Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

10 CFR Part 1708

Procedures for Safety Investigations

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Second notice of proposed rule.

SUMMARY: The Defense Nuclear Facilities Safety Board (Board) published a proposed rule in the **Federal Register** (77 FR 44174) on July 27, 2012. The proposed rule established procedures for conducting preliminary and formal safety investigations of events or practices at Department of Energy (DOE) defense nuclear facilities that the Board determines have adversely affected, or may adversely affect, public health and safety. The Board's experience in conducting formal safety investigations necessitates codifying the procedures set forth in the final rule. Among other benefits, these procedures will ensure a more efficient investigative process, protect confidential and privileged safety information, and promote uniformity of future safety investigations. The rule also promotes public awareness through greater transparency in the conduct of Board investigations.

The Board's enabling legislation, 42 U.S.C. 2286 et seq., was amended on January 2, 2013, by the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013. The amendments appeared before the final rule was published. This second notice of proposed rule incorporates changes necessitated by those amendments.

DATES: To be considered, comments must be mailed, emailed, or delivered to the address listed below on or before October 10, 2014.

FOR FURTHER INFORMATION CONTACT: John G. Batherson, Associate General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004, telephone (202) 694–7018, facsimile (202) 208–6518, email *JohnB@dnfsb.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On July 27, 2012, the Board published a proposed rule in the **Federal Register** (77 FR 44174). The Board initially provided a 30-day public comment period for the proposed rule, and then extended the comment period an additional 30 days to September 26, 2012 (77 FR 51943). Subsequent to publication of the proposed rule and disposition of comments, but before the final rule was published, the NDAA for FY 2013 amended the Board's enabling legislation on January 2, 2013. One new provision, 42 U.S.C. 2286(c)(5), describes the authority of individual Board Members. This authority includes equal responsibility in establishing decisions and determining actions of the Board, full access to all information relating to the performance of the Board's functions, powers, and mission, and authority to have one vote. The NDAA amendments require the Board to further modify the proposed rule. These modifications will be described in further detail in Section V. below.

The Board is responsible for making recommendations to the Secretary of Energy and the President as the Board determines are necessary to ensure adequate protection of public health and safety at DOE defense nuclear facilities. The Board is vested with broad authority pursuant to 42 U.S.C. 2286a(b)(2) to investigate events or practices which have adversely affected, or may adversely affect, public health and safety at DOE's defense nuclear facilities. The Board is authorized to promulgate this final rule pursuant to its enabling legislation in the Atomic Energy Act of 1954, as amended, at 42 U.S.C. 2286b(c), which states that the Board may prescribe regulations to carry out its responsibilities. The final rule establishes a new Part 1708 in the Board's regulations, setting forth procedures governing the conduct of safety investigations.

It is imperative that Board investigators be able to obtain information from witnesses necessary to form an understanding of the underlying causes that adversely affect, or may adversely affect, public health and safety at DOE defense nuclear facilities. Frank communications are critical if Board investigators are to be effective. The Board must also be viewed as uncompromising in maintaining non-disclosure of privileged safety information. The Board must be able to assure complete confidentiality in order to encourage future witnesses to come forward.

The Board requires the discretion to offer individuals enforceable assurances of confidentiality in order to encourage their full and frank testimony. Without such authority, individuals may refrain from providing the Board with vital information affecting public health and safety, frustrating the efficient operation of the Board's oversight mission. To encourage candor and facilitate the free flow of information, the Board adopted in the proposed rule procedures to protect confidential statements from disclosure to the maximum extent permitted under existing law.

The Board received two formal comments on the July 27, 2012, proposed rule: An email comment from Mr. Richard L. Urie, dated September 4, 2012, and a letter from Mr. Eric Fygi, DOE Deputy General Counsel, dated September 26, 2012, submitted on behalf of DOE. The Board also became aware of additional commentary from Mr. Larry Brown, a former Board Member, published in the ''Weapons Complex Monitor.'' This commentary was not sent to the Board's contact point noticed in the proposed rule. However, the Board, in its discretion, has decided to treat this commentary as having been submitted directly to the Board as a comment. The Board has carefully considered each comment received, and has made modifications to the proposed rule in response where appropriate.

II. Email Comment From Mr. Richard L. Urie

Comment. The commenter stated that he submitted his comment in his personal capacity as a health and safety professional, and that he was not speaking on behalf of or for DOE. The commenter fully supports the concept of providing anonymity and formality in the investigative process. He alluded to raising significant safety issues in the past as a contractor and found the subsequent process to be demoralizing and punitive in nature. The commenter further suggested that raising safety issues, even with the best of intentions, nearly always negatively impacts both the individual and his or her family; such impacts disincentivize employees

to report safety issues. The commenter indicated he was a strong advocate of workers' rights to report or discuss relevant issues in a protected status, and that anything less is counterproductive to a mission oriented, proactive safety culture within any organization.

Response: The Board agrees with this comment. The Board's intent in promulgating the rule resonates with the commenter's support for anonymity and formality in the investigative process. The Board believes the final rule will address the concerns raised by the commenter by providing confidentiality to individuals and enhanced procedural processes in the conduct of safety investigations. No change to the proposed rule is needed in response to this comment.

III. Comments From the Department of Energy via Deputy General Counsel Eric Fygi

A comprehensive set of comments was received from Mr. Eric Fygi, DOE Deputy General Counsel. Each of the enumerated comments under this sub-heading is attributable to the commenter.

