the Office of Counterintelligence, and that it must be made in writing. DOE believes that the Secretary and the D/OCI must have the authority immediately to suspend an individual's access when they are in receipt of information that the individual poses an unacceptable risk to national security or defense.

Finally, one commenter stated that the proposed regulation did not reflect the full range of possible results since this section only considers ''deception indicated'' and ''no opinion.'' DOE believes that the regulation, taken in its entirety, does address the full range of possible results. The same commenter suggested that DOE should indicate the basis for arriving at the determinations of ''deception indicated'' and ''no opinion.'' DOE has revised the regulation in section 709.3 to provide a definition of each of these terms.

Section 709.26 How Does DOE Protect the Confidentiality of Polygraph Examination Records?

One commenter stated that counterintelligence officials no doubt would share information on individuals who refuse to take a polygraph examination. OCI will not share information on such individuals, except as provided in this rule. Under the provisions of section 709.26(e), DOE must protect from disclosure the fact that an individual refused to take a polygraph examination. However, in accordance with section 709.14, OCI must notify the individual's relevant Program Manager who must implement any actions required by section 709.14. In addition, as noted before, DOE will record a refusal in the individual's personnel security file, but not in his or her personnel file.

One commenter noted that DOE may not begin collecting and storing polygraph information until it publishes a Privacy Act notice regarding the establishment of a system of records on polygraph examinations. The Office of Counterintelligence has an existing system of records, System of Records 84, which was established in 1994. DOE is amending this system of records to clarify that polygraph examination records will be stored in this system and to explain how they will be protected.

Several commenters recommended that all the records of the polygraph examination be destroyed within a specified period of time following completion of the polygraph examination. The polygraph report is a permanent record. An individual is able to file a request for release of the polygraph report under the provisions of the Privacy Act. DOE has added a new paragraph (f) to section 709.26 which provides that, subject to DOE Order 1324.5B, with the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the eligibility evaluation is completed, and a favorable recommendation has been made to grant or continue the access any of to the positions identified in section 709.4(a)(1)–(8). If the recommendation is to deny or revoke access to the position, then the records are retained at least until the final resolution of any request for reconsideration by the individual or the completion of any ongoing investigation.

Subpart D—Polygraph Examination and Examiner Standards

Section 709.31 What Are The DOE Standards for Polygraph Examinations and Polygraph Examiners?

One commenter on this section suggested that DOE should publish standards for polygraph examinations and examiners that are at least as stringent as those set by the Department of Labor at 29 CFR 801.26. The commenter noted that DOE had not established a limit on the number of examinations that a polygrapher is permitted to conduct in a day. DOE has reviewed the provisions of 29 CFR 801.26 and has determined that those qualifications and requirements, such as a minimum bond requirement, are more appropriately applied to private examiners as opposed to those under contract to a federal agency. Nonetheless, DOE has revised section 709.31 to limit the number of examinations to five that an examiner may perform in a day. DOE has added a new paragraph (b) that provides that a polygraph examiner may not administer any more than five polygraph examinations in any twenty-four hour period. This does not include those instances in which an individual voluntarily terminates the examination prior to the actual testing phase.

DOE received a number of comments concerning the polygraph examiners themselves. One commenter suggested that, in order to reduce costs, DOE should hire independent contractors, who would provide their own polygraph equipment. A second commenter objected to DOE's use of contractors, rather than federal employees. A third commenter objected that DOE, as part of its effort to assure that it only used experienced polygraphers, was hiring experienced examiners from other federal agencies rather than training its own from the start. Still others suggested that DOE should hire female examiners to examine female individuals. Finally, several commenters recommended using independent polygraph examiners or permitting the individual to select his or her own polygrapher. DOE has considered these diverse comments and decided not to revise the proposed regulation because the commenters' suggestions would unnecessarily restrict DOE's ability to select the best polygraphers available.

