

(5) *Length of appointments.* A covered agency may use this authority to appoint individuals for a period of more than 1 year, but not more than 4 years.

(i) A covered agency may extend any appointment under this authority for up to 4 additional years, if the direct hire authority remains in effect.

(ii) No individual may serve more than 8 years on an appointment made under these provisions for information technology positions.

(iii) No individual hired under these provisions may be transferred to positions that are not IT positions.

■ 3. Add paragraph (c) to § 337.205 to read as follows:

**§ 337.205 Critical hiring needs.**

\* \* \* \* \*

(c) *Information Technology (IT) positions.* (1) The head of a covered agency, as defined in paragraph (c)(2) of this section, may determine whether a critical hiring need exists for any position in the information technology management series, general schedule (GS)–2210 or equivalent. In making such a determination, a covered agency must adhere to and use the supporting evidence criteria prescribed in paragraphs (b)(1)–(4) of this section. In addition, a covered agency must maintain a file of the supporting evidence for documentation and reporting purposes. Upon determination of such a finding, an agency head may approve a direct hire authority for covered positions within the agency.

(2) *Covered agency.* A covered agency is an entity listed in 31 U.S.C. 901(b) (excluding the Department of Defense), or an independent regulatory agency defined in 44 U.S.C. 3502(5).

(3) *Notification to the U.S. Office of Personnel Management (OPM).* Once the head of a covered agency affirmatively determines the presence of a critical hiring need and the direct hire authority is approved by the agency head, he or she must notify OPM within 10 business days. Such notification must include a description of the supporting evidence relied upon in making the determination.

(4) *Using this authority.* A covered agency must adhere to all provisions of subpart B of this part.

(5) *Length of appointments.* A covered agency may use this authority to appoint individuals for a period of more than 1 year, but not more than 4 years, if the direct hire authority remains in effect.

(i) A covered agency may extend any appointment under this authority for up to 4 additional years.

(ii) No individual may serve more than 8 years on an appointment made

under these provisions for information technology positions.

(iii) No individual hired under these provisions may be transferred to positions that are not IT positions.

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**BILLING CODE 6325–39–P**

## DEPARTMENT OF ENERGY

### 10 CFR Part 1004

**RIN 1901–AB44**

#### Critical Electric Infrastructure Information; New Administrative Procedures

**AGENCY:** Office of Electricity, U.S. Department of Energy.

**ACTION:** Notice of proposed rulemaking and opportunity for comment.

**SUMMARY:** The Department of Energy (DOE or Department) publishes a proposed rule for public comment to implement DOE’s critical electric infrastructure information (CEII) designation authority under the Federal Power Act. The proposed administrative procedures are intended to ensure that stakeholders and the public understand how the Department would designate, protect, and share CEII under the Federal Power Act.

**DATES:** Public comment on this proposed rule will be accepted until December 28, 2018.

**ADDRESSES:** You may submit comments, identified by RIN 1901–AB44, by any of the following methods:

1. *Federal eRulemaking Portal:* Follow the instructions for submitting comments on the Federal eRulemaking Portal at <http://www.regulations.gov>.

2. *Email:* Send email to [oeregs@hq.doe.gov](mailto:oeregs@hq.doe.gov). Include RIN 1901–AB44 in the subject line of the email. Please include the full body of your comments in the text of the message or as an attachment.

3. *Mail:* Address postal mail to U.S. Department of Energy, Office of Electricity, Mailstop OE–20, Room 8E–030, 1000 Independence Avenue SW, Washington, DC 20585.

Due to potential delays in the delivery of postal mail, we encourage respondents to submit comments electronically to ensure timely receipt.

This notice of proposed rulemaking and any comments that DOE receives will be made available on [regulations.gov](http://regulations.gov) or the DOE Office of Electricity website at: <https://www.energy.gov/oe/office-electricity>.

**FOR FURTHER INFORMATION CONTACT:** Julie Ann Smith, Ph.D., U.S. Department of

Energy, Office of Electricity, Mailstop OE–20, Room 8E–030, 1000 Independence Avenue SW, Washington, DC 20585; 202–586–7668; or [oeregs@hq.doe.gov](mailto:oeregs@hq.doe.gov).

#### SUPPLEMENTARY INFORMATION:

*Acronyms and Abbreviations.* A number of acronyms and abbreviations are used in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms, acronyms, and abbreviations are defined as follows:

DHS Department of Homeland Security  
DOE Department of Energy  
CEII Critical Electric Infrastructure Information  
FAST Act Fixing America’s Surface Transportation Act  
FERC Federal Energy Regulatory Commission  
FOIA Freedom of Information Act  
FPA Federal Power Act  
NTIA National Telecommunications and Information Administration  
OE Office of Electricity (office within DOE)  
PMA Power Marketing Administration

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#### I. Introduction and Background

In this proposed rule, DOE proposes to establish procedures for the designation of critical electric infrastructure information (CEII) under the Fixing America’s Surface Transportation Act (FAST Act), Public Law 114–94. The FAST Act contains

several provisions designed to protect and enhance the Nation's electric power delivery infrastructure. Section 61003 of that Act added a new section 215A, entitled "Critical Electric Infrastructure Security," to Part II of the Federal Power Act (FPA), codified at 16 U.S.C. 824o-1. FPA section 215A authorizes both the Secretary of Energy (the Secretary) and the Federal Energy Regulatory Commission (FERC) independently to designate CEII. The FAST Act required FERC, after consultation with the Secretary, to "promulgate such regulations as necessary to . . . establish criteria and procedures to designate information as [CEII]". 16 U.S.C. 824o-1(d)(2). While FERC's 2016 rulemaking established criteria for designating CEII applicable to both FERC and the Department, the designation procedures in the rulemaking were limited to FERC. Thus, the Department proposes to establish its own designation procedures.

The Department has sought to harmonize its procedures with the FERC procedures as much as possible. Some small variations are the result of the different roles of each agency. Specifically, the Department anticipates receiving a smaller volume of CEII materials, due to DOE's non-regulatory role, which gives DOE the flexibility to engage in more proactive designations. Additionally, the Department's procedures reflect informal input from industry representatives, who are the submitters of CEII, regarding enhancements the DOE could make when adapting CEII procedures to the unique role of DOE as the Sector-Specific Agency for the Energy Sector. For example, DOE has designed proposed procedures that anticipate designation before a FOIA request is received and allow for longer industry response times before materials are released.

According to the statutory definition, CEII includes information that qualifies as "critical energy infrastructure information" under existing FERC regulations, which are codified at 18 CFR 388.113(c). These proposed CEII regulations align with DOE's role as the lead Sector-Specific Agency for cybersecurity for the energy sector under section 61003(c)(2)(A) of the FAST Act, and the Sector-Specific Agency for Energy (Critical Infrastructure) under Presidential Policy Directive 21, "Critical Infrastructure Security and Resilience" (Feb. 12, 2013). In those roles and in coordination with DHS, DOE coordinates interagency sharing of information concerning the energy sector.

