

Unfunded Mandates Reform Act do not apply.

H. Review of 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. Today's notice of proposed determination 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. Review of 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 today's notice under the OMB and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy, Supply, Distribution, or Use, 66 FR 28355 (May 22, 2001) requires preparation and submission to OMB of a Statement of Energy Effects for significant regulatory actions under Executive Order 12866 that are likely to have a significant adverse effect on the supply, distribution, or use of energy. A determination that a private and local government fleet AFV acquisition program is not "necessary" under EPCA 1992 section 507(e) does not require private and local government fleets, suppliers of energy, or distributors of energy to do or to refrain from doing anything. Thus, although today's proposed negative determination is a significant regulatory action, if finalized the determination is not expected to have a significant adverse impact on the supply, distribution, or use of energy.

K. Review Under Executive Order 13432

Executive Order 13432, Cooperation Among Agencies in Protecting the Environment With Respect to Greenhouse Gas Emissions from Motor Vehicles, Nonroad Vehicles, and

Nonroad Engines, 72 FR 27717 (May 16, 2007) requires DOE to work with DOT and EPA when conducting rulemakings that could be considered to affect emissions. In particular, this Executive Order requires that "the head of an agency undertaking a regulatory action that can reasonably be expected to directly regulate emissions, or to substantially and predictably affect emissions, of greenhouse gases from motor vehicles, nonroad vehicles, nonroad engines, or the use of motor vehicle fuels, including alternative fuels, shall" conduct the rulemaking jointly with other agencies, to the extent permitted by law; consider, as appropriate, laws, information, and recommendations of the other agencies; exercise the agency's authority effectively; and obtain concurrence or other views by the other agencies throughout the rulemaking process. In meeting this requirement, the Department has consulted with both the Department of Transportation and the Environmental Protection Agency throughout development of this proposed determination.

VIII. Approval by the Office of the Secretary

The issuance of the proposed determination for the Private and Local Government Fleet Determination has been approved by the Office of the Secretary.

Issued in Washington, DC, on September 6, 2007.

Alexander A. Karsner,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. E7–18153 Filed 9–13–07; 8:45 am]

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DEPARTMENT OF ENERGY

10 CFR Part 1017

RIN 1992–AA35

Identification and Protection of Unclassified Controlled Nuclear Information

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

ACTION: Notice of proposed rulemaking and public hearing.

SUMMARY: The Department of Energy (DOE) proposes to amend regulations that prohibit the unauthorized dissemination of certain unclassified but sensitive information identified as Unclassified Controlled Nuclear Information (UCNI). DOE is amending these regulations to clarify the types of information that may be identified as

UCNI to prevent overly-broad application of UCNI controls and to streamline the UCNI program by simplifying the process for identifying information as UCNI.

DATES: Written comments (7 copies) may be submitted on or before November 13, 2007. A public hearing will be held in Washington, DC, on October 29, 2007. Requests to speak at the hearing must be received by October 22, 2007.

ADDRESSES: You may submit comments and requests to speak at the hearing, identified by RIN 1992–AA35, by any of the following methods:

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

E-mail: emily.puhl@hq.doe.gov.

Include RIN 1992–AA35 in the subject line of the message.

Fax: (301) 903–1230.

Mail: Emily A. Puhl, Department of Energy, Office of Classification, HS–91/ Germantown Building, 1000 Independence Ave., SW., Washington, DC 20585–1290.

A public hearing will be held on October 29, 2007, from 9:30 a.m. until 11:30 a.m. at the U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC, room GJ–015.

All submissions must include the agency name for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the "Public Comment Procedures" heading of the **SUPPLEMENTARY INFORMATION** section of this document. Electronic submissions are encouraged.

FOR FURTHER INFORMATION CONTACT:

Nicholas G. Prospero, Office of Classification, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290, (301) 903–9967; Jo Ann Williams, Office of the General Counsel, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–6899.

SUPPLEMENTARY INFORMATION:

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- II. Description of Proposed Changes
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 - F. Review Under Executive Order 12988
 - G. Review Under the Unfunded Mandates Reform Act of 1995
 - H. Review Under the Treasury and General Government Appropriations Act, 1999
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I. Background

Under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), DOE is charged with the operation of programs for: (1) Research, development, testing, and production of nuclear weapons; (2) nuclear material production for defense activities; and, (3) certain defense related nuclear reactors. In 1981, Congress and DOE became increasingly concerned about the possibility of terrorist or other criminal acts directed against a Government nuclear defense activity. This concern was based, in part, on the increased incidence of acts of terrorist-inspired violence, the increased sophistication of these acts, and the increased availability of the technological resources, including information in the public domain, necessary to commit these acts.

In response to this threat, Congress, in 1982, amended the Atomic Energy Act of 1954 (hereafter “the Act”) by adding section 148 (“Prohibition Against the Dissemination of Certain Unclassified Information”), which directed DOE to adopt regulations to safeguard certain types of unclassified but sensitive information from unauthorized dissemination in the interest of protecting both the health and safety of the public and the common defense and security of the Nation. Congress recognized that while much information concerning atomic energy defense programs was classified, a new statutory provision was necessary to protect certain sensitive information that could not be classified under statute or executive order for operational or legal reasons.

Section 148 was not without precedent. In 1980, the Congress amended the Act to add section 147. Section 147 of the Act requires the Nuclear Regulatory Commission to prohibit the unauthorized disclosure of Safeguards Information, which includes a licensee’s or applicant’s procedures and security measures for the protection of special nuclear material, source material, or byproduct material. Under section 147, Safeguards Information also includes security measures for the protection of and location of certain plant equipment vital to the safety of production or utilization facilities. The major purpose of section 148 is to require DOE to control similar sensitive information about its atomic energy defense programs as section 147

protects with respect to commercial and other non-DOE nuclear facilities.

Section 148 directs the Secretary of Energy (the Secretary) to prescribe regulations, after notice and opportunity for public comment, or issue orders as may be necessary to prohibit the unauthorized dissemination of certain unclassified information concerning atomic energy defense programs. This information must pertain to the following:

1. The design of production or utilization facilities;
2. Security measures (including security plans, procedures, and equipment) for the physical protection of (a) production or utilization facilities or (b) nuclear material, regardless of its physical state or form, contained in these facilities or in transit; or,
3. The design, manufacture, or utilization of nuclear weapons or components that were once classified as Restricted Data, as defined in section 11y. of the Act.

In order for the information in the above categories to be controlled under section 148, the Secretary must determine that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of: (1) The illegal production of nuclear weapons, or (2) the theft, diversion, or sabotage of nuclear materials, equipment, or facilities.

UCNI only includes Government information that: (1) Is not classified; (2) concerns atomic energy defense programs; (3) falls within at least one of the three categories described above; (4) meets the adverse effect test described above; and (5) is not exempt from being UCNI under these regulations.

II. Description of Proposed Changes

The intent of this proposed rule is to describe more precisely the information that may be identified as UCNI. Section II.A. of this preamble describes new definitions intended to more clearly define the kind of information that may be identified as UCNI. Section II.B. discusses proposed changes intended to simplify and to streamline the UCNI program based on experience gained in the program to date. Section II.C. briefly describes a number of conforming technical changes.

A. Amendments To Clarify Information That May Be Identified as UCNI

1. New Definitions: “Production Facility” and “Utilization Facility”

DOE proposes to add definitions of “production facility” and “utilization facility” to define more precisely the types of information that may be identified as UCNI. These definitions are based on sections 11.v. and 11.cc., respectively, of the Act, and include lists of specific categories of equipment and devices that are subject to UCNI controls. These proposed lists are definitive; no additions may be made to them except through the process for amending these regulations. The inclusion of these more precise definitions of “production facility” and “utilization facility” would clarify what information may be identified as UCNI. DOE emphasizes that the proposed definitions of “production facility” and “utilization facility” are intended to only apply to these proposed regulations and do not constitute a more general interpretation of these statutory terms.