A few commenters suggested that each polygraph examiner must obtain a personnel security clearance at or above that of the individual whom they are examining, or else the examiner should not be allowed to ask questions that concern classified information. DOE agrees with this comment. Proposed paragraph 709.31(c)(2) requires that DOE polygraph examiners complete a single scope background investigation and a counterintelligence scope polygraph examination. DOE believes that it is also appropriate to require the examiners to hold a ''Q'' access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, each examiner must have been granted SCI access approval. DOE has revised and relettered the proposed paragraph as paragraph 709.31(d)(2) to reflect these levels of required clearance and access.

One commenter suggested that each polygraph examiner should have adequate training in analysis of physiological data and that each should be a physician licensed in the District of Columbia and the state in which the polygraph examination is being conducted. Furthermore, the commenter believed that the polygraph examiners should meet the same annual requirements as those imposed on participants in the PAP and PSAP, go through a full-field FBI investigation, and make public a financial disclosure statement. Other suggested requirements included an annual psychological examination which focused on emotional stability and the ability to maintain objectivity while making judgments about people which may affect national security; urine tests taken before administering any polygraph examinations in order to demonstrate that the examiner is not impaired by alcohol; and constant monitoring to assure that the examiner does not drink alcoholic beverages after the urine test but before conducting the polygraph examination. DOE believes that these requirements are unnecessary and would not substantially enhance the reliability of DOE's polygraph program. In addition, the regulation already provides for appropriate monitoring of examinations.

DOE has deleted from paragraph 709.31(a) the statements concerning inspection, approval and certification of the DOE Test Center, because, although true, they did not state regulatory requirements.

Section 709.32 What Are The Training Requirements for Polygraph Examiners?

A number of commenters objected to what appeared to be minimal training requirements for polygraph examiners. Proposed section 709.32(a) provided that polygraph examiners must undergo a minimum forty hours of training annually within the discipline of

Forensic Psychophysiological Detection of Deception. This language established the annual continuing education requirement, as distinguished from the initial training required to become a polygraph examiner. DOE has revised section 709.32 to make clear the forty hours is an annual continuing education requirement and redesignated that section as paragraph (b). In addition, DOE has added a new paragraph 709.32(a) that establishes that each polygraph examiner must undergo an initial training period of thirteen weeks in accordance with the procedures and standards established by the DODPI.

V. Regulatory Review

A. National Environmental Policy Act

One commenter asserted that the proposed regulation would require the establishment of a number of offices and the hiring of new staff to administer the proposed polygraph examinations and therefore would require the preparation of an environmental assessment or impact statement. This rule establishes the procedures for use of polygraph examinations. DOE has determined that this rule is covered under the Categorical Exclusion found in the Department's National Environmental Policy Act regulations at paragraph A.6 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to rulemakings that are strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement is required. Furthermore, while DOE did hire new staff in order to implement DOE Notice 472.2 as it applied to Federal employees, it has no intention of building new facilities or hiring new staff to administer this program. The Department has made no determination that the institution of polygraph examinations will require any significant enlargement of staff or construction of new facilities. In any event, it is clear that not every Federal procurement or hiring decision necessitates an environmental impact statement. NEPA never has been applied to such administrative Federal actions.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that an agency prepare an initial regulatory flexibility analysis for any rule, for which a general notice of proposed rulemaking is required, that would have a significant economic effect on small entities. A final regulatory flexibility analysis must be prepared and made available when a final rule is published. These requirements do not apply if the agency ''certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605.

Comments submitted during this rulemaking prompted DOE to reevaluate the application of the Regulatory Flexibility Act to this rule. DOE finds that this rulemaking does not directly regulate small businesses or small governmental entities. The rule applies to individuals who currently are employed by, or applicants for employment by, some of the DOE's prime contractors. Furthermore, the contractors are primarily large businesses. Even if the rulemaking were to directly regulate some small businesses that are subcontractors, the rule does not have a significant economic impact because it would not impose unallowable costs on the small businesses. Accordingly, DOE certifies that the rule will not have a substantial impact on a significant number of small entities.

C. Paperwork Reduction Act

DOE has determined that this rule does not contain any new or amended record keeping, reporting, or application requirements, or any other type of information collection requirements subject to the Paperwork Reduction Act (Pub. L. No. 96–511).

