DEPARTMENT OF ENERGY

10 CFR Part 710

[EHSS-RM-20-PACNM]

RIN 1992-AA64

Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material

AGENCY: Office of Health, Safety, and Security. Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) proposes to amend its regulations, which set forth the policies and procedures for resolving questions concerning eligibility for DOE access authorizations. The proposed revisions would: expand the scope of the current rule to include individuals applying for or in positions requiring eligibility to hold a sensitive position; update and add clarity, including by deleting obsolete references, throughout the rule for consistency with national policies and DOE practices; and update references to DOE officials and offices.

DATES: Written comments on this proposed rule must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

ADDRESES: You may submit comments, identified by "Determining Eligibility for Access and RIN 1992-AA64," by any of the following methods (comments by e-mail are encouraged):

● *Federal eRulemaking Portal*: *www.regulations.gov*. Follow the instructions for submitting comments.

● *E-mail* to: *OfficeofDepartmentalPersonnelSecurity@hq.doe.gov*. Include Determining Eligibility for Access and RIN 1992-AA64 in the subject line of the message.

● *Mail* to: U.S. Department of Energy, Office of Departmental Personnel Security, EHSS-53, 1000 Independence Avenue, SW, Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Tracy L. Kindle, U.S. Department of Energy, Office of Departmental Personnel Security, (202) 586-3249, *officeofdepartmentalpersonnelsecurity@hq.doe.gov*, or Christina Pak, Office of the General Counsel, (202) 586-4114, *christina.pak@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Background and Summary

DOE is publishing this notice of proposed rulemaking in order to update and clarify DOE's policies and procedures for determining eligibility for access authorizations. The current rule implements the requirement in Executive Order (E.O.) 12968, *Access to Classified Information*, that agencies promulgate regulations to provide review proceedings to individuals whose eligibility for access to classified information is denied or revoked.

The current rule has not been substantively updated since 2016 (81 FR 71331, Oct. 17, 2016). Since then, as various national policies were issued and amended and DOE has gained additional implementation experience under the current rule, so proposed revisions to update and clarify provisions in the rule are appropriate. The proposed revisions would: (1) expand the scope of the current rule to include individuals applying for or in positions requiring eligibility to hold a sensitive position; (2) incorporate requirements of Security Executive Agent Directive (SEAD) 9, *Appellate Review of Retaliation Regarding Security Clearances and Access Determinations*, which provides appeal rights to both federal and contractor employees; (3) update hearing procedures to more accurately reflect current practices; (4) update references to DOE offices and officials to reflect new titles and

organizational names; (5) remove appendix A, SEAD 4, *National Security Adjudicative Guidelines* (June 8, 2017); (6) revise and add definitions for certain terms; and (7) make minor updates to improve clarity and delete obsolete references.

II. Section-by-Section Description of Proposed Changes

DOE proposes to amend title 10 Code of Federal Regulation (CFR) part 710 as follows:

1. The title of this part would be amended to add, "OR ELIGIBILITY TO HOLD A SENSITIVE POSITION" at the end to reflect the proposed expansion of the scope of the rule, as explained in paragraph 4.

2. The authority section of this part would be amended to add a reference to E.O. 13467. Context for this proposed change is explained in paragraph 4.

3. In proposed § 710.1, "Purpose," § 710.1(a) would be amended to add at the end "or eligibility to hold a sensitive position pursuant to Executive Order 13467 (Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information)," to reflect the proposed change to the scope of the rule, as explained below in paragraph 4. Section 710.1(b) would be amended to add after the citation for E.O. 10865, "Executive Order 13467, 73 FR 38103 (June 30, 2008) as amended" and to add "or successor directive" after the reference to SEAD 4.

4. In proposed § 710.2 "Scope," a new paragraph would be added to make the provisions of the rule applicable to an individual's eligibility to hold a sensitive position. This proposed change would clarify that, except when specifically noted, any provision that applies to determinations of eligibility for access to classified information or special nuclear matter would also apply to determinations of eligibility to hold a sensitive position. Conforming changes are also proposed to be made in § 710.2.

In 2017, E.O. 13467, Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified

National Security Information, was amended by E.O. 13764 to make the provisions of EO 12968 that apply to eligibility for access to classified information to also apply to eligibility to hold a sensitive position regardless of whether or not that sensitive position requires access to classified information.