The key to determining that a facility is a production or utilization facility for purposes of these proposed regulations is establishing whether the facility ever produced (in the case of a production facility) or ever used (in the case of a utilization facility) “special nuclear material” as defined in section 11.aa. of the Act. Production facilities include uranium enrichment activities and plutonium production reactors since both produce special nuclear material. Conversely, tritium production reactors are not considered production facilities because tritium is not a “special nuclear material.” However, tritium production reactors are considered utilization facilities because they use special nuclear material to make tritium. Similarly, weapons plants, such as DOE’s Pantex Plant, that make use of special nuclear material to produce nuclear weapons or components are examples of utilization facilities. In contrast, weapons plants that do not make use of special nuclear material in producing nuclear weapons or components, such as the Kansas City Plant, which makes nonnuclear electronic and mechanical components, are not considered utilization facilities. In addition, special nuclear material storage facilities are not considered to be utilization facilities since storage is not considered use. Therefore, facilities such as the Yucca Mountain waste repository and the Waste Isolation Pilot Plant are not considered utilization facilities, and UCNI controls cannot apply to them.

The fact that a facility meets the definition of production or utilization facility does not mean that all information about the facility is automatically treated as UCNI. All of the criteria in proposed § 1017.7 must also be met for information to be identified as UCNI.

2. Simplification of “Adverse Effect Test”

In order for information to be identified as UCNI, it must meet the “adverse effect test” described in section 148.a.(2) of the Act and the current regulations in § 1017.9. DOE is proposing to add two new definitions to the regulations (see proposed § 1017.4) that simplify the “adverse effect test” in order to reduce ambiguities in the UCNI determination process. The terms are “essential technology-related information” and “exploitable security-related information.” “Essential technology-related information” means technical information the unauthorized dissemination of which could significantly increase the likelihood of the illegal production of a nuclear weapon. “Exploitable security-related information” means information whose unauthorized dissemination could significantly increase the likelihood of the theft, diversion, or sabotage of nuclear material, equipment, or facilities. If information is not covered by one of these definitions, it cannot be identified as UCNI because it fails to meet the “adverse effect test.” Experience gained in implementing the UCNI program for over 20 years has convinced DOE that the proposed new definitions will eliminate ambiguities and promote consistency in application of the statutory criteria.

3. Clarification of the Concept of “Widely Disseminated in the Public Domain”

DOE proposes to clarify the concept of “widely disseminated in the public domain.” In § 1017.6(b)(2) of the current regulations, a document that has been at any time “widely disseminated in the public domain” cannot be protected as UCNI. The intent of this language was to make clear that documents that were not only widely disseminated in the past, but also are currently available in the public domain cannot be protected as UCNI. However, the concept of “widely disseminated in the public domain” was not intended to apply to documents that were disseminated in the past but are no longer available. A document that cannot be located during a reasonable search is not considered “widely disseminated in the public domain” and is eligible to be protected

as UCNI today. For example, a report sent to a university library in 1960 that cannot be located today at the university library or anywhere else would not be “widely disseminated in the public domain.” Therefore, copies of the report held by DOE may be protected as UCNI.

DOE proposes to address the concept of “widely disseminated in the public domain” in a new section, proposed § 1017.15 (“Review Process”), which is intended to further clarify the concept by describing more clearly the process for reviewing documents or material for UCNI in order to minimize the likelihood of UCNI controls being erroneously applied.

4. Revised Definition for “Atomic Energy Defense Programs”

DOE proposes to revise the definition of “atomic energy defense programs” (see proposed § 1017.4) to more clearly reflect the statute’s intent to include not only Government activities, equipment, and facilities currently engaged in support of (1) Developing, producing, testing, sampling, maintaining, repairing, modifying, assembling or disassembling, using, transporting, or retiring nuclear weapons or components of nuclear weapons, or (2) producing, using, or transporting nuclear material that could be used in nuclear weapons or military-related utilization facilities, but also those activities, equipment, and facilities that are capable of performing these activities. This amendment is necessary to protect nuclear defense activities, equipment, and facilities that are not currently being conducted or used by the U.S. Government to support nuclear weapons or components development, but that were once conducted or used in support of such programs and that could be conducted or used again in the future to support the national security. Information about activities, equipment, and facilities relating to programs that are no longer active clearly may represent a national security risk and, if so, should be protected as UCNI. For example, gaseous diffusion technology is not currently being used to enrich uranium for nuclear weapons production, yet the activities, equipment, and facilities previously involved with this technology remain sensitive because of their potential for misuse by proliferants or terrorists.

In addition, we are proposing to delete one part (subparagraph (3)) of the definition of “atomic energy defense programs” that concerns the “safeguarding of activities, equipment, or facilities which support the functions in paragraphs (b)(1) and (b)(2) of this section, including the protection of

nuclear weapons, components of nuclear weapons, or nuclear material for military applications at a fixed facility or in transit.” DOE is proposing to delete this subparagraph to clarify the original intent of the definition in these regulations. In order for security measures to be identified as UCNI, they must pertain to the physical protection of production or utilization facilities, nuclear material contained in these facilities, or nuclear material in transit. In other words, the security measures must pertain to nuclear material. Because subparagraph (3) does not include this “nuclear material” limitation, it does not express the original intent of the definition, and we are therefore proposing to delete it.

5. Clarification of Materials That Can Be Determined To Be “Nuclear Material”

DOE proposes to clarify what materials other than byproduct, source, or special nuclear material can be determined to be “nuclear material.” Under § 1017.10(a)(2)(i) of the current regulations, the Secretary may determine that specific material that “could be used as a hazardous environmental contaminant” is within the scope of the term “nuclear material.” DOE is proposing to revise this paragraph to state “could be used as a hazardous, radioactive environmental contaminant” in order to clarify the intent of this section. Adding “radioactive” would ensure that only materials capable of releasing hazardous radioactivity could be determined to be “nuclear material.”

B. Changes Made To Simplify and Streamline the UCNI Program

1. Designated Officials

DOE proposes to delete the position of “Controlling Official” described in the current regulations in § 1017.3(e) and § 1017.7(a) to simplify the UCNI review process by removing a concept that has often led to confusion and uncertainty. In the current regulations, the Controlling Official is responsible for applying control criteria (i.e., the adverse effect test) to information and using the results of the “test” to develop UCNI guidance, whereas the Reviewing Official is responsible for following instructions in UCNI guidance. This division in responsibilities has led to confusion in implementation over the past 20 years, with the most common error being that Reviewing Officials have attempted to apply the “adverse effect test” during review of a document rather than simply following instructions in UCNI guidance. Deleting the concept of Controlling Official

would limit the application of the “adverse effect test” to the Secretary or his or her designee, which would remove any confusion in roles and improve the UCNI review process.

In addition, DOE proposes to amend the definition of Denying Official to include a reference to DOE’s Freedom of Information Act regulations at 10 CFR part 1004. This amendment would clarify under what authority a Denying Official is empowered to withhold information from the public.

2. Routine Access

DOE proposes to revise current § 1017.16 to remove redundancies in the eligibility requirements for routine access to UCNI. No substantive changes would be made to this section.

3. Limited Access

A definition of “limited access” is proposed to be added to proposed § 1017.4. The same concept appears in the current regulations in § 1017.16(b) but is identified as “special access” to UCNI. The new term more accurately conveys that this form of access has more restrictions than does routine access to UCNI.

4. Requesting a Deviation

A new § 1017.5 is proposed to establish a process for requesting a deviation for any requirements in these regulations.

5. Subject Areas Eligible To Be UCNI

DOE proposes to revise § 1017.8 to delete extraneous language; no substantive changes would be made.