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

This rule does not impose a Federal mandate on State, local or tribal governments. This rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

E. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. While today's rule applies to individuals who may be members of a family, the rule does not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

F. Executive Order 12866

Section 6 of Executive Order 12866 provides for a review by the Office of Information and Regulatory Affairs (OIRA) of a significant regulatory action, which is defined to include an action that may have an effect on the economy of $100 million or more, or adversely affect, in a material way, the economy, competition, jobs, productivity, the environment, public health or safety, or State, local, or tribal governments. DOE has concluded that this rule is not a significant regulatory action.

G. Executive Order 13132

Executive Order 13132 (64 FR 43255, August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

H. Executive Order 12875

Executive Order 12875 (Enhancing Intergovernmental Partnership), provides for reduction or mitigation, to the extent allowed by law, of the burden on State, local and tribal governments of unfunded Federal mandates not required by statute. The analysis under the Unfunded Mandates Reform Act of 1995, satisfies the requirements of Executive Order 12875. Accordingly, no further analysis is required under Executive Order 12875.

I. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, Civil Justice Reform, 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the rule meets the relevant standards of Executive Order 12988.

J. Executive Order 13084

Under Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments), DOE may not issue a discretionary rule that significantly or uniquely affects Indian tribal governments and imposes substantial direct compliance costs. This rule would not have such effects. Accordingly, Executive Order 13084 does not apply to this rulemaking.

K. Small Business Regulatory Enforcement Fairness Act of 1996

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 804(3).

List of Subjects

10 CFR Part 709

Polygraph tests.

10 CFR Part 710

Administrative practice and procedure, Classified information, Government contracts, Government employees, Nuclear materials.

10 CFR Part 711

Administrative practice and procedure, Alcohol abuse, Drug abuse, Government contracts, Government employees, Health, Nuclear safety, and Occupational safety and health.

Issued in Washington, D.C. on December 13, 1999.

Edward J. Curran,

Director, Office of Counterintelligence.

For the reasons stated in the preamble, DOE amends Chapter III of title 10 of the Code of Federal Regulations as set forth below:

1. New part 709 is added to read as follows:

PART 709—POLYGRAPH EXAMINATION REGULATIONS

Subpart A—General Provisions

Sec.
709.1 What is the purpose of this part?
709.2 What is the scope of this part?
709.3 What are the definitions of the terms used in this part?
709.4 To whom does the polygraph examination requirement under this part apply?
709.5 How will an individual know if his or her position will be eligible for a polygraph examination?
709.6 How often will an individual be subject to polygraph examination?

Subpart B—Polygraph Examination Protocols and Protection of National Security

709.11 What types of topics are within the scope of a polygraph examination?
709.12 How does DOE determine the wording of questions?
709.13 May an individual refuse to take a polygraph examination?
709.14 What are the consequences of a refusal to take a polygraph examination?
709.15 How does DOE use polygraph examination results?

Subpart C—Safeguarding Privacy and Employee Rights

709.21 When is an individual notified that a polygraph examination is scheduled?
709.22 What rights to counsel or other representation does an individual have?
709.23 How does DOE obtain an individual's consent to a polygraph examination?
709.24 What other information is provided to the individual prior to a polygraph examination?
709.25 Are there limits on use of polygraph examination results that reflect ''deception indicated'' or ''no opinion''?
709.26 How does DOE protect the confidentiality of polygraph examination records?

Subpart D—Polygraph Examination and Examiner Standards

709.31 What are the DOE standards for polygraph examinations and polygraph examiners?
709.32 What are the training requirements for polygraph examiners?

Authority: 42 U.S.C. 2011, *et seq.*, 42 U.S.C. 7101, *et seq.*, 42 U.S.C. 7383h.

Subpart A '' General Provisions

§ 709.1 What is the purpose of this part?

This part:

(a) Describes the categories of individuals who are eligible for counterintelligence-scope polygraph testing; and

(b) Provides guidelines for the use of counterintelligence-scope polygraph examinations and for the use of exculpatory polygraph examinations, upon the request of an individual, in order to resolve counterintelligence investigations and personnel security issues; and

(c) Provides guidelines for protecting the rights of individual DOE, and DOE contractor, and employees subject to this rule.

§ 709.2 What is the scope of this part?