The term "sensitive position" is defined in E.O. 13467, as amended, to mean any position within or in support of a Federal department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on national security regardless of whether the occupant has access to classified information and regardless of whether the occupant is an employee, military service member, or contractor.

The current scope of 10 CFR part 710 applies only to individuals who require eligibility for access to classified information and special nuclear materials and does not address individuals who require eligibility to hold a sensitive position where an access authorization is not a requirement of the position.

Expanding the applicability of this rule to individuals applying for or in positions requiring eligibility to hold a sensitive position, who do not require an access authorization, would bring DOE into compliance with E.O. 13467, as amended.

5. Existing § 710.3, "Reference," would be deleted in its entirety because appendix A, SEAD 4, *National Security Adjudicative Guidelines* (June 8, 2017), is proposed for removal as explained below in paragraph 22.

6. In § 710.4, "Policy," § 710.4(a) would be amended to add at the end "or eligibility to hold a sensitive position," and § 710.4(b) would be amended to add "or eligibility to hold a sensitive position" after "access authorization" to reflect the proposed change to § 710.2 "Scope."

7. In § 710.5, "Definitions," a number of new or amended definitions are proposed.

The term “Continuous Vetting” would be added to reflect recent national policies under Trusted Workforce (TW) 2.0, as explained in paragraph 8.

The term “Local Director of Security” would be amended by removing the references to “Chicago” and “Oak Ridge,” and adding “for the Office of Science (SC), the individual designated in writing by the Deputy Director for Operations,” removing the references to Richland and Savannah River and adding “for the Office of Environmental Management (EM), the individual(s) designated in writing by the Senior Advisor, or delegee, adding an “s” after “individual” in the reference to the National Nuclear Security Administration, and adding “Security” in the title of the Naval Nuclear Propulsion Program. These changes would reflect new titles and organization name changes since the last changes to this rule.

The term “Manager” would be amended by removing the references to the Chicago Operations Office, the Oak Ridge Operations Office, and the “Director, Office of Headquarters Security Operations”. “Manager” would be changed by adding “(to include the Office of River Protection)” in the reference to “Richland,” adding “for the Office of Environmental Management (EM), the individuals(s) designated in writing by the Senior Advisor, or delegee, adding “for the Office of Science (SC), the individual designated in writing by the Deputy Director for Operations,” adding “Security” in the title of the Naval Nuclear Propulsion Program, and adding “Director, Office of Headquarters Security Vetting” in place of “Director, Office of Headquarters Security Operations”. These proposed changes would reflect new titles and organization name changes since the last change to this rule.

The term “Sensitive Position” would be added to reflect the expansion of the scope of the rule to apply to individuals applying for or in sensitive positions, consistent with E.O. 13467, as amended, as explained in paragraph 4.

8. In § 710.6, "Cooperation by the individual," § 710.6(a)(1) would be amended to add "continuous vetting" after "reinvestigation." The Director of National Intelligence and the Director of the Office of Personnel Management, pursuant to their responsibilities as Executive Agents under E.O. 13467, as amended, launched the "Trusted Workforce 2.0" initiative to transform Federal personnel vetting programs. One of the changes included a transition from traditional periodic reinvestigations to government-wide continuous vetting. Paragraph (a)(1) would also delete "interviews" and add in its place "consultations" for consistency with current DOE terminology. It would also delete "investigative activities" and add in its place "actions" for consistency with current DOE terminology. The last sentence of paragraph (a)(1) would also be amended to add the language "for incumbents" before "any access authorization then in effect may be administratively withdrawn" to clarify that the term "administratively withdrawn" applies to incumbents while "administratively terminated" applies to applicants. Paragraph (c) would be amended to delete the words "his/her" and add in their place the word "their" for consistency with other DOE policies.

9. Section 710.7(d) would be amended to delete "reports of investigation" and add in its place "investigative results report" for consistency with DOE and other Federal agency practices.

10. Section 710.8(a) would be amended by removing references to an "interview" wherever it occurs and adding, in their place references to a "consultation" for consistency with current DOE terminology.