6. Information Exempt From Being UCNI

Current § 1017.6, Exemptions, would be revised to delete exemptions that are redundant or that are no longer necessary. DOE proposes to delete existing § 1017.6 subparagraphs (a)(1) (non-Government information) and (a)(2) (non-atomic energy defense programs) because these exemptions are covered in the criteria for information to be identified as UCNI in proposed § 1017.7. DOE proposes to delete Restricted Data, Formerly Restricted Data, and National Security Information from current § 1017.6 subparagraph (a)(3) because these are categories of classified information and as such are excluded from being identified as UCNI because only unclassified information may be UCNI. DOE proposes to delete subparagraphs (a)(5), (a)(6), (a)(8), and (a)(10) of current § 1017.6 because the proposed new definitions of “production facility” and “utilization facility” provide explicit language that

eliminates ambiguity in these exemptions.

7. Review Process for Documents

Although the procedure for reviewing documents for UCNI would not substantively change, DOE is proposing to clarify the review process currently described in § 1017.12 by adding a new § 1017.15. The proposed language would emphasize that reviewing documents to identify UCNI begins with the Reviewing Official determining whether the document is “widely disseminated in the public domain.” This is an essential part of the review process because documents determined to be “widely disseminated in the public domain” cannot be protected as UCNI. The current regulations do not explain this clearly. Proposed § 1017.15 also contains a paragraph that exempts documents already in files from requiring review and clarifies how these documents are to be handled.

8. UCNI Markings on Documents or Material

DOE proposes to revise § 1017.15 to clarify the marking procedures for documents and material. Proposed § 1017.16 would add a requirement for separate front markings and page markings. Proposed § 1017.16 would also prohibit the marking of classified documents as UCNI. Finally, proposed § 1017.16 would prohibit the use of the “May Contain UCNI” marking. Although originally intended to protect documents that were likely to contain UCNI pending their transmittal to a Reviewing Official for a determination, a lack of understanding has led to widespread misuse of the stamp.

9. Determining That a Document or Material No Longer Contains or Does Not Contain UCNI

DOE proposes to add a new § 1017.17 to address how Reviewing and Denying Officials should handle documents or material that, after review, are determined no longer to contain or not to contain UCNI. A new stamp with the marking, “Does Not Contain UCNI,” is being proposed for use in these situations.

10. Enforcement of Civil Penalty Provisions

DOE proposes to revise the civil penalty enforcement provisions in the current regulations to achieve greater consistency with procedures in other DOE civil penalty enforcement regimes, particularly those related to violations of classified information protection requirements. DOE issued “Procedural Rules for the Assessment of Civil

Penalties for Classified Information Security Violations” (10 CFR part 824) (70 F.R. 3599, January 26, 2005), to implement section 234B of the Act. To the extent appropriate, the procedures proposed today adopt the procedures in 10 CFR part 824.

C. Technical Changes

DOE proposes a number of technical changes to the present regulations to reflect, among other matters, DOE organizational changes and minor changes in Federal Government procedures.

III. Procedural Requirements

A. Review Under Executive Order 12866

Today’s regulatory action has been determined not to be a “significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (October 4, 1993). Accordingly, this notice of proposed rulemaking was not subject to review by OMB under the Executive Order.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking” (67 FR 53461, August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of the General Counsel’s Web site: <http://www.gc.doe.gov>. DOE has reviewed today’s proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

Today’s proposed rule would amend DOE’s policies and procedures regarding UCNI. The rule, if promulgated, will apply to all agencies, persons, and entities that generate and maintain UCNI documents or material. The Department estimates that fewer than five Federal Government entities have access to UCNI documents or material. Each of these Government entities may, in turn, have contractors or consultants who have access to UCNI documents or material.

Section 1017.14 would impose on Government and non-Government entities the requirement that persons who review documents for UCNI be properly trained and certified. The economic impact of the training requirement on non-Government entities would be limited to the labor hours required to familiarize those persons reviewing documents for UCNI with the training materials provided by DOE.

Section 1017.16 would require that Government and non-Government Reviewing Officials clearly mark or authorize the marking of a new document or material to convey that it contains UCNI. The burden of the marking requirement would vary depending on the number of documents or amount of material the entity generates. DOE considers the proper marking of a controlled document to be an act integrated in the act of creating the document. As such, the marking of documents or material containing UCNI imposes minimal costs on the entity generating new UCNI documents or material.

DOE recognizes that in most cases non-Government entities that generate documents or material containing UCNI will do so pursuant to a Government contract. In such cases, any costs incurred in compliance with these regulations will be charged back to the Government. Infrequently, DOE may enter into an agreement (e.g., a Cooperative Research and Development Agreement) with a non-Government entity in which DOE provides UCNI to the entity without any vehicle for reimbursement by the Government for increased security costs. However, since UCNI is protected in a manner similar to how a company protects proprietary or employees' personal information, the incremental cost of protecting UCNI would be negligible. In these cases, this rule would have only a minor economic impact on very few small entities.

On the basis of the foregoing, DOE certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking.

C. Review Under the Paperwork Reduction Act

No new information or record keeping requirements are imposed by this rulemaking. Accordingly, no OMB clearance is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act of 1969

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule deals only with agency procedures and, therefore, is covered under the Categorical Exclusion in paragraph A6 to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 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. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined today's proposed rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996), imposes on Federal 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. Section 3(b) of

Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and, (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires a Federal agency to perform a written 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, in the aggregate, 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 not impose a Federal mandate on State, local and tribal governments or on the private sector. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any 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. Review Under the 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 today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 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 the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of 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. Today's regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

IV. Public Comment Procedures

A. Written Comments

Interested persons are invited to participate by submitting data, views, or arguments with respect to the proposed amendments to these regulations set forth in this notice. Written comments should be submitted to the address indicated in the **ADDRESSES** section of this notice. All comments will be available for public inspection in the

DOE Freedom of Information Reading Room, room 1E-190, 1000 Independence Avenue, SW., Washington, DC 20585, between the hours of 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Written comments received by the date indicated in the **DATES** section of this notice of proposed rulemaking will be assessed and considered prior to publication of the final rule. Any information that a commenter considers to be confidential must be so identified and submitted in writing, one copy only. DOE reserves the right to determine the appropriateness of confidential status for the information and to treat it in accordance with its determination. See 10 CFR 1004.11.

B. Public Hearing

Requests to speak at the hearing must be submitted to the address and by the date indicated in the **DATES** section of this notice of proposed rulemaking. Requests for oral presentations should contain a telephone number where the requester may be contacted prior to the hearing. Speakers are requested to submit copies of their statement to DOE at the hearings.

DOE reserves the right to select the persons to be heard at the hearing, to schedule their respective presentations, and to establish the procedures governing the conduct of the hearing. The length of each presentation is limited to fifteen minutes. The hearing will begin at 9:30 a.m. A DOE official will be designated to preside at the hearing. It will not be a judicial-type hearing. Questions may be asked only by those conducting the hearing. Any further procedural rules needed for the proper conduct of the hearing will be announced by the presiding officer. A transcript of the hearing will be made available to the public. The entire record of the hearing, including the transcript, will be retained by DOE and made available for inspection in the DOE Freedom of Information Reading Room. Transcripts may be purchased from the hearing transcriber/reporter.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved the publication of today's proposed rule.

List of Subjects in 10 CFR Part 1017

Administrative practice and procedure, Government contracts, Nuclear energy, Penalties, Security measures.

Issued in Washington, DC on September 7, 2007.

Glenn Podonsky,

Office of Health, Safety and Security.

For the reasons set out in the preamble, DOE proposes to revise part 1017 of Chapter X of Title 10 of the Code of Federal Regulations to read as follows:

PART 1017—IDENTIFICATION AND PROTECTION OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

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Authority: 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*; 42 U.S.C. 2168; 28 U.S.C. 2461.

