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SUPPLEMENTARY INFORMATION:

I. Introduction

Under section 3152(a) of the National Defense Authorization Act for Fiscal Year 2002 (NDAA for FY 2002), DOE is obligated to prescribe regulations for a new counterintelligence polygraph program the stated purpose of which is “* * * to minimize the potential for release or disclosure of classified data, materials, or information” (42 U.S.C. 7383h–1(a).) Section 3152(b) requires DOE to “* * * take into account the results of the Polygraph Review,” which is defined by section 3152(e) to mean “* * * the review of the Committee to Review the Scientific Evidence on the Polygraph of the National Academy of Sciences” (42 U.S.C. 7383h–1(b), (e)).

Upon promulgation of final regulations under section 3152, and “effective 30 days after the Secretary submits to the congressional defense committees the Secretary’s certification that the final rule * * * has been fully implemented, * * *” section 3154 of the National Defense Authorization Act for Fiscal Year 2000 (NDAA for FY 2000) (42 U.S.C. 7383h), would be repealed by operation of law. (42 U.S.C. 7383h–1(c).) The repeal of section 3154 would eliminate the existing authority which underlies DOE’s counterintelligence polygraph regulations, which are codified at 10 CFR part 709, but would not preclude the retention of some or all of those regulations through this rulemaking pursuant to the later-enacted section 3152 of the NDAA for FY 2002.

In Part II of this **SUPPLEMENTARY INFORMATION**, DOE reviews background information useful in understanding the existing statutory and regulatory provisions applicable to DOE’s current counterintelligence polygraph examination program. In Part III of this Supplementary Information, DOE discusses its preliminary views with regard to the relevant factual and policy issues, including DOE’s evaluation of the NAS Polygraph Review which is entitled “The Polygraph and Lie Detection.” That discussion explains why the Secretary of Energy has approved today’s preliminary proposal to retain the regulations in 10 CFR part 709 as a balanced approach for the carefully circumscribed use of polygraph examinations as a tool that appears in current circumstances well-suited to accomplish the Congressionally-specified purpose “* * * to minimize the potential for release or disclosure of classified data,

materials, or information” (42 U.S.C. 7383h–1).

DOE invites interested members of the public to provide their views on the issues in this rulemaking by filing written comments. With an open mind, DOE intends carefully to evaluate the public comments received in response to this notice of proposed rulemaking. DOE will then consider whether to issue a supplemental notice of proposed rulemaking with additional policy options for public comment and whether it is necessary and timely to hold a public hearing to provide an opportunity for presentation of oral comments.

II. Background

Consistent with section 3154 of the NDAA for FY 2000, DOE published a notice of final rulemaking establishing 10 CFR part 709 on December 17, 1999 (64 FR 70975). The provisions of 10 CFR part 709 list the types of employees and positions that are subject to polygraph examinations. Under 10 CFR 709.4, the polygraph program applies to all DOE employees and contractor employees, applicants for employment, and other individuals assigned or detailed to positions in eight categories which are discussed in detail in part III of this Supplementary Information. Employees may request exculpatory polygraph examinations to deal with unresolved counterintelligence or personnel security issues. Part 709 also describes the polygraph examination protocols DOE uses, the policies for safeguarding the privacy rights of employees, and the requirements that apply to ensure well qualified and well trained polygraph examiners.

After DOE promulgated 10 CFR part 709, Congress amended section 3154 of the NDAA for FY 2000 by section 3135 in the National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106–398). Section 3135 amended the earlier definition of “covered persons” contained in section 3154 to include assignees, detailees and applicants. The definition of “high risk program” was revised to include programs using information known as Sensitive Compartmented Information, SAP, PSAP, PAP, and any other program or position category specified in section 709.4(a) of Title 10, Code of Federal Regulations. Section 3135 amended section 3154(f) to add the terms “terrorism” after “sabotage” and “deliberate damage to or malicious misuse of a United States Government information or defense system” to the statutory definition of the scope of a counterintelligence polygraph examination. Section 3135 also

amended section 3154 by adding language that limited the Secretary’s authority to waive the examination requirement.

III. DOE’s Proposal To Implement Section 3152(a) of the NDAA for FY 2002

The focal point for analysis of the factual information and policy considerations relevant to this rulemaking is the Congressionally stated purpose of the counterintelligence polygraph regulations which is “* * * to minimize the potential for release or disclosure of classified data, material, or information” (42 U.S.C. 7383h–1(a)). Given the nature of this directive—as a statement of the purpose of the program, not as a standard that the program must meet—DOE does not construe this directive as a mandate mechanistically to construct a program that takes all steps to protect classified data, materials, or information, no matter what the countervailing considerations. Construing the directive in that fashion could lead to absurd results, potentially requiring DOE to expend so much of its resources on polygraphs and associated provisions that the program would significantly detract from DOE’s ability to accomplish its national security mission. At the same time, however, DOE does believe that the directive signals a Congressional hierarchy in the weighing of various considerations, pursuant to which DOE must take potential jeopardy of classified data, materials, or information very seriously in considering the potential consequences that may flow from how it constructs its program. DOE has evaluated the question whether to retain or modify the list of positions currently set forth in its regulations as subject to polygraph examinations over a five-year period against this Congressionally-stated purpose so construed.

As noted above, that list is set forth at 10 CFR 709.4. It includes: “(1) Positions that DOE has determined include counterintelligence activities or access to counterintelligence sources and methods; (2) positions that DOE has determined include intelligence activities or access to intelligence sources and methods; (3) positions requiring access to information that is protected within a non-intelligence special access program (SAP) designated by the Secretary of Energy; (4) positions that are subject to the Personnel Security Assurance Program (PSAP); (5) positions that are subject to the Personnel Assurance program (PAP); (6) positions that DOE has determined have a need-to-know or access to information specifically designated by the Secretary