## II. Discussion of Proposed Rule

### General

Through this proposed rule, DOE would establish a set of procedures by which the Secretary of Energy would designate, protect, and share CEII under new section 215A of the FPA, according to criteria FERC has established and codified at 18 CFR 388.113. This proposed rule would also set forth provisions concerning the type of information that DOE would designate as CEII, when that information has been submitted in response to a request from DOE. The proposed procedures apply to both Federal entities and non-Federal entities that may submit or request information designated, protected, and shared as CEII. The procedures do not contemplate any new collection or storage techniques, but instead describe marking protocols for physical and electronic materials to indicate that they are to be treated as CEII. These procedures better facilitate the use of the CEII FOIA exemption for material shared with the Department for reasons outside the scope of this proposed rule.

In this proposed rule, DOE also intends to address stakeholder concerns about the protection of critical infrastructure information from public release.<sup>1</sup> For example, DOE is proposing a process for immediate CEII designation (pre-designation) of information marked "Defense Critical Electric Infrastructure Information," and for information provided by industry in response to certain Federal agency reporting requirements. DOE also proposes to address concerns about the format required and time allotted for communications with DOE regarding its CEII designation actions. DOE further proposes increased coordination between DOE and submitters of potential CEII-designated materials to facilitate voluntary sharing of CEII with, between, and by Federal and non-Federal entities, as appropriate.<sup>2</sup>

<sup>1</sup> On February 14–15, 2018, DOE's Office of Electricity (OE) (known at the time as DOE's Office of Electricity Delivery and Energy Reliability) and Office of Policy convened representatives from energy industry, local, state, and Federal government agencies to discuss issues, challenges, and opportunities in CEII-sharing frameworks and optional information sharing protections and protocols leading up to the development of this proposed rule. A memorandum summarizing this meeting is available at <https://www.energy.gov/oe/office-electricity>.

<sup>2</sup> New Section 215A(d) of the Federal Power Act (FPA) requires DOE to develop its proposed CEII procedures necessary to, "taking into account standards of the Electric Reliability Organization, facilitate voluntary sharing of critical electric infrastructure information with, between, and by: (i) Federal, State, political subdivision, and tribal authorities; (ii) the Electric Reliability Organization; (iii) regional entities; (iv) information sharing and

Finally, DOE is proposing that the Department convene on occasion with other Federal agencies, in order to facilitate mutual understanding among Federal information classification programs as it may relate to CEII.

Note that as a general principle, DOE does not intend to designate information as CEII if it has been made publicly available by the owner or generator of the CEII previously.

### Definitions

Section 1004.13(c) of the proposed rule would define terms applicable to the proposed procedures in this notice for the designation of critical electric infrastructure information. Some terms are adopted from those used in the existing procedures. Other terms are proposed for the first time in this context.

"Bulk-power system" means the facilities and control systems necessary for operating an interconnected electric energy transmission network (and any portion thereof) and electric energy from generation facilities needed to maintain transmission system reliability. The term excludes facilities used in local electric distribution.

"Critical electric infrastructure" means a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.

"Critical electric infrastructure information" or "CEII" means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to FERC or another Federal agency, other than classified national security information, that is designated as critical electric infrastructure information by FERC or the Secretary pursuant to section 215A(d) of the FPA.<sup>3</sup> CEII-designated material would include information related to Defense

analysis centers established pursuant to Presidential Decision Directive 63; (v) owners, operators, and users of critical electric infrastructure in the United States; and (vi) other entities determined appropriate by the [Federal Energy Regulatory] Commission." 16 U.S.C. 824o-1(d)(2)(D).

<sup>3</sup> Section 215A of the FPA defines critical electric infrastructure information to include information that is (i) "related to critical electric infrastructure, or proposed critical electric infrastructure," (ii) "generated by or provided to the Commission or other Federal agency" and (iii) "designated as critical electric infrastructure information by the Commission or the Secretary." The definition then notes that "[s]uch term includes information that qualifies as critical energy infrastructure information under the Commission's regulations." 16 U.S.C. 824o-1(a)(3).

Critical Electric Infrastructure, consistent with section 215A(a)(4) of the FPA. DOE would also include the following in the definition of CEII: (1) “critical energy infrastructure information” as described in 18 CFR 388.113(c);<sup>4</sup> (2) information reported to DOE through the Electric Emergency Incident and Disturbance Report (Form OE-417); and (3) Federal spectrum information managed by the National Telecommunications and Information Administration (NTIA) as CEII-designated material.

“CEII coordinator” means the Assistant Secretary or Principal Deputy Assistant Secretary of the DOE Office of Electricity, who shall provide coordination for and oversight of the implementation of DOE’s program for CEII designation authority under Section 215A of the FPA and shall assist all DOE Offices in determining whether particular information meets the definition of CEII, as well as managing DOE’s protection, storage, and sharing of CEII materials to ensure that CEII materials are shielded from disclosure in accordance with the Federal Power Act and the Freedom of Information Act. The CEII coordinator may delegate the daily implementation of the CEII coordinator function as described in this proposed rule to an appropriate official in the DOE Office of Electricity, Bonneville Power Administration, Energy Information Administration, Southeastern Power Administration, Southwestern Power Administration, or Western Area Power Administration (“Coordinator’s designee”).

#### *Summary of Proposed Procedural Rules for CEII Designation*

Proposed § 1004.13(a) provides interested stakeholders with the location of information regarding CEII filing procedures and guidance.

As described in proposed § 1004.13(b), procedures for the designation, protection, and sharing of CEII developed under section 215A of the FPA would apply to anyone who provides CEII to DOE or who receives CEII from DOE, including DOE employees, DOE contractors, agents of DOE, and individuals or organizations who have been permitted access to CEII, as well as non-DOE entities submitting CEII to DOE or receiving CEII from DOE.

<sup>4</sup> FERC’s regulations at 18 CFR 388.113(c) define “critical energy infrastructure information” to include information that: (i) Relates details about the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and (iv) Does not simply give the general location of the critical infrastructure.”

These proposed procedures would also apply to other Federal agencies seeking CEII designation and protection of information agencies may submit to DOE.

Proposed § 1004.13(c) defines the terms Critical Electric Infrastructure, Critical Electric Infrastructure Information (CEII), CEII Coordinator, Defense Critical Electric Infrastructure, Department of Energy (DOE), DOE Office, and Secretary, as used throughout proposed § 1004.13. Where the terms are defined by statute or by FERC’s CEII regulations, the definitions track those corresponding definitions, either verbatim or with maximum consistency.