11. Section 710.9(e) would be amended to reflect the requirements in SEAD 9, *Appellate Review of Retaliation Regarding Security Clearances and Access Determinations.* In 2022, the Director of National Intelligence issued SEAD 9, which established an appellate review process for employees who seek to appeal an adverse final agency determination with respect to alleged retaliatory action(s) taken by an employing agency

affecting the employees' security clearance or access determination as a result of protected disclosures. SEAD 9 clarified that the agency review and appeal rights were available to both federal and contractor employees. Therefore, paragraph (e) would be amended to remove the words, "if the individual is a Federal employee," and add language to address the appeal rights under SEAD 9. Paragraphs (e) and (f) would be amended to delete the words, "his/her," and add in their place the word "their" for consistency with other DOE policies.

12. Section 710.20 would be amended to remove the word "interview" and add in its place the word "consultation" for consistency with current DOE terminology.

13. Section 710.21 would be amended to delete from it the words "his/her" and add in their place the word "their" for consistency with other DOE policies. Paragraph (c)(1) would be amended to add a requirement for the Manager to provide a copy of SEAD 4 or successor directive as part of the notification letter. Since Appendix A, which currently contains SEAD 4, is proposed for removal, this proposed amendment would ensure that an individual going through administrative review under this part will receive a copy of the applicable adjudicative standards. Paragraph (c)(2) would be amended to remove the words, "For Federal employees only", and add language to reflect the requirements in SEAD 9, *Appellate Review of Retaliation Regarding Security Clearances and Access Determinations,* which extended appeal rights beyond Federal employees to include Federal contractors, as detailed in the explanation of proposed changes to § 710.9(e), in paragraph 11.

14. Proposed § 710.22(c)(4) would be amended to clarify that the 30 days provided to the individual for requesting review of the Manager's initial decision is subject to any extensions granted by the Director under paragraph (c)(3).

15. Proposed § 710.25(c) would be amended to delete the words "his/her" and add in their place the words "their" for consistency with other DOE policies. Paragraph (e)

would be amended to delete language stating that hearings will normally be held at or near a DOE facility unless determined otherwise by the Administrative Judge and also to delete that the hearing location will be selected for all the participants' convenience. Paragraph (f) would be amended to add language to clarify that conferences may be conducted by telephone, video teleconference, or other means as directed by the Administrative Judge. These changes to paragraphs (e) and (f) are proposed in order to conform to current agency practice.

16. Proposed § 710.26(a) would be amended to delete the words "his/her" and add in their place the words "their" for consistency with other DOE policies. Paragraph (d) would be amended to delete language that requires the proponent of a witness to conduct the direct examination of their witness. This change is proposed because if an individual is represented by counsel, the individual's counsel will often conduct the direct examination of the individual's witnesses. However, when the individual is not represented by counsel, the individual may choose to allow DOE counsel to conduct the direct examination of the individual's witnesses. This proposed change would align the regulation with current DOE practices, which provides the individual with flexibility in the conduct of direct examinations. In addition, the language currently in § 710.26(d), "[w]henever reasonably possible, testimony shall be given in person," would be deleted to reflect the current practice that testimony is normally given live via video teleconference and not in-person.

17. Proposed § 710.27(b) would be amended to delete the word "handicapped" and add in its place the word "prejudiced" to reflect updated terminology.

18. Proposed § 710.28(a)(4) would be amended to delete the words "his/her" and add in their place the words "their" for consistency with other DOE policies.

19. Proposed § 710.29(c) would be amended to delete the words "his/her" and add in their place the word "their" to reflect updated terminology for consistency with other DOE policies.

20. In § 710.31, paragraphs (b)(4), (b)(5), and (b)(6) would be amended to correct typographical errors made in the last substantive revision to this regulation. Specifically, paragraphs (b)(4) and (b)(5) would be amended to delete the language "provisions of § 710.31(2)" and add, in their place, "provisions of § 710.31(b)(2)" since § 710.31(2) does not exist in the current rule and the correct reference should have been to paragraph (b)(2), which describes the actions to be taken depending on whether a reconsideration request is approved. Paragraph (b)(6) would be amended to delete the language "paragraphs (f) or (g)" and add, in their place, "paragraphs (b)(4) or (b)(5)". There are no paragraphs (f) and (g) in the current § 710.31 and paragraph (b)(6) should have referenced §§ 710.31(b)(4) and 710.31(b)(5), which describe the actions to be taken based on whether an individual is found to be eligible for access authorization. Paragraph (b)(6) would also be amended to delete the language "set forth in paragraph (d)" and add, in its place, "set forth in paragraph (b)(2)" for the same reason explained previously. This change is proposed because there is no § 710.31(d) in the current rule. The correct reference should have been § 710.31(b)(2).