Comment 1. As a general matter, the Board is a public entity whose paramount mission is to provide recommendations to DOE relating to nuclear safety. However, the proposed rule would allow the Board to withhold information it collects during safety investigations and would place restrictive limits on the role of DOE's counsel in such investigations. The rule therefore runs counter to the Board's essential mission of providing information and recommendations to DOE and will likely have unintended, negative consequences. If there are safety matters to resolve, DOE is the entity responsible for taking swift and appropriate actions. By withholding information collected by the Board from DOE, the Board's proposed rule runs the very real risk of limiting the effectiveness of DOE's response to genuine safety issues.

Response: The comment fundamentally misconstrues the statutory structure that governs the Board's operations. It is true that one of the Board's principal functions is ''to provide recommendations to the Department of Energy relating to nuclear safety.'' In order to carry out this function, the Board must gather information. The Board collects information via examination of documents sent to it voluntarily and with the cooperation of DOE, imposition of reporting requirements on the Secretary of Energy, investigations, and public hearings. The Board's enabling act and the legislative history do not, however, assign to the Board the task of ''providing information'' to DOE. In the investigative context, the Board reviews all information it develops and may use the information to make recommendations to the Secretary. But the Board must first obtain all necessary information, which is the precise purpose of the proposed rule. In the event a safety investigation revealed information pertinent to a genuine safety issue, the Board would readily disclose such information consistent with its charter to ensure adequate protection of the public and worker health and safety. On the other hand, an investigation could conceivably not result in the discovery of new safety information of value to DOE. No change to the proposed rule is needed in response to this comment.

Comment 2: The proposed rule does not take account of existing, effective procedures through which safety concerns may be raised to DOE. DOE and its contractors provide numerous formal and informal processes by which employees may report safety concerns, including the Differing Professional Opinion process. DOE takes seriously its need to foster and support a fully effective ''Safety Conscious Work Environment,'' one where employees feel free to raise safety concerns to management without fear of reprisal. It is not clear that the Board's proposed rule is necessary or that it fully takes account of existing, effective procedures at DOE and its contractors.

Response: The Board is aware of the internal DOE procedures referred to in the comment. It is not clear how these procedures relate to the subject of the proposed rule regarding safety investigations conducted by the Board. The Board's enabling legislation states that the Board ''shall investigate any event or practice at a Department of Energy defense nuclear facility which the Board determines has adversely affected, or may adversely affect, public health and safety.'' The Board is not given the option of declining to do investigations of health and safety matters based on DOE's employee concerns reporting procedures. Moreover, DOE and contractor processes for protecting employees who report safety issues may not be completely effective. In the investigation preceding the Board's Recommendation 2011–1, *Safety Culture at the Waste Treatment and Immobilization Plant (WTP),* the Board found evidence that a DOE employee concerns program was not effective, and that technical dissent was being suppressed at the WTP project. Provisions in the Board's final rule designed to further enhance the confidentiality of employees who raise safety issues facilitate a healthier ''Safety Conscious Work Environment.'' No change to the proposed rule is needed in response to this comment.

Comment 3: DOE objects to any provisions that would purport to allow the Board or any Investigating Officer from barring counsel from a hearing room absent extraordinarily weighty grounds. Specifically, proposed § 1708.110(c) would authorize an Investigating Officer to exclude an attorney who represents multiple interests if the Investigating Officer has ''concrete evidence'' that the attorney's presence would ''obstruct or impede the safety investigation.'' DOE objects to this proposed provision to the extent it may be construed to exclude DOE counsel from being present during the testimony of multiple agency witnesses. As an initial matter, a DOE attorney appearing with DOE officers and employees does not have a ''possible conflict of interest'' to report because DOE counsel represents the interests of the agency and its officers and employees in their official capacities.

Response: In a safety investigation, testimony could be taken from DOE or contractor employees who have challenged management positions and fear corporate or agency reprisals. In such cases, representation by corporate counsel or DOE counsel may not be desired by the witness. If counsel is nonetheless present, such witnesses may say little or refuse to testify at all because the attorney may report the substance of the testimony to corporate or agency officials. For this reason, it is entirely appropriate for the Board to exclude a corporate or DOE attorney in certain cases where the ''concrete evidence'' standard is met. Moreover, there may come a point where a witness's or employee's interests may diverge from that of the employer or agency. Proposed § 1708.110(c) simply recognizes the contingency where potential or actual adverse interests may exist such that impartiality cannot be maintained consistent with the ''concrete evidence'' standard. No change to the proposed rule is needed in response to this comment.

Comment 4: The Nuclear Regulatory Commission (NRC), in promulgating a rule that contains a provision nearly identical to proposed § 1708.110(c), predicted that ''it will be a rare case in which there is actual proof that the multiple representation will seriously obstruct and impede the investigation.'' 57 FR 61,780, 61,783 (Dec. 29, 1992). That prediction was prescient: in the twenty years since the NRC's rule went

into effect, the agency has not once exercised its power to exclude counsel from a safety investigation. DOE contends that should the Board choose to maintain the ''concrete evidence'' language in the rule that it apply the standard in the same rigorous fashion as the NRC.