Subpart A—General Overview

§ 1017.1 Purpose and scope.

(a) This part implements section 148 of the Atomic Energy Act (42 U.S.C. 2168) which prohibits the unauthorized dissemination of certain unclassified Government information. This information identified by the term “Unclassified Controlled Nuclear Information” (UCNI) consists of certain design and security information concerning nuclear facilities, nuclear materials, and nuclear weapons.

(b) This part:

(1) Provides for the review of information prior to its designation as UCNI;

(2) Describes how information is determined to be UCNI;

(3) Establishes minimum physical protection standards for documents and material containing UCNI;

(4) Specifies who may have access to UCNI; and,

(5) Establishes a procedure for the imposition of penalties on persons who violate section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations.

(c) This part does not apply to information controlled under 10 U.S.C. 128 by the Department of Defense.

§ 1017.2 Applicability.

This part applies to any person who is or was authorized access to UCNI, requires authorized access to UCNI, or attempts to gain or gains unauthorized access to UCNI.

§ 1017.3 Policy.

The Department of Energy (DOE) strives to make information publicly available to the fullest extent possible. Therefore, this part must be interpreted and implemented to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security consistent with the requirement in section 148 of the Atomic Energy Act to prohibit the unauthorized dissemination of UCNI.

§ 1017.4 Definitions.

As used in this part:

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

Atomic energy defense programs means Government activities, equipment, and facilities that are capable of:

(1) Developing, producing, testing, sampling, maintaining, repairing, modifying, assembling or disassembling, using, transporting, or retiring nuclear weapons or components of nuclear weapons; or

(2) Producing, using, or transporting nuclear material that could be used in nuclear weapons or military-related utilization facilities.

Authorized Individual means a person who has routine access to UCNI under § 1017.20.

Component means any operational, experimental, or research-related part, subsection, design, or material used in the manufacture or utilization of a nuclear weapon, nuclear explosive device, or nuclear weapon test assembly.

Denying Official means a DOE official designated under 10 CFR 1004.2(b) who is authorized to deny a request for unclassified information that is exempt from release when requested under the Freedom of Information Act (FOIA).

Director means the DOE Official, or his or her designee, to whom the Secretary has assigned responsibility for enforcement of this part.

Document means the physical medium on or in which information is recorded, regardless of its physical form or characteristics.

DOE means the United States Department of Energy, including the National Nuclear Security Administration (NNSA).

Essential technology-related information means technical information whose unauthorized dissemination could significantly increase the likelihood of the illegal production of a nuclear weapon.

Exploitable security-related information means information whose unauthorized dissemination could significantly increase the likelihood of the theft, diversion, or sabotage of nuclear material, equipment, or facilities.

Government means the Executive Branch of the United States Government.

Government information means any fact or concept, regardless of its physical form or characteristics, that is owned by, produced by or for, or otherwise controlled by the United States Government, including such facts or concepts that are provided by the Government to any person, including persons who are not employees of the Government.

Guidance means detailed written instructions that describe decisions made by the Secretary or his/her designee issued under Subpart B of

these regulations concerning what specific information is UCNI.

Illegal production means the production or manufacture of a nuclear weapon in violation of either domestic (e.g., the Atomic Energy Act) or international (e.g., the Treaty on the Non-Proliferation of Nuclear Weapons) law.

In transit means the physical movement of a nuclear weapon, a component of a nuclear weapon containing nuclear material, or nuclear material from one part to another part of a facility or from one facility to another facility. An item is considered “in transit” until it has been relinquished to the custody of the authorized recipient and is in storage at its ultimate destination. An item in temporary storage pending shipment to its ultimate destination is “in transit.”

Limited access means access to specific UCNI granted by the cognizant DOE Program Secretarial Officer or a Deputy Administrator of the NNSA to an individual not eligible for routine access (see § 1017.21).

Material means a product (e.g., a part or a machine) or substance (e.g., a compound or an alloy), regardless of its physical form or characteristics.

Need to know means a determination made by an Authorized Individual that a person requires access to specific UCNI to perform official duties or other Government-authorized activities.

Nuclear material means special nuclear material, byproduct material, or source material as defined by sections 11.aa., 11.e., and 11.z., respectively, of the Atomic Energy Act (42 U.S.C. 2014 aa., e., and z), or any other material used in the production, testing, utilization, or assembly of nuclear weapons or components of nuclear weapons that the Secretary determines to be nuclear material under § 1017.9(a).

Nuclear weapon means atomic weapon as defined in section 11.d. of the Atomic Energy Act (42 U.S.C. 2014 d).

Person means any person as defined in section 11.s. of the Atomic Energy Act (42 U.S.C. 2014 s) or any affiliate or parent corporation thereof.

Production facility means:

(1) Any equipment or device capable of producing special nuclear material in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public; or

(2) Any important component part especially designed for such equipment or device.

(3) For the purposes of this part, equipment and devices described in

paragraphs (1) and (2) of this definition include only:

- (i) Government uranium isotope enrichment equipment or devices and any other uranium isotope enrichment equipment or devices that use related technology provided by the Government; or
- (ii) Government plutonium production reactors, isotope enrichment equipment or devices, and separation and purification equipment or devices and other such equipment or devices that use related technology provided by the Government.

Reviewing Official means an individual authorized under § 1017.14(a) to make a determination, based on guidance, that a document or material contains UCNI.

Routine access means access to UCNI granted by an Authorized Individual to an individual eligible to receive UCNI under § 1017.20 in order to perform official duties or other Government-authorized activities.

Secretary means the Secretary of Energy.

Unauthorized dissemination means the intentional or negligent transfer of UCNI documents or material to any person other than an Authorized Individual or a person granted limited access to UCNI under § 1017.21.

Unclassified Controlled Nuclear Information or UCNI means certain unclassified Government information concerning nuclear facilities, materials, weapons, and components whose dissemination is controlled under section 148 of the Atomic Energy Act and this part.

Utilization facility means:

- (1) Any equipment or device, or any important component part especially designed for such equipment or device, except for a nuclear weapon, that is capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public. For the purposes of this part, such equipment or devices include only Government equipment or devices that use special nuclear material in the research, development, production, or testing of nuclear weapons, nuclear weapon components, or nuclear material capable of being used in nuclear weapons; or

- (2) Any equipment or device, or any important component part especially designed for such equipment or device, except for a nuclear weapon, that is peculiarly adapted for making use of nuclear energy in such quantity as to be of significance to the common defense and security or in such manner as to

affect the health and safety of the public. For the purposes of this part, such equipment or devices include only:

- (i) Naval propulsion reactors;
- (ii) Military reactors and power sources that use special nuclear material;
- (iii) Tritium production reactors; and,
- (iv) Government research reactors.

§ 1017.5 Requesting a deviation.

(a) Any person may request a deviation, or condition that diverges from the norm and that is categorized as:

- (1) A variance (*i.e.*, an approved condition that technically varies from a requirement in these regulations);
- (2) A waiver (*i.e.*, an approved nonstandard condition that deviates from a requirement in these regulations and which, if uncompensated, would create a potential or real vulnerability); or

(3) An exception (*i.e.*, an approved deviation from a requirement in these regulations for which DOE accepts the risk of a safeguards and security vulnerability) according to the degree of risk involved.

(b) In writing, the person must:

- (1) Identify the specific requirement for which the deviation is being requested;
- (2) Explain why the deviation is needed; and,
- (3) If appropriate, describe the alternate or equivalent means for meeting the requirement.

(c) DOE employees must submit such requests according to internal directives. DOE contractors must submit such requests according to directives incorporated into their contracts. Other individuals must submit such requests to the Office of Classification, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585–1290. The Office of Classification's decision must be made within 30 days.