21. Appendix A to Part 710 – SEAD 4, *National Security Adjudicative Guidelines* (June 8, 2017) would be deleted in its entirety. On October 17, 2016, DOE removed its adjudicative criteria from the regulation in order to rely solely on the national security adjudicative guidelines (81 FR 71331). As part of that rule, DOE added the entire text of the national security adjudicative guidelines to the regulation as appendix A. The intent behind adding appendix A was to provide the maximum transparency and notice to the public as to the applicable adjudicative criteria in determining eligibility for access to classified information. On December 4, 2017, this regulation was updated to include the

latest version of the national security adjudicative guidelines, SEAD 4, which was issued by the Director of National Intelligence. Future updates to the National Security Adjudicative Guidelines are likely and DOE believes retaining appendix A, which may not reflect the latest updated version due to the time it takes to amend a regulation, may cause confusion to the public as to which version of the guidelines applies to their eligibility determination. Therefore, DOE proposes to remove appendix A, SEAD 4, National Security Adjudicative Guidelines (June 8, 2017), and require that a copy of the applicable guidelines be provided to individuals as part of the notification letter, as proposed in § 710.21(c)(1).

I. Regulatory Review

A. Executive Orders 12866, 13563, and 14094

This proposed regulatory action has been determined not to be a "significant regulatory action" under E.O. 12866, *Regulatory Planning and Review*, 58 FR 51735 (October 4, 1993) as supplemented and reaffirmed by E.O. 13563, "Improving Regulation and Regulatory Review," 76 FR 3821 (Jan. 21, 2011) and amended by E.O. 14094, "Modernizing Regulatory Review", 88 FR 21879 (April 11, 2023). Accordingly, this proposed rule is not subject to review under the E.O. by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).

B. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of E.O. 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 E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed regulation meets the relevant standards of E.O. 12988.

C. 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 E.O. 13272, "Proper Consideration of Small Entities in Agency Rulemaking," (67 FR 53461, August 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 has made its procedures and policies available on the Office of the General Counsel's Web site at *www.gc.doe.gov*.

DOE has reviewed this proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The proposed rule would amend procedures that apply to the determination of eligibility of individuals for access to classified information and access to special nuclear material. The proposed rule applies to individuals, and would not apply to "small entities," as that term is defined in the Regulatory Flexibility Act. In addition, as stated previously, DOE has no

discretion in adopting the national policies; it is the national policies themselves that impose any impact on affected individuals. As a result, if adopted, the proposed rule would not have a significant economic impact on a substantial number of small entities.

Accordingly, DOE certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis is required, and 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 for review under 5 U.S.C. 605(b).

D. Paperwork Reduction Act

This proposed rule does not impose a collection of information requirement subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq*.

E. National Environmental Policy Act

DOE has determined that this proposed rule is covered under the Categorial Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A5 of appendix A to subpart D, 10 CFR part 1021, which applies to a rulemaking that amends an existing rule or regulation and that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

F. Executive Order 13132

E.O. 13132, "Federalism", 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined this proposed rule and has determined that it does not preempt State law

and, if adopted, would 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 E.O. 13132.

G. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Public Law 104─4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or Tribal governments, or to the private sector, of $100 million or more 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 would expand the scope of the current rule with respect to individuals covered, make updates and clarifications for consistency with national polices and DOE practices, update references to DOE officials and offices, and make minor updates to improve clarity and delete obsolete references. The proposed rule would not result in the expenditure by State, local or 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.

H. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105-277), requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This proposed rule would 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.

I. Executive Order 13211

E.O. 13211, "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, 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 promulgates or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under E.O. 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 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 would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

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 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 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. Approval by the Office of the Secretary of Energy

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

List of Subjects in 10 CFR Part 710

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

Signing Authority

This document of the Department of Energy was signed on January 24, 2024, by Jennifer Granholm, Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC on January 26, 2024.