The procedures, as described in proposed § 1004.13(d), are designed to allow the Secretary, or DOE Offices with authority delegated by the Secretary, to receive and designate CEII in a manner ensuring that the Department can access the critical information it needs to execute its responsibilities as the lead Sector-Specific Agency for cybersecurity for the energy sector and the Sector-Specific Agency for Energy (Critical Infrastructure). The FAST Act protects CEII by exempting CEII-designated information from disclosure under the Freedom of Information Act (FOIA), as codified at 5 U.S.C. 552(b)(3), or any Federal, State, political subdivision, or tribal law requiring disclosure of information or records. The proposed rules set out a standardized process to request CEII designation, and requirements for treatment of CEII following a CEII determination. The following sections provide greater detail regarding the proposed revisions to the Department’s FOIA regulations.

Proposed § 1004.13(e) sets out the functions of the CEII Coordinator and the Coordinator’s designee. The CEII coordinator may apply immediate CEII designation (pre-designation) to information such as that marked as “Defense Critical Electric Infrastructure Information,” or to information provided by industry in response to certain Federal agency reporting requirements or requests, as appropriate. However, final CEII designation authority would reside with the DOE Office exercising its delegated CEII designation authority. The CEII Coordinator, in consultation with the DOE Office with CEII designation authority, would be the responsible DOE official to make a final determination regarding the release of CEII to any non-Federal entity requesting the release of CEII-designated materials from the Department. The proposed subsection also provides that DOE entities with authority to designate

CEII would meet to calibrate their approaches to CEII designation, and would meet with representatives of other Federal agencies, as needed and at the discretion of the Coordinator or designee, to ensure consistent understanding of CEII designation processes.

Proposed § 1004.13(f) states that CEII is exempt from disclosure under FOIA, as provided by the FAST Act amendments to the FPA.

Proposed § 1004.13(g) sets out criteria and procedures the Department would follow to designate CEII. The subsection covers requesting designation for information submitted to or generated by DOE, how DOE would treat submitted information and apply the CEII designation criteria, how DOE would treat information once it has decided whether to designate the information as CEII, and how DOE would protect designated CEII.

Proposed § 1004.13(h) states that CEII designations can last up to five years and are renewable, and describes how designation may be removed and how DOE would treat and return the information should its designation be removed.

Proposed § 1004.13(i) describes how a submitter may request reconsideration of a decision not to designate CEII, not to release CEII in response to a request for release, or not to maintain an existing CEII designation, and discusses eligibility for judicial review. The subsection also notes that, with several exceptions, a reconsideration request triggers a stay of the underlying decision.

Proposed § 1004.13(j) discusses tightly-controlled sharing of CEII among Federal and non-Federal Entities, taking into account International Sharing Protocols when appropriate. The subsection notes that when the Department plans to share CEII it did not generate, it would notify the submitter well in advance unless circumstances dictate otherwise and would speak directly with the submitter before sharing any of the information to discuss any concerns and make a well-informed determination.

Proposed § 1004.13(k) describes procedural requirements for requesting CEII. A request must include contact information, an explanation of the need for and intended use of the CEII, and a signed Non-Disclosure Acknowledgment or Agreement, as applicable.

Proposed § 1004.13(l) sets out penalties and sanctions for unauthorized disclosure of CEII, emphasizing that statutory whistleblower protections still apply.

(a) Criteria and Procedure for Designating CEII

Proposed § 1004.13 outlines criteria and procedures for designating CEII. The Department understands that the energy sector, including electric entities, requires assurance that certain critical information will be protected from public disclosure. DOE would take appropriate measures related to the treatment of submitted information as CEII, including designation of a central Departmental point of contact for all CEII matters—the DOE CEII Coordinator as defined in § 1004.13(c)(3)—who would provide oversight and assistance to DOE Offices in the implementation of the proposed procedures as described in § 1004.13(e).

In cases where information concerns “Defense Critical Electric Infrastructure,” as defined by Section 215A(a)(4) of the FPA, DOE proposes to designate such information as CEII automatically upon receipt by the DOE CEII Coordinator. In cases where information concerning Federal government agency spectrum use managed by the NTIA is submitted,<sup>5</sup> or in cases in which information on electric incidents and emergencies reported to DOE through Form OE-417 is submitted as a part of a CEII-designation request, DOE also proposes to designate such information as CEII automatically upon receipt by the DOE CEII Coordinator.<sup>6</sup> In communications to the submitter, or DOE Office and/or Federal agency generating the information, DOE may “pre-designate” such information as CEII, noting why it

<sup>5</sup> See Executive Order No. 12046, as amended, 3 CFR (1978 comp.) 158, *reprinted in* 47 U.S.C. 305 app. at 127 (1989); U.S. Department of Commerce, Department Organization Orders 10-10 and 25-7. Executive Order No. 12046, as amended, requires that NTIA, on behalf of the Secretary of Commerce, act as Federal spectrum manager for Federal government agency spectrum users, and as the principal Executive branch advisor on telecommunications policy. Information concerned with Federal agency spectrum frequency assignments includes data about critical electric infrastructure owned and/or operated by Federal Power Marketing Administrations.

<sup>6</sup> Electric utilities that operate as Balancing Authority Area and/or Reliability Coordinator as well as other electric utilities, as appropriate, are required to file the Form OE-417. This form is a mandatory filing whenever an electrical incident or disturbance is large enough to cross the reporting thresholds. Reporting coverage for the Form OE-417 includes all 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and the U.S. Trust Territories. The Department of Energy uses the information to fulfill its overall national security and other energy emergency management responsibilities, as well as for analytical purposes. The incidence and disturbance data reported on Schedule 1 of the form are not confidential. However, all data reported on Schedule 2 of the Form (information on the official to contact for follow-up and the narrative description of the incident and disturbance) will be protected.

considers the material to fall within the statutory and regulatory definition of CEII.

The proposed procedures outline how the Department would provide protection for information where CEII designation has been requested but a final determination on CEII status has not yet been made by the Secretary or the designating DOE Office. After submission, DOE would evaluate whether the submitted information or portions of information meet the criteria established for designation prior to making a CEII determination. DOE would subsequently communicate the decision to the submitter as soon as practicable. If designated as CEII, information would be labeled as such and would be stored in a manner affording protection as CEII. Information voluntarily supplied by submitter that is not designated as CEII by DOE would be returned or destroyed at the request of the submitter. If a submitter is required to provide information and DOE denies CEII designation, the submitter may file a request for review under the proposed procedures.

Power Marketing Administrations (PMAs) generate copious data, a great deal of which may be CEII. To accommodate the practical difficulties of making CEII designation decisions about such data, proposed section (g)(2)(iv) states that all organizational entities that are a part of the Executive Department created by Title II of the DOE Organization Act may make CEII determination decisions at any time, regardless of when such information was generated. The proposed procedures are also intended for use by other Federal agencies that may also want to request CEII protection for information generated, collected, managed, or potentially released that fits into the definition of CEII in § 1004.13(c). These procedures create no new burdens in the existing FOIA response process.