Response: The Board agrees that it will probably be a rare case where the ''concrete evidence'' standard is satisfied. However, as the commenter points out, this standard is one accepted by the courts in the Administrative Procedure Act (APA) context. See *Professional Reactor Operator Society* v. *Nuclear Regulatory Commission, 939 F.2d 1047 (D.C. Cir. 1991) and Security and Exchange Commission* v. *Frank Csapo, 533 F.2d 7 (D.C. Cir. 1976).* The Board agrees with the commenter's suggestion that the Board should apply rigor in the application of the standard should the situation ever arise. No change to the proposed rule is needed in response to this comment.

Comment 5: DOE recommends that the Board institute the same procedural protections that the NRC's rule provides, viz., the requirement that the Board issue a written statement of the reasons supporting any decision to exclude counsel, and provide for a delay of the hearing to permit the retention of new counsel. See 10 CFR 19.18.

Response: The Board agrees with the comment and has modified § 1708.110 of the rule accordingly, so that the Board must issue a verbal or written statement of the reasons supporting any decision to exclude counsel and provide for a delay of the hearing to permit the retention of new counsel.

Comment 6: Proposed § 1708.112(b) would authorize the Board to exclude from appearing before the Board any counsel found ''[t]o have engaged in obstructionism or contumacy.'' Unlike proposed § 1708.110(c), this provision has no counterpart in the NRC's regulations governing investigatory proceedings. Indeed, despite the NRC's critically important nuclear safety mission, that agency's regulations do not contemplate the exclusion of counsel from investigative proceedings on any grounds except for representation of multiple interests, as discussed above. The NRC's regulations governing adjudicatory proceedings—distinct from the investigative proceedings contemplated in the Board's proposed rule—do contain a provision authorizing the presiding officer to exclude any counsel ''who refuses to comply with its directions, or who is disorderly, disruptive, or engages in contemptuous conduct.'' 10 CFR 2.314(c). This authority has been exercised only on rare occasions, and only in the face of truly egregious misconduct.

Response: The commenter seems to be arguing that the Board's rules must track those used by NRC when NRC investigates licensees. The provision objected to has been utilized by other federal agencies with similar language. For example, the Chemical Safety and Hazard Investigation Board's (CSHIB) rule on attorney misconduct provides that persons conducting depositions have authority to take all necessary actions to avoid delay, obstructionism and contemptuous language. This same provision grants the CSHIB authority to exclude attorneys from participation in investigations if circumstances warrant. See 40 CFR 1610.1(a)(5). The Federal Energy Regulatory Commission's (FERC) rule on attorney misconduct has similar effect. A FERC investigating officer has authority to take all necessary action to regulate the course of a proceeding to avoid delay and prevent or restrain obstructionist or contumacious conduct or contemptuous language. Moreover, the Commission may suspend or bar counsel from further appearance before it, and may even exclude counsel from participation in an investigation if circumstances warrant. See 18 CFR 1b.16c(4). The Board's proposed § 1708.112(c) is similar to the misconduct provisions in both the CSHIB and FERC rules in that the Board may exclude or suspend persons from participation in safety investigations if those persons engage in obstructionist or contumacious conduct. The Board finds that the CSHIB and FERC provisions, in use for a considerable length of time, are suitable models and chooses not to employ NRC's more elaborate procedures, except as provided in response to Comments 8 and 9 below. No change to the proposed rule is needed in response to this comment.

Comment 7: Further, DOE asserts that proposed § 1708.112 does not provide any method to challenge an attorney's exclusion on the grounds of obstructionism or contumacy. If the Board does not remove this provision from its proposed rule, DOE recommends that the Board provide witnesses and their attorneys the ability to request a stay and review of any contumacy or obstructionism finding, similar to that which NRC grants to attorneys practicing before it in an adjudicatory setting.

Response: The Board chooses not to adopt the procedures used by NRC with respect to requesting a stay and review of contumacy or obstructionism findings. No change to the proposed rule is needed in response to this comment.

Comment 8: Proposed § 1708.112(b) does not require any statement (written or otherwise) of the reasons for the finding of ''obstructionism or contumacy.'' DOE recommends that if the provision is retained, the proposed rule require a written statement of reasons to be given at the time of the finding.

Response: The Board agrees with the comment and has created new § 1708.112(d) to include language that a statement, either verbal or written, of the reasons for a finding of ''obstructionism or contumacy'' will be given at the time of the finding.

Comment 9: While proposed § 1708.112(d) allows a witness whose counsel has been suspended or excluded to retain a replacement, DOE suggests that if retained, the rule specify that the witness will be allowed a reasonable time to obtain such a replacement.

Response: The Board agrees with the comment and has created new § 1708.112(e) to include language allowing a reasonable period of time to permit retention of new counsel.

Comment 10. Proposed § 1708.109 seeks to limit in various ways the grounds on which attorneys may raise objections at an investigative hearing. For example, it would prohibit counsel from objecting to any question unless it is deemed to be outside the scope of the investigation or would require the witness to reveal privileged information. See Proposed § 1708.109(c). It would also prohibit ''unnecessary objections,'' without providing guidance on what objections should be considered necessary and what should be considered unnecessary. Finally, it would preclude counsel from repeating an objection that has been made to a similar line of inquiry. See Proposed § 1708.109(e), (f). These prohibitions do not constitute the full range of acceptable and reasonable legal objections, and these limitations would necessarily infringe upon counsel's responsibility to zealously represent his or her client.