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Treena V. Garrett

Federal Register Liaison Officer,
U.S. Department of Energy

For the reasons set out in the preamble, DOE proposes to amend part 710 of title 10 of the Code of Federal Regulations as set forth below:

PART 710—PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED MATTER AND SPECIAL NUCLEAR MATERIAL OR ELIGIBILTY TO HOLD A SENSITIVE POSITION

1. The authority citation for part 710 is revised to read as follows:

Authority: 42 U.S.C. 2165, 2201, 5815, 7101, *et seq*., 7383h-l; 50 U.S.C. 2401 *et seq*.; E.O. 10865, 3 CFR 1959-1963 comp., p. 398, as amended, 3 CFR Chap. IV; E.O. 13526, 3 CFR 2010 Comp., pp. 298-327 (or successor orders); E.O. 12968, 3 CFR 1995 Comp., p. 391; E.O. 13467, 3 CFR 2008 Comp., p. 196.

2. Revise the part 710 heading to read as set forth above.

3. Revise § 710.1 to read as follows:

§ 710.1 Purpose.

(a) This part establishes the procedures for determining the eligibility of individuals described in § 710.2 for access to classified matter or special nuclear material, pursuant to the Atomic Energy Act of 1954, or for access to national security information in accordance with E.O. 13526 (Classified National Security Information), or eligibility to hold a sensitive position pursuant to E.O. 13467 (Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information).

(b) This part implements: E.O. 12968, 60 FR 40245 (August 2, 1995), as amended; E.O. 13526, 75 FR 707 (January 5, 2010) as amended; E.O. 10865, 25 FR 1583 (February

24, 1960), as amended; E.O. 13467, 73 FR 38103 (June 30, 2008) as amended; and the National Security Adjudicative Guidelines, issued as SEAD 4, by the Director of National Intelligence on December 10, 2016, or successor directive.

4. Revise § 710.2 to read as follows:

§ 710.2 Scope.

(a) The procedures outlined in this rule apply to determinations of eligibility for access authorization or eligibility to hold a sensitive position for:

(1) Employees (including consultants) of, and applicants for employment with, contractors and agents of the DOE;

(2) Access permittees of the DOE and their employees (including consultants) and applicants for employment;

(3) Employees (including consultants) of, and applicants for employment with, the DOE; and

(4) Other persons designated by the Secretary of Energy.

(b) To the extent the procedures in this rule apply to determinations of eligibility for access to classified information or special nuclear material, they shall also apply to determinations of eligibility to hold a sensitive position, except as specifically noted.

§ 710.3 [Removed and Reserved]

5. Remove and reserve § 710.3.

6. Revise § 710.4 to read as follows:

§ 710.4 Policy.

(a) It is the policy of DOE to provide for the security of its programs in a manner consistent with traditional American concepts of justice and fairness. To this end, the

Secretary has established procedures that will afford those individuals described in § 710.2 the opportunity for administrative review of questions concerning their eligibility for access authorization or eligibility to hold a sensitive position.

(b) It is also the policy of DOE that none of the procedures established for determining eligibility for access authorization or eligibility to hold a sensitive position shall be used for an improper purpose, including any attempt to coerce, restrain, threaten, intimidate, or retaliate against individuals for exercising their rights under any statute, regulation or DOE directive. Any DOE officer or employee violating, or causing the violation of this policy, shall be subject to appropriate disciplinary action.

7. Amend § 710.5 by:

a. Adding in alphabetical order the definition for "Continuous vetting";

b. Revising the definitions for "Local Director of Security" and "Manager"; and

c. Adding in alphabetical order the definition for "Sensitive position".

The additions and revisions read as follows:

§ 710.5 Definitions.

* * * * *

Continuous vetting means reviewing the background of an individual described in § 710.2(a)(1) through (4) of this part at any time to determine whether that individual continues to meet applicable requirements for access authorization or a sensitive position.

* * * * *

Local Director of Security means the individual with primary responsibility for safeguards and security at the Idaho Operations Office; for the Office of Environmental Management (EM), the individual(s) designated in writing by the Senior Advisor, or delegee;

for the Office of Science (SC), the individual designated in writing by the Deputy Director for Operations; for Naval Reactors, the individual(s) designated under the authority of the Director, Security Naval Nuclear Propulsion Program; for the National Nuclear Security Administration (NNSA), the individual(s) designated in writing by the Chief, Defense Nuclear Security; and for DOE Headquarters cases the Director, Office of Headquarters Personnel Security Operations.