(b) Duration of CEII Designation

Proposed § 1004.13(h) outlines procedures governing the duration of CEII designation, to include re-applications for CEII designation, expiration of designation, removal of designation, and treatment and return of information no longer designated as CEII.

(c) Review or Requests for Reconsideration of Designation

Proposed § 1004.13(i) establishes procedures that would allow any person who has submitted information requested to be CEII to request reconsideration of a DOE decision to not

designate that information as CEII, to remove an existing CEII designation, or to deny a request for the release or change of designation of CEII.

(d) Sharing of CEII

As indicated in proposed § 1004.13(j), DOE may share CEII as necessary to carry out its specific jurisdictional duties pursuant to section 215A of the FPA and as the lead Sector-Specific Agency for cybersecurity for the energy sector under section 61003(c)(2)(A) of the FAST Act, and the Sector-Specific Agency for Energy (Critical Infrastructure) under Presidential Policy Directive 21, “Critical Infrastructure Security and Resilience” (Feb. 12, 2013). Those submitting CEII would have DOE’s assurance that the information will be protected from unauthorized disclosure. The Department would follow standardized procedures when sharing CEII with Federal and non-Federal entities to ensure the protection of CEII. Non-Federal entities would be required to enter into a Non-Disclosure Agreement with the Department, meeting minimum standards outlined in the proposed rule, prior to receiving CEII from DOE. When a non-Federal entity requests such information, the DOE CEII coordinator would notify the submitter of the CEII and the appropriate DOE Office(s), to facilitate coordination and allow the submitter to raise concerns related to a requesting entity. The DOE CEII coordinator would, in consultation with the appropriate DOE Office(s), make a final determination on whether to release any CEII-designated material in response to such a request.

(e) Procedures for Requesting CEII

Proposed § 1004.13(k) delineates procedures for requesting CEII designation and sharing CEII-designated materials.

### III. Public Comment Procedures

Interested persons are invited to participate in this proceeding by submitting data, views, or arguments. Written comments should be submitted to the address, and in the form, indicated in the **ADDRESSES** section of this notice of proposed rulemaking. To help DOE’s review of the comments, interested persons are asked to refer to specific proposed rule provisions, if possible.

Written comments must be submitted by 4:00 p.m., December 28, 2018, electronically via [Regulations.gov](http://Regulations.gov), via email to [oeregs@hq.doe.gov](mailto:oeregs@hq.doe.gov), or to the address indicated in the **ADDRESSES** section of this preamble and should be identified on the outside envelope and

on the document with the designation: "Proposed Rulemaking Critical Electric Infrastructure Information Designation Procedures (Docket #OE-1901-AB44)." All comments received will be available for public inspection via <http://www.regulations.gov>. All comments received by 4:00 p.m., December 28, 2018, and all other relevant information will be considered by DOE before final action is taken on this proposed regulation.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information requested to be exempt by law from public disclosure has been redacted. DOE is responsible for the final determination regarding disclosure or nondisclosure of the information, and for treating the information accordingly under FOIA and DOE implementing regulations at 10 CFR 1004.11.

#### IV. Regulatory Review

##### A. Executive Order 12866

This action was determined to be a significant regulatory action subject to review under Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (Oct. 4, 1993) by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

##### B. Executive Orders 13771, 13777, and 13783

On January 30, 2017, the President issued Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs." That Order stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. The Order stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued Executive Order 13777, "Enforcing the Regulatory Reform Agenda." The Order required the head of each agency to designate an agency official as its Regulatory Reform Officer (RRO). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, Executive Order 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head

regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

- (i) Eliminate jobs, or inhibit job creation;
- (ii) Are outdated, unnecessary, or ineffective;
- (iii) Impose costs that exceed benefits;
- (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- (v) Are inconsistent with the requirements of the Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or
- (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

Finally, on March 28, 2017, the President signed Executive Order 13783, entitled "Promoting Energy Independence and Economic Growth." Among other things, Executive Order 13783 requires the heads of agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review does not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth elsewhere in that order. Executive Order 13783 defined "burden" for purposes of the review of existing regulations to mean "to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

The development and implementation of the proposed procedures, as laid out in Section 215A(d) of the FPA, are designed to protect the security and reliability of the nation's bulk-power system, distribution facilities, and other forms of energy infrastructure. The procedures relate solely to marking information that would facilitate voluntary sharing of CEII among DOE and other appropriate Federal, state, or local entities to address emergencies, accidents, or intentional destructive acts affecting the production, transmission and delivery of energy resources. There is no new reporting requirement nor

new program created as a result of the proposed procedures. This information will be stored on currently existing DOE systems. DOE concludes that this proposed rule is consistent with the directives set forth in these Executive Orders.

##### C. National Environmental Policy Act

DOE has determined that this proposed rule is covered under the Categorical Exclusion found in the DOE's National Environmental Policy Act regulations at paragraph A6 Rulemakings, procedural of Appendix A to Subpart D, 10 CFR part 1021, which applies to Rulemakings that are strictly procedural, such as rulemaking (under 48 CFR part 9) establishing procedures for technical and pricing proposals and establishing contract clauses and contracting practices for the purchase of goods and services, and rulemaking (under 10 CFR part 600) establishing application and review procedures for, and administration, audit, and closeout of, grants and cooperative agreements. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

##### D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE's procedures and policies are available on the Office of General Counsel's website: <https://energy.gov/gc/office-general-counsel>.

DOE has reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. This proposed rule sets forth agency procedures for the designation, sharing, and protection of CEII, and applies to DOE employees, DOE contractors, agents of DOE, and individuals or organizations submitting a request for CEII designation or who have requested or been permitted access to CEII. The proposed procedures for marking incoming requests and/or submissions, which are expected to

facilitate voluntary sharing of CEII among DOE and other appropriate Federal, state, or local entities to address emergencies, accidents, or intentional destructive acts to the production, transmission, and delivery of energy resources, are not expected to result in a significant impact. FERC's regulations already require entities requesting CEII designation to mark the subject information. DOE's procedures would provide consistency and would also help avoid unauthorized disclosure or release. DOE therefore expects that these procedures, if adopted, would not affect DOE's decision to designate submitted information as CEII, nor any decision to withhold or release information to requesters of energy infrastructure information under FOIA. On the basis of the foregoing, DOE certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

#### *E. Paperwork Reduction Act*

Proposed §§ 1004.13(g), 1004.13(h), 1004.13(i), and 1004.13(k) contain information collection requirements. DOE has submitted the proposed collection of information to the OMB for approval pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act at 5 CFR part 1320. A person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DOE invites public comment on (1) whether the proposed information collection requirements are necessary for the performance of DOE's functions, including whether the information will have practical utility; (2) the accuracy of DOE's estimates of the burden of the proposed information collection requirements; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the information collection requirements on respondents. Comments should be addressed to the DOE Desk Officer, OIRA, OMB, 725 17th Street NW, Washington, DC 20503. Persons submitting comments to OMB also are requested to send a copy to the contact person at the address given in the **ADDRESSES** section of this notice of proposed rulemaking. Interested

persons may obtain a copy of DOE's Paperwork Reduction Act Submission to OMB from the contact person named in this notice of proposed rulemaking.