Subpart B—Initially Determining What Information Is Unclassified Controlled Nuclear Information

§ 1017.6 Authority.

The Secretary, or his or her designee, determines whether information is UCNI. These determinations are incorporated into guidance that each Reviewing Official and Denying Official consults in his or her review of a document or material to decide whether the document or material contains UCNI.

§ 1017.7 Criteria.

To be identified as UCNI, the information must meet each of the following criteria:

(a) The information must be Government information as defined in § 1017.4;

(b) The information must concern atomic energy defense programs as defined in § 1017.4;

(c) The information must fall within the scope of at least one of the three subject areas eligible to be UCNI in § 1017.8;

(d) The information must meet the adverse effect test described in § 1017.10; and

(e) The information must not be exempt from being UCNI under § 1017.11.

§ 1017.8 Subject areas eligible to be Unclassified Controlled Nuclear Information.

To be eligible for identification as UCNI, information must concern at least one of the following categories:

(a) The design of production or utilization facilities;

(b) Security measures (including security plans, procedures, and equipment) for the physical protection of production or utilization facilities or nuclear material, regardless of its physical state or form, contained in these facilities or in transit; or

(c) The design, manufacture, or utilization of nuclear weapons or components that were once classified as Restricted Data, as defined in section 11y. of the Atomic Energy Act.

§ 1017.9 Nuclear material determinations.

(a) The Secretary may determine that a material other than special nuclear material, byproduct material, or source material as defined by the Atomic Energy Act is included within the scope of the term “nuclear material” if it meets the following criteria:

(1) The material is used in the production, testing, utilization, or assembly of nuclear weapons or components of nuclear weapons; and

(2) Unauthorized acquisition of the material could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security because the specific material:

(i) Could be used as a hazardous radioactive environmental contaminant; or

(ii) Could be of significant assistance in the illegal production of a nuclear weapon.

(b) Designation of a material as a nuclear material under paragraph (a) of this section does not make all

information about the material UCNI. Specific information about the material must still meet each of the criteria in § 1017.7 prior to its being identified and controlled as UCNI.

§ 1017.10 Adverse effect test.

In order for information to be identified as UCNI, it must be determined that the unauthorized dissemination of the information under review could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of:

- (a) Illegal production of a nuclear weapon; or
- (b) Theft, diversion, or sabotage of nuclear material, equipment, or facilities.

§ 1017.11 Information exempt from being Unclassified Controlled Nuclear Information.

Information exempt from these regulations includes:

- (a) Information protected from disclosure under section 147 of the Atomic Energy Act (42 U.S.C. 2167) that is identified as Safeguards Information and controlled by the United States Nuclear Regulatory Commission;
- (b) Basic scientific information (i.e., information resulting from research directed toward increasing fundamental scientific knowledge or understanding rather than any practical application of that knowledge);
- (c) Radiation exposure data and all other personal health information; and,
- (d) Information concerning the transportation of low level radioactive waste.

§ 1017.12 Prohibitions on identifying Unclassified Controlled Nuclear Information.

Information, documents, and material must not be identified as being or containing UCNI in order to:

- (a) Conceal violations of law, inefficiency, or administrative error;
- (b) Prevent embarrassment to a person or organization;
- (c) Restrain competition; or,
- (d) Prevent or delay the release of any information that does not properly qualify as UCNI.

§ 1017.13 Report concerning determinations.

The Office of Classification or successor office shall issue a report by the end of each quarter that identifies any new information that has been determined for the first time to be UCNI during the previous quarter, explains how each such determination meets the

criteria in § 1017.7, and explains why each such determination protects from disclosure only the minimum amount of information necessary to protect the health and safety of the public or the common defense and security. A copy of the report may be obtained by writing to the Office of Classification, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585-1290.

Subpart C—Review of a Document or Material for Unclassified Controlled Nuclear Information

§ 1017.14 Designated officials.

(a) *Reviewing Official.*—(1) *Authority.* A Reviewing Official with cognizance over the information contained in a document or material is authorized to determine whether the document or material contains UCNI based on applicable guidance. A Reviewing Official marks or authorizes the marking of the document or material as specified in § 1017.16.

(2) *Request for designation.* Procedures for requesting that a DOE Federal or contractor employee be designated as a Reviewing Official are contained in Departmental directives issued by the Secretary. DOE may also designate other Government agency employees, contractors, or other individuals granted routine access under § 1017.20 as Reviewing Officials.

(3) *Designation.* Prior to being designated as a Reviewing Official, each employee must receive training approved by DOE that covers the requirements in this regulation and be tested on his or her proficiency in using applicable UCNI guidance. Upon successful completion of the training and test, he or she is designated as a Reviewing Official only while serving in his or her current position for a maximum of 3 years. The employee does not retain the authority when he or she leaves his or her current position. The employee cannot delegate this authority to anyone else, and the authority may not be assumed by another employee acting in the employee's position. At the end of 3 years, if the position still requires the authority, the employee must be retested and redesignated by DOE as a Reviewing Official.

(b) *Individuals approved to use DOE or joint DOE classification guidance—*

(1) *Authority.* Other Government agency employees who are approved by DOE or another Government agency to use classification guidance developed by DOE or jointly by DOE and another Government agency may also be

approved to review documents for UCNI and to make UCNI determinations. This authority is limited to the UCNI subject areas contained in the specific classification guidance that the individual has been approved to use.

(2) *Designation.* Individuals must be designated this authority in writing by the appropriate DOE or other Government agency official with cognizance over the specific DOE or Joint DOE classification guidance.

(c) *Denying Official.*—(1) *Authority.* A DOE Denying Official for unclassified information with cognizance over the information contained in a document is authorized to deny a request made under statute (e.g., the FOIA, the Privacy Act) or the mandatory review provisions of Executive Order 12958, as amended, "Classified National Security Information," and its successor orders, for all or any portion of the document that contains UCNI. The Denying Official bases his or her denial on applicable guidance, ensuring that the Reviewing Official who determined that the document contains UCNI correctly interpreted and applied the guidance.

(2) *Designation.* Information on the designation of DOE Denying Officials is contained in 10 CFR part 1004, *Freedom of Information* (see definition of the term "Authorizing or Denying Official.")

§ 1017.15 Review process.

(a) *Reviewing documents for UCNI.* Anyone who originates or possesses a document that he or she thinks may contain UCNI must send the document to a Reviewing Official for a determination before it is finalized, sent outside of his or her organization, or filed. If the originator or possessor must send the document outside of his or her organization for the review, he or she must mark the front of the document with "Protect as UCNI Pending Review" and must transmit the document in accordance with the requirements in § 1017.27. The Reviewing Official must first determine whether or not the document is widely disseminated in the public domain, which means that the document under review can be found in a public library or open literature source, or it can be accessed on the Internet using readily available search methods.

(1) If the document is determined to be widely disseminated in the public domain, it cannot be controlled as UCNI. The Reviewing Official returns the document to the person who sent it to the Reviewing Official and informs him or her why the document cannot be controlled as UCNI. This does not preclude control of the same

information as UCNI if it is contained in another document that is not widely disseminated.

(2) If the document is not determined to be widely disseminated in the public domain, the Reviewing Official evaluates the information in the document using guidance to determine whether the document contains UCNI. If the Reviewing Official determines that the document does contain UCNI, the Reviewing Official marks or authorizes the marking of the document as specified in § 1017.16. If the Reviewing Official determines that the document does not contain UCNI, the Reviewing Official returns the document to the person who sent it and informs him or her that the document does not contain UCNI. For documentation purposes, the Reviewing Official may mark or authorize the marking of the document as specified in § 1017.17(b).

