

considerations, DOE believes that at this time, when the United States is engaged in hostilities precisely in order to address the potentially disastrous consequences that may flow from weapons of mass destruction falling into the wrong hands, it is under a particular obligation to make sure that no action that it takes be susceptible to misinterpretation as a relaxation of controls over information concerning these kinds of weapons. For all these reasons, while fully respecting the questions the NAS has raised about the use of polygraphs as a screening tool, DOE does not believe it can endorse the NAS's conclusion that the tool should be laid down.

Perhaps in recognition that its main conclusion was less tenable in the context of Federal agencies with national security missions established by law, the NAS went on to conclude in the alternative that if polygraph screening is to be used at all, it should only be used as a trigger for follow-up detailed investigations and not as a sole basis for personnel action (NAS Polygraph Review, p. 5). This alternative conclusion appears to DOE to be much more compatible with the priority DOE is statutorily invited to place on minimizing the potential for release or disclosure of classified information. It is also consistent with the way DOE currently uses screening polygraphs.

Under DOE's current regulations, neither DOE nor its contractors may take an adverse personnel action against an individual solely on the basis of a polygraph result indicating deception (10 CFR 709.25). If, after an initial polygraph examination, there are remaining unresolved issues, DOE must advise the individual and provide an opportunity for the individual to undergo an additional polygraph examination. If the additional polygraph examination is not sufficient to resolve the matter, DOE must undertake a comprehensive investigation using the polygraph examination as an investigative lead (10 CFR 709.15(b)). In DOE's view, this regulatory scheme is consistent both with the NAS's alternative conclusion and with the statutory priority on minimizing release or disclosure of classified information. Therefore, pursuant to section 3152 of the NDAA for FY 2002, DOE today proposes on a preliminary basis to retain the regulatory provisions in part 709. DOE invites public comment on its evaluation of the NAS Polygraph Review with regard to employee screening and on its assessment that the existing provisions of part 709 are

consistent with the NAS's alternative conclusion

IV. Regulatory Review

A. National Environmental Policy Act

The proposed rule would retain the existing procedures for counterintelligence evaluations to include polygraph examinations and therefore will have no impact on the environment. DOE has determined that this rule is covered under the Categorical Exclusion in DOE's National Environmental Policy Act regulations in paragraph A.5 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings amending an existing regulation that does not change the environmental effect of the regulations being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires preparation of an initial regulatory flexibility analysis for every rule that 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. This rulemaking will not directly regulate small businesses or small governmental entities. It will apply principally to individuals who are employees of, or applicants for employment by, some of DOE's prime contractors, which are large businesses. There may be some affected small businesses that are subcontractors, but the rule will not impose unallowable costs. Accordingly, DOE certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

DOE has determined that this proposed rule does not contain any new or amended record-keeping, reporting or application requirements, or any other type of information collection requirements that require the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* The OMB has defined the term "information" to exclude certifications, consents, and acknowledgments that entail only minimal burden [5 CFR 1320.3(h)(1)].

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, requires a Federal agency to perform a detailed

assessment of the costs and benefits of any rule imposing a Federal mandate with costs to state, local, or tribal governments, or to the private sector of \$100 million or more. The proposed rule does not impose a Federal mandate requiring preparation of an assessment under the Unfunded Mandates Reform Act of 1995.

E. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999, (Pub. L. No. 105–277), requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well being. This proposed rule will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

F. Executive Order 12866

Executive Order 12866, 58 FR 51735 (October 4, 1993) provides for a review by the Office of Information and Regulatory Affairs in the Office of Management and Budget of a "significant regulatory action," which is defined as an action that may have an effect on the economy of \$100 million or more or adversely affect the economy, competition, jobs, productivity, environment, public health or safety, or state, local or tribal governments. DOE has concluded that this proposed rule (10 CFR Part 709) is not a significant regulatory action. Accordingly, this rulemaking has not been reviewed by the Office of Information and Regulatory Affairs.

G. Executive Order 12988

Section 3(a) of Executive Order 12988, 61 FR 4729 (February 7, 1996) imposes on executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. 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