#### *F. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Section 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 in any one year (adjusted annually for inflation). 2 U.S.C. 1532(a) and (b). 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. 2 U.S.C. 1534.

The proposed 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.

#### *G. 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. The proposed rule will 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.

#### *H. Executive Order 13132*

Executive Order 13132, "Federalism," 64 FR 43255 (Aug. 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 this proposed rule and has determined that it will not preempt State law and will 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.

#### *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 (Feb. 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 whether 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 proposed rule meets the relevant standards of Executive Order 12988.

### *J. Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

### *K. Executive Order 13211*

Executive Order No. 13,211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of the OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action will not have a significant adverse effect on the supply, distribution, or use of energy because it is concerned primarily with the procedures for designating, protecting, and sharing information. As the FAST Act highlighted, protection of CEII will have a positive effect on the energy supply, and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

### **V. Approval of the Office of the Secretary**

The Secretary of Energy has approved publication of this notice of proposed rulemaking.

### **List of Subjects in 10 CFR Part 1004**

Freedom of Information.

Signed in Washington, DC, on October 19, 2018.

**Bruce J. Walker,**

*Assistant Secretary, Office of Electricity.*

For the reasons set out in the preamble, the DOE proposes to amend part 1004 of title 10, Code of Federal Regulations as set forth below:

### **PART 1004—FREEDOM OF INFORMATION ACT (FOIA)**

■ 1. The authority citation for part 1004 is revised to read as follows:

**Authority:** 5 U.S.C. 552; 16 U.S.C. 824o–1.

■ 2. Add § 1004.13 to read as follows:

#### **§ 1004.13 Critical electric infrastructure information.**

(a) *Filing Procedures and Guidance.* Information regarding critical electric infrastructure information (CEII) filing procedures and further guidance for submitters and requesters is available on the website of the DOE Office of Electricity at <https://www.energy.gov/oe/office-electricity>.

(b) *Purpose and Scope.* This part sets forth the regulations of the Department of Energy (DOE) that implement section 215A(d) of the Federal Power Act (FPA), codified at 16 U.S.C. 824o–1(d). The regulations in this part set forth the DOE procedures for the designation, sharing, and protection of CEII. This section applies to anyone who provides CEII to DOE or who receives CEII from DOE, including DOE employees, DOE contractors, and agents of DOE or of other Federal agencies, as well as individuals or organizations providing CEII or submitting a request for CEII designation to DOE or who have requested or have been permitted access to CEII by DOE.

(c) *Definitions.*

(1) *Bulk-Power System* means the facilities and control systems necessary for operating an interconnected electric energy transmission network (and any portion thereof), and electric energy from generation facilities needed to maintain transmission system reliability. The term does not include facilities used in the local distribution of electric energy.

(2) *Critical Electric Infrastructure* means a system or asset of the bulk-power system, whether physical or virtual, the incapacity or destruction of which would negatively affect national security, economic security, public health or safety, or any combination of such matters.

(3) *Critical Electric Infrastructure Information (CEII)* is defined at FPA section 215A(a)(3), with designation criteria codified at 18 CFR 388.113(c).

CEII means information related to critical electric infrastructure, or proposed critical electrical infrastructure, generated by or provided to FERC or another Federal agency, other than classified national security information, that is designated as CEII by FERC or the Secretary pursuant to section 215A(d) of the FPA. Such term includes information that qualifies as critical energy infrastructure information under FERC's regulations. CEII-designated material may include information related to Defense Critical Electric Infrastructure, consistent with section 215A(a)(4) of the FPA; information on electric incidents and emergencies reported to DOE through the Electric Emergency Incident and Disturbance Report (Form OE-417); and/or Federal spectrum information managed by the National Telecommunications and Information Administration (NTIA), to the extent such information also qualifies as CEII.

(4) *CEII Coordinator* means the Assistant Secretary or Principal Deputy Assistant Secretary of the DOE Office of Electricity, who shall coordinate and oversee the implementation of DOE's program for CEII-designation authority under section 215A of the FPA, assist all DOE Office(s) with respect to requests for CEII designation in determining whether particular information fits within the definition of CEII, and manage DOE's protection, storage, and sharing of CEII materials and oversight of the development of CEII international sharing protocols. The CEII Coordinator may delegate the daily implementation of the CEII Coordinator function as described in this proposed rule to an appropriate DOE Office of Electricity official, and to an appropriate official in the Bonneville Power Administration, the Energy Information Administration, the Southeastern Power Administration, the Southwestern Power Administration, or the Western Area Power Administration ("Coordinator's designee").

(5) *Defense Critical Electric Infrastructure* means any electric infrastructure located in any of the 48 contiguous States or the District of Columbia that serves a facility designated by the Secretary as critical to the defense of the United States and vulnerable to a disruption of the supply of electric energy provided to such facility by an external provider, but that is not owned or operated by the owner or operator of such facility.

(6) *Department* means the United States Department of Energy.

(7) *Department of Energy (DOE)* means all organizational entities that are part of the Executive Department

created by Title II of the DOE Organization Act (Pub. L. 95–91, 91 Stat. 565, 42 U.S.C. 7101 *et seq.*). For purposes of this part, the definition of DOE specifically excludes the Federal Energy Regulatory Commission, which has promulgated its own CEII procedures at 18 CFR 388.113.

(8) *DOE Office* means any administrative or operating unit of DOE with authority at or above the level of Assistant Secretary, Principal Deputy Assistant Secretary, or Administrator.

(9) *Secretary* means the Secretary of Energy.

(d) *Authority to designate information as CEII.* The Secretary has the authority to designate information as CEII, in accordance with FPA section 215A. The Secretary may delegate the authority to designate information as CEII to any DOE Office.

(e) *Coordination among DOE Office designators.* The DOE CEII Coordinator shall be the primary point of contact for the submission of all requests for designation of information as CEII by DOE, as well as for requests made to DOE by organizations or individuals for information that may be protected, in whole or in part, as CEII.