Response: The commenter misapprehends the purpose of testimony given in a Board safety investigation. Safety investigations are not APA proceedings designed to assemble an evidentiary record upon which rulemaking or adjudicatory decisions are based. Hearings in safety investigations conducted by the Board have only one purpose: To obtain as much relevant information as possible in a timely manner about the event or practice of concern. Counsel for a

witness is not present to ensure that strict rules of evidence are followed. To the contrary, formal rules of evidence do not apply in such proceedings. Investigative proceedings could easily be made ineffective by actions of counsel whose purpose is to impede the free giving of relevant testimony. The Board certainly recognizes that if the form of a question is confusing or could be misconstrued, counsel is encouraged to seek clarification from the Board. Additionally, the Board will not make inquiries into protected privileged communications between counsel and client. The Board is optimistic that if a hearing is convened pursuant to a safety investigation, it will be conducted in a mutually civil and cooperative manner. No change to the proposed rule is needed in response to this comment.

Comment 11: DOE also questions the Board's authority for withholding information from DOE based on a purported ''safety privilege,'' at proposed §§ 1708.104, 1708.114, and 1708.115. The proposed rule provides that information will be treated as ''safety privileged . . . to the extent permissible under existing law.'' Proposed § 1708.104; see also Background paragraph (safety privilege adopted ''to protect confidential witness statements to the maximum extent permitted under existing law''). However, no common law or statutory privilege exists to protect disclosure of information to DOE on the ground that it relates to safety.

Response: This comment appears to proceed from the assumption that DOE has a statutory right to request information from the Board, much as a private citizen has a statutory right to request disclosure of agency records under the Freedom of Information Act (FOIA). Such an assumption conflicts both with the Board's enabling legislation (which offers no such right) and with the Board's status as an independent federal agency within the executive branch. The Board need not cite a privilege in response to a DOE request because DOE has no statutory right to Board information. In the event a safety investigation revealed information pertinent to a genuine safety issue, the Board would readily disclose such information consistent with its charter to ensure adequate protection of the public and worker health and safety. Since the Board began operation, confidentiality of communications from concerned employees or the public has served both the Board and DOE in ensuring adequate protection of public health and safety. The rule's provisions on confidentiality are intended to be consistent with the Board's legal obligations with respect to compliance with the Freedom of Information Act, the Government in the Sunshine Act, or any procedures or requirements contained in the Board's regulations issued pursuant to those Acts. These statutes relate to public access to information, not access by other federal agencies.

With regard to public access to information, the U.S. Supreme Court has recognized that FOIA Exemption 5 encompasses a common law, safety-related privilege concerning promises of confidentiality given to complainants and witnesses interviewed during accident investigations. *United States* v. *Weber Aircraft Corp., 465 U.S. 792, 800 (1984); Machin* v. *Zuckert, 316 F.2d 336 (1963).* Indeed, DOE's Office of Hearings and Appeals (OHA) applied this privilege administratively in a FOIA appeal matter. *Department of Energy OHA Case No. TFA–0173 (March 29, 2007).* Acknowledging the need for confidentiality in safety investigations, OHA remarked that promises of confidentiality given to complainants and witnesses are critical to the effectiveness of investigations. No change to the proposed rule is needed in response to this comment.

Comment 12: In addition, the creation of a ''safety privilege,'' which would allow the Board to withhold from DOE information collected in its safety investigations, may have negative, unintended consequences. For example, proposed § 1708.115(b) provides that the report of the safety investigation is not releasable because it is protected by the safety privilege. By withholding this information from DOE as a matter of course, the Board's proposed rule runs the very real risk of limiting the effectiveness of DOE's response to genuine safety issues.

Response: As stated in the response to Comment 1, the Board will ensure that any safety information developed in an investigation that would assist DOE in effectively responding to a health and safety issue will be promptly provided. The Board reserves the right, however, to provide information without disclosing its sources. No change to the proposed rule is needed in response to this comment.

Comment 13: The Board's enabling statute, under the heading ''Powers of Board'' and the subheading ''Hearings,'' authorizes the Board or a member authorized by the Board to hold hearings and require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of evidence. 42 U.S.C. 2286b(a)(1). Further, the Board's statute allows subpoenas to be issued only under the signature of the Chairman or any Member of the Board designated by him. 42 U.S.C. 2286b(a)(2)(A). Proposed § 1708.109, and in particular proposed § 1708.109(h) and (i), exceed the Board's statutory authority because under that authority, the Board may compel testimony or document productions only before the Board [as a whole] or a Member authorized by the Board. 42 U.S.C. 2286b(a)(1). The Board has no statutory authority to compel a witness to testify before Board staff or even a Board staff member designated as an ''Investigative Officer.''

Response: The Board accepts the comment and has modified the text of § 1708.109 to clarify that only the Board or designated Board Members may receive testimony and documents taken under compulsion of a subpoena issued by the Chairman or a Board Member authorized by the Chairman.

Comment 14: In the second paragraph of the Background section, the proposed rule references the Board's authority to investigate practices that affect ''health and safety of the public and workers at DOE defense nuclear facilities.'' DOE suggests striking the words ''and workers,'' as investigations into worker health and safety exceed the Board's statutory authority. See 42 U.S.C. 2286a.