Manager means the senior Federal official at the Idaho, Richland (to include the Office of River Protection) Operations Offices; for the Office of Environmental Management, the individual(s) designated in writing by the Senior Advisor, or delegee; for the Office of Science (SC), the individual designated in writing by the Deputy Director for Operations; for Naval Reactors, the individual designated under the authority of the Director, Security Naval Nuclear Propulsion Program; for the NNSA, the individual designated in writing by the NNSA Administrator or Deputy Administrator; and for DOE Headquarters cases, the Director, Office of Headquarters Security Vetting.

* * * * *

Sensitive position means any position within or in support of a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security, regardless of whether the occupant has access to classified information, and regardless of whether the occupant is an employee, a military service member, or a contractor. Sensitive positions for the purpose of this part only include individuals designated by DOE in non-critical sensitive, critical sensitive or special sensitive positions.

* * * * *

8. Amend § 710.6 by:

a. Revising paragraph (a)(1); and

b. Removing in paragraph (c), in the first sentence the words “his/her” and adding in their place the word “their”.

The revision reads as follows:

§ 710.6 Cooperation by the individual.

(a)(1) It is the responsibility of the individual to provide full, frank, and truthful answers to DOE's relevant and material questions, and when requested, to furnish or authorize others to furnish information that the DOE deems pertinent to the individual's eligibility for access authorization. This obligation to cooperate applies when completing security forms, during the course of a personnel security background investigation, reinvestigation or continuous vetting, and at any stage of DOE’s processing of the individual's access authorization request, including but not limited to, personnel security consultations, DOE-sponsored mental health evaluations, and other authorized DOE actions under this part. The individual may elect not to cooperate; however, such refusal may prevent DOE from reaching an affirmative finding required for granting or continuing the access authorization. In this event, for incumbents any access authorization then in effect may be administratively withdrawn or, for applicants, further processing may be administratively terminated.

* * * * *

§ 710.7 [Amended]

9. Amend § 710.7 paragraph (d) by removing the words “reports of investigation” and adding, in their place, the words “investigative results report”.

10. Amend § 710.8 paragraph (a) by revising the first sentence to read as follows:

§ 710.8 Action on derogatory information.

(a) If a question arises as to the individual's access authorization eligibility, the Local Director of Security shall authorize the conduct of a consultation with the individual, or other appropriate actions and, on the basis of the results of such consultation or actions, may authorize the granting of the individual's access authorization. * * *

* * * * *

11. Amend § 710.9 by:

a. Revising paragraph (e); and

b. Removing in paragraph (f), in the second sentence the words "his/her" and adding in their place the word "their".

The revision reads as follows:

§ 710.9 Suspension of access authorization.

* * * * *

(e) Written notification to the individual shall include notification that if the individual believes that the action to suspend their access authorization was taken as retaliation against the individual for having made a protected disclosure, as defined in Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information*, or any successor directive issued under the authority of the President, the individual may submit a request for review of this matter directly to the DOE Office of the Inspector General. Such a request shall have no impact upon the continued processing of the individual's access authorization eligibility under this part. If the individual receives an adverse final agency determination in response to such request, the individual may submit an appeal of that decision to the Director of National Intelligence, in accordance with the Security Executive Agent Directive 9, Appellate Review of Retaliation Regarding Security Clearances and Access Determinations, or to the Inspector General of the Intelligence

Community, in accordance with Intelligence Community Directive 120, Intelligence Community Whistleblower Protection.

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§ 710.20 [Amended]

12. Amend § 710.20 by removing the word "interview" and adding in its place "consultation".

13. Amend § 710.21 by:

a. Removing in paragraphs (b)(7) and (b)(12)(iii) the words "his/her" and adding in their place the word "their"; and

b. Revising paragraphs (c)(1) and (2).

The revisions read as follows:

§ 710.21 Notice to the individual.