This part includes:

(a) A description of the conditions under which DOE may administer and use polygraph examinations;

(b) A description of the positions which DOE may subject to polygraph examination;

(c) Controls on the use of polygraph examinations; and

(d) Safeguards to prevent unwarranted intrusion into the privacy of individuals.

§ 709.3 What are the definitions of the terms used in this part?

For purposes of this part:

Accelerated Access Authorization Program or AAAP means the program for granting interim access to classified

matter and special nuclear material based on a drug test, a National Agency Check, a psychological assessment, and a counterintelligence-scope polygraph examination consistent with this part.

Access means the admission of DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE to the eight categories of positions identified in § 709.4(a)(1)–(8).

Access authorization means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Adverse personnel action means

(1) With regard to a DOE employee, the removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less as described in 5 U.S.C. Chapter 75; or

(2) With regard to a contractor employee, the discharge, discipline, or denial of employment or promotion, or any other discrimination in regard to hire or tenure of employment or any term or condition of employment.

Contractor means a DOE contractor or a subcontractor at any tier.

Control questions means questions used during a polygraph examination that are designed to produce a physiological response, which may be compared to the physiological responses to the relevant questions.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.

Deception indicated means an opinion that indicates that an analysis of the polygraph charts reveal physiological responses to the relevant questions that were indicative of evasion.

DOE means the Department of Energy.

Eligibility evaluation means the process employed by the Office of Counterintelligence to determine whether DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE will be recommended for access or continued access to the eight categories of positions identified in § 709.4(a)(1)–(8).

Intelligence means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations or foreign persons.

Local commuting area means the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual employment.

No deception indicated means an opinion that indicates that an analysis of the polygraph charts revealed the physiological responses to the relevant questions were not indicative of evasion.

No opinion refers to an evaluation of a polygraph test in which the polygraph examiner cannot render an opinion based upon the physiological data on the polygraph charts.

Personnel Assurance Program or PAP means the human reliability program set forth under 10 CFR part 711 designed to ensure that individuals assigned to nuclear explosive duties do not have emotional, mental or physical incapacities that could result in a threat to nuclear explosive safety.

Personnel Security Assurance Program or PSAP means the program in subpart B of 10 CFR part 710.

Personnel security clearance means an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.

Polygraph means an instrument that

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

Polygraph examination means a process that encompasses all activities that take place between a polygraph examiner and individual during a specific series of interactions, including the pretest interview, the use of the polygraph instrument to collect physiological data from the individual while the polygraph examiner is presenting a series of tests, the test data analysis phase, and the post-test phase.

Polygraph examination records means all records of the polygraph examination, including the polygraph report, audio-video recording, and the polygraph consent form.

Polygraph report refers to a polygraph document that may contain identifying data of the individual, a synopsis of the basis for which the examination was conducted, the relevant questions utilized and the polygraph examiner's conclusions.

Polygraph test means that portion of the polygraph examination during which the polygraph instrument collects physiological data based upon the individual's responses to test questions from the examiner.

Relevant questions are those questions used during the polygraph examination that pertain directly to the issues for which the examination is being conducted.

Special Access Program or SAP means a program established under Executive Order 12958 for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

Unresolved issues refers to an opinion which indicates that the analysis of the polygraph charts revealed consistent, significant, timely physiological responses to the relevant questions in personnel screening.

§ 709.4 To whom does the polygraph examination requirement under this part apply?

(a) Except as provided in paragraph (b) of this section, this part applies to DOE and contractor employees and applicants for employment, and other individuals assigned or detailed to Federal positions at DOE, who are in:

(1) Positions that DOE has determined include counterintelligence activities or access to counterintelligence sources and methods;

(2) Positions that DOE has determined include intelligence activities or access to intelligence sources and methods;

(3) Positions requiring access to information that is protected within a non-intelligence special access program (SAP) designated by the Secretary of Energy;

(4) Positions that are subject to the Personnel Security Assurance Program (PSAP);

(5) Positions that are subject to the Personnel Assurance Program (PAP);

(6) Positions that DOE has determined have a need-to-know or access to information specifically designated by the Secretary regarding the design and operation of nuclear weapons and associated use control features;

(7) Positions within the Office of Independent Oversight and Performance Assurance, or any successor thereto, involved in inspection and assessment of safeguards and security functions, including cyber security, of the Department;

(8) Positions within the Office of Security and Emergency Operations, or any successor thereto;

(9) The Accelerated Access Authorization Program (AAAP); and

(10) Positions where the applicant or incumbent has requested a polygraph examination in order to respond to questions that have arisen in the context of counterintelligence investigations or personnel security issues. These examinations are referred to in this part as exculpatory polygraph examinations.