(3) If no applicable guidance exists, but the Reviewing Official thinks the information should be identified as UCNI, then the Reviewing Official must send the document to the appropriate official identified in applicable DOE directives issued by the Secretary or his or her designee. The Reviewing Official should also include a written recommendation as to why the information should be identified as UCNI.

(b) *Review exemption for documents in files.* Any document that was permanently filed prior to May 22, 1985, is not required to be reviewed for UCNI while in the files or when retrieved from the files for reference, inventory, or similar purposes as long as the document will be returned to the files and is not accessible by individuals who are not Authorized Individuals for the UCNI contained in the document. However, when a document that is likely to contain UCNI is removed from the files for dissemination within or outside of the immediate organization, it must be reviewed by a Reviewing Official with cognizance over the information.

(c) *Reviewing material for UCNI.* Anyone who produces or possesses material that he or she thinks may contain or reveal UCNI must consult with a Reviewing Official for a determination. If the Reviewing Official determines that the material does contain or reveal UCNI, the Reviewing Official marks or authorizes the marking of the material as specified in § 1017.16(b).

§ 1017.16 Unclassified Controlled Nuclear Information markings on documents or material.

(a) *Marking documents.* If a Reviewing Official determines that a document contains UCNI, the Reviewing Official must mark or authorize the marking of the document as described in this section.

(1) *Front marking.* The following marking must appear on the front of the document:

Unclassified Controlled Nuclear Information Not for Public Dissemination

Unauthorized dissemination subject to civil and criminal sanctions under section 148 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).
Reviewing Official:

(Name/Organization)

Date:

Guidance Used:

(2) *Page marking.* The marking “Unclassified Controlled Nuclear Information” must be placed on the bottom of the front of the document and on the bottom of each interior page of the document that contains text or if more convenient, on the bottom of only those interior pages that contain UCNI. The page marking must also be placed on the back of the last page. If space limitations do not allow for use of the full page marking, the acronym “UCNI” may be used as the page marking.

(3) *Classified documents.* UCNI front and page markings are not applied to a classified document that also contains UCNI. If a classified document is portion marked, the acronym “UCNI” is used to indicate those unclassified portions that contain UCNI.

(4) *Obsolete “May Contain UCNI” marking.* The “May Contain UCNI” marking is no longer used. Any document marked with the “May Contain UCNI” marking is considered to contain UCNI and must be protected accordingly until a Reviewing Official or Denying Official determines otherwise. The obsolete “May Contain UCNI” marking reads as follows:

Not for Public Dissemination
May contain Unclassified Controlled Nuclear Information subject to section 148 of the Atomic Energy Act of 1954 (42 U.S.C. 2168). Approval by the Department of Energy prior to release is required.

(b) *Marking material.* If possible, material containing or revealing UCNI must be marked as described in § 1017.16(a)(1). If space limitations do not allow for use of the full marking in § 1017.16(a)(1), the acronym “UCNI” may be used.

§ 1017.17 Determining that a document or material no longer contains or does not contain Unclassified Controlled Nuclear Information.

(a) *Document or material no longer contains UCNI.* A Reviewing Official with cognizance over the information in a document or material marked as containing UCNI may determine that the document or material no longer contains UCNI. A Denying Official may also determine that such a document or material no longer contains UCNI. The official making this determination must base it on guidance and must ensure that any UCNI markings are crossed out (for documents) or removed (for material). The official marks or authorizes the marking of the document (or the material, if space allows) as follows:

DOES NOT CONTAIN UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION

Reviewing/Denying Official:

(Name and organization)

Date:

(b) *Document or material does not contain UCNI.* A Reviewing Official may confirm that an unmarked document or material does not contain UCNI based on guidance. No markings are required in this case; however, for documentation purposes, the Reviewing Official may mark or may authorize the marking of the document or material with the same marking used in § 1017.17(a).

§ 1017.18 Joint documents or material.

If a document or material marked as containing UCNI is under consideration for decontrol and falls under the cognizance of another DOE organization or other Government agency, the Reviewing Official or Denying Official must coordinate the decontrol review with that DOE organization or other Government agency. Any disagreement concerning the control or decontrol of any document or material that contains UCNI that was originated by or for DOE or another Government agency is resolved by the Secretary or his or her designee.

Subpart D—Access to Unclassified Controlled Nuclear Information

§ 1017.19 Access limitations.

A person may only have access to UCNI if he or she has been granted routine access by an Authorized Individual (see § 1017.20) or limited access by the DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator with cognizance over the UCNI (see § 1017.21). The Secretary, or his or her designee, may impose

additional administrative controls concerning the granting of routine or limited access to UCNI to a person who is not a U.S. citizen.

§ 1017.20 Routine access.

(a) *Authorized Individual.* The Reviewing Official who determines that a document or material contains UCNI is the initial Authorized Individual for that document or material. An Authorized Individual, for UCNI in his or her possession or control, may determine that another person is an Authorized Individual who may be granted access to the UCNI, subject to limitations in paragraph (b) of this section, and who may further disseminate the UCNI under the provisions of this section.

(b) *Requirements for routine access.* To be eligible for routine access to UCNI, the person must have a need to know the UCNI in order to perform official duties or other Government-authorized activities and must be:

- (1) A U.S. citizen who is:
 - (i) An employee of any branch of the Federal Government, including the U.S. Armed Forces;
 - (ii) An employee or representative of a State, local, or Indian tribal government;
 - (iii) A member of an emergency response organization;
 - (iv) An employee of a Government contractor or a consultant, including those contractors or consultants who need access to bid on a Government contract;
 - (v) A member of Congress or a staff member of a congressional committee or of an individual member of Congress;
 - (vi) A Governor of a state, his or her designated representative, or a State government official;
 - (vii) A member of a DOE advisory committee; or,
 - (viii) A member of an entity that has entered into a formal agreement with the Government, such as a Cooperative Research and Development Agreement or similar arrangement; or,
- (2) A person who is not a U.S. citizen but who is:
 - (i) A Federal Government employee or a member of the U.S. Armed Forces;
 - (ii) An employee of a Federal Government contractor or subcontractor;
 - (iii) A Federal Government consultant;
 - (iv) A member of a DOE advisory committee; or,
 - (v) A member of an entity that has entered into a formal agreement with the Government, such as a Cooperative Research and Development Agreement or similar arrangement; or,
- (3) A person who is not a U.S. citizen but who needs to know the UCNI in

conjunction with an activity approved by the DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator with cognizance over the UCNI.

§ 1017.21 Limited access.

(a) A person who is not eligible for routine access to specific UCNI under § 1017.20 may request limited access to such UCNI by sending a written request to the DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator with cognizance over the information. The written request must include the following:

(1) The name, current residence or business address, birthplace, birth date, and country of citizenship of the person submitting the request;

(2) A description of the specific UCNI for which limited access is being requested;

(3) A description of the purpose for which the UCNI is needed; and,

(4) Certification by the requester that he or she:

(i) Understands and will follow these regulations; and

(ii) Understands that he or she is subject to the civil and criminal penalties under Subpart F of this part.

(b) The decision whether to grant the request for limited access is based on the following criteria:

(1) The sensitivity of the UCNI for which limited access is being requested;

(2) The approving official's evaluation of the likelihood that the requester will disseminate the UCNI to unauthorized individuals; and,

(3) The approving official's evaluation of the likelihood that the requester will use the UCNI for illegal purposes.

(c) Within 30 days of receipt of the request for limited access, the appropriate DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator must notify the requester if limited access is granted or denied, or if the determination cannot be made within 30 days, of the date when the determination will be made.

(d) A person granted limited access to specific UCNI is not an Authorized Individual and may not further disseminate the UCNI to anyone.

Subpart E—Physical Protection Requirements

§ 1017.22 Notification of protection requirements.