(1) The CEII Coordinator or Coordinator's designee shall:

(i) Receive and review all incoming requests for CEII as defined in § 1004.13(c) and in accordance with § 1004.13(g);

(ii) Make initial determinations as to whether particular information fits within the definition of CEII found at § 1004.13(c), including but not limited to those considerations related to pre-designation of information related to Defense Critical Electric Infrastructure as defined in § 1004.13(c), NTIA-managed Federal agency spectrum use information, and/or accident and emergency information provided to DOE through Form OE-417;

(iii) Assist any DOE Offices with delegated CEII designation authority to make determinations as to whether a particular requester's need for and ability and willingness to protect CEII warrants limited disclosure of the information to the requester;

(iv) Establish reasonable conditions for considering requests for release of CEII-designated material in accordance with § 1004.13(g)(5) through (6);

(v) Make the Department's final determination regarding request by any non-Federal entity (organization or individual) for CEII-designated materials, in consultation with the appropriate DOE Office(s);

(vi) Notify a CEII submitter of a request for such information by a non-Federal entity;

(vii) Convene a conference call within no more than five (5) business days between an affected DOE Office and a CEII submitter to discuss concerns related to a non-Federal entity requesting release of CEII; and

(viii) Perform oversight of the DOE CEII program and establish guidance for the treatment, handling, and storage of all CEII materials in the Department in accordance with § 1004.13(g)(6), including those related to CEII international sharing protocols.

(2) DOE Offices with delegated authority to designate CEII in accordance with § 1004.13(d), as well as any CEII Coordinator designee(s) from the Bonneville Power Administration, the Energy Information Administration, the Southeastern Power Administration, the Southwestern Power Administration, and the Western Area Power Administration, will meet regularly, at the discretion of the CEII Coordinator, but not less than once per year, to ensure coordinated implementation of DOE's CEII designation authority.

(3) DOE, at the discretion of the CEII Coordinator, shall meet with representatives from FERC semi-annually (or more often, as necessary) to ensure that both agencies are applying CEII designation criteria consistently and to share best practices.

(4) DOE, at the discretion of the CEII Coordinator, shall meet annually with representatives from Department of Commerce, NTIA, or other Federal agencies, as needed, to ensure shared understanding and consistent communication among Federal agencies that collect, maintain and potentially release information that DOE may consider designating as CEII as defined in § 1004.13(c).

(f) *Criteria and procedures for designating CEII.*

(1) *Requesting CEII designation of information submitted to DOE.* Any person or entity requesting that information submitted to DOE be designated as CEII must submit such request to the DOE CEII Coordinator or Coordinator's designee according to the following procedures:

(i) The submitter must clearly label the cover page and pages or portions of the information for which CEII treatment is requested in bold, capital lettering, indicating that it contains CEII, as appropriate, and marked "CEII—DO NOT RELEASE."

(ii) The submitter must also clearly indicate the DOE Office(s) from which the CEII designation is being requested in bold, capital lettering on the cover page.

(iii) The submitter must also segregate those portions of the information that contain CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) wherever feasible.

(iv) The submitter must submit a public version of the information where information designated CEII and information for which CEII designation is requested is redacted or otherwise protected through extraction from the non-CEII to the DOE CEII Coordinator and the Coordinator's designee in an appropriate DOE Office.

(2) *Requesting CEII designation for information generated by DOE.* Any DOE employees, DOE contractors, or agents of DOE requesting that information generated by the Department be designated as CEII must submit such request to the DOE CEII Coordinator and the Coordinator's designee in an appropriate DOE Office according to the following procedures:

(i) The submitter must clearly label the cover page and pages or portions of the information for which CEII treatment is requested in bold, capital lettering, indicating that it contains CEII, as appropriate, and marked "CEII—DO NOT RELEASE."

(ii) The submitter must also segregate those portions of the information that contain CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) wherever feasible.

(iii) The submitter must submit to DOE a public version of the information where information designated CEII and information for which CEII designation is requested is redacted or otherwise protected through extraction from non-CEII to the DOE CEII Coordinator and Coordinator's designee.

(iv) CEII designation for information generated by DOE, to include, all organizational entities that are a part of the Executive Department created by Title II of the DOE Organization Act, may be executed at any time, regardless of when such information was generated.

(3) *Treatment of Submitted Information as CEII.*

(i) Upon receiving a request for CEII designation of information submitted to DOE, the DOE CEII Coordinator or Coordinator's designee shall review the submission made in accordance with § 1004.13(g)(2) for information about "Defense Critical Electric Infrastructure," as defined by section 215A(a)(4) of the FPA; information on electric incidents and emergencies reported to DOE through Form OE-417; and/or Federal spectrum information managed by the NTIA, for immediate

pre-designation as CEII. If the CEII Coordinator determines that the information submitted does not qualify for immediate pre-designation, such information shall be evaluated for designation as CEII under this part.

(ii) Information for which CEII treatment is requested will be maintained by the CEII Coordinator or Coordinator's designee in DOE's files as non-public unless and until DOE completes its determination that the information is not entitled to CEII treatment. The interim treatment of the information as CEII does not mean that DOE has made a determination regarding CEII designation. DOE will endeavor to make a determination as soon as practicable. The Department retains the right to make determinations about any request for CEII designation at any time, including the removal of a previously granted CEII designation. At such time that a determination is made that information is not entitled to CEII treatment, DOE will follow the procedures for return of information not designated as CEII outlined in § 1004.13(g)(5)(iii).

(iii) When a requester seeks information for which CEII status has been requested but not designated, or when DOE itself is considering release of such information, DOE will render a decision on designation before responding to the requester or releasing such information. Subsequently, the release of information will be treated in accordance with the procedures established for CEII-designated material, or the return of information not designated as CEII.

(4) *Evaluation of CEII designation criteria to inform CEII designation determination.*

(i) The DOE CEII Coordinator, or a Coordinator's designee, will execute the Department's evaluation as to whether the submitted information or portions of the information meets the definition of CEII, as described at section (c)(2) of this Part, with the appropriate DOE Office with delegated CEII designation authority. The DOE Office will designate submitted information as soon as practicable and will inform submitters of the designation date if requested at the time of submission.

(ii) Reserved.

(5) *CEII Determination.*

(i) The Secretary or delegated DOE Office will make a determination regarding CEII designation after considering the information against the criteria for CEII designation. Upon making the determination, the DOE CEII Coordinator or Coordinator's designee shall communicate the decision to the submitter.

(ii) *Review of determination.* DOE reserves the right to review at any time information designated by DOE as CEII to determine whether the information is properly designated. The designation of information as CEII, or the removal of such designation, must be reviewed when:

(A) A FOIA request is submitted for the information under section 1004.10, or

(B) A request is made for reconsideration of the designation or removal of the designation under § 1004.13(i)(1).

(iii) *Return of Information not designated as CEII.* If the submitter voluntarily provided the information to DOE, at the request of the submitter, DOE will return or destroy information for which CEII designation was requested but not granted, and will attempt to remove all copies of such information from DOE files, both physical and electronic. DOE shall not remove electronic files in the ordinary course of business. If a submitter is required to provide information and DOE denies CEII designation, the submitter may file a request for review under the procedures.