(b) This part does not apply to:

(1) Any individual for whom the Director of the Office of Counterintelligence (D/OCI), gives a waiver, based upon certification from another Federal agency that the individual has successfully completed a full scope or counterintelligence-scope polygraph examination administered within the last five years;

(2) Any individual who is being treated for a medical or psychological condition or is taking medication that, based upon consultation with the individual, the DOE Test Center determines would preclude the individual from being tested; or

(3) Any individual for whom the Secretary of Energy gives a written waiver in the interest of national security.

(c) The Program Manager responsible for each program with positions identified in paragraphs (a)(1)–(8) of this section identifies in the first instance, in order of priority, those specific positions that will be polygraphed.

(d) The Program Manager submits positions identified under paragraph (c) of this section to the D/OCI for review and concurrence. The D/OCI forwards the positions, with suggested additions or deletions, to the Secretary for approval.

§ 709.5 How will an individual know if his or her position will be eligible for a polygraph examination?

(a) All positions in the programs described in § 709.4(a)(1)–(8) are eligible for polygraph examination. When a polygraph examination is scheduled, DOE must notify the individual, in accordance with § 709.21.

(b) Any job announcement or posting with respect to any position in those programs must indicate that the selection of an individual for the position may be conditioned upon his or her successful completion of a counterintelligence-scope polygraph examination.

§ 709.6 How often will an individual be subject to polygraph examination?

Positions identified in § 709.4(a)(1)–(8) are subject to a five year periodic, as well as an aperiodic, reinvestigation polygraph.

Subpart B—Polygraph Examination Protocols and Protection of National Security

§ 709.11 What types of topics are within the scope of a polygraph examination?

(a) DOE may ask questions that are appropriate to a counterintelligence-scope examination or that are relevant to the matter at issue in an exculpatory examination.

(b) A counterintelligence-scope polygraph examination is limited to topics concerning the individual's involvement in espionage, sabotage, terrorism, unauthorized disclosure of classified information, unauthorized foreign contacts, and deliberate damage to or malicious misuse of a U.S. government information or defense system.

(c) DOE may not ask questions that:

(1) Probe a person's thoughts or beliefs;

(2) Concern conduct that has no counterintelligence implication; or

(3) concern conduct that has no direct relevance to an investigation.

§ 709.12 How does DOE determine the wording of questions?

The examiner determines the exact wording of the polygraph questions based on the examiner's pretest interview of the individual, the individual's understanding of the questions, and other input from the individual.

§ 709.13 May an individual refuse to take a polygraph examination?

(a) Yes. An individual may refuse to take a counterintelligence-scope or exculpatory polygraph examination, and an individual being examined may terminate the examination at any time.

(b) If an individual terminates a counterintelligence-scope or exculpatory polygraph examination prior to the completion of the examination, DOE may treat that termination as a refusal to take a polygraph examination under § 709.14.

§ 709.14 What are the consequences of a refusal to take a polygraph examination?

(a) If an individual is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8), and the individual refuses to take a counterintelligence polygraph examination required by statute as an initial condition of access, DOE and its contractors must refuse to employ, assign, or detail the individual to the identified position.

(b) If the individual is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8) and the individual refuses to take a counterintelligence polygraph examination otherwise required by this part, DOE and its contractors may refuse to employ, assign, or detail the individual to the identified position.

(c) If an individual is an incumbent in a position described in § 709.4(a)(1)–(8) and the individual refuses to take a counterintelligence polygraph examination required by statute as a condition of continued access, DOE and its contractors must deny the individual access to the information or involvement in the activities that justified conducting the examination, consistent with § 709.15. If the individual is a DOE employee, DOE may reassign or realign the individual's duties, within the local commuting area, or take other action, consistent with that denial of access.