(a) An Authorized Individual who grants routine access to specific UCNI under § 1017.20 to a person who is not an employee or contractor of the DOE must notify the person receiving the UCNI of protection requirements

described in this subpart and any limitations on further dissemination.

(b) A DOE Program Secretarial Officer or NNSA Deputy or Associate Administrator who grants limited access to specific UCNI under § 1017.21 must notify the person receiving the UCNI of protection requirements described in this subpart and any limitations on further dissemination.

§ 1017.23 Protection in use.

An Authorized Individual or a person granted limited access to UCNI under § 1017.21 must maintain physical control over any document or material marked as containing UCNI that is in use to prevent unauthorized access to it.

§ 1017.24 Storage.

A document or material marked as containing UCNI must be stored to preclude unauthorized disclosure. When not in use, documents or material containing UCNI must be stored in locked receptacles (e.g., file cabinet, desk drawer), or if in secured areas or facilities, in a manner that would prevent inadvertent access by an unauthorized individual.

§ 1017.25 Reproduction.

A document marked as containing UCNI may be reproduced without the permission of the originator to the minimum extent necessary consistent with the need to carry out official duties, provided the reproduced document is marked and protected in the same manner as the original document.

§ 1017.26 Destruction.

A document marked as containing UCNI must be destroyed, at a minimum, by using a cross-cut shredder that produces particles no larger than 1/4-inch wide and 2 inches long. Other comparable destruction methods may be used. Material containing or revealing UCNI must be destroyed according to agency directives.

§ 1017.27 Transmission.

(a) Physically transmitting UCNI documents or material.

(1) A document or material marked as containing UCNI may be transmitted by:

- (i) U.S. First Class, Express, Certified, or Registered mail;
- (ii) Any means approved for transmission of classified documents or material;

(iii) An Authorized Individual or person granted limited access under § 1017.21 as long as physical control of the package is maintained; or,

(iv) Internal mail services.

(2) The document or material must be packaged to conceal the presence of the

UCNI from someone who is not authorized access. A single, opaque envelope or wrapping is sufficient for this purpose. The address of the recipient and the sender must be indicated on the outside of the envelope or wrapping along with the words "TO BE OPENED BY ADDRESSEE ONLY."

(b) Transmitting UCNI documents over telecommunications circuits. Encryption algorithms that comply with all applicable Federal laws, regulations, and standards for the protection of unclassified controlled information must be used when transmitting UCNI over a telecommunications circuit (including the telephone, facsimile, radio, e-mail, Internet).

§ 1017.28 Processing on Automated Information Systems (AIS).

UCNI may be processed or produced on any AIS that complies with the guidance in OMB Circular No. A-130, Revised, Transmittal No. 4, Appendix III, "Security of Federal Automated Information Resources," or is certified for classified information.

Subpart F—Violations

§ 1017.29 Civil penalty.

(a) Any person who violates an UCNI security requirement of any of the following is subject to a civil penalty under this part:

(1) 10 CFR Part 1017—Identification and Protection of Unclassified Controlled Nuclear Information; or

(2) Any other DOE regulation related to the safeguarding or security of UCNI if the regulation provides that violation of its provisions may result in a civil penalty pursuant to section 148 of the Act.

(b) If, without violating a requirement of any regulation issued under section 148, a person by an act or omission causes, or creates a risk of, the loss, compromise or unauthorized disclosure of UCNI, the Secretary may issue a compliance order to that person requiring the person to take corrective action and notifying the person that violation of the compliance order is subject to a notice of violation and assessment of a civil penalty. If a person wishes to contest the compliance order, the person must file a notice of appeal with the Secretary within 15 days of receipt of the compliance order.

(c) The Director may propose imposition of a civil penalty for violation of a requirement of a regulation under paragraph (a) of this section or a compliance order issued under paragraph (b) of this section, not to exceed \$100,000 for each violation.

(d) *Settlements.* The Director may enter into a settlement, with or without

conditions, of an enforcement proceeding at any time if the settlement is consistent with the objectives of DOE's UCNI protection requirements.

(e) *Investigations.* The Director may conduct investigations and inspections relating to the scope, nature and extent of compliance by a person with DOE security requirements specified in these regulations and take such action as the Director deems necessary and appropriate to the conduct of the investigation or inspection, including signing, issuing and serving subpoenas.

(f) *Preliminary notice of violation.* (1) In order to begin a proceeding to impose a civil penalty under this part, the Director shall notify the person by a written preliminary notice of violation sent by certified mail, return receipt requested, of:

(i) The date, facts, and nature of each act or omission constituting the alleged violation;

(ii) The particular provision of the regulation or compliance order involved in each alleged violation;

(iii) The proposed remedy for each alleged violation, including the amount of any civil penalty proposed;

(iv) The right of the person to submit a written reply to the Director within 30 calendar days of receipt of such preliminary notice of violation; and,

(v) The fact that upon failure of the person to pay any civil penalty imposed, the penalty may be collected by civil action.

(2) A reply to a preliminary notice of violation must contain a statement of all relevant facts pertaining to an alleged violation. The reply must:

(i) State any facts, explanations, and arguments that support a denial of the alleged violation;

(ii) Demonstrate any extenuating circumstances or other reason why a proposed remedy should not be imposed or should be mitigated;

(iii) Discuss the relevant authorities that support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE;

(iv) Furnish full and complete answers to any questions set forth in the preliminary notice; and,

(v) Include copies of all relevant documents.

(3) If a person fails to submit a written reply within 30 calendar days of receipt of a preliminary notice of violation:

(i) The person relinquishes any right to appeal any matter in the preliminary notice; and

(ii) The preliminary notice, including any remedies therein, constitutes a final order.

(4) The Director, at the request of a person notified of an alleged violation,

may extend for a reasonable period the time for submitting a reply or a hearing request letter.

(g) *Final notice of violation.* (1) If a person submits a written reply within 30 calendar days of receipt of a preliminary notice of violation, the Director must make a final determination whether the person violated or is continuing to violate an UCNI security requirement.

(2) Based on a determination by the Director that a person has violated or is continuing to violate an UCNI security requirement, the Director may issue to the person a final notice of violation that concisely states the determined violation, the amount of any civil penalty imposed, and further actions necessary by or available to the person. The final notice of violation also must state that the person has the right to submit to the Director, within 30 calendar days of the receipt of the notice, a written request for a hearing under paragraph (h) of this section.

(3) The Director must send a final notice of violation by certified mail, return receipt requested, within 30 calendar days of the receipt of a reply.

(4) Subject to paragraphs (g)(7) and (g)(8) of this section, the effect of final notice shall be:

(i) If a final notice of violation does not contain a civil penalty, it shall be deemed a final order 15 days after the final notice is issued.

(ii) If a final notice of violation contains a civil penalty, the person must submit to the Director within 30 days after the issuance of the final notice:

(A) A waiver of further proceedings;

or

(B) A request for an on-the-record hearing under paragraph (h) of this section.

(5) If a person waives further proceedings, the final notice of violation shall be deemed a final order enforceable against the person. The person must pay the civil penalty set forth in the notice of violation within 60 days of the filing of waiver unless the Director grants additional time.

(6) If a person files a request for an on-the-record hearing, then the hearing process commences.

(7) The Director may amend the final notice of violation at any time before the time periods specified in paragraphs (g)(4)(i) or (g)(4)(ii) of this section expire. An amendment shall add 15 days to the time period under paragraph (g)(4) of this section.

(8) The Director may withdraw the final notice of violation, or any part thereof, at any time before the time periods specified in paragraphs (g)(4)(i) or (g)(4)(ii) of this section expire.

(h) *Hearing.* (1) Any person who receives a final notice of violation under paragraph (g) may request a hearing concerning the allegations contained in the notice. The person must mail or deliver any written request for a hearing to the Director within 30 calendar days of receipt of the final notice of violation.