Response: In its Annual Report to Congress for 1990 (Annual Report to Congress, Defense Nuclear Facilities Safety Board, February 1991) the Board stated:

> The Board's jurisdiction extends to ''public health and safety'' issues at ''United States Department of Energy defense nuclear facilities.'' 42 U.S.C. 2286a, 2286g. The various provisions of the statute and their attendant legislative history indicate that Congress generally intended the phrase ''public health and safety'' to be considered broadly. For example, both Congress and the Board have interpreted the public to include workers at defense nuclear facilities.

The Board's 1991 statement on jurisdiction had, and still has, sound support in case law. *Siegel* v. *Atomic Energy Commission, 400 F.2d 778 (D.C. Cir. 1968); Commonwealth of Massachusetts* v. *U.S. Nuclear Regulatory Commission, 708 F.3d 63 (1st Cir. 2013).* The Board has issued a number of recommendations aimed in whole or in part at the safety of workers at DOE's defense nuclear facilities. See, for example, Recommendations 90–6, 91–6, 92–7, 94–4, and 2010–1. DOE has accepted all of these recommendations either fully or, in the case of Recommendation 2010–1, partially. In no case has DOE rejected any part of a recommendation based on the argument made in this comment. In fact, DOE has

endorsed this interpretation of the Board's statute. For example, in Recommendation 92–7, ''*Training and Qualification,''* the Board stated:

> Since its inception, the Defense Nuclear Facilities Safety Board has emphasized that a well constructed and documented program for training and qualifying operations, maintenance, and technical support personnel and supervisors at defense nuclear facilities is an essential foundation of operations and maintenance and, hence, the safety and health of the public, *including the facility workers.* (Emphasis added).

Secretary James Watkins responded:

> Your recommendations in 92–7 are fully consistent with our ongoing initiatives, and consequently, I accept all elements of Recommendation 92–7.

As recently as May 27, 2011, Secretary Chu wrote to the Board in regard to Recommendation 2010–1:

> The clarifications you provided in your reaffirmation letter have furthered that dialogue, and will help guide our work to develop an Implementation Plan that satisfies our mutual objectives of ensuring that our requirements are clear, ensure adequate protection of the public, *workers* and the environment, and can be implemented as written. (Emphasis added).

The comment appears to be at odds with DOE's official, public position that the Board's health and safety jurisdiction extends to workers at defense nuclear facilities. No change to the proposed rule is needed in response to this comment.

IV. Comment From Mr. Larry Brown

Comment 1. The commenter's primary concern is that the rule is contrary to the principle of open and transparent government, and that the procedures grant to the Chairman unchecked power.

Response: With regard to transparency, the Board's objective is not to make its operations less transparent to the public, but to protect its sources and the content of confidential communications in safety investigations. It is unclear what the commenter is referring to in the context that the rule imparts to the Chairman ''unchecked power.'' With that said, the Board has modified the rule in such a way that complies with recent amendments to the Board's enabling legislation and addresses this comment. Specifically, the Board amended the rule to make clear that safety investigations will only be instituted by an order following a recorded notational vote of all Board Members, or after convening a meeting in accordance with the Government in the Sunshine Act of 1976 and voting in open or closed session. Hearings associated with safety investigations will be convened only after a recorded notational vote of all Board Members. Finally, subpoenas associated with safety investigation hearings will only be authorized by notational vote of the Board, and issued as authorized under the Board's enabling legislation—under signature of the Chairman or any Member of the Board designated by the Chairman.

V. Modifications to the Proposed Rule Resulting From Amendments to the Board's Statute

The NDAA for FY 2013 contained amendments to the Board's enabling legislation that require several changes to the proposed rule in addition to those changes resulting from the aforementioned comments. Section 1708.102(f) of the proposed rule is modified to clarify that following a notational vote, the Board may authorize a closed investigative hearing that grants all Board Members full participatory rights and access to all information relating to the matter under investigation. This modification satisfies the new language in the Board's statute at 42 U.S.C. 2286(c)(5)(B) that each Board Member shall have full access to information relating to the performance of the Board's functions, powers, and mission, including the investigation function. This provision also contemplates that all of the requirements of the Government in the Sunshine Act will be met for closed proceedings.

Section 1708.102(g) is also modified to add the word ''hearings'' after the words ''safety investigation.'' This change is made for two reasons. First, to clarify that issuance of subpoenas in safety investigations is authorized only where the hearing power is invoked during such investigations. In making this change, it is noted that the Board's hearing provision under 42 U.S.C. 2286b(a)(2)(C) states that in connection with issuance of a subpoena, a court may order ''such person to appear before the Board to produce evidence or to give testimony relating to the matter under investigation.'' This provision demonstrates that the Board's hearing provision contemplates convening hearings for investigations.

Moreover, § 1708.102(g) will now include language that subpoenas associated with safety investigation hearings will only be authorized after notational vote of the Board. The change is intended to satisfy 42 U.S.C. 2286(c)(5)(A), which provides that each Board member shall have equal responsibility and authority in establishing decisions and determining actions of the Board. Issuance of the subpoena remains the exclusive authority of the Chairman pursuant to 42 U.S.C. 2286b(a)(2)(A), unless the Chairman designates another Board Member with that authority.