(d) If the individual is an incumbent in a position described in § 709.4(a)(1)–(8), and the individual refuses to take a counterintelligence polygraph examination as required by this part, DOE and its contractors may deny that individual access to the information or involvement in the activities that justified conducting the examination, consistent with § 709.15. If the individual is a DOE employee, DOE may reassign or realign the individual's duties, within the local commuting area, or take other action, consistent with that denial of access.

(e) If the individual is a DOE employee whose current position does not require a counterintelligence polygraph examination and is an applicant for employment, assignment, or detail to one of the positions described in § 709.4(a)(1)–(8), the individual's refusal to take a polygraph examination will not affect the individual's current employment status.

(f) If an individual refuses to take a polygraph examination as part of the Accelerated Access Authorization Program, DOE must terminate the accelerated authorization process and the individual may continue to be processed for access authorization under the standard DOE personnel security process.

(g) Since an exculpatory polygraph examination is administered at the request of an individual, DOE and its contractors may not take any adverse personnel action against an individual for refusing to request or take an exculpatory polygraph examination. DOE and its contractors may not record an individual's refusal to take an exculpatory polygraph examination in the individual's personnel security file, or any investigative file. DOE also may

not record the fact of that refusal in a DOE employee's personnel file.

(h) If a DOE employee refuses to take a counterintelligence polygraph examination, DOE may not record the fact of that refusal in the employee's personnel file.

§ 709.15 How does DOE use polygraph examination results?

(a) If, following the completion of the polygraph test, there are any unresolved issues, the polygraph examiner must conduct an in-depth interview of the individual to address those unresolved issues.

(b) If, after the polygraph examination, there are remaining unresolved issues that raise significant questions relevant to the individual's access to the information or involvement in the activities that justified the polygraph examination, DOE must so advise the individual and provide an opportunity for the individual to undergo an additional polygraph examination. If the additional polygraph examination is not sufficient to resolve the matter, DOE must undertake a comprehensive investigation of the individual, using the polygraph examination as an investigative lead.

(c) The Office of Counterintelligence (OCI) will conduct an eligibility evaluation that considers examination results, the individual's personnel security file, and other pertinent information. If unresolved issues remain at the time of the eligibility evaluation, DOE will interview the individual if it is determined that a personal interview will assist in resolving the issue. No denial or revocation of access will occur until the eligibility evaluation is completed.

(d) Following the eligibility evaluation, D/OCI must recommend, in writing, to the Program Manager responsible for the access that the individual's access be approved or retained, or denied or revoked.

(1) If the Program Manager agrees with the recommendation, the Program Manager will notify the individual, in writing, that the individual's access has been approved or retained, or denied or revoked.

(2) If the Program Manager disagrees with the D/OCI's recommendation the matter will be referred to the Secretary for a final decision.

(3) If the Program Manager denies or revokes the individual's access, and the individual is a DOE employee, DOE may reassign the individual or realign the individual's duties within the local commuting area or take other actions consistent with the denial of access.

(4) If the Program Manager denies the individual's access and the individual is an applicant for employment, assignment, or detail to one of the positions described in 709.4(a)(1)–(8), DOE and its contractors may refuse to employ, assign or detail the individual to the identified position.

(5) If the Program Manager revokes the access of an individual assigned or detailed to DOE, DOE may remove the individual from access to the information that justified the polygraph examination and return the individual to the agency of origin.

(6) If the Program Manager denies or revokes the access for an individual applying for a DOE access authorization or already holding a DOE access authorization, DOE may initiate an administrative review of the individual's clearance eligibility under the DOE regulations governing eligibility for a security clearance at 10 CFR part 710.

(7) For cases involving a question of loyalty to the United States, DOE may refer the matter to the FBI as required by section 145d of the AEA.

(e) DOE and contractor employees, applicants for employment, and other individuals assigned or detailed to Federal positions within DOE whose access to the categories described in § 709.4(a)(1)–(8) is denied or revoked may request reconsideration by the relevant head of the departmental element, as identified in the notice of denial or revocation. Individuals who decline to take the counterintelligence scope polygraph examination will not be afforded these reconsideration rights.