(2) Upon receipt from a person of a written request for a hearing, the Director shall:

(i) Appoint a Hearing Counsel; and
(ii) Select an administrative law judge appointed under section 3105 of Title 5, U.S.C., to serve as Hearing Officer.

(i) *Hearing Counsel.* The Hearing Counsel:

(1) Represents DOE;
(2) Consults with the person or the person's counsel prior to the hearing;
(3) Examines and cross-examines witnesses during the hearing; and,
(4) Enters into a settlement of the enforcement proceeding at any time if settlement is consistent with the objectives of the Act and DOE security requirements.

(j) *Hearing Officer.* The Hearing Officer:

(1) Is responsible for the administrative preparations for the hearing;
(2) Convenes the hearing as soon as is reasonable;
(3) Administers oaths and affirmations;
(4) Issues subpoenas, at the request of either party or on the Hearing Officer's motion;
(5) Rules on offers of proof and receives relevant evidence;
(6) Takes depositions or has depositions taken when the ends of justice would be served;
(7) Conducts the hearing in a manner which is fair and impartial;
(8) Holds conferences for the settlement or simplification of the issues by consent of the parties;
(9) Disposes of procedural requests or similar matters;
(10) Requires production of documents; and,
(11) Makes an initial decision under paragraph (m) of this section.

(k) *Rights of the person at the hearing.* The person may:

(1) Testify or present evidence through witnesses or by documents;
(2) Cross-examine witnesses and rebut records or other physical evidence, except as provided in paragraph (l)(4) of this section;
(3) Be present during the entire hearing, except as provided in paragraph (l)(4) of this section; and
(4) Be accompanied, represented, and advised by counsel of the person's choosing.

(l) *Conduct of the hearing.* (1) DOE shall make a transcript of the hearing.

(2) Except as provided in paragraph (l)(4) of this section, the Hearing Officer may receive any oral or documentary evidence, but shall exclude irrelevant, immaterial, or unduly repetitious evidence.

(3) Witnesses shall testify under oath and are subject to cross-examination, except as provided in paragraph (l)(4) of this section.

(4) The Hearing Officer must use procedures appropriate to safeguard and prevent unauthorized disclosure of classified information, UCNI, or any other information protected from public disclosure by law or regulation, with minimum impairment of rights and obligations under this part. The UCNI status shall not, however, preclude information from being introduced into evidence. The Hearing Officer may issue such orders as may be necessary to consider such evidence *in camera* including the preparation of a supplemental initial decision to address issues of law or fact that arise out of that portion of the evidence that is protected.

(5) DOE has the burden of going forward with and of proving by a preponderance of the evidence that the violation occurred as set forth in the final notice of violation and that the proposed civil penalty is appropriate. The person to whom the final notice of violation has been addressed shall have the burden of presenting and of going forward with any defense to the allegations set forth in the final notice of violation. Each matter of controversy shall be determined by the Hearing Officer upon a preponderance of the evidence.

(m) *Initial decision.* (1) The Hearing Officer shall issue an initial decision as soon as practicable after the hearing. The initial decision shall contain findings of fact and conclusions regarding all material issues of law, as well as reasons therefor. If the Hearing Officer determines that a violation has occurred and that a civil penalty is appropriate, the initial decision shall set forth the amount of the civil penalty based on:

(i) The nature, circumstances, extent, and gravity of the violation or violations;
(ii) The violator's ability to pay;
(iii) The effect of the civil penalty on the person's ability to do business;
(iv) Any history of prior violations;
(v) The degree of culpability; and,
(vi) Such other matters as justice may require.

(2) The Hearing Officer shall serve all parties with the initial decision by certified mail, return receipt requested.

The initial decision shall include notice that it constitutes a final order of DOE 30 days after the filing of the initial decision unless the Secretary files a Notice of Review. If the Secretary files a Notice of Review, he shall file a final order as soon as practicable after completing his review. The Secretary, at his discretion, may order additional proceedings, remand the matter, or modify the amount of the civil penalty assessed in the initial decision. DOE shall notify the person of the Secretary's action under this paragraph in writing by certified mail, return receipt requested. The person against whom the civil penalty is assessed by the final order shall pay the full amount of the civil penalty assessed in the final order within 30 days unless otherwise agreed by the Director.

(n) *Collection of penalty.* (1) The Secretary may request the Attorney General to institute a civil action to collect a penalty imposed under this section.

(2) The Attorney General has the exclusive power to uphold, compromise or mitigate, or remit any civil penalty imposed by the Secretary under this section and referred to the Attorney General for collection.

(o) *Direction to NNSA.* (1) Notwithstanding any other provision of this part, the NNSA Administrator, rather than the Director, signs, issues, serves, or takes the following actions that direct NNSA employees, contractors, subcontractors, or employees of such NNSA contractors or subcontractors.

(i) Subpoenas;
(ii) Orders to compel attendance;
(iii) Disclosures of information or documents obtained during an investigation or inspection;
(iv) Preliminary notices of violation; and,
(v) Final notice of violations.

(2) The Administrator shall act after consideration of the Director's recommendation. If the Administrator disagrees with the Director's recommendation, and the disagreement cannot be resolved by the two officials, the Director may refer the matter to the Deputy Secretary for resolution.

§ 1017.30 Criminal penalty.

Any person who violates section 148 of the Atomic Energy Act or any regulation or order of the Secretary issued under section 148 of the Atomic Energy Act, including these regulations, may be subject to a criminal penalty under section 223 of the Atomic Energy Act (42 U.S.C. 2273). In such case, the Secretary shall refer the matter to the

Attorney General for investigation and possible prosecution.

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BILLING CODE 6450-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2007-28957; Directorate Identifier 2007-CE-069-AD]

RIN 2120-AA64

Airworthiness Directives; CTRM Aviation Sdn. Bhd. (Formerly Eagle Aircraft (Malaysia) Sdn. Bhd.) Model Eagle 150B Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An operator has reported severe exfoliation corrosion on Wing/Canard Flap Hinges, P/N 5731D01-16 (middle and outboard hinges) on his Eagle 150B. The corrosion has been detected during 100-hour inspection. The aircraft has accumulated more than 1000 flight hours. The corrosion is so severe that one of the Flap Hinges thickness has been reduced by 50%. The corrosion is not easily detected because the Flap Hinge is sandwiched between the Flap Hinge Support Bracket P/N 5731D01-01.

The failure of the hinge bracket may result in disintegration of flap / canard wing thus leading to loss of control, with catastrophic consequences.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by October 15, 2007.

ADDRESSES: You may send comments by any of the following methods:

- **DOT Docket Web Site:** Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- **Fax:** (202) 493-2251.

- **Mail:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://dms.dot.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4146; fax: (816) 329-4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2007-28957; Directorate Identifier 2007-CE-069-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The Department of Civil Aviation (DCA), which is the aviation authority for Malaysia, has issued AD No. CAM AD 001-07-2007, dated July 20, 2007 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

An operator has reported severe exfoliation corrosion on Wing / Canard Flap Hinges, P/N 5731D01-16 (middle and outboard hinges)

on his Eagle 150B. The corrosion has been detected during 100-hour inspection. The aircraft has accumulated more than 1000 flight hours. The corrosion is so severe that one of the Flap Hinges thickness has been reduced by 50%. The corrosion is not easily detected because the Flap Hinge is sandwiched between the Flap Hinge Support Bracket P/N 5731D01-01.

The failure of the hinge bracket may result in disintegration of flap / canard wing thus leading to loss of control, with catastrophic consequences.

The MCAI requires you to visually inspect the flap hinges and flap hinge support brackets for any corrosion. You are to take corrective action if you find any corrosion.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

CTRM Aviation Sdn. Bhd. has issued Mandatory Service Bulletin SB 1126, dated, July 19, 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information. We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 6 products of U.S. registry.