(6) *Protection of CEII.*

(i) *Marking of CEII.* All information designated by DOE as CEII, whether submitted to or generated by DOE, shall be clearly labeled as such, and shall include the date on which the information was designated as CEII. For information that meets the definition of CEII but cannot be physically labeled, such as electronic information, the information shall be stored in a secure electronic environment that identifies the stored information as CEII.

(ii) *Protection and Exemption from Disclosure.* All information designated by DOE as CEII:

(A) Shall be exempt from disclosure under the FOIA exemption codified at 5 U.S.C. 552(b)(3); and

(B) Shall not be made available by any Federal, State, political subdivision or tribal authority under any Federal, State, political subdivision or tribal law requiring public disclosure of information or records, in accordance with FPA section 215A(d)(1).

(iii) *Secure Storage.* DOE will store information for which CEII treatment is requested in a secure place in a manner that would prevent unauthorized access.

(h) *Duration of designation.* Designation of information as CEII may last up to a five-year period, unless redesignated.

(1) *Expiration of designation.*

(i) The Secretary or delegated DOE Office will determine the duration of designation at the time of designation.

(ii) A submitter may re-apply for CEII designation no earlier than one year prior to the date of expiration of the prior designation or re-designation in accordance with the application procedures in § 1004.13(g)(1).

(2) *Removal of designation.* The designation of information as CEII may be removed at any time, by the Secretary or the DOE CEII Coordinator in consultation with the DOE Office to which the Secretary has delegated the authority, in whole or in part, upon determination that the unauthorized disclosure of such information could no longer be used to impair the security or reliability of the bulk-power system or distribution facilities or any other form of energy infrastructure. If the CEII designation is to be removed, the submitter and the DOE Office that produced or maintains the CEII will receive notice and an opportunity to comment. The CEII Coordinator or Coordinator's designee will notify the submitter and the DOE Office that produced or maintains the CEII, and will give the submitter an opportunity (at least ten (10) business days) in which to comment in writing prior to the removal of the designation. The CEII Coordinator or Coordinator's designee will provide notice of a removal decision to any submitter claiming that the information is CEII no less than twenty (20) business days before disclosure. The notice will briefly explain DOE's determination of why the submitter's objections do not support a decision to retain the CEII designation.

(3) *Treatment and return of information no longer designated as CEII.* At the request of the submitter, DOE will return or destroy information for which CEII designation has expired or has been removed and will attempt to remove all copies of it from DOE files, both physical and electronic; however, DOE shall not remove electronic files that have been backed up in the ordinary course of business. Such backed up electronic files shall be treated as CEII until they are destroyed under the normal electronic backup retention schedules. If a FOIA request is received for the non-CEII prior to its return or destruction, DOE will work with the submitter to review whether the information is subject to other FOIA exemptions.

(i) *Review or requests for reconsideration of designation.*

(1) *Request for Reconsideration.*

(i) Any person who has submitted information and requested such information to be designated as CEII may request reconsideration of a DOE decision not to designate that information as CEII or to remove an

existing CEII designation. Within ten (10) business days of notification by DOE of its CEII decision, the person must file a request for reconsideration. The request must be sent to the DOE CEII Coordinator and Coordinator's designee in electronic format at: CEII COORDINATOR MAILBOX. The request must also be sent to the DOE Office that made the decision at issue and to DOE's Office of General Counsel in Washington, DC, according to the instructions at 10 CFR 205.12. A statement in support of the request for reconsideration must be submitted within twenty (20) business days of the date of the determination. The request and the supporting statement will be considered submitted upon receipt by the Office of General Counsel.

(ii) Any person who has received a decision denying a request for the release of CEII, in whole or in part, or a decision denying a request to change the designation of CEII, may request reconsideration of that decision. A statement in support of the request for reconsideration must be submitted to the Office of General Counsel within twenty (20) business days of the date of the determination.

(iii) The Secretary or the DOE Office that made the decision at issue will make a determination, in coordination with the DOE CEII Coordinator or Coordinator's designee, with respect to any request for reconsideration within twenty (20) business days after the receipt of the request and will notify the person submitting the request of the determination and the availability of judicial review.

(iv) Before seeking judicial review in Federal District Court under section 215A(d)(11) of the Federal Power Act, a person who received a determination from DOE concerning a CEII designation must first request reconsideration of that determination.

(v) A request for reconsideration triggers a stay of the underlying decision, except in instances where voluntary sharing of the disputed information is necessary for law enforcement purposes, to ensure reliable operation or maintenance of electric or energy infrastructure, to maintain infrastructure security, to address potential threats, or to address an urgent need to disseminate the information quickly due to an emergency or other unforeseen circumstance.

(j) *Sharing of CEII.*

(1) *Federal Entities.* DOE will require those Federal entities requesting CEII to follow the procedures specified in § 1004.13(k). DOE may share CEII with affected agencies for those agencies to carry out their specific jurisdictional

responsibilities, but may impose additional restrictions on how the information may be used and maintained, if shared.

(2) *Non-Federal Entities.* The Secretary or the DOE Coordinator shall make a final determination whether to share CEII materials requested by non-Federal entities that are within the categories specified in section 215A(d)(2)(D) of the FPA. A request by such a non-Federal entity shall not be entertained unless the requesting non-Federal entity has entered into a Non-Disclosure Agreement with DOE that ensures, at a minimum:

(i) Use of the information only for authorized purposes and by authorized recipients and under the conditions prescribed by the Secretary or CEII Coordinator;

(ii) Protection of the information in a secure manner to prevent unauthorized access;

(iii) Destruction or return of the information after the intended purposes of receiving the information have been fulfilled;

(iv) Prevention of viewing or access by individuals or organizations that have been prohibited or restricted by the United States or the Department from viewing or accessing CEII;

(v) Compliance with the provisions of the Non-Disclosure Agreement, subject to DOE audit; and

(vi) No further sharing of the information without DOE's permission.

(3) *Security and Reliability Coordination.* In accordance with section 215A(d)(2)(D) of the FPA, DOE may, taking into account standards of the Electric Reliability Organization, facilitate voluntary sharing of CEII with, between, and by Federal, State, political subdivision, and tribal authorities; the Electric Reliability Organization; regional entities; information sharing and analysis centers established pursuant to Presidential Decision Directive 63; reliability coordinators, balancing authorities areas, owners, operators, and users of critical electric infrastructure in the United States; and other entities determined appropriate. All entities receiving CEII must execute either a Non-Disclosure Agreement or an Acknowledgement and Agreement or participate in an Electric Reliability Organization or Regional Entity information sharing program that ensures the protection of CEII. A copy of each agreement or program will be maintained by the DOE Office with a copy to the CEII Coordinator or the Coordinator's designee. If DOE facilitates voluntary sharing of CEII under this subsection, DOE may impose additional restrictions on how the

information may be used and maintained.