(f) Utilizing the DOE security criteria used to grant or deny access to classified information, OCI will make a determination whether an individual completing a counterintelligence polygraph examination has made disclosures that warrant referral, as appropriate, to the Office of Security and Emergency Operations or the Manager of the applicable Operations Office. OCI will not report minor security infractions that do not create a serious question as to the individual's eligibility for a personnel security clearance.

Subpart C—Safeguarding Privacy and Employee Rights

§ 709.21 When is an individual notified that a polygraph examination is scheduled?

When a polygraph examination is scheduled, DOE must notify the individual, in writing, of the date, time, and place of the polygraph examination, and the individual's right to obtain and consult with legal counsel or to secure another representative prior to the examination. DOE must provide a copy of this part to the individual. The individual must receive the notification at least ten days, excluding weekend days and holidays, before the time of the examination except when good cause is shown or when the individual waives the advance notice provision.

§ 709.22 What rights to counsel or other representation does an individual have?

(a) At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative prior to the polygraph examination. The counsel or representative may not be present during the polygraph examination. No one other than the individual and the examiner may be present in the examination room during the polygraph examination.

(b) At the individual's own expense, an individual has the right to obtain and consult with legal counsel or another representative at any time during an interview conducted in accordance with § 709.15(c).

§ 709.23 How does DOE obtain an individual's consent to a polygraph examination?

DOE may not administer a polygraph examination unless DOE has:

(a) Notified the individual of the polygraph examination in writing in accordance with § 709.21; and

(b) Obtained written consent from the individual.

§ 709.24 What other information is provided to the individual prior to a polygraph examination?

Before administering the polygraph examination, the examiner must:

(a) Inform the individual of the use of audio and video recording devices and other observation devices, such as two-way mirrors and observation rooms;

(b) Explain to the individual the characteristics and nature of the polygraph instrument and examination;

(c) Explain the physical operation of the instrument and the procedures to be followed during the examination;

(d) Review with the individual the control questions and relevant questions to be asked during the examination;

(e) Advise the individual of the individual's privilege against self-incrimination; and

(f) Provide the individual with a pre-addressed envelope addressed to the D/OCI in Washington, D.C., which may be used to submit comments or complaints concerning the examination.

§ 709.25 Are there limits on use of polygraph examination results that reflect ''deception indicated'' or ''no opinion''?

(a) DOE or its contractors may not:

(1) Take an adverse personnel action against an individual solely on the basis of a polygraph examination result of ''deception indicated'' or ''no opinion''; or

(2) Use a polygraph examination that reflects ''deception indicated'' or ''no opinion'' as a substitute for any other required investigation.

(b) The Secretary or the D/OCI may suspend an individual's access based upon a written determination that the individual's admission of involvement in one or more of the activities covered by the counterintelligence polygraph, when considered in the context of the individual's access to one or more of the high risk programs identified in § 709.4(a)(1)–(8), poses an unacceptable risk to national security or defense. In such cases, DOE will investigate the matter immediately and make a determination of whether to revoke the individual's access.

§ 709.26 How does DOE protect the confidentiality of polygraph examination records?

(a) DOE owns all polygraph examination records and reports.

(b) Except as provided in paragraph (c) of this section, the Office of Counterintelligence maintains all polygraph examination records and reports in a system of records established under the Privacy Act of 1974, 5 U.S.C. 552a.

(c) The Office of Intelligence also may maintain polygraph examination reports generated with respect to individuals identified in § 709.4(a)(2) in a system of records established under the Privacy Act.

(d) Polygraph examination records and reports used to make AAAP determinations or generated as a result of an exculpatory personnel security polygraph examination are maintained in a system of records established under the Privacy Act of 1974.

(e) DOE must afford the full privacy protection provided by law to information regarding an employee's refusal to take a polygraph examination.

(f) With the exception of the polygraph report, all other polygraph examination records are destroyed ninety days after the eligibility evaluation is completed, provided that a favorable recommendation has been made to grant or continue the access to the position. If a recommendation is made to deny or revoke access to the information or involvement in the activities that justified conducting the polygraph examination, then all the records are retained at least until the final resolution of any request for reconsideration by the individual or the completion of any ongoing investigation.