Finally, a new provision in the proposed rule, § 1708.102(h), is added to recognize 42 U.S.C. 2286(c)(5)(A) and (C). These provisions, when read together, provide that before the Board establishes a decision or determines an action the Board must take a notational vote on that decision or action with each Board Member having one vote. Consequently, § 1708.102(h) mandates that the Board will conduct a notational vote before making any decision or taking any action authorized under the procedures in the proposed rule.

Matters of Regulatory Procedure

Regulatory Flexibility Act

For purposes of the Regulatory Flexibility Act, the rule will not have a significant economic impact on a substantial number of small entities. The rule addresses only the procedures to be followed in safety investigations. Accordingly, the Board has determined that a Regulatory Flexibility Analysis is not required.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, the rule would not significantly or uniquely affect small governments and would not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (as adjusted for inflation).

Executive Order 12866

In issuing this regulation, the Board has adhered to the regulatory philosophy and the applicable principles of regulation as set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This rule has not been reviewed by the Office of Management and Budget under that Executive Order since it is not a significant regulatory action within the meaning of the Executive Order.

Executive Order 12988

The Board has reviewed this regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certifies that it meets the applicable standards provided therein.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this regulation does not contain information collection requirements that require approval by the Office of Management and Budget.

The Board expects the collection of information that is called for by the regulation would involve fewer than 10 persons each year.

Congressional Review Act

The Board has determined that this rulemaking does not involve a rule within the meaning of the Congressional Review Act.

List of Subjects in 10 CFR Part 1708

Administrative practice, Procedure, and Safety investigations.

For the reasons set forth in the preamble, the Defense Nuclear Facilities Safety Board proposes to add Part 1708 to 10 CFR chapter XVII to read as follows:

PART 1708—PROCEDURES FOR SAFETY INVESTIGATIONS

Sec.

Authority: 42 U.S.C. 2286b(c); 42 U.S.C. 2286a(b)(2); 44 U.S.C. 3101–3107, 3301–3303a, 3308–3314.

§ 1708.100 Authority to conduct safety investigations.

(a) The Defense Nuclear Facilities Safety Board (Board) is an independent federal agency in the executive branch of the United States Government.

(b) The Board's enabling legislation authorizes it to conduct safety investigations pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. 2286a(b)(2)).

§ 1708.101 Scope and purpose of safety investigations.

(a) The Board shall investigate any event or practice at a Department of Energy defense nuclear facility which the Board determines has adversely affected, or may adversely affect, public health and safety.

(b) The purpose of any Board investigation shall be:

(1) To determine whether the Secretary of Energy is adequately implementing standards (including all applicable Department of Energy orders, regulations, and requirements) at Department of Energy defense nuclear facilities;

(2) To ascertain information concerning the circumstances of such event or practice and its implications for such standards;

(3) To determine whether such event or practice is related to other events or practices at other Department of Energy defense nuclear facilities; and

(4) To provide to the Secretary of Energy such recommendations for changes in such standards or the implementation of such standards (including Department of Energy orders, regulations, and requirements) and such recommendations relating to data or research needs as may be prudent or necessary.

§ 1708.102 Types of safety investigations.

(a) The Board may initiate a preliminary safety inquiry or order a formal safety investigation.

(b) A preliminary safety inquiry means any inquiry conducted by the Board or its staff, other than a formal investigation. Where it appears from a preliminary safety inquiry that a formal safety investigation is appropriate, the Board's staff will so recommend to the Board.

(c) A formal safety investigation is instituted by an Order of Safety Investigation issued either after a recorded notational vote of Board Members or after convening a meeting in accordance with the Government in the Sunshine Act and voting in open or closed session, as the case may be.

(d) Orders of Safety Investigations will outline the basis for the investigation, the matters to be investigated, the Investigating Officer(s) designated to conduct the investigation, and their authority.

(e) The Office of the General Counsel shall have primary responsibility for conducting and leading a formal safety investigation. The Investigating Officer(s) shall report to the Board.

(f) Following a notational vote and in accordance with the Government in the Sunshine Act, the Board or an individual Board Member authorized by the Board may hold such closed or open hearings and sit and act at such times and places, and require the attendance and testimony of such witnesses and the production of such evidence as the Board or an authorized member may find advisable, or exercise any other applicable authority as provided in the Board's enabling legislation. Each Board Member shall have full access to all information relating to the matter under investigation, including attendance at closed hearings.

(g) Subpoenas in formal safety investigation hearings may be issued by the Chairman only after a notational vote of the Board. The Chairman may designate another Board Member to issue a subpoena. Subpoenas shall be served by any person designated by the Chairman, or otherwise as provided by law.

(h) A determination of a decision or action authorized to the Board by these procedures shall only be made after a notational vote of the Board with each Board Member having one vote.

§ 1708.103 Request to conduct safety investigations.

(a) Any person may request that the Board perform a preliminary safety inquiry or conduct a formal safety investigation concerning a matter within the Board's jurisdiction.

(b) Actions the Board may take regarding safety investigation requests are discretionary.

(c) The Board will offer to protect the identity of a person requesting a safety investigation to the maximum extent permitted by law.

(d) Board safety investigations are wholly administrative and investigatory in nature and do not involve a determination of criminal culpability, adjudication of rights and duties, or other quasi-judicial determinations.

§ 1708.104 Confidentiality of safety investigations and privileged safety information.