(4) *International Sharing Protocols.* The Secretary may delegate authority to DOE Offices to develop, after consultation with Canadian and Mexican authorities, protocols for the voluntary sharing of CEII with Canadian and Mexican authorities and owners, operators, and users of the bulk-power system outside the United States. The DOE CEII Coordinator or Coordinator's designee would provide assistance and advice to DOE Offices in the development of the international sharing protocols.

(5) *Notice for Sharing of CEII not Generated by DOE.* The DOE CEII Coordinator or Coordinator's designee will provide electronic notice to the CEII submitter no less than ten (10) business days before DOE releases CEII submitted to and not generated by DOE, except in instances where voluntary sharing is necessary for law enforcement purposes, to ensure reliable operation or maintenance of electric or energy infrastructure, to maintain infrastructure security, or to address potential threats; where there is an urgent need to quickly disseminate the information; or where prior notice is not practicable due to an emergency or other unforeseen circumstance. If prior notice is not given, DOE will provide notice as soon as practicable. The DOE CEII Coordinator or Coordinator's designee would convene a phone call, within five (5) days of electronic notice with the CEII submitter, to discuss concerns about the proposed release of CEII-designated materials to the requester. DOE would make the final determination as to whether to share CEII not generated by DOE.

(k) *Procedures for requesting CEII.* Any person requesting CEII must include the following material with the request:

(1) *Contact Information.* Provide your name, title and employer, work address, work phone number, and work email. If you are requesting the information on behalf of a person or entity other than yourself, you must also list that person's or entity's work contact information, including name, title, address, phone number, and email.

(2) *Explanation of Need.* Provide a detailed statement explaining the particular need for and intended use of the information.

(3) *Signed Non-Disclosure Acknowledgement/Agreement.* Provide an executed Non-Disclosure Acknowledgement (if the requester is a Federal entity) or an executed Non-Disclosure Agreement (if the requester is not a Federal entity) requiring

adherence to limitations on the use and disclosure of the information requested.

(4) *DOE evaluation.* Upon receiving a request for CEII, the CEII Coordinator shall contact the DOE Office or Federal agency that created or maintains the CEII. In consultation with the DOE Office, the CEII Coordinator shall determine if the need for CEII and the protection afforded to the CEII should result in sharing CEII for the limited purpose made in the request. In the event the CEII Coordinator or Coordinator's designee denies the request, the requestor may seek request for reconsideration, as provided in § 1004.13(i).

(l) *Unauthorized Disclosure.*

(1) *Disclosure by submitter of information.* If the submitter of information discloses to the public information that has received a CEII designation, then the Department reserves the right to remove its CEII designation.

(2) *Disciplinary Action for Unauthorized Disclosure.* DOE employees or contractors who knowingly or willfully disclose CEII in an unauthorized manner will be subject to appropriate sanctions, including disciplinary action under DOE or DOE Office personnel rules or referral to the DOE Inspector General.

(3) In accordance with the Whistleblower Protection Enhancement Act of 2012 (Pub. L. 112-199, 126 Stat. 1465), these provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute relating to:

(i) Classified information,

(ii) Communications to Congress,

(iii) The reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or

(iv) Any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling statutory provisions are incorporated into this agreement and are controlling.

[FR Doc. 2018-23459 Filed 10-26-18; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 91

[Docket No.: FAA-2010-0289; SFAR No. 110]

RIN 2120-AJ69

#### Prohibition Against Certain Flights Within the Territory and Airspace of Afghanistan; Withdrawal

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking; withdrawal.

**SUMMARY:** The Federal Aviation Administration (FAA) is withdrawing a previously published notice of proposed rulemaking that proposed to restrict U.S. civil flight operations below flight level (FL) 160 within the territory and airspace of Afghanistan.

**DATES:** The notice of proposed rulemaking published on May 26, 2010 (75 FR 29466) is withdrawn as of October 29, 2018.

**FOR FURTHER INFORMATION CONTACT:** Michael Filippell, Air Transportation Division, Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone 202-267-8166; email [michael.e.filippell@faa.gov](mailto:michael.e.filippell@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

On May 26, 2010, the FAA published a notice of proposed rulemaking (NPRM) titled "Prohibition against Certain Flights within the Territory and Airspace of Afghanistan" (75 FR 29466). The NPRM proposed to restrict U.S. civil flight operations below FL 160 within the territory and airspace of Afghanistan, unless the operations are authorized by another U.S. Government department or agency (hereinafter referred to as "department or agency") and approved by the FAA, or subject to an exemption granted by the FAA. The preamble to the NPRM explained the process for a department or agency to apply for FAA approval for operations to be conducted under contract to that department or agency and for operators to apply for exemption.

The situation in Afghanistan presented a unique environment relative to other situations where the FAA had imposed similar regulations to address the safety of U.S. operators while in foreign territories and airspace. The presence of the U.S. military forces in Afghanistan had required a large

presence of U.S. civil aircraft operations to support the warfighting, nation building, and humanitarian efforts. The level of these operations occurring in Afghanistan warranted the FAA to provide notice of the proposed regulation to limit flight in this area and a limited opportunity for comment from operators or other individuals that might have been affected by such action. The FAA found that good cause existed to limit the notice and public comment period required by 5 U.S.C. 553(d)(3) to 15 days. The comment period closed on June 10, 2010.

#### Discussion of Comments Received

The FAA received 22 submissions containing multiple comments from air carriers, associations, labor organizations, humanitarian organizations, and individuals. All of the commenters acknowledged the risks associated with conducting aviation operations in Afghanistan. Several commenters fully supported the provisions in the NPRM, while others requested clarification of certain elements in the proposal. The majority of commenters, however, asserted that the proposed rule would place unnecessary restrictions and burdens on U.S. civil aviation operations in Afghanistan. They contended that the proposed rule would result in an adverse economic impact for U.S. operators and limit their ability to support the ongoing U.S. military activities, nation building, and humanitarian efforts.

Following publication of the NPRM, several commenters, including Kalitta Air, Pactec International, and Atlas Air Worldwide Holdings submitted comments that questioned the FAA's determination of the costs of implementing the NPRM if adopted as proposed. Kalitta Air specifically requested that the FAA complete a regulatory impact analysis to accurately account for the costs associated with the proposal. In response, the FAA published a Supplemental Regulatory Flexibility Analysis on July 20, 2010 (75 FR 42015) for a 15-day comment period that closed on August 4, 2010. No comments were submitted to the supplemental regulatory flexibility analysis.

#### Conclusion

After considering the comments, the FAA has determined the unique environment in Afghanistan continues. There is no scheduled U.S. air service in Afghanistan, and the only operations by U.S. operators or airmen currently conducted there are in support of U.S. Government activities. Additionally, the