Subpart D—Polygraph Examination and Examiner Standards

§ 709.31 What are the DOE standards for polygraph examinations and polygraph examiners?

(a) DOE adheres to the procedures and standards established by the Department of Defense Polygraph Institute (DODPI). DOE administers only DODPI approved testing formats.

(b) A polygraph examiner may administer no more than five polygraph examinations in any twenty-four hour period. This does not include those instances in which an individual voluntarily terminates an examination prior to the actual testing phase.

(c) The polygraph examiner must be certified to conduct polygraph examinations under this part by the DOE Psychophysiological Detection of Deception/Polygraph Program Quality Control Official.

(d) To be certified under paragraph (c) of this section, an examiner must have the following minimum qualifications:

(1) The examiner must be an experienced counterintelligence or criminal investigator with extensive additional training in using computerized instrumentation in Psychophysiological Detection of Deception and in psychology, physiology, interviewing, and interrogation.

(2) The examiner must have a favorably adjudicated single-scope background investigation, complete a counterintelligence-scope polygraph examination, and must hold a ''Q'' access authorization, which is necessary for access to Secret Restricted Data and Top Secret National Security Information. In addition, he or she must have been granted SCI access approval.

(3) The examiner must receive basic Forensic Psychophysiological Detection of Deception training from the DODPI.

(4) The examiner must be certified by DOE to conduct the following tests:

(i) Test for Espionage, Sabotage, and Terrorism;

(ii) Counterintelligence-Scope Polygraph Tests;

(iii) Zone Comparison Tests;

(iv) Modified General Question Tests;

(v) Peak of Tension Tests; and,

(vi) Relevant and Irrelevant and Directed Lie Control Tests.

§ 709.32 What are the training requirements for polygraph examiners?

(a) Examiners must complete an initial training course of thirteen weeks, or longer, in conformance with the procedures and standards established by DODPI.

(b) Examiners must undergo annual continuing education for a minimum of forty hours training within the discipline of Forensic Psychophysiological Detection of Deception.

(c) The following organizations provide acceptable curricula to meet the training requirement of paragraph (b) of this section:

(1) American Polygraph Association,

(2) American Association of Police Polygraphists, and

(3) Department of Defense Polygraph Institute.

PART 710—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER OR SPECIAL NUCLEAR MATERIAL

2. The authority citation for part 710 continues to read as follows:

Authority: Sec. 145, 68 Stat. 942 (42 U.S.C. 2165) and sec. 161, 68 Stat. 948 (42 U.S.C. 2201); E.O. 10450, 3 CFR 1949–1953 Comp., p. 936, as amended; E.O. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended, 3 CFR Chap. IV; sec. 104(c), 38 Stat. 1237 (42 U.S.C. 5814); sec. 105(a), 88 Stat. 1238 (42 U.S.C. 5815); secs. 641, 644, 646, 91 Stat. 598, 599 (42 U.S.C. 7251, 7254, and 7256).

3. In § 710.57 (subpart B), paragraphs (f) through (i) are redesignated as paragraphs (g) through (j) and a new paragraph (f) is added to read as follows:

§ 710.57 Supervisory review.

* * * * *

(f) Applicants tentatively selected for PSAP positions and each individual occupying a PSAP position, but not yet holding a PSAP access authorization, must submit to a polygraph examination under 10 CFR part 709.

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PART 711—PERSONNEL ASSURANCE PROGRAM (PAP)

4. The authority citation for part 711 continues to read as follows:

Authority: 42 U.S.C. 2201(p), 7191.

5. In § 711.5:

a. Paragraph (b)(6) is amended by removing the word ''and'' from the end of the paragraph;

b. Paragraph (b)(7) is amended by removing the period at the end of the paragraph and adding ''; and'' in its place; and

c. Paragraph (b)(8) is added to read as follows:

§ 711.5 General requirements.

* * * * *

(b) * * *

(8) Be eligible for a polygraph examination under 10 CFR part 709.

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