(a) Information obtained during the course of a preliminary safety inquiry or a formal safety investigation may be treated as confidential, safety privileged, and non-public by the Board and its staff, to the extent permissible under existing law. The information subject to this protection includes but is not limited to: Identity of witnesses; recordings; statements; testimony; transcripts; emails; all documents, whether or not obtained pursuant to Board subpoena; any conclusions based on privileged safety information; any deliberations or recommendations as to policies to be pursued; and all other related investigative proceedings and activities.

(b) The Board shall have the discretion to assert the safety privilege when safety information, determined by

the Board as protected from release, is sought by any private or public governmental entity or by parties to litigation who attempt to compel its release.

(c) Nothing in this section voids or otherwise displaces the Board's legal obligations with respect to the Freedom of Information Act, the Government in the Sunshine Act, or any procedures or requirements contained in the Board's regulations issued pursuant to those Acts.

§ 1708.105 Promise of confidentiality.

(a) The Investigating Officer(s) may give a promise of confidentiality to any individual who provides evidence for a safety inquiry or investigation to encourage frank communication.

(b) A promise of confidentiality must be explicit.

(c) A promise of confidentiality must be documented in writing.

(d) A promise of confidentiality may be given only as needed to ensure forthright cooperation of a witness and may not be given on a blanket basis to all witnesses.

(e) A promise of confidentiality must inform the witness that it applies only to information given to the Investigating Officer(s) and not to the same information if given to others.

§ 1708.106 Limitation on participation.

(a) A safety investigation under this rule is not a judicial or adjudicatory proceeding.

(b) No person or entity has standing to intervene or participate as a matter of right in any safety investigation under this regulation.

§ 1708.107 Powers of persons conducting formal safety investigations.

The Investigating Officer(s) appointed by the Board may take informal or formal statements, interview witnesses, take testimony, request production of documents, recommend issuance of subpoenas, recommend taking of testimony in a closed forum, recommend administration of oaths, and otherwise perform any lawful act authorized under the Board's enabling legislation in connection with any safety investigation ordered by the Board.

§ 1708.108 Cooperation: Ready access to facilities, personnel, and information.

(a) Section 2286c(a) of the Atomic Energy Act of 1954, as amended, requires the Department of Energy to fully cooperate with the Board and provide the Board with ready access to such facilities, personnel, and information as the Board considers necessary, including ready access in connection with a safety investigation.

(b) Each contractor operating a Department of Energy defense nuclear facility under a contract awarded by the Secretary is also required, to the extent provided in such contract or otherwise with the contractor's consent, to fully cooperate with the Board and provide the Board with ready access to such facilities, personnel, and information of the contractor as the Board considers necessary in connection with a safety investigation.

(c) The Board may make a written request to persons or entities relevant to the safety investigation to preserve pertinent information, documents, and evidence, including electronically stored information, in order to preclude alteration or destruction of that information.

§ 1708.109 Rights of witnesses in safety investigations.

(a) Any person who is compelled to appear in person to provide testimony or produce documents in connection with a safety investigation is entitled to be accompanied, represented, and advised by an attorney. Subpoenas in safety investigations shall issue only under signature of the Chairman or any Member of the Board designated by the Chairman. Attendance and testimony shall be before the Board or a Member authorized by the Board.

(b) If an executive branch agency employee witness is represented by counsel from that same agency, counsel shall identify who counsel represents to determine whether counsel represents multiple interests in the safety investigation.

(c) Counsel for a witness may advise the witness with respect to any question asked where it is claimed that the testimony sought from the witness is outside the scope of the safety investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence. For these permissible objections, the witness or counsel may object on the record to the question and may state briefly and precisely the grounds therefore. If the witness refuses to answer a question, then counsel may briefly state on the record that counsel has advised the witness not to answer the question and the legal grounds for such refusal. The witness and his or her counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt any oral examination.

(d) When it is claimed that the witness has a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(e) Any objections made during the course of examination will be treated as continuing objections and preserved throughout the further course of testimony without the necessity for repeating them as to any similar line of inquiry.

(f) Counsel for a witness may not interrupt the examination by making any unnecessary objections or statements on the record.

(g) Following completion of the examination of a witness, such witness may make a statement on the record, and that person's counsel may, on the record, question the witness to enable the witness to clarify any of the witness's answers or to offer other evidence.

(h) The Board or any Member authorized by the Board shall take all measures necessary to regulate the course of an investigative proceeding to avoid delay and prevent or restrain obstructionist or contumacious conduct or contemptuous language.

(i) If the Board or any Member authorized by the Board finds that counsel for a witness, or other representative, has refused to comply with his or her directions, or has engaged in obstructionism or contumacy, the Board or Member authorized by the Board may thereupon take action as the circumstances may warrant.

(j) Witnesses appearing voluntarily do not have a right to have counsel present during questioning, although the Board or Member authorized by the Board, in consultation with the Office of the General Counsel, may permit a witness appearing on a voluntary basis to be accompanied by an attorney or non-attorney representative.

§ 1708.110 Multiple interests.

(a) If counsel representing a witness appears in connection with a safety investigation, counsel shall state on the record all other persons or entities counsel represents in that investigation.

(b) When counsel does represent more than one person or entity in a safety investigation, counsel shall inform the Investigating Officer(s) and each client of counsel's possible conflict of interest in representing that client.