* * * * *

(c) * * *

(1) Include a copy of this part and SEAD 4, *National Security Adjudicative Guidelines*, or successor directive; and

(2) Indicate that if the individual believes that the action to process the individual under this part was taken as retaliation against the individual for having made a protected disclosure, as defined in Presidential Policy Directive 19, *Protecting Whistleblowers with Access to Classified Information,* or any successor directive issued under the authority of the President, the individual may submit a request for review of this matter directly to the DOE Office of the Inspector General. Such a request shall have no impact upon the continued processing of the individual's access authorization eligibility under this part. If the individual

receives an adverse final agency determination in response to such request, the individual may submit an appeal of that decision to the Director of National Intelligence, in accordance with the SEAD 9, *Appellate Review of Retaliation Regarding Security Clearances and Access Determinations*, or to the Inspector General of the Intelligence Community, in accordance with *Intelligence Community Directive 120,* Intelligence Community Whistleblower Protection.

14. Amend § 710.22 by revising paragraph (c)(4) to reads as follows:

§ 710.22 Initial decision process.

* * * * *

(c) * * *

(4) That if the written request for a review of the Manager's initial decision by the Appeal Panel is not filed within 30 calendar days of the individual's receipt of the Manager's letter, or by the date to which the Director has granted an extension, the Manager's initial decision in the case shall be final and not subject to further review or appeal.

15. Amend § 710.25 by:

a. Removing in paragraph (c) the words "his/her" and adding in their place the word "their"; and

b. Revising paragraphs (e) and (f).

The revisions read as follows:

§ 710.25 Appointment of Administrative Judge; prehearing conference; commencement of hearings.

* * * * *

(e) The Administrative Judge shall determine the day, time, and place for the hearing and shall decide whether the hearing will be conducted via video teleconferencing. In the event the individual fails to appear at the time and place specified, without good cause shown, the record in the case shall be closed and returned to the Manager, who shall then make an initial determination regarding the eligibility of the individual for DOE access authorization in accordance with § 710.22(a)(3).

(f) At least 7 calendar days prior to the date scheduled for the hearing, the Administrative Judge shall convene a prehearing conference for the purpose of discussing stipulations and exhibits, identifying witnesses, and disposing of other appropriate matters. The conference may be conducted by telephone, video teleconference, or other means as directed by the Administrative Judge.

* * * * *

16. Amend § 710.26 by:

a. Removing in paragraph (a) wherever it appears the words "his/her" and adding in their place the word "their"; and

b. Revising paragraph (d).

The revision reads as follows:

§ 710.26 Conduct of hearings.

* * * * *

(d) DOE Counsel shall assist the Administrative Judge in establishing a complete administrative hearing record in the proceeding and bringing out a full and true disclosure of all facts, both favorable and unfavorable, having a bearing on the issues before the Administrative Judge. The individual shall be afforded the opportunity of presenting

testimonial, documentary, and physical evidence, including testimony by the individual in the individual's own behalf. All witnesses shall be subject to cross-examination, if possible.

* * * * *

§ 710.27 [Amended]

17. Amend § 710.27 paragraph (b), in the second sentence by removing the word "handicapped" and adding in its place, the word "prejudiced".

§ 710.28 [Amended]

18. Amend § 710.28 in paragraph (a)(4) by removing the words "his/her" and adding in their place the word "their".

§ 710.29 [Amended]

19. Amend § 710.29 paragraph (c), in the first sentence by removing the words "his/her" and adding in their place the word "their".

20. Amend § 710.31 by revising paragraphs (b)(4), (5), and (6) to read as follows:

§ 710.31 Reconsideration of access eligibility.

* * * * *

(b) * * *

(4) If, pursuant to the provisions of paragraph (b)(2) of this section, the Manager determines the individual is eligible for access authorization, the Manager shall grant access authorization.

(5) If, pursuant to the provisions of paragraph (b)(2) of this section, the Manager determines the individual remains ineligible for access authorization, the Manager shall so notify the Director in writing. If the Director concurs, the Director shall notify the individual

in writing. This decision is final and not subject to review or appeal. If the Director does not concur, the Director shall confer with the Manager on further actions.

(6) Determinations as to eligibility for access authorization pursuant to paragraphs (b)(4) or (5) of this section may be based solely upon the mitigation of derogatory information which was relied upon in a final decision to deny or to revoke access authorization. If, pursuant to the procedures set forth in paragraph (b)(2) of this section, previously unconsidered derogatory information is identified, a determination as to eligibility for access authorization must be subject to a new Administrative Review proceeding.

Appendix A to Part 710 [Removed]

21. Appendix A to part 710 is removed.

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