(c) When an Investigating Officer(s), or the Board, as the case may be, in consultation with the Board's General Counsel, has concrete evidence that the presence of an attorney representing multiple interests would obstruct or impede the safety investigation, the Investigating Officer(s) or the Board may prohibit that attorney from being present during testimony.

(d) The Board shall issue a written statement of the reasons supporting a decision to exclude counsel under this section within five working days following exclusion. The Board shall also delay the safety investigation for a reasonable period of time to permit retention of new counsel.

§ 1708.111 Sequestration of witnesses.

(a) Witnesses shall be sequestered during interviews, or during the taking of testimony, unless otherwise permitted by the Investigating Officer(s) or by the Board, as the case may be.

(b) No witness, or counsel accompanying any such witness, shall be permitted to be present during the examination of any other witness called in such proceeding, unless permitted by the Investigating Officer(s) or the Board, as the case may be.

§ 1708.112 Appearance and practice before the Board.

(a) Counsel appearing before the Board or the Investigating Officer(s) must conform to the standards of ethical conduct required of practitioners before the Courts of the United States.

(b) The Board may suspend or deny, temporarily or permanently, the privilege of appearing or practicing before the Board in any way to a person who is found:

(1) Not to possess the requisite qualifications to represent others; or

(2) To have engaged in unethical or improper professional conduct; or

(3) To have engaged in obstructionism or contumacy before the Board; or

(4) To be otherwise not qualified.

(c) Obstructionist or contumacious conduct in an investigation before the Board or the Investigating Officer(s) will be grounds for exclusion of any person from such safety investigation proceedings and for summary suspension for the duration of the investigation.

(d) At the time of the finding the Board shall issue a verbal or written statement of the reasons supporting a decision to suspend or exclude counsel for obstructionism or contumacy.

(e) A witness may have a reasonable amount of time to retain replacement counsel if original counsel is suspended or excluded.

§ 1708.113 Right to submit statements.

At any time during the course of an investigation, any person may submit documents, statements of facts, or memoranda of law for the purpose of explanation or further development of the facts and circumstances relevant to the safety matter under investigation.

§ 1708.114 Official transcripts.

(a) Official transcripts of witness testimony, whether or not compelled by subpoena to appear before a Board safety investigation, shall be recorded either by an official reporter or by any other person or means designated by the Investigating Officer(s) or the Board's General Counsel.

(b) Such witness, after completing the compelled testimony, may file a request with the Board's General Counsel to procure a copy of the official transcript of that witness's testimony. The General Counsel shall rule on the request, and may deny for good cause.

(c) Good cause for denying a witness's request to procure a transcript may include, but shall not be limited to, the protection of a trade secret, non-disclosure of confidential or proprietary business information, security-sensitive operational or vulnerability information, safety privileged information, or the integrity of Board investigations.

(d) Whether or not a request is made, the witness and his or her attorney shall have the right to inspect the official transcript of the witness's own testimony, in the presence of the Investigating Officer(s) or his designee, for purposes of conducting errata review.

(e) Transcripts of testimony are otherwise considered confidential and privileged safety information, and in no case shall a copy or any reproduction of such transcript be released to any other person or entity, except as provided in paragraph (b) above or as required under the Freedom of Information Act or the Government in the Sunshine Act, or any procedures or requirements contained in Board regulations issued pursuant to those Acts.

§ 1708.115 Final report of safety investigation.

(a) The Board will complete a final report of the safety investigation fully setting forth the Board's findings and conclusions.

(b) The final report of the safety investigation is confidential and protected by the safety privilege, and is therefore not releasable.

(c) The Board, in its discretion, may sanitize the final report of the safety investigation by redacting confidential and safety privileged information so that the report is put in a publically releasable format.

(d) Nothing in this section voids or otherwise displaces the Board's legal obligations with respect to compliance with the Freedom of Information Act, the Government in the Sunshine Act, or any procedures or requirements contained in the Board's regulations issued pursuant to those Acts.

§ 1708.116 Procedure after safety investigations.

(a) If a formal safety investigation results in a finding that an event or practice has adversely affected, or may adversely affect, public health and safety, the Board may take any appropriate action authorized to it under its enabling statute, including, but not limited to, making a formal recommendation to the Secretary of Energy, convening a hearing, or establishing a reporting requirement.

(b) If a safety investigation yields information relating to violations of federal criminal law involving government officers and employees, the Board shall expeditiously refer the matter to the Department of Justice for disposition.

(c) If in the course of a safety investigation, a safety issue or concern is found to be outside the Board's jurisdiction, that safety issue or concern shall be referred to the appropriate entity with jurisdiction for disposition.

(d) Statements made in connection with testimony provided to the Board in an investigation are subject to the provisions of 18 U.S.C. 1001.

Dated: August 6, 2014.

Peter S. Winokur,

Chairman.

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BILLING CODE 3670–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AE39

Federal Credit Union Ownership of Fixed Assets

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The NCUA Board (Board) proposes to amend its regulation governing federal credit union (FCU) ownership of fixed assets to provide regulatory relief and to help FCUs better manage their fixed assets. The proposed rule provides greater flexibility to FCUs by removing the waiver requirement for FCUs to exceed the five percent aggregate limit on investments in fixed assets. An FCU that chooses to exceed the five percent aggregate limit may do so without prior NCUA approval, provided it implements a fixed assets management (